

***RETHINKING PRIVATE VIOLENCE:  
HOW CONSTITUTIONS STRUCTURE STATE RESPONSES TO DOMESTIC VIOLENCE***

**BY**

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For Brian

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*ABSTRACT*

Domestic violence is a difficult issue for states to navigate both legally and socially. From a legal perspective, both legislatures and judiciaries are heavily involved in domestic violence law. While most reform efforts focus on these two branches of government, there is generally little appreciation for the fact that a state's legal approach to domestic violence occurs against the backdrop of its constitution and is heavily influenced by the constitution's structure and content. In this dissertation I analyze the United States—the federal system as well as Wisconsin, Colorado, and Montana—and South Africa to argue that constitutional structure has a significant impact in shaping a state's legal response to domestic violence. I argue that constitutional structure, in particular the relative horizontality or verticality of rights provisions, influences the thinkability of different legal responses to domestic violence. Structure influences thinkability largely by outlining the public and private spheres in a given society and helping to shape understandings of appropriate legal action. I argue that it is the ability of the lay and legal communities to conceive of possible appropriate options, more than explicit legal directives, that has the most significant impact on legal outcomes.

**CHAPTER I**  
**INTRODUCTION**

***I. Statement of the Problem***

Domestic violence has proved an intractable problem for states<sup>1</sup>. Among the most intimate and private of problems that governments seek to address, it has been difficult terrain for states to navigate. Although states have primarily attempted to affirmatively address the issue through legislation, domestic violence victims and advocates have also tried using the judicial system to change or enforce law and policy. Thus, both the legislative and judicial systems are heavily implicated in the state response to domestic violence.<sup>2</sup> While not widely acknowledged or appreciated, these legal actions occur against the backdrop of a state's constitution. As a result, it is important to understand how constitutions affect states' responses to domestic violence to appreciate the different outcomes observed in various localities.

In this dissertation I put the constitution at the forefront of the analysis of a government's legal response to domestic violence. To do this, I analyzed the United States—both the federal system and three states—and South Africa to determine how different constitutional configurations of specific rights provisions have structured governments' legal approaches to domestic violence. I found that in the United States, a vicious and ineffective legal circle has developed around intimate violence. Victims initially sought state remedies—both statutory and

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<sup>1</sup> When discussing states, unless I specify a specific U.S. state or am contrasting the U.S. federal approach with a state approach, I mean a governmental entity. In this dissertation I discuss both U.S. states and states more generally.

<sup>2</sup> This is not a complete picture of how the state is engaged on the subject of domestic violence, but merely a brief overview. Domestic violence victims and advocates also lobby the legislatures for change, and abusers regularly challenge legislation in court.

constitutional—for private violence resulting, in part, from ineffective state intervention. State courts generally permitted localities and governmental officials to assert immunity, thereby barring a victim from having his/her day in court. To overcome immunity, victims then asserted federal constitutional claims. Federal courts overwhelmingly rejected these claims, largely by holding that private violence is a state issue and must consequently be dealt with at the state level. The states, however, did not pick up this mantle; they have largely remained unwilling to assume responsibility for failed intervention in private violence situations. As a result, in the United States individuals have no constitutional right to be free or protected from private violence, and victims of intimate violence generally have no remedy for damages experienced, in part, due to ineffective state intervention. South Africa, however, provides an alternative approach to dealing with intimate violence, as the courts have found that the government does have an obligation, in certain circumstances, to protect women from gendered violence. Consequently, in South Africa, victims of gendered private violence can sue the government for damages if their injuries resulted, in part, from failed state intervention.

To explain these results, I argue that constitutional structure must feature prominently in the analysis. Thus, while a constitution's structure and content both shape state responses to domestic violence, until this point structure has been largely neglected from the discussion in favor of a content-based analysis. Although looking at content—i.e. rights—is potentially more empirically compelling, by neglecting structure it is difficult to fully understand the role a particular rights provision plays in a given society. Accordingly, I argue that constitutional structure, particularly the relative horizontality and verticality of rights provisions, affects two crucial, and related, factors: 1) it outlines and reinforces the public-private divide; and 2) it

strongly influences what a society considers appropriate legal action—something I dub the ‘thinkability’ of a given action—in a specific context.

When discussing constitutional content, I am primarily concerned with specific rights provided for in the constitution, such as the right to free speech or to water. Constitutional structure, however, is slightly more complicated and includes both a broad and narrow component. Broadly speaking, constitutional structure includes how power is divided within government as well as how authority is allocated between the state and its citizens; specifically, constitutional structure includes how individual rights provisions are configured. There are two ways in which rights can be configured—they can be either exclusively vertical, or they can also be horizontally structured. Vertical rights configurations create a duty between the state and individuals. The rights provisions of a vertically-oriented constitution are conceived of as a contract between the individual and the state and only govern state action—not individual behavior. Exclusively vertical rights configurations strive to limit the state’s ability to intervene in individuals’ lives by creating a rigid boundary between the public and private spheres. Consequently, under a vertical constitution the state is obligated to protect individuals from rights violations perpetrated by the state, but not necessarily rights violations perpetrated by individuals. In contrast, horizontally-oriented rights provisions apply to both individuals and the state and in so doing, redefine—or at a minimum blur—traditional liberal definitions of the public and private spheres. The rights provisions in a horizontally-oriented constitution govern both interactions between the state and individuals, as well as interactions between individuals. As a result, horizontally-oriented rights provisions in constitutions increase the burden on the state to protect individuals from constitutional rights violations perpetrated by private individuals



because under certain circumstances private behavior can result in constitutional violations. From a practical perspective, because horizontal constitutional applications address private action, this structure significantly increases the ability and the obligation of the state to intervene in rights violations stemming from domestic and other private violence. Although both types of structure and content matter, in this dissertation I focus primarily on how the configuration of individual rights provisions affects the interpretation and subsequent implementation of specific rights.

A focus on structure accomplishes several things. First, as discussed above, it puts specific rights provisions into context. Feminist constitutional scholars have largely focused on constitutional content to explain and remedy discrimination. Despite having achieved constitutional protections in many jurisdictions, however, these efforts have not eliminated legal or social gender inequality. By focusing on structure, it allows for a more complete understanding of how and why certain claims fail or succeed—and why failure or success is heavily issue-specific. For example, constitutionally-enshrined sex equality rights have been significantly more successful in addressing overt discrimination, such as legal bias in employment or property rights, than they have been at combatting violent discrimination against women. Thus, an analysis of constitutional structure enables us to see how it shapes a state's response to a given problem.

Second, an emphasis on structure helps bring the sticky nature of the public-private divide into focus and highlights how the divide influences state responses to domestic violence. Feminists worldwide have long argued that the public-private divide is a key impediment to creating, passing, and enforcing effective legal measures to combat domestic violence. An

analysis of constitutional structure clarifies how the public and private spheres are largely established—or at a minimum, are codified and reinforced—through the constitutional configuration of rights provisions.

Finally, focusing on structure diminishes the importance placed on formal rights—what exists on paper—and highlights the role that interpretation plays in determining substantive rights—what rights individuals can rely upon in their everyday lives.<sup>3</sup> Constitutional structure, in part through outlining the public-private divide, largely influences the thinkability of a given legal action. Although thinkability is also strongly influenced by jurisprudence and cultural movements, constitutional structure is foundational to embracing something—or not—as acceptable legal action. By influencing the thinkability of a particular legal action, constitutional structure provides an alternative route to changing a state's legal response to domestic violence. While a fundamental constitutional revision might be ideal in the abstract, it is also rarely happens. Thus, in lieu of focusing on specific discrete changes, like rewriting a constitution or even creating a horizontal right to sex equality, advocates can instead concentrate on changing the interpretation of existing provisions by laying the appropriate legal groundwork and harnessing a supportive cultural movement to implement fundamental change.

I borrow the notion of thinkability from Michael Schatzberg's<sup>4</sup> work on political legitimacy in Africa. In his analysis, he argues that every political system has an underlying moral matrix that shapes political legitimacy and thinkability. More specifically, Schatzberg

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<sup>3</sup> When discussing substantive rights I do not mean rights that an individual can rely upon others to respect in his/her daily life. Instead, I mean rights that have a meaningful remedy when they are violated.

<sup>4</sup> Schatzberg, Michael. *Political Legitimacy in Middle Africa: Father, Family, Food*, Bloomington, Indiana University Press, 2001.

argues that moral matrices “form a culturally rooted template against which people come to understand the political legitimacy, or ‘thinkability,’ of institutions, ideas, policies, and procedures.”<sup>5</sup> Thus, the thinkability of a certain idea can be traced to the cultural and social structures in a given society. In this way, thinkability is more than a rational calculation to achieve an ideal outcome based upon various factors and incentives—it is instead what enables an individual to even conceive of the various possibilities in a given situation, before engaging in a rational calculation to maximize an outcome.

Applying this concept to the case studies helps illuminate its usefulness. In the United States, despite the fact that there is nothing prohibiting the use of constitutions to protect women from intimate violence, judges have a difficult time applying the constitution to gendered violence in part because it is simply not thinkable. There is nothing in the constitution requiring such an interpretation, and there is little existing jurisprudence and no social movement to inspire such a change. In South Africa, in contrast, judges have interpreted constitutional provisions to require the state, in some circumstances, to protect women from private violence. This shift was supported by explicit constitutional provisions and a social movement that highlighted the way private discrimination could significantly impact individuals’ freedom and equality.

In summary, in this dissertation I find that constitutions play a major role in shaping a state’s response to domestic violence in several ways. Perhaps most basically, constitutions provide broad outlines of what a state can, cannot, and must do to address domestic violence. Constitutions do this both through their structure and content, as how rights provisions are configured determines both what must be protected, but also against whom and under what

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<sup>5</sup> Schatzberg 2001: 1.

conditions. These provisions are mediated by legislators and judges, who have to interpret the written word to implement constitutional provisions into meaningful rights.

Through the type and scope of protections provided in the text, constitutions outline the contours of the public and private spheres and influence the thinkability of certain state actions and responses. Thus, a constitution's structure and content help shape what legal and lay communities consider thinkable approaches to combatting private gendered violence in their societies. Although constitutions help influence outcomes by shaping the thinkability of particular actions, they almost never dictate specific results. In fact, constitutions frequently have multiple ways they could be interpreted. Thus, the thinkability of a given action becomes evident in the interpretive process, when the legislature and the judiciary interpret the text to transform various provisions into concrete rights. As a result, although multiple approaches are almost always possible, judges and legislators frequently only see severely limited options because they cannot conceive of alternative possibilities.

Finally, and surprisingly, I found that many constitutional issues raised in domestic violence situations could be largely eliminated if jurisdictions jettisoned the doctrines of sovereign and qualified immunity. In the United States, in particular, the immunity doctrines act as a barrier to suit, and consequently as an impediment to enabling domestic violence victims and advocates to use the courts to instigate policy reform and change. Largely based on common and statutory law, the immunity doctrines would be relatively simple to change.<sup>6</sup> The major

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<sup>6</sup> State immunity from suit in federal courts is a constitutional issue, but is not relevant for this discussion. The eleventh amendment, ratified in 1795, was a response to the U.S. Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793) where the Court held that states were subject to the authority and jurisdiction of the federal judiciary. The eleventh amendment overruled that decision, stating, "[t]he Judicial power of the United States shall

impediment to such change is not constitutional—it is the entrenched tradition of protecting the state and its officers from liability for their wrongful actions.

This dissertation makes both theoretical and practical contributions. Theoretically, it will bridge feminist constitutional analyses and analyses of horizontal and vertical constitutional structures. Feminist constitutional analyses have made important contributions to understanding how constitutions—primarily constitutional content—affects women’s rights. Insights gleaned from feminist constitutional theorists have crystalized the role of the public and private spheres in addressing domestic violence, how constitutional content can be instrumental to securing certain rights, and perhaps most importantly, how gender permeates implementation and interpretation of non-gendered rights, concepts, and laws. In contrast, analyses of horizontal and vertical constitutional structures have begun to explain how different rights configurations influence individuals’ legal claims. To date, however, these analyses have largely focused on socio-economic rights and omitted analyses of civil rights. Thus, by leveraging insights from both literatures—one that focuses on content and the other that emphasizes structure—I am able to explain how the relative verticality or horizontality of constitutional rights provisions impacts a state’s ability to legally address domestic violence.

Practically this project will demonstrate how neglected constitutional structures have a direct impact on women’s lives. In a surprise finding, I am also able to provide an alternative, extra-constitutional remedy for the current legal impasse in the United States. Combined, this knowledge will enable advocates, lawyers, and legislators to more effectively work within, or

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not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

press for reform of, constitutional and other legal structures to increase women's safety in the private sphere.

The rest of the introduction will continue as follows: I will review the two relevant bodies of theoretical literature that are guiding my dissertation and then discuss my research design, case selection, and methods, followed by my conclusions, significance, and a chapter outline for the remainder of the dissertation.

## ***II. Review of Relevant Literature***

This project draws upon two bodies of theoretical literature: analyses of horizontal and vertical constitutional structure and feminist constitutional analyses, with a focus on constitutions both as a source of law and policy, and as a structuring instrument. As noted above, both literatures can contribute important insights to the role that constitutions play in state responses to domestic violence, but must be merged to harness their full potential. Feminist theorists have highlighted the role of the public-private divide in handicapping state responses to domestic violence, how specific gender rights have selectively increased women's equality, and finally how non-gendered laws, policies, and rights are interpreted through a masculine frame. Analyses of horizontal and vertical constitutions have focused on the role that one aspect of state structure—the configuration of rights provisions—has on the realization of those rights. Thus, while feminist theory has mostly omitted constitutional structure as a point of enquiry, analyses of horizontal and vertical constitutional structure has largely focused on how the relative structure of rights affects socio-economic rights, not civil rights. As a result, by combining the

insights from both literatures, I am better able to explain how the structure of constitutional rights impacts a state's legal response to domestic violence.

### *Analyses of Horizontal and Vertical Constitutional Structure*

The choice of how to apply rights is a primary way that the structure of the constitution configures the public-private divide and is consequently relevant to an analysis of how the public-private divide affects states' attempts to legally address domestic violence. Over the last decade, there has been a resurgence of comparative constitutional analyses of the consequences and implications of horizontal and vertical constitutional rights applications. Conceptually, a vertical application of the constitution is the most simple. Under a vertical construction, the primary way in which constitutional rights provisions function is either to restrain the state from doing, or to require the state to do, something. Vertical constitutional constructions take, as a fundamental operating assumption, the gross power discrepancy between individuals and the state, and rights provisions thus serve to help constrain a state's attempts to protect individuals from private violence.

There are three consequences of a purely vertical constitution. First, a vertical constitution creates a rigid theoretical and philosophical division between the public and private spheres by trying to limit a state's involvement in individuals' lives. As a result, only state action, not private action, can be challenged in the courts for being unconstitutional.

Legislation—action by the legislative branch—is considered state action and is a principal means that the state exerts control over individuals' lives. Second, once legislation is struck down by a country's highest court, the offending law is merely erased from the books, it is not

reformulated.<sup>7</sup> Thus, instead of altering or developing statutory law to make it constitutional, the judiciary merely accepts or strikes down challenged legislation. If a law is struck down, the legislature must decide if it would like to let it die or reformulate it—usually without significant input from the judiciary on how to make the previously offending law constitutional.<sup>8</sup>

Finally, if the legislature does not give legislative effect to a right in the constitution, that right cannot generally be relied upon in private litigation.<sup>9</sup> For example, if a constitution, like that of the United States, guarantees that the state shall make no law respecting the establishment or free exercise of religion, Congress must pass a law that expands that right for an individual to be able to rely upon it in a private lawsuit.<sup>10</sup> Without such a statute private individuals cannot sue private entities, like a company or private school, for religious discrimination. Each of the three consequences of a vertical constitution has potentially serious implications for state's attempts to address domestic violence and must be explored from a gendered perspective to better understand their impact on situations of private gender violence.

Under a horizontal constitutional structure constitutional rights govern not only interactions between the state and an individual, but also interactions between private

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<sup>7</sup> Cheadle, Halton, "Third Party Effect in the South African Constitution," in *The Constitution in Private Relations: Expanding Constitutionalism*, edited by Sajo, Andras and Renata Uitz, pgs. 55-78. The Netherlands, Eleven International Publishing, 2005.

<sup>8</sup> We see an example of this after the U.S. Supreme Court struck down the civil rights remedy in the Violence Against Women Act of 1994. The issue will be discussed further in chapter five.

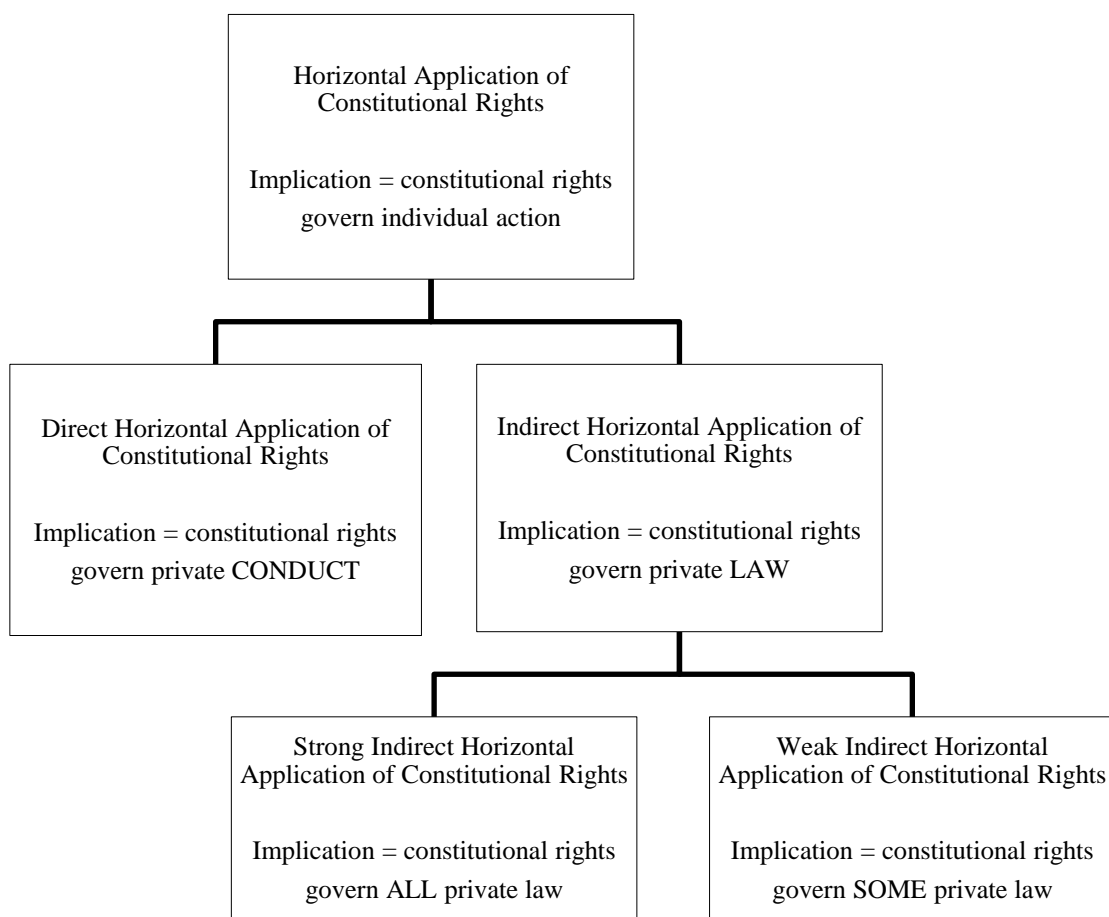
<sup>9</sup> Cheadle, 2005.

<sup>10</sup> There is an exception to this principle in the United States in cases where people are seeking damages for constitutional violations perpetrated by the state, called the *Bivens* doctrine. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) the Supreme Court allowed a lawsuit seeking damages for a constitutional violation to proceed without statutory authority. For a more detailed discussion of this issue see Susan Bandes' "Reinventing *Bivens*: The Self-Executing Constitution," in 68 *Southern California Law Review* 289 (1994-5).



individuals.<sup>11</sup> Thus, under a horizontal constitutional structure the state begins to intentionally blur or redraw traditional liberal lines between the public and private spheres. Beyond that basic description, however, scholars disagree about how to define the parameters of horizontal constitutional applications. Figure one maps some of the different types of horizontal constitutional applications scholars have identified in the literature.

**FIGURE 1: HORIZONTAL APPLICATION OF CONSTITUTIONAL RIGHTS DIAGRAM**



<sup>11</sup> Gardbaum, Stephen “Where the (state) action is,” in *International Journal of Constitutional Law*, vol. 4 no. 4 pgs. 760-779, 2006.

At its most basic division, scholars have distinguished between direct and indirect horizontal constitutional applications. Under a direct horizontal constitution, constitutional rights govern private *conduct*.<sup>12</sup> If a constitution governs private conduct, constitutional rights provisions directly apply to individuals and one private citizen cannot legally violate another private citizen's constitutional rights.<sup>13</sup> For example, under the U.S. constitution, that would mean that an employer would not be able to fire an individual for speaking against the company because it would violate the employee's first amendment rights to free speech.

In contrast, under an indirect horizontal constitution, constitutional rights govern private *law* (e.g. tort, family, contract, or property law).<sup>14</sup> Thus, under an indirect horizontal constitution, constitutional rights only indirectly govern private action by requiring that the private laws that structure individuals' legal relations with each other adhere to enumerated constitutional rights and underlying constitutional values.<sup>15</sup> Indirect horizontal application is perhaps best known from the German concept of *drittwirkung*, first established when Germany's Federal Labor Court held that the fundamental rights contained in Germany's Basic Law were directly applicable to the relations between employer and employee.<sup>16</sup>

Within the category of indirect horizontal constitutional application, some scholars argue the group should be further divided into weak and strong indirect horizontal applications of constitutional rights. Weak indirect horizontal application means that only some types of private

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<sup>12</sup> Cheadle, 2005.

<sup>13</sup> Like all constitutional rights structures, the direct horizontal application of constitutional rights generates interesting conflicts of rights that would have to be resolved either in the constitution or in the courts.

<sup>14</sup> Cheadle, 2005.

<sup>15</sup> Gardbaum, 2006.

<sup>16</sup> Preuß, Ulrich, "The German *Drittwirkung* Doctrine and Its Socio-Political Background," in *The Constitution in Private Relations: Expanding Constitutionalism*, edited by Sajo, Andras and Renata Uitz, pgs. 23-32. The Netherlands, Eleven International Publishing, 2005.

law are subject to constitutional rights. This weak indirect horizontal application typically manifests itself as requiring courts to take constitutional values into account when interpreting and applying only *some* areas of private law. Strong indirect effect goes further and requires courts to take constitutional values into account when developing and interpreting all private law. Thus, under a constitution with a strong indirect effect, courts must take constitutional values into account when interpreting and applying *all* areas of private law.<sup>17</sup>

Other scholars have argued that the horizontal application of constitutional rights, rather than being conceived of as neatly dividing into nested extremes, should instead be understood as a spectrum. Despite agreement on the complexity of the concept, however, there is no agreement on what the spectrum should look like. Cheryl Saunders, in her analysis of how the common law interacts with constitutional law, argues that there are potentially four different mechanisms “by which the influence of constitutional rights may be extended to the common law governing private relations.”<sup>18</sup> Halton Cheadle,<sup>19</sup> in a slightly broader analysis, argues that there are actually five different types of horizontal engagement between constitutional and private law.<sup>20</sup> To identify the five types of horizontal engagement, Cheadle assesses whether a constitution governs private conduct or private law, as well as the scope of the constitutional application to private law.

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<sup>17</sup> Gardbaum, 2006.

<sup>18</sup> Saunders, Cheryl. “Constitutional Rights and the Common Law,” in *The Constitution in Private Relations: Expanding Constitutionalism*, edited by Sajo, Andras and Renata Uitz, pgs. 183-216. The Netherlands, Eleven International Publishing, 2005: 213.

<sup>19</sup> Cheadle, 2005.

<sup>20</sup> Private law is a category of law dealing with individuals as well as their property and relationships, and can include both case and statutory law. It can be contrasted with public law, which deals with the relationship between individuals and the government as well as with the structure and operation of the government. Public law includes three broad categories of law, including: constitutional, criminal, and administrative law.

Although there is little agreement on the precise conceptualization of horizontal applications of constitutional rights, there is an underlying agreement that a horizontal structure applies constitutional rights to private action to some extent by governing either private conduct or private law. The conceptual murkiness is in part the natural result of increased analysis, as additional case studies of particular constitutional arrangements have lead scholars to continuously refine their understanding of horizontal applications of constitutional rights. Despite the theoretical complexity associated with horizontal applications, some scholars argue that in use, some amount of horizontal application leads to greater consistency of constitutional jurisprudence and strengthened rights provisions.<sup>21</sup> Consequently, it is necessary to have a good understanding of the different ways horizontal constitutional structures can be implemented, as the structural application of constitutional rights can dramatically affect the conceptualization and outcomes of rights claims, as well as the ability of states to deal with issues previously considered private, such as domestic violence.

Comparative constitutional scholars have used the vertical-horizontal constitutional framework to better understand constitutional rights challenges worldwide and to explore how the rights structure impacts state approaches to certain issues. Although some scholars have analyzed the impact of the relative vertical or horizontal constitutional structure on first generation rights claims in specific countries, most recent analyses explore its role on second and third generation rights claims in democracies around the world.<sup>22</sup> Consequently, most analyses have focused on the ability of individuals to press socio-economic constitutional rights claims—

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<sup>21</sup> Cheadle, 2005; Chemerinsky, Erwin, “Rethinking State Action,” in *Northwestern University Law Review*, vol. 80 no. 3, pgs. 503-557, 1986.

<sup>22</sup> There are generally considered to be three generation of rights. The first generation are civil and political rights; the second generation of rights are socio-economic and cultural; the third generation of rights are environmental.

and how governments respond to these claims—not on the impact of the relative horizontality or verticality of a constitutional structure on civil and political rights.

The gendered consequences of a vertical or horizontal constitutional application have also not been adequately explored. In fact, gender is almost never mentioned, let alone addressed, in analyses of horizontal and vertical constitutional applications. This is true despite the fact that the structural choice could potentially have serious consequences for women's everyday lives. At their most basic, vertical constitutions establish and enforce a public-private divide, whereas horizontal constitutions try to bring the private sphere under constitutional authority. Considering the fact that in contemporary democracies, the private sphere—an area that is only partially accountable to constitutional rights under many systems—is the scene of domestic violence, the rights structure in the constitution could dramatically impact both women's rights claims and states' attempts to protect women's rights.

The complex nature of horizontal application of rights, however, also demonstrates an alternative route to increasing women's safety in the private sphere outside of fundamental constitutional reform. If courts in countries with ambiguously, or vertically, structured rights provisions so desired, they could interpret the rights to also apply to private action through the indirect horizontal application of constitutional principles to private law. The primary impediment to this shift, however, appears to be the thinkability of such a radical transformation. Thus, this dissertation explores how the relative verticality or horizontality of constitutional rights affects states' attempts to address the denial of women's first generation rights in domestic violence situations, in part through structuring the thinkability of fundamental legal change.

*Feminist Constitutional Analysis*

Feminist engagement with, and critiques of, constitutions is not new, but the focus has evolved over time. Early efforts focused on inserting formal sex<sup>23</sup> equality provisions into constitutions. When formal sex equality provisions were not attainable, feminist scholars and activists instead worked toward developing sex equality jurisprudence.<sup>24</sup> Although this movement towards formal equality was not without its detractors, the underlying theory governing the effort was the belief that removing legal impediments<sup>25</sup> for women would largely result in the actualization of sex equality.

However, despite both the fact that most countries have explicit constitutional measures guaranteeing sex equality<sup>26</sup> and the increased international attention on women's rights, women continue to have subordinate legal, social, and cultural status worldwide.<sup>27</sup> As a result of this discrepancy, many feminist scholars have begun to differentiate between formal equality—the official equal treatment of men and women—and substantive equality—the actual equality of men and women in daily life.

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<sup>23</sup> The difference between sex and gender equality is the difference between guaranteeing equality regardless of biological differences (sex equality) as compared to guaranteeing equality regardless of social differences (gender equality). Although a seemingly innocuous choice, guaranteeing only sex equality, and not gender equality, means that discrimination based upon a social understanding of women's roles is potentially acceptable under a sex equality provision, since ascribed roles are not covered under the biological equality guarantee.

<sup>24</sup> Baines, Beverly, Daphne Barak-Erez, and Tsvi Kahana, "Introduction: The Idea and Practice of Feminist Constitutionalism," in *Feminist Constitutionalism: Global Perspectives*, edited by Beverly Baines, Daphne Barak-Erez, and Tsvi Kahana, pgs. 1-14. Cambridge, Cambridge University Press, 2011.

<sup>25</sup> Legal impediments have ranged from women not being recognized as adults under the law, laws barring specific activities for women—such as working in certain professions, voting, and owning property—to discriminatory family laws governing marriage, divorce, and child custody.

<sup>26</sup> Sullivan, Kathleen, "Constitutionalizing Women's Equality," in *California Law Review*, vol. 90 pgs. 735-764, 2002.

<sup>27</sup> UNIFEM, *Progress of the World's Women: In Pursuit of Justice 2011/2012*, <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> (accessed March 11, 2013).

To better understand why formal equality has not translated into substantive equality, feminist policy theorists have tried to disaggregate the various levels at which this failure is occurring. Two important and overlapping areas identified are the public-private divide and constitutional provisions and structure. I will discuss both.

Feminists have identified the public-private divide as a significant obstacle to the realization of substantive equality because it excludes the primary location of discrimination against women—the home—from the view and power of the state.<sup>28</sup> Although not adequately addressed in the feminist literature, the contours public-private divide are largely outlined and reinforced through the configuration of constitutional rights provisions.<sup>29</sup> A strict public-private divide contributes to the lack of substantive equality in two primary ways. First, it creates an ideological barrier to certain types of legislation and intervention. Rigid understandings of the public and private spheres, even if only from a theoretical perspective, condition what actors in a given society consider appropriate and legitimate state action—i.e. the thinkability of certain legal approaches to various social problems.<sup>30</sup> Second, a strict public-private divide creates a hierarchy of rights in which privacy is considered to be fundamental. Thus, when confronting discrimination in general, or domestic violence in particular, a state must be able to justify incursions into the private sphere, or violations of privacy rights, by citing the protection of competing fundamental rights.

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<sup>28</sup> Pateman, Carole, “Feminist Critiques of the Public/Private Dichotomy,” in *Public and Private in Social Life*, edited by Benn, Stanley and Gerald Gaus, pgs. 281-303. New York, St. Martin’s Press, 1983.

<sup>29</sup> Baines et al (2011) argue that feminists must address how “constitutional law...shapes the understanding of the public and private and elaborates the principles that apply to this distinction.” They further argue that “[t]he way the public-private distinction applies in other spheres is the product of constitutional foundations,” but do not elaborate (3).

<sup>30</sup> Rigid divisions of the public-private divide are a hallmark of liberal political philosophies. Here I argue that in states that subscribe to a liberal political philosophy, part of that state’s legitimacy is based on maintaining at least the illusion of a private sphere in which citizens are free to conduct their lives in the manner they see fit.

What are the public and private spheres? Under most traditional formulations, “the public” is synonymous with “the political” and is consequently contestable space. In contrast, “the private” is defined as the anti-public or the anti-political, and is consequently shielded from external scrutiny under the guise of privacy rights. Feminists, however, have argued not only that “public” and “private” are not discrete categories with fixed definitions, but also that as traditionally deployed, have gendered implications.<sup>31</sup> Instead of distinct categories, the public and private spheres should be understood as political categories that are deployed for political and legal purposes to either legitimize or delegitimize certain claims to power and authority. Thus, by helping to construct the public-private divide, constitutional structure becomes vital to understanding how and when different claims are successful—or not—based upon the ability to frame an issue as public or private.

The argument that a strict public-private divide undermines substantive equality is based upon an understanding that women’s subjugation in the home inherently affects their ability to fully participate in society. Indeed, rather than individual acts of private violence, feminists argue that domestic violence should be understood as a means of exerting and maintaining power and control over women.<sup>32</sup> More broadly, Anna Shola Orloff argues that

relations of domination based upon control of women’s bodies in the family, the workplace, and public spaces undermine women’s abilities to participate as ‘independent individuals’—citizens—in the polity, which in turn affect their capacities to demand and utilize social rights. The ways that states intervene—or refuse to—are critical to women’s situation.<sup>33</sup>

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<sup>31</sup> Olsen, Frances. “Constitutional Law: Feminist Critiques of the Public/Private Distinction,” 10 *Constitutional Commentary*, pgs. 319-327, 1993.

<sup>32</sup> Hester, Marianne, Liz Kelly and Jill Radford, *Women, Violence, and Male Power: Feminist Activism, Research, and Practice*, Open University Press, Philadelphia, 1996; Bograd, Michele, “Feminist Perspectives on Wife Abuse: An Introduction,” in *Feminist Perspectives on Wife Abuse*, edited by Yllö, Kersti and Michele Bograd, pgs. 11-26. Sage Publications, Thousand Oaks, CA, 1988.

<sup>33</sup> Orloff, Ann Shola, “Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States,” *American Sociological Review* vol. 58 no. 3, pgs. 303-328, June 1993: 309.



Although most feminists agree that the private must be incorporated into understandings and analyses of the political, exactly how it should be incorporated is controversial.<sup>34</sup> It is clear, however, that by enlarging our understanding of the political to include nominally private sphere issues, scholars would conduct more accurate and informative analyses of the political. In addition, the expansion of the political could also lead to increased substantive equality once the primary location of gender discrimination becomes contestable space.

The other principal area feminists have identified where formal equality fails to translate into substantive equality that is relevant to this discussion is blueprint policies.<sup>35</sup> Blueprint policies consist of “the range of constitutional provisions, legislation, equality plans, reports, and policy machineries governments use to establish general principles, or a blueprint, for feminist state action at the national and sub-national levels.”<sup>36</sup> Blueprint policies are particularly relevant to this analysis, as the category includes, but is not limited to, constitutions. Thus, in their analyses of the failure of formal equality to translate into substantive equality, feminist policy analyses have highlighted the importance of constitutions and redoubled their efforts to better understand how constitutions affect gender equality.

This renewed focus on constitutions has resulted in a multitude of constitutional audits from a gendered perspective to try to better understand the disconnect between formal and

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<sup>34</sup> Prokhovnik, Raia, “Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness,” *Feminist Review*, Autumn. vol. 60 no. 8, pgs. 84-104, 1998.

<sup>35</sup> Feminist policy theorists have identified a total of eight sub-sectors where states could engage in feminist government action. The eight sub-sectors are: blueprint policies; political representation; equal employment; reconciliation—policies that target how men and women deal with the double burden of work and family; family law; reproductive rights; sexuality and violence; and, public service delivery. See Amy Mazur, *Theorizing Feminist Policy*, Oxford, Oxford University Press, 2002.

<sup>36</sup> Mazur 2002:47.

substantive equality.<sup>37</sup> These gendered constitutional audits examine not only the existence of formal equality provisions, but also their content, other rights provisions in the constitution, and background structural issues (e.g. federal vs. centralized government; presidential vs. parliamentary system). What becomes evident in many of these analyses is that a common contributing factor to the lack of substantive equality is that many constitutions create, but do not resolve, conflicting rights provisions. Thus, while many states have constitutional provisions designed to protect women, they oftentimes conflict with constitutional protections for other groups or categories of people (e.g. religious and minority groups), as well as other fundamental rights (e.g. privacy), and are consequently not fully enforced.

Feminist analyses of the state would argue that the apparent subordination of women's rights to fundamental (such as privacy rights) or other minority rights is the natural result of gendered political institutions. Although scholars have traditionally viewed the state as a gender-neutral concept, feminist scholarship has demonstrated the need to examine the state, and the core concepts associated with it, as gendered institutions.<sup>38</sup>

Of particular relevance to the current discussion, feminist scholars have demonstrated the need to imbue widespread concepts associated with the state—such as citizenship, civil and political rights, as well as the private-public sphere divide—with a gendered understanding of their meaning. Feminist theorists argue that although these concepts are nominally gender-neutral, they are implicitly based on male experiences and understandings and thereby affect the

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<sup>37</sup> Irving, Helen, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge, Cambridge University Press, 2008.

<sup>38</sup> Kenney, Sally, "New Research on Gendered Political Institutions," 49 *Political Research Quarterly* pgs. 445-466, 1996; Waylen, Georgina. *Engendering Transitions: Women's Mobilization, Institutions, and Gender Outcomes*. Oxford, Oxford University Press, 2007.

structure of rights, duties, and responsibilities within a polity.<sup>39</sup> Thus, feminist critiques can not only help analysts better understand difference between formal and substantive equality, but they can also help inform efforts to create women-friendly constitutions.

Despite the fact that gender audits have identified many of the potentially problematic features in individual constitutions, there has been surprisingly little effort to synthesize these studies and establish a gender-friendly constitutional template. There are several notable exceptions, each with a slightly different approach. One example of this effort attempts to establish the five sets of choices “a hypothetical set of feminist drafters [would] face if they were to constitutionalize women’s equality from scratch.”<sup>40</sup> According to Kathleen Sullivan, such drafters would be required to choose:

(1) between a general provision favoring equality or a specific provision favoring sex equality, (2) between limiting classifications based on sex or protecting the class of women, (3) between reaching only state discrimination or reaching private discrimination as well, (4) between protecting women from discrimination or also guaranteeing affirmative rights to the material preconditions for equality, and (5) between setting forth only judicially enforceable or also broadly aspirational equality norms.<sup>41</sup>

Although Sullivan presents these five choices, she does not herself opine on the best possible solution. Instead, she focuses on outlining rights provision choices that inevitably have serious consequences for women, but largely ignores underlying structural issues that could dramatically impact the substantive effects of these rights decisions. A crucial exception, however, is in choice three. Sullivan includes the choice regarding the application of the constitution only to state action (i.e. a vertical application of the constitution), or to also have the constitution apply to private action (i.e. a horizontal application of the constitution). Sullivan’s

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<sup>39</sup> Prokhovnik, 1998; Orloff, 1993.

<sup>40</sup> Sullivan, 2002: 747.

<sup>41</sup> Ibid.

presentation of this issue, however, is cursory and does not offer an in-depth analysis of the possible consequences of adopting either a vertical or horizontal constitutional rights application.

In another attempt to develop “a feminist constitutional agenda,” Beverly Baines and Ruth Rubio-Marin present a template for action in the introduction to their edited volume on gender and constitutional jurisprudence.<sup>42</sup> Although this agenda includes some amount of flexibility, they argue that at a minimum it

should address the position of women with respect to: (i) constitutional agency; (ii) constitutional rights; (iii) constitutionally structured diversity; (iv) constitutional equality; and give special attention to (v) women’s reproductive rights and sexual autonomy; (vi) women’s rights within the family; (vii) women’s socioeconomic development and democratic rights.<sup>43</sup>

Thus, similar to Sullivan, Baines and Rubio-Marin emphasize a rights-oriented constitutional approach. However, in addition to promoting rights, the authors include mechanisms to ensure that women are able to represent their own interests during constitution-making and mechanisms to ensure that constitutional structures promote substantive equality.

Finally, Helen Irving, in her discussion of how to create women-friendly constitutions, attempts to more fully integrate both issues of women’s interests and women’s rights into the constitutional drafting process.<sup>44</sup> She focuses on “what the words of a constitution say and mean, how the parts of a constitution are structured, and how a constitution’s provisions work in practice.”<sup>45</sup> Although Irving mentions the possibility of creating a constitution with horizontal application, she does not actually investigate the potential consequences of that structure. Irving

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<sup>42</sup> Baines, Beverley and Ruth Rubio-Marin, “Introduction: Toward a Feminist Constitutional Agenda,” in *The Gender of Constitutional Jurisprudence*, edited by Baines, Beverly and Ruth Rubio-Marin, pgs. 1-21. Cambridge, Cambridge University Press, 2005: 4.

<sup>43</sup> Ibid.

<sup>44</sup> Irving, 2008.

<sup>45</sup> Irving, 2008: 31-32.

emphasizes, however, that she does not believe there is a universal, woman-friendly constitution. Instead, she argues “that certain framing questions can be asked in all cases of constitutional making and that a range of options, as well as guidelines, can be identified, which are useful, transnationally and transculturally.”<sup>46</sup> Consequently, rather than providing a template, even a flexible one, Irving focuses on the background conditions that influence the realization of the equality rights discussed by Sullivan as well as Baines and Rubio-Marin.

Feminist scholars have produced many gender audits of constitutions and identified some of the problematic and promising aspects of constitutional law in individual countries. Far from accepting the notion that constitutions are a panacea for women’s rights, feminist constitutional scholars have noted that without feminist interpretation and implementation, constitutions can actually serve to entrench anti-emancipatory law, policies, and practice.<sup>47</sup>

Nevertheless, despite the potential pitfalls, the above scholars have taken these constitutional analyses and attempted to create feminist constitutional templates<sup>48</sup>—templates that would ideally be applied wholesale in the creation of a new constitution, but that could also be incorporated piecemeal or through amendments to existing constitutional arrangements. While several scholars have raised the issue of horizontal application as being a potentially important instrument to help women realize substantive equality, there has not been concerted feminist attention to the actual impact this constitutional policy choice would have. Thus, although horizontal application of constitutional rights has been alluded to in several general

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<sup>46</sup> Irving, 2008: 22.

<sup>47</sup> Irving, 2008.

<sup>48</sup> By template, neither I nor the scholars discussed above mean to imply a ridged, fill-in-the-blank form that can travel from country to country without regard for the specific people, history, culture, or legal goals of the particular locale. Instead, the scholars suggest issues that must be addressed in the creation of—or transformation to—a feminist constitution by the relevant groups. In this way, the templates are in many ways like a checklist of important things to address in constitutional negotiations.

analyses, there is no body of scholarship that addresses the effect it could have on women's rights, both in theory and in practice. To begin to fill this gap, I will examine how the relative verticality or horizontality of the constitution impacts the legal approaches to domestic violence in the United States and South Africa.

### ***III. Research Design, Case Selection, and Methods***

#### ***Research Design and Case Selection***

This dissertation broadly seeks to explore the potential impact of constitutional structure on women's rights. More specifically, I seek to explain the impact constitutional rights structures have on states' legal strategies to confront domestic violence. To do this, I conducted a comparative case analysis of the federal United States system, three U.S. states, and South Africa. A case study methodology is ideal for this project, as I seek first to explore and then to explain the causal links between certain aspects of constitutional structure and a state's legal approach to domestic violence.<sup>49</sup> In addition, the small-N project design enabled me to compare the various processes involved in applying vertical or horizontal rights to legal issues underlying domestic violence. This analysis allowed me to better understand the way in which a particular rights structure and specific rights provisions impact a state's approach to domestic violence.<sup>50</sup>

I analyzed the United States and South Africa because they share several important similarities, but their constitutions differ along two key axes. First, the United States and South

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<sup>49</sup> Yin, Robert. *Case Study Research: Design and Methods* (2<sup>nd</sup> edition), Thousand Oaks, Sage Publications, 1994.

<sup>50</sup> Steinberg, Paul F., "Causal Assessment in Small-N Policy Studies," *Policy Studies Journal*, vol. 35, no. 2, pgs. 181-204, May 2007.

Africa are both democratic states whose courts enjoy a significant amount of independence from executive or legislative interference. Furthermore, because of their shared status as former British colonies, both countries have common law legal systems.<sup>51</sup> Finally, both countries have significant domestic violence problems, and in response, both countries' national legislative body has passed national domestic violence legislation.

Despite the similarities, however, these countries differ on important constitutional dimensions. Most obviously, they differ on formal constitutional protections, such as sex and gender equality guaranties, as well as on the vertical and horizontal application of these constitutional rights.<sup>52</sup> Thus, while there are inevitably innumerable contributing factors for the adoption of domestic violence legislation, by choosing two countries with structural similarities but differing applications of constitutional and equality rights, I was able to better ascertain the relative impact of the vertical or horizontal application of constitutional rights on the state's legal approach to domestic violence. I will briefly discuss each country's relevant constitutional components before discussing how I conducted my analysis.

### The United States

The U.S. constitution is significantly older than the South African constitution. It is strongly vertical in its construction and application.<sup>53</sup> The constitution creates a rigid theoretical

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<sup>51</sup> Although South Africa is technically considered a hybrid legal system because it retained certain aspects of Dutch civil law, it functions as a common law system with binding precedent and case law forming a separate area of legal development. As a result of how the legal system functions, comparison with the United States is appropriate.

<sup>52</sup> These two states also differ in their level of economic development. While that difference would render certain comparisons inappropriate, the countries' legal structures are similar enough in important ways to warrant a comparison of the legal areas I identify that differ.

<sup>53</sup> Although most scholars agree that the U.S. constitution has a strong vertical orientation, Stephen Gardbaum argues that in fact, the U.S. constitution is actually strongly horizontally-oriented but lacks almost any positive

divide between the public and private spheres by mostly guaranteeing negative individual rights against the government and by very pointedly not guaranteeing any rights—positive or negative<sup>54</sup>—between individuals.

Adopted in 1787, the U.S. constitution does not explicitly mention gender, and only mentions sex in the fourteenth and nineteenth amendments. The main body of the constitution is principally concerned with creating, and establishing the functions of, the three branches of government. Rights are only subsequently granted in the amendments, and are then only applied vertically.<sup>55</sup> Consequently, to trigger a constitutional rights claim, there must be some state involvement in the denial of constitutional rights, which is also known as ‘state action.’<sup>56 57</sup>

Although initially most of the rights and responsibilities conferred in the U.S. constitution were legislatively and judicially interpreted to apply only to white men, the constitution itself deals mainly in gender-neutral terms such as “citizens” and “persons.” Gradually these terms have been expanded to include women and minorities, leading some to argue that specific constitutional guarantees for women in the United States are unnecessary. Notwithstanding the

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rights, which is why there is confusion. See, Gardbaum, Stephen, “The ‘Horizontal Effect’ of Constitutional Rights,” 102 *Michigan Law Review*, pgs. 387-459, 2003 and Gardbaum 2006. My findings contradict Gardbaum’s arguments, as it is not the positive or negative nature of constitutional rights that increase the pressure on a government to prevent private violation of constitutional rights, but it is instead the horizontal application of those rights that creates this obligation. Explicit rights help force the government’s hand, but it is the horizontal structure of those rights that compels action.

<sup>54</sup> Negative rights are rights that must not be violated or rights that require inaction (e.g. freedom of speech). Positive rights are rights that must be granted or rights that require action (e.g. right to housing). The right to an attorney, provided in the sixth amendment, is an example of a positive right provided in the U.S. constitution. Most of the rights provided in the U.S. constitution, however, are negative rights.

<sup>55</sup> The only exception to this vertical construction is the thirteenth amendment, adopted after the Civil War in 1865. Designed to actually abolish the existence of both de facto and formal slavery, section one of the amendment reads, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist with the United States, or any place subject to their jurisdiction.”

<sup>56</sup> Although the *Civil Rights Cases*, 109 U.S. 3 (1883), are frequently credited with being the origin of the state action doctrine, the Supreme Court actually first discussed the doctrine in *United States v. Cruikshank*, 92 U.S. 542 (1876) and again in *Virginia v. Rives*, 100 U.S. 313 (1879).

<sup>57</sup> What qualifies as state action is often inconsistent. In fact, this is one of the primary critiques of the state action doctrine. See Chemerinsky, 1986.



sex equality jurisprudence, however, many have argued that an explicit constitutional guarantee of sex equality was necessary.

In 1923, feminists attempted to codify women's rights and proposed the Equal Rights Amendment (ERA), which would ensure that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."<sup>58</sup> In keeping with the U.S. constitutional structure, the sex equality amendment had a strong vertical orientation, requiring only that the state and federal governments treat males and females equally. The main campaign to ratify the ERA died in 1982, three states shy of the required thirty-eight to become an amendment. As a result, the United States has no explicit sex or gender equality provisions in its constitution.

Strongly federal in structure, the U.S. constitution also restricts the ability of the federal government to legislate on many issues, reserving most legislative powers for the states. Although the fourteenth amendment, in particular, has expanded Congress' legislative powers, the constitution itself mainly limits legislative powers to regulating commerce. Consequently, for Congress to be able to legislate on issues related to intimate violence, it must, in general, claim authority either through the Commerce Clause or the fourteenth amendment.

Because of this strong federal structure in the United States, the enforcement of domestic violence law occurs at both the state and federal level. As a result, in addition to the U.S. federal analysis I also conducted three U.S. state case studies—Wisconsin, Colorado, and Montana. To select state case studies, I read through the constitutional rights provisions for all fifty states as well as each state's domestic violence legislation. For the constitutions, I compiled a list of

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<sup>58</sup> Equal Rights Amendment, <http://www.equalrightsamendment.org/overview.htm> (accessed October 20, 2008).

potentially relevant rights and then charted whether or not each state had an equality provision, if it explicitly included sex or gender, as well as if it had a horizontal or vertical application. After completing this part of the analysis, I included Montana as a case study as it was the only state with an explicit, horizontally-oriented sex equality provision in its constitution.<sup>59</sup> Thus, Montana allowed me to determine whether a horizontally-oriented rights structure at the state level could be sufficient to overcome the dominant, vertically-oriented federal rights structure in the United States federal constitution.

To determine the remaining case studies, I looked at the type of domestic violence legislation—both civil and criminal<sup>60</sup>—in each state to ensure I chose states that were either representative of the different types of domestic violence legislation throughout the country, or possessed some unique attribute that needed to be explored. For every piece of domestic violence legislation I noted whether or not the definition of domestic violence contained a list of crimes constituting domestic violence or if it was a very broad statement of what was not allowed. I also noted whether or not specific crimes, such as sexual assault, stalking, and harassment (or emotional abuse) were included. I then looked at whether the category of people included in the legislation was expansive (including former and current spouses, family, household, people in a dating relationships, as well as people who share a child in common) or narrow (family, household, and people who share a child in common).

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<sup>59</sup> New York State has a horizontal equality provision in its state constitution, although sex and gender are explicitly omitted. No other states have an explicit horizontal equality provision in their constitution.

<sup>60</sup> For my purposes, criminal statutes are laws that either define the crime of domestic violence or ones that create a sentencing enhancement for criminal actions in domestic violence situations. Civil statutes are the temporary and permanent restraining order laws that enable victims to obtain court orders prohibiting an abuser from engaging in certain actions. Although violating a restraining order law can have criminal consequences, restraining order statutes are classified as civil laws because the procedures for obtaining an order differ dramatically from criminal procedures.

While most states had nearly identical definitions of which individuals qualified under their domestic violence statutes, six states had different definitions in their civil and criminal statutes. One of these states is Wisconsin, which has a broader definition of which relationships and actions qualify as domestic violence under its civil statute than it does for its criminal one.<sup>61</sup> In addition, Wisconsin does not have a sex or gender equality provision in its constitution.<sup>62</sup> If the Wisconsin approach to domestic violence turned out to be particularly strong, this would challenge my theory regarding the role sex equality rights in the constitution play in protecting women from private violence. Thus, I included Wisconsin both because it represents a unique formulation of domestic violence legislation and because it does not include sex or gender equality rights in its constitution.

For my final case study I chose Colorado for several reasons. First, Colorado has a vertical sex equality provision in its constitution. Having one state with a vertical sex equality constitutional provision allowed me to ascertain whether simply having a sex equality provision would be sufficient to influence how a state legally approaches domestic violence. In addition, Colorado had representative domestic violence legislation.<sup>63</sup> Perhaps most importantly, however, a seminal federal case discussed in chapter six, *Town of Castle Rock v. Gonzales*<sup>64</sup>, originated in Colorado and was based, in part, on a federal interpretation of Colorado state law.

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<sup>61</sup> This will be discussed in more detail in the following chapter, but the most important difference between the definitions is that under Wisconsin civil law dating relationships qualify for protection, but under the state's criminal statutes abuse between dating couples—unless the two share a child in common or cohabitate—is not considered domestic violence.

<sup>62</sup> Thirty U.S. states have neither a sex nor a gender equality provision in their constitution. Two states, Iowa and Rhode Island, have a gender equality provision and eighteen states have sex equality provisions.

<sup>63</sup> Colorado domestic violence law has no list of specific offenses and an expansive definition of what types of relationships qualify under the law. A total of eighteen other states have similar types of domestic violence legislation.

<sup>64</sup> 545 U.S. 748 (2005).

Thus, by including Colorado it allowed me to examine the connection between state and federal law in the United States, as well as to explore the sufficiency of sex equality provisions for protecting women from domestic violence.

### South Africa

The 1996 constitution is the keystone of South Africa's democracy. It is strongly horizontal in both construction and application. It is an expansive document that not only established a new political system, but also actively attempted to remedy past ills of the apartheid regime. Consequently, the constitution has an extensive Bill of Rights that seeks to protect both positive and negative individual and community rights. In addition, the constitution applies to both state and private action. The horizontal as well as vertical application of the constitution has strong implications for women's attempts to invoke the power of the state to protect themselves in their private lives. I will briefly highlight some of the most important sections of the 1996 constitution for women, especially those that have implications for personal security and domestic violence.

The Founding Provisions of the constitution outline the fundamental principles upon which the new South Africa was to be based. Included in the enumerated fundamental values of the country are, "human dignity, the achievement of equality and the advancement of human rights and freedoms," as well as "non-racialism and non-sexism."<sup>65</sup>

Section nine of the South African constitution outlines equality rights. This section states that everyone is equal before the law and has a right to equal protection and benefit of the law, as

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<sup>65</sup> Constitution of the Republic of South Africa, 1996, Chapter 1, sections 1(a) and (b).

well as explicitly lists categories of people against whom the state *and* private individuals may not directly or indirectly discriminate. This list includes gender, sex, pregnancy, marital status, and sexual orientation, among other categories of individuals. Although there is an explicit prohibition against invidious discrimination, either direct or indirect, section nine allows for benevolent discrimination, such as affirmative action. In addition, three subsequent sections deal with individuals' rights to dignity and physical integrity. These rights, in particular the right to physical integrity when combined with the aforementioned sex and gender guarantees, were crucial in the Constitutional Court's decision to create a legal duty for the state to protect women from private violence.<sup>66</sup>

Furthermore, according to the constitution, the legislature and courts are required to enact or develop law to give effect to constitutional rights. Thus, rather than merely outlining possible rights, the South African constitution requires that the appropriate governmental entities enable citizens to be able to rely upon their enumerated rights. By requiring state action to actively support individuals' rights, the constitution further reinforces the explicit horizontal structure of rights provisions.

### Methods

To explain how the constitutional construction of the public-private divide impacts a state's legal approach to domestic violence, I conducted two analyses for each case. By breaking my analysis into two separate parts—an analysis of domestic violence legislation and domestic violence appellate case law—I was able to identify, understand, and explain the related but

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<sup>66</sup> See, *Carmichele v. The Minister of Safety and Security and The Minister of Justice and Constitutional Development*, 2001 (4) SA 938 (CC), discussed in detail in chapter seven.

distinct constitutional processes involved in formulating a state's legal approach to domestic violence. The background to both analyses is a detailed examination of each state's constitution and constitutional case law as it relates to private and domestic violence, as it is a prerequisite for any examination of the structuring of a public-private divide and the formulation of thinkable legal solutions to domestic violence.

### Domestic violence laws

My first analysis for each case study was a thorough study of the relevant civil and criminal domestic violence legislation. This analysis included not only the content, scope, and outcome of each law, but also an in-depth legislative history for each piece of legislation, where possible. Both countries in this study have a piece of national domestic violence legislation: the United States passed the Violence Against Women Act in 1994 and South Africa passed the Domestic Violence Act in 1998. Each U.S. state also has at least one separate civil and criminal domestic violence law, each of which has been altered or amended multiple times.

I began my analysis with the legislative debates surrounding a bill. Legislative histories were not possible for each of the five case studies I completed, however. For the U.S. federal system I was able to obtain verbatim transcripts of legislative debates for the Violence Against Women Act and could therefore include them in my analysis. Montana also has thorough legislative debate summaries, so I was able to utilize them in that case study. For Colorado, I was only able to obtain verbatim transcripts for legislation occurring after 2003. Wisconsin, however, does not preserve legislative debates on all bills, so I was unable to include any legislative debates in my legislative history for the state. Finally, South Africa publishes some

summaries of committee meetings, so I was able to include that data in the legislative history for the Domestic Violence Act.

For Colorado before 2003 and Wisconsin, I did keyword newspaper searches to try to capture any legislative or popular debate that was occurring around specific legislation. These searches, however, did not uncover much of substance. As a result, I was forced to conclude that regardless of the debate that was occurring inside legislative chambers, it largely did not make it to the general public, except in a few isolated circumstances. Those circumstances included: the O.J. Simpson murder trial of Nicole Brown Simpson and Ron Goldman—both Colorado and Wisconsin papers were full of domestic violence information surrounding that period; when a popular hockey star was arrested under the Colorado mandatory arrest law, Coloradoans wanted to debate the wisdom of mandatory arrest; and, when the Supreme Court was preparing to hear the *Castle Rock v. Gonzales* appeal, Colorado papers discussed the case and its implications.

The legislative debates I was able to access allowed me to focus on the rights invoked in the deliberative process, particularly on any competing rights that might have been raised (e.g. privacy rights or defendant rights vs. the victim's right to life and liberty). Overall, this analysis enabled me to look at how the respective legislative bodies understood the constitutional constraints involved in dealing with a nominally private matter, and how they attempted to resolve those issues.

In addition to the analysis of legislative history, I also analyzed the content and outcome of the domestic violence laws. Examining the content of the laws enabled me to discern how legislatures understand not only the legal duties, but also the legal options stemming from their respective constitutions. As previously discussed, legal duties and options are a primary

indicator of a country's constitutional configuration of the public-private divide and are consequently important to understanding how different constitutional configurations affect legal approaches to domestic violence. In addition, analyzing the content and outcome of the domestic violence laws also enabled me to assess the thinkability of various solutions by the legislature, and later the litigants and justices determining their outcome. Particularly useful in this part of the analysis was to compare successive bills with the final legislative product and then ultimately with a court's assessment of a piece of legislation's constitutionality. I assessed the laws' outcomes by searching for cases challenging the various pieces of legislation. For the U.S. case studies I used lexisnexis to complete my searches. For South Africa I used both lexisnexis and the Constitutional Court's search engine.

Analysis of the domestic violence laws enabled me to explore how legislators are interpreting the constitutional constraints involved in legislating domestic violence—an act of private gender discrimination—by following the legal processes and debates. Conducting the same analysis on two countries and three states allowed me to compare how the various constitutional constructions have directly impacted debates on, as well as the scope, content, and outcome of domestic violence legislation. This analysis enabled me to examine the relationship between a particular constitutional structuring of the public-private divide and the resultant domestic violence legislation. Although I did not discover significant variation in legislation based upon a jurisdiction's underlying constitutional structure, there was evidence that constitutional rights do play a role in structuring how legislators understand what they are able to do—this is evidenced in the debates and what rights are invoked by the legislators as they discuss the issues involved in domestic violence. This finding bolsters my conclusion regarding



the role constitutions play in creating thinkable legal strategies for dealing with domestic violence.

### Appellate Case Law

The second part of my analysis focused on how the courts have interpreted the public and private spheres established by the different constitutions and how that divide subsequently impacted the thinkability of particular legal response to private violence. To do this, I analyzed appellate cases dealing with domestic violence and related issues in both countries and the three U.S. states. To do this I used lexisnexis for both the United States and South Africa, in addition to the Constitutional Court database for South Africa.

For South Africa, I examined case law beginning after the transition from apartheid, starting with cases arising under the interim constitution of 1993, through 2011. In addition to marking the transition towards majority-rule democracy, the interim constitution also marked the transition from a system of parliamentary sovereignty to one of a constitutional democracy.<sup>67</sup> Consequently, pre-1993 case law is not informative in a discussion that centers on how constitutions structure the public-private divide and is not included in my analysis, except to provide context for the transformation that occurred in the 1990s.

For the United States federal system and the three states I examined case law from 1960 to 2011. The U.S. federal analysis focused on circuit and Supreme Court cases; the state analyses focused on appellate level cases—both intermediate appellate courts and Supreme

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<sup>67</sup> Klug, Heinz, “South Africa: From Constitutional Promise to Social Transformation,” in *Interpreting Constitutions: A Comparative Study*, edited by Jeffrey Goldsworthy, pgs. 266-320. Oxford University Press, Oxford, 2006.

Courts—in the state court systems. I began with cases in 1960 because the second wave of the feminist movement marked the beginning of the politicization of the traditional public-private divide.<sup>68</sup> Although the second wave of U.S. feminism really flourished in the 1970s, it began during the 1960s and I wanted to make sure I erred on being over- rather than under-inclusive. In addition, beginning in 1960 also enabled me to capture select civil rights cases that, at times, demonstrated alternative approaches were possible under the U.S. constitutional framework, despite the fact they were generally not applied to private gender violence.<sup>69</sup> This enabled me to hone in on the situational and contextual nature of the thinkability of distinct legal approaches available for different legal issues presented.

For each case study, I created a master case spreadsheet containing information on all of the searches I conducted and the resulting hits. For each hit, I read at least the case summary and catalogued all the basic information about the case, as well as what the case was about and whether or not it was useful for my research. Table one lists the number of searches I conducted and hits I reviewed for each case study.

**TABLE 1: TOTAL SEARCHES CONDUCTED AND HITS REVIEWED IN ANALYSIS TWO**

|                     | Searches conducted | Total hits |
|---------------------|--------------------|------------|
| U.S. federal system | 45                 | 1216       |
| Wisconsin           | 29                 | 727        |
| Colorado            | 37                 | 899        |
| Montana             | 46                 | 530        |
| South Africa        | 17                 | 349        |

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<sup>68</sup> Olsen, 1993.

<sup>69</sup> Although a benefit to my analysis beginning in 1960 was that I could capture some civil rights cases, the civil rights movement began, and many important cases occurred, before that date. Thus, I do not mean to imply I did a thorough analysis of civil rights legislation in this dissertation—merely that there was some overlap that augmented my argument regarding how constitutions and social or cultural movements intersect to influence the thinkability of legal responses to different social problems.

|       |     |      |
|-------|-----|------|
|       |     |      |
| Total | 174 | 3721 |

Court opinions captured the constitutional rationale embraced and codified by the justices, as well as any disagreements expressed in the dissenting opinions. In their opinions judges outlined the thinkability of various legal outcomes, and definitively accepted or rebuffed them. As a result, the opinions provided me with valuable information on what courts viewed as acceptable possible outcomes to various legal situations. Because opinions include detailed analysis, they were invaluable to comprehending how constitutional content and structure shape judicial understandings of a particular outcome's thinkability. In addition to the court opinions, for select cases I also reviewed the briefs submitted by and on behalf of both parties. These briefs detailed the various issues raised by both parties and gave me a better understanding of what the options presented to the court were, as well as more information on what the court chose and why.

The case law analysis complemented my legislative analysis by looking at the same issue—the constitution's role in shaping the thinkability of different legal responses to domestic violence—from a slightly different perspective. Appellate case law sets tangible boundaries within which legislatures must operate in common law systems, as court opinions and rulings provide guidance on how to interpret the sometimes challenging and elusive constitutional provisions and structure. By striking down or affirming legislation, courts play a crucial role in the actualization of the boundaries between the public and private spheres, which in turn influences the thinkability of different legal actions. Thus, by understanding the reasoning and

rationale of a given court, and by comparing different approaches, I am able to more fully explain how the constitutional structuring of rights provisions impacts the thinkability of different legal approaches to domestic violence.

Taken together, the two analyses enable me to show how the constitutional structuring of rights provisions impacts both the contours of the public-private divide and the thinkability of certain legal approaches, which consequently impacts a state's legal approach to domestic violence. Taking my analysis one step further, by understanding how this relationship works, I am able to theorize not only on the potential impact of horizontal or vertical constitutional structures on domestic violence, but also its impact on the broader issue of private gender discrimination.

#### ***IV. Conclusions***

The combination of the U.S. federal and state case studies paint a vivid picture of how the United States has essentially created a circular, and unsuccessful, path for legal claims arising from private violence incidents. More specifically, although in the United States it is widely accepted that domestic violence is a state issue, states generally do not provide adequate protection for private violence victims, or permit accountability when that protection fails. State courts commonly do this by granting summary judgment<sup>70</sup> motions to state entities and officials

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<sup>70</sup> Summary judgment motions argue that there is no genuine issue of fact and that as a matter of law the moving party is entitled to a judgment. They can be requested by either party to a lawsuit. The moving party has the burden of proof to demonstrate there is no genuine issue of fact. If the moving party meets its burden, the non-moving party must then demonstrate that there is a triable issue in the case to prevent the case from being decided. (*Duong v. County of Arapahoe*, 837 P.2d 226 (1992), citing *Civil Service Commission v. Pinder*, 812 P.2d 645 (Colo 1991)).

who assert sovereign<sup>71</sup> and qualified<sup>72</sup> immunity to avoid liability for negligent actions resulting in harm. As a result, with state action foreclosed, victims seek relief under the federal constitution via a section 1983 claim<sup>73</sup> or federal statutes, their only possible remaining avenue for accountability. When faced with these claims, the federal courts punt the issue back to the states by either granting immunity to the defendants or asserting that there is no state action and consequently no actionable federal claim. This response is rooted in the notion that private and domestic violence is a state, not a federal issue. As a result, women are unable to adequately hold government officials liable for damages experienced due, in part, to the officials' negligence and are limited in their ability to use the courts to pursue policy changes.

I argue that despite the pervasiveness of this outcome, the U.S. federal and state constitutions do not require it. Indeed, while U.S. constitutions generally do not facilitate holdings or laws that increase women's security in the private sphere, they also do not preclude them. Instead, it is the inability of the legislature, courts, and litigants to imagine and implement

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<sup>71</sup> Sovereign immunity is a government's immunity from being sued in its own courts without its permission. Under federal law sovereign immunity has been largely waived by the federal tort claims act. For states, the two main exceptions to sovereign immunity arising in private violence situations are a special relationship with the victim or a state-created danger that causes the injury.

<sup>72</sup> Qualified immunity is a public official's immunity from civil liability for discretionary functions, as long as the conduct does not violate established constitutional rights or meet other exceptions that result in a court waiving immunity.

<sup>73</sup> Originally passed in the Civil Rights Act of 1871, 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." In practice the section allows individuals to file a federal civil lawsuit against state officials who violate established constitutional rights under color of state law. The Supreme Court first opened this avenue in *Monroe v. Pape*, 365 U.S. 167 (1961), when a family was abused by police officers in their home and the Court said that the police officers, but not the municipality, could be sued. The Court later ruled that municipalities could also be sued when they implemented policies that violated individuals' constitutional rights in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The purpose of the legislation was to provide a federal remedy when state courts, due to prejudice or neglect, did not enforce citizens' fourteenth amendment rights. See Harper, Laura S., "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues after *DeShaney v. Winnebago Department of Social Services*," 75 *Cornell Law Review*, pgs. 1392-1424 (1989).

alternative realities that leads to the current scenario. At the most basic level, it is not thinkable to permit such claims to go to trial, or laws to be implemented, as they would undermine the established public-private divide and the existing legal culture in the United States. As a result, legislation is passed primarily at a state level and there is little accountability, state or federal, when official (in)action leads to tragic outcomes.

In this context, the South African case study serves as an example of an alternative approach to protecting women's rights in the private sphere. South Africa, during its transformation from apartheid to a constitutional democracy, reworked core institutions and their relationship to society. As part of this fundamental change the public-private divide was reworked and the private sphere was brought somewhat into the public domain via constitutional accountability. The redrawing of the public-private divide was largely spurred by a desire to prevent the privatization of apartheid. Constitutional drafters were concerned that a traditional vertical constitution would permit some of the egregious racial (and sexual) policies from the apartheid era to continue in the private sphere despite the fact they were no longer officially condoned by the state, similar to what occurred in the Jim Crow south following the U.S. civil war. Cognizant of the intersection of race and gender under apartheid, women were among the oppressed groups represented and protected in the social and legal reconfiguration. As a result, the legislature and judges have explicit constitutional direction that enables them to approach private violence in a new manner. It is important to note, however, that even in the context of a fundamental transformation, the new constitution was not sufficient to compel all judges to initially support this change. The first court case emerging on the subject followed traditional liberal approaches to public accountability of private violence by holding that the state did not

have a duty to protect Alix Carmichele.<sup>74</sup> This fact leads me to conclude that although constitutional provisions can be instrumental in permitting and inspiring a fundamental legal change, they are not necessarily sufficient to bring that change about.<sup>75</sup> A cultural shift accompanying and supporting the desired legal change appears to be necessary to bring about transformation.

Accordingly, from a theoretical perspective, constitutions structure state responses to domestic violence by outlining what a state—via its legislative and judicial branch—must do, what it can do, and what it cannot do to address intimate violence. This authority is established not only by a division of power between and within the different branches of government, but also by the content and application of specific rights provisions. Importantly, the U.S. federal constitution limits the ability of Congress to address diverse issues by permitting action only in specific areas, which for issues of private violence are primarily interstate commerce and the fourteenth amendment. The South African constitution, however, requires legislative and judicial action to effectuate the plethora of rights contained in the Bill of Rights. In addition, the U.S. federal constitution contains few individual rights, almost all of which have a strong vertical structure. As a result, not only are there few rights for victims to assert in their quest for protection from private violence, those rights are also predominantly structured (and are and almost exclusively interpreted) to only apply to state action. When compared to South Africa,

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<sup>74</sup> See the discussion of the High Court and Supreme Court of Appeals' initial decisions in *Carmichele* in chapter seven.

<sup>75</sup> This conclusion is also bolstered by the Montana case study. Although Montana has a horizontal sex equality provision in its constitution, it has not been invoked to increase protections for women. Montana will be discussed further in chapter four.

which has multiple relevant individual rights guaranteed in the constitution that are explicitly structured to apply to both state and individual action, the difference is dramatic.

Establishing these findings is significant from a constitutional perspective for two principal reasons. First, they confirm the need for constitutional scholars to examine how non-gendered aspects of constitutions impact the ability of the state to protect women in the private sphere. Relatedly, and perhaps more importantly, my dissertation demonstrates the role that constitutions play in shaping what legislators and the legal community understand is possible. The constitution appears to play a significant role in framing what legal professionals and the general population consider thinkable when formulating different approaches to solving problems. We see evidence of this when analyzing legislative debates and judicial interpretations of the constitution. This includes the creation of legislative remedies as well as shaping the arguments lawyers make and judges are amenable to in trying to force change through or obtain judicial remedies. Although crucial, as discussed above, simple constitutional change is not necessarily sufficient to enact fundamental transformation. Instead, it appears necessary to have a social or cultural movement that supports the desired changes, as occurred in South Africa, but not in the United States<sup>76</sup>.

Perhaps most surprisingly, my research identified a potential stop gap measure that could be employed to circumvent some of the complicated constitutional issues that arose in this project. The Montana case study demonstrates that eliminating immunity doctrines for state entities and officials precludes a need to engage in fundamental constitutional change or

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<sup>76</sup> In the United States there was a brief window following the O.J. Simpson murder trial of Nicole Brown Simpson and Ron Goldman in which new approaches to domestic violence were thinkable, but there was not a sustained cultural movement along with the trial that enabled a fundamental shift that allowed for public accountability in private violence situations.



reinterpretation to create accountability. Although eliminating immunity doctrines does not change how legislatures conceive of the state's role in preventing private violence, it does at a minimum result in increased accountability by government officials when they fail to implement established law. As a result, governmental entities and officials can be held accountable for creating discriminatory or problematic policies, for implementing policies in a discriminatory manner, or failing to enforce existing laws or policies dealing with domestic violence. Thus, while not achieving the fundamental change some feminist scholars strive for, eliminating immunity would provide for some measure of responsibility where there currently is none.

## *V. Significance*

This dissertation makes both theoretical and practical contributions. From a theoretical perspective, it contributes to two separate bodies of literature. It contributes to feminist constitutional analyses by exploring an oft neglected element of constitutional law—the potential impact of horizontal constitutional applications on state approaches to one pervasive type of gender discrimination, domestic violence. It also contributes to critiques of the public-private divide by detailing how the constitutional structuring of the divide directly influences key legal approaches to nominally private issues. I conclude that while gendered constitutional rights are important and further many gender equality goals, they are not, in themselves adequate to compel the state to address perhaps the most pernicious gender discrimination women face—intimate and domestic violence.

From a formal, structural perspective, I argue that in addition to explicit gender rights, feminists should also focus on how the configuration of rights provisions influences state action. From an informal, cultural perspective, I argue that structure itself is not necessarily sufficient to achieve state intervention in private violence. Feminists must continue to transform societies from above and below so that legal professionals and lay people alike recognize the very real problems associated with intimate violence, and can contemplate the necessary legal reform—at the most basic level, feminists need to make addressing gendered violence as a fundamental human rights issue thinkable.

In addition, this project begins to insert a gendered perspective into analyses of vertical and horizontal applications of the constitution, something that is infrequently done, but necessary. My research demonstrates that horizontally-oriented constitutions could have a dramatic impact on state's legal duties to women, since horizontal applications of constitutional rights are designed to ameliorate private rights violations, and the private sphere is currently the site of women's greatest vulnerability. While I was not able to definitively determine how generalizable my findings regarding the gendered consequences of a horizontal or vertical constitution are, this dissertation was a first step toward exploring and theorizing those issues.

From a practical perspective, this dissertation has two important implications. First, it provides a better understanding of how the constitutional structuring of the public-private divide via rights provisions affects state responses to women's rights violations by shaping what lay and legal communities consider thinkable responses to intimate violence. This knowledge will not only enable women to better craft, amend, and interpret constitutions, but it also demonstrates that exclusively focusing on the constitution will not necessarily be sufficient to implement

fundamental change. Women have focused on constitutions to try to achieve formal equality, and are now, in part, looking to constitutions to try to achieve substantive equality as well. This dissertation explores the role that thinkability—influenced by constitutional structure—plays in shaping state responses to domestic violence. It suggests that a supportive social or cultural movement supporting fundamental change is perhaps more important than explicit constitutional reform. Thus, while constitutional rights structures are potentially powerful tools to advance women's rights, they must continue to be explored to better understand their different influences on state responses to women's rights violations.

Second, short of constitutional reform, this dissertation also suggests that women, particularly in the United States, should pursue eliminating sovereign and qualified immunity doctrines as a means of circumventing some of the problems associated with constitutional restrictions on state responses to domestic violence. Immunity doctrines are among the biggest legal impediments in the U.S. to forcing policy changes and accountability in the courts, especially in cases involving a state's failure to protect women from intimate violence. In addition, immunity doctrines are significantly easier to change than a constitution as they are primarily based on common and statutory law—not constitutional law. As a result, eliminating immunity doctrines would be a less controversial approach with fewer procedural hurdles to accomplish than fundamental constitutional change, while still resulting in real change in women's lives.

## ***VI. Chapter Outline***

This dissertation will proceed as follows. I begin with the U.S. state case studies. Chapter two will look at Wisconsin; chapter three will analyze Colorado; and chapter four will examine Montana. Chapters two and three are examples of how state constitutional law fails to provide an alternative structure that will influence state responses to domestic violence. In both Wisconsin and Colorado, domestic violence laws are passed, but there is little accountability when those laws are disregarded, even when tragedy results. Montana demonstrates the power of not providing blanket immunity for governmental entities and officials. Although Montana has the most expansive state constitution, it is not invoked in domestic violence lawsuits because there is no immunity that must be overcome. As a result, implementation failure potentially has consequences for both the municipalities and officers who disregard state law.

The following two chapters examine the U.S. federal system. Chapter five examines the Violence Against Women Act of 1994—its route through Congress and the judiciary. This chapter explores how the Violence Against Women Act was passed on the wave of concern following the O.J. Simpson murder trial for the deaths of Nicole Brown Simpson and Ron Goldman and how its most novel, and potentially most useful, component was struck down as unconstitutional by the Supreme Court several years later. This chapter demonstrates how thinkability fundamentally influences legal action, as the core tension surrounding the law was whether or not women's rights were civil rights, or if they were an issue that had to be decided at the state level.

Chapter six examines the fourteenth amendment claims that victims of private violence have brought in the effort to hold state officials who acted negligently or in violation of state law

or policy accountable for their failings. The chapter examines the three ways victims have tried to bring these claims—namely substantive due process, procedural due process, and equal protection claims. The first two claims are each represented by a seminal case heard by the Supreme Court, whereas the equal protection claims have more diverse outcomes from multiple cases.

Taken together, the two federal chapters demonstrate that the U.S. federal legal system does not provide any meaningful protection or remedies for victims of private violence. Indeed, the consensus at the federal level is that private gendered violence is a state issue and must be addressed by the states, not the federal government. Thus, when these federal chapters are read with the state chapters, I demonstrate the painfully circuitous nature of legal remedies for private violence in the United States. The states offer some protection, but in general no accountability for egregious failures by state officials and municipalities to implement state law. After unsuccessful cases filed in state court, victims attempted to assert federal claims, which the Supreme Court has denied—declaring that private violence is a state issue.

Chapter seven explores the South African case as an example of an alternative approach to protecting women's rights in the private sphere. In this chapter I demonstrate that despite the pervasive belief in the U.S. that an alternative structure permitting some amount of public liability in incidences of private violence would lead to a litigation explosion and legal chaos, this is not necessarily the case. South African courts, interpreting the permanent constitution, have demonstrated how a state can obligate itself to protect individuals from certain types of private violence, and hold itself accountable when it fails to provide that protection.

The final chapter offers some conclusions and thoughts about future research building off of my findings in this project.

## Chapter 2

### Wisconsin

"You could say it would be unusual, yes, to be anywhere in a courthouse with a gun. But we don't really have the ability to just frisk or do anything to someone in a hallway or common area...*You can only limit their rights so much*" (emphasis added).

- Lt. Sam Leatherwood, from "Harassed Woman Slain in Courthouse," *Wisconsin State Journal*, March 10, 1992.<sup>1</sup>

#### ***I. Introduction***

Shannon Barillari and Charles Estergard dated for over two years before their relationship ended in a murder-suicide on August 4, 1987. The events leading up to the tragic end of this relationship exemplify not only the inability of domestic violence victims to rely upon the state of Wisconsin for protection from private violence, but also their, and their families', inability to hold the state accountable when it fails to protect them.

In the month preceding the murder-suicide, Shannon attempted to end her relationship with Charles, but felt unable to leave after he threatened to commit suicide. On Wednesday, July 29<sup>th</sup>, Shannon tried again to end the relationship. In response, Charles raped Shannon at knife-point and threatened to kill both Shannon and himself. To diffuse the situation, Shannon agreed to move in with Charles and told him to pick her up at her mother's house the following day at 3:30pm. That morning, July 30<sup>th</sup>, Shannon told her mother and her sister about the assault and

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<sup>1</sup> The quote was given after Shirley Lowery, 51, was stabbed nineteen times by her ex-boyfriend in the Milwaukee County Courthouse while waiting for the hearing on her request for a permanent restraining order. Shirley already had a temporary restraining order against her ex-boyfriend and was at the courthouse to have the temporary order converted into a permanent injunction. Her ex-boyfriend brought both an eight-inch butcher knife and a loaded gun into the courthouse. The quote is a glaring example of the conflict of rights that frequently surround domestic violence situations—and the fact that privacy rights often trump victims' attempts to stay safe.

then went to the hospital. While at the hospital, two Milwaukee police detectives, Raymond Stanczyck and Duane Luick, interviewed Shannon about the assault and took photographs of her injuries.

During the interview, Detective Stanczyck recommended Shannon file a sexual assault claim against Charles to prevent him from having further contact with her. Detective Luick also advised Shannon to follow through on the prosecution of Charles and recommended she initiate charges the following day at the district attorney's office. Following the interview at the hospital, Detective Luick had no additional contact with either Shannon or her family.

According to the Barillari family, after the detectives interviewed Shannon, her mother expressed her concern to them that Charles would return and harm Shannon. Detective Luick allegedly promised Shannon's mother that Charles would not be able to hurt Shannon again because not only would the police immediately obtain a warrant for Charles' arrest, but that they would also be at Shannon's mother's house at 3:30pm that day to arrest Charles.<sup>2</sup> Relying upon the police officers' assurances, Shannon decided to cancel her plans to leave town to avoid Charles' threats and possible future attacks. Although Luick did get an apprehension request<sup>3</sup> to arrest Charles, and Detective Stanczyck requested a squad car go arrest Charles at Shannon's mother's house the afternoon of July 30<sup>th</sup>, no contact was made between Charles and the police that day.

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<sup>2</sup> One of Shannon's neighbors also stated in her deposition that the police told her (the neighbor) and Shannon "that they would be there to make sure that they picked [Charles] up. They totally assured us that we had no worries, none whatsoever, that [Charles] would be picked up at least for questioning" (*Barillari v. Milwaukee*, 186 Wis. 2d 415 (1994) at 425).

<sup>3</sup> An apprehension request is different from a warrant, but does give the police authorization to arrest a suspect.



The following day, Friday, July 31<sup>st</sup>, Detective Stanczyck briefly met with Shannon and her mother at the district attorney's office. At that time, the assistant district attorney (ADA) in charge of the case decided to give Charles a few days to voluntarily turn himself in to the police. If Charles did not come in by the beginning of the next week, the ADA told Stanczyck that he should return and obtain a warrant for Charles' arrest.

On Tuesday, August 4<sup>th</sup>, Charles went to Shannon's home and killed both her and himself with a gun he purchased over the weekend. Shannon was eighteen years old. Shannon's family filed a wrongful death suit against the City of Milwaukee, alleging that the City, through its police department and its officers, was negligent in failing to fulfill their promise to arrest Charles or to notify Shannon that they did not arrest Charles. The case was eventually heard by the state Supreme Court, which held that the city and its officers were immune from suit, that the Barillari family did not state an actionable claim, and that the city had no duty to protect Shannon from private violence, despite the promise, because police officers must use their discretion to determine how best to use their resources and accomplish their tasks.

As a practical matter, this case shows that in Wisconsin police officers have no legal obligation to protect individuals, even if they make a specific promise to do so. Indeed, negligent performance of their duties—as long as they are classified as discretionary and not as ministerial duties<sup>4</sup>—does not expose either the officers or their employer to any liability. Functionally, this case removed a potentially powerful corrective tool, the civil lawsuit, for problematic and negligent police policy and action. As a result, domestic violence victims in

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<sup>4</sup> As opposed to a discretionary act, a ministerial duty is “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” *Barillari v. Milwaukee* at 6, citing *Lister v. Board of Regents*, 72 Wis. 2d (1976) at 301.

Wisconsin cannot rely upon police promises of protection, as breaking those promises has no consequences for either police officers or municipal governments.

### *Why Wisconsin?*

Wisconsin has several important characteristics—constitutional, legislative, and judicial—that makes it an interesting case study into how constitutions structure state responses to domestic violence. Perhaps most importantly, it does not have a sex equality provision in the state constitution. This stands in marked contrast to both Montana and Colorado, both of which have explicit sex equality sections in their constitutions. In addition, the constitution is largely vertically-structured and has been interpreted by the courts and legislature as an exclusively vertical constitution. As a result, constitutional rights are merely binding between the state and individuals, not between private citizens. Not only does this mean that individuals do not have constitutional obligations to each other, but it also minimizes the role of the state in protecting private violations of individuals’ constitutional rights by eliminating an important impetus on the state to provide protection from private violations. Thus, these structural and interpretive choices indicate that the state recognizes a fairly rigid division of the public and private spheres, thereby making it more difficult for victims of private violence to seek protection and accountability with the state. In practice, the state and federal constitutions have made certain approaches to private violence unthinkable, consequently leaving victims of intimate violence with few options in the absence of effective state intervention.

From a legislative perspective, Wisconsin is one of only six states<sup>5</sup> that have different civil and criminal definitions of domestic violence both in the legislation's scope and application. Criminal domestic violence law is the crime of domestic violence (e.g. battery, sexual assault, homicide, etc.). Civil domestic violence law is most importantly implicated in the granting of restraining orders. Despite being civil law, however, violations of civil restraining orders can have criminal penalties. The most important difference between Wisconsin's civil and criminal legislation is that dating relationships are considered qualifying relationships under civil domestic violence legislation, but not under criminal domestic violence law. As a result, in Wisconsin, if a man beats his girlfriend he can only be charged with battery, not with domestic violence battery.<sup>6</sup> However, if the man's girlfriend obtains a restraining order against him, and he violates the terms of that order, he can be prosecuted criminally for violating a domestic abuse injunction. In addition to this variation in scope, although there is some overlap, different activities qualify as domestic abuse under civil and criminal law. These discrepancies, though existing in only a minority of states, presented a potentially interesting twist in an analysis of how constitutions structure state responses to domestic violence. In the end, however, the difference did not appear to be significant.

From a judicial perspective, one of the most important cases in the development of individuals' federal constitutional rights to be protected from private violence in the United

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<sup>5</sup> As of 2011, the other states with significantly different definitions were Alabama, Idaho, Indiana, Louisiana, and Maryland. Other states might have slightly different definitions in one area or the other, but most states have virtually identical definitions.

<sup>6</sup> There are several types of battery in Wisconsin. At its most basic, battery is defined in Wisconsin law as intentionally causing bodily harm to another without consent of the victim and is a Class A misdemeanor (940.19(1)). A Class A misdemeanor is punishable by a fine of up to \$10,000 and nine months in jail (939.51(3)(a)). If the defendant is charged with domestic abuse battery, s/he is exposed to an additional fine. In addition, in some counties, like Milwaukee County, domestic abuse is handled by a specialized prosecutorial unit with victim advocates available to assist victims.

States originated in Wisconsin. *DeShaney v. Winnebago County*, although a federal case, was a lawsuit brought by an abused boy and his mother against Winnebago County, Wisconsin.<sup>7</sup> This chapter will help demonstrate why the DeShaneys might have elected to bring a federal lawsuit, rather than a state one, as the state courts were in the process of foreclosing liability in private violence cases before Joshua DeShaney was assaulted and rendered permanently disabled by his father.

Finally, also potentially relevant is the fact that judges are elected in Wisconsin. Although it is impossible to definitively determine the role election, appointment, or a hybrid system would have on the development of case law, I wanted to make sure I included different types of judicial selection methods in my analysis to make sure that disparate selection methods are not the reason for my results. During the federal Violence Against Women Act of 1994 debates<sup>8</sup>, a crucial factor cited for the creation of the federal civil rights claim was to permit women to appear before federal judges, as they were understood to be more independent and insulated from politics than were elected state judges. Despite this belief that the means of judicial selection might influence statutory and constitutional interpretation by either exposing or insulating judges from political pressure, it did not appear to play a significant role in cases involving intimate violence. Most—although not all—judges, regardless of judicial selection method, were not receptive to arguments regarding a restructuring of the public-private divide and expansion of constitutional rights to individuals in private violence situations.

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<sup>7</sup> In *DeShaney v. Winnebago*, 489 U.S. 189 (1989) the U.S. Supreme Court held that the state has no constitutional duty to protect an individual from private violence. The case was brought as a substantive due process challenge to failed state intervention in a child abuse case. I will discuss the case in further detail in chapter six.

<sup>8</sup> The Violence Against Women Act of 1994, the debates, and subsequent case law will be discussed in chapter five.

### Chapter Outline

This chapter is an analysis of Wisconsin domestic violence law. I will first discuss the Wisconsin constitutional provisions that could potentially be applied to domestic violence law but that have generally not been used in that manner. In addition to outlining the various constitutional provisions, I will also discuss how they have been interpreted, thus far, in Wisconsin case law. This section will demonstrate how the structuring of the public and private sphere at the state level reinforces—and is reinforced by—federal interpretations of the proper role of government. In addition, this section will foreshadow how the interplay between state and federal constitutional structure and rights informs what state actions judges and legislators consider thinkable.

Section three outlines the different statutes relating to domestic violence and their development over time and through case law. This analysis primarily focuses on civil restraining order, criminal domestic violence, and criminal violation of a restraining order statutes. In section four I will discuss case law not previously addressed in the constitutional or statutory analysis that influences and structures Wisconsin's response to domestic violence. These cases demonstrate that alternative state responses to domestic violence are possible because they have been successfully applied in other areas. This suggests that one of the primary impediments to state accountability for private violence is thinkability, not merely legal structure. Finally, I will briefly describe my article archival research, which was perhaps more revelatory in what was not there than what was. In conclusion, I will briefly review the current state of Wisconsin domestic violence law and discuss the role the Wisconsin constitution has played in structuring the state's response to domestic violence through the structuring of both the public-private divide and what

individuals—officials and laypeople—consider thinkable responses to a nominally private problem.

## *II. The Wisconsin State Constitution*

Before beginning an analysis of the Wisconsin constitution as it relates to intimate violence, it is important to note that very few of the cases discussed below explicitly cite to the Wisconsin constitution. In contrast to Colorado, where plaintiffs use the state’s constitution to assert legal claims and rights in areas relevant to domestic violence, there is little of that in Wisconsin case law.<sup>9</sup> In Wisconsin, plaintiffs largely use the federal constitution and state statutes to support their domestic violence-related claims; they do not ground their claims in the Wisconsin state constitution. This reflects not only the paucity of constitutional provisions that could be used to protect or guarantee individual rights, but it might also reflect the dearth of creative structuring of claims by Wisconsin attorneys or the non-receptiveness of Wisconsin judges to arguments that expand rights. In this analysis I include a discussion of three potentially relevant constitutional provisions<sup>10</sup> despite the fact they are not relied upon in domestic violence cases because in an analysis that relies upon the notion of thinkability, it is important to identify what arguments might be possible, if they were attempted.

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<sup>9</sup> Montana cases also do not reference state constitutional claims but for different reasons. The Montana constitution contains extensive individual protections when compared to other U.S. state constitutions and the U.S. federal constitution, but because it does not have sovereign or qualified immunity these provisions are not invoked by private violence victims in court. Montana will be discussed in further detail in chapter four.

<sup>10</sup> Article I of the Wisconsin constitution contains the constitution’s declaration of rights. There are three potentially relevant provisions in the Article: sections one (equality; inherent rights), nine (remedy for wrongs), and nine “m” (victims of crime).

Although it is important to look at what is in the Wisconsin state constitution, I must first highlight what is not there. Wisconsin's constitution does not have a specific sex equality provision. Although an equal rights amendment (ERA) was on the ballot in 1973, it was soundly defeated by Wisconsin voters.<sup>11</sup> The state amendment, echoing the federal amendment, would have read: "Equality of rights or equal protection under the law shall not be denied or abridged on the basis of sex."<sup>12</sup> It was the first state ERA to be defeated in the country.<sup>13</sup> Before voters rejected a state ERA, however, Wisconsin ratified the federal ERA in April 1972.

In addition to not having a sex equality provision, the Wisconsin constitution contains neither a Due Process Clause nor an Equal Protection Clause. The federal Due Process and Equal Protection Clauses are the source of the two most important federal constitutional claims in domestic violence situations, so the fact that the Wisconsin state constitution does not have either of those clauses could theoretically result in dramatically different state constitutional claims. Instead, the Wisconsin state constitution has an "equality; inherent rights" section. Although originally gendered, Article I, section one was amended and rendered gender neutral in 1982.<sup>14</sup> The provision currently reads:

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<sup>11</sup> The amendment was defeated 520,936 to 447,240. Wisconsin Legislative Reference Bureau.

<sup>12</sup> 1971 AJR 140. The amendment is clearly intended to be vertical in its construction. However, had the amendment passed, it potentially could have been used to argue that the police treatment of domestic violence effectively violated women's equal protection under the law.

<sup>13</sup> Miller, Midge Leeper, "Wisconsin's Struggle for the Equal Rights Amendment," Wisconsin Women's Network, <http://wiwomensnetwork.org/resources/publications/equal-rights-amendment> Accessed March, 19, 2012.

<sup>14</sup> Originally, Article I, section one read: "All *men* are born equally free and independent, and have certain inherent rights; among these are life, liberty and pursuit of happiness; to serve these rights, governments are instituted among *men*, deriving their just powers from the consent of the governed" (emphasis added). The first reference to men was replaced by "people" and the second reference was removed entirely. Article I, section one has been amended twice. The first change, discussed above, was in 1982. Four years later the section was changed again, replacing the word "serve" with the word "secure."

All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.<sup>15</sup>

The state Supreme Court has interpreted this equality clause as both the state's Due Process and Equal Protection Clause,<sup>16</sup> and has not explored alternative options for interpretation. As a result, the equality section has primarily been used as a due process and equal protection guarantee and there have not been concentrated efforts to use it as a potentially horizontal guarantee of equality and bodily integrity. This matters not because it is problematic to interpret the equality section as a due process and equal protection section, but instead because it could be possible to interpret this section much more broadly to procure additional individual rights for Wisconsin residents, but has not been.

On its face, the equality constitutional provision could be used to support or require certain state approaches to protect domestic violence victims as the provision is not explicitly vertical. However, due to an early decision to interpret the section in the same manner as the federal constitution's fourteenth amendment, a vertical interpretation has taken hold in state jurisprudence.<sup>17</sup> The mention of "inherent rights" such as "life, liberty and the pursuit of happiness" combined with the notion that the rationale for the government is "to secure these rights" could be interpreted to require the government to take a more proactive role in protecting individuals from private violence. Indeed, the very rationale for the government's existence is,

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<sup>15</sup> Wisconsin Constitution, Article I, section one.

<sup>16</sup> See Brown, Ray A., "The Making of the Wisconsin Constitution," 1952 Wisconsin Law Review pgs. 23-63 citing *State ex rel. Kellog v. Currens*, 111 Wis. 431 (1901) and *State v. Redmon*, 134 Wis. 89 (1907).

<sup>17</sup> When discussing constitutional interpretation, it is important to remember that lawyers and judges are limited in their arguments and decisions by what they can imagine. This brings the issue of thinkability to the forefront of legal development and constitutional jurisprudence. It requires both the legal argument by an attorney and sympathetic judges to advance certain legal developments.



in part, to secure the rights to “life, liberty, and the pursuit of happiness.” While the section has been used to address sex discrimination in the state<sup>18</sup>, two cases involving the state placement of children are more relevant to a discussion of how the Wisconsin constitution structures state responses to intimate violence.

The first case was decided by the Court of Appeals in 1995. The case, *Jones v. Dane County*<sup>19</sup>, involved the removal of Barbara Jones’ stepson, Leland “Robby” Jones, from her home after he was found to be delinquent and placed under the supervision of the county. Robby’s initial adjudication of delinquency occurred in April 1981. Although he was not removed from Barbara’s home at that time, a contemporaneous psychological examination of Robby found that he hated his stepmother and could harm her. In October of that same year, Robby was again found to be delinquent, removed from Barbara’s home, and placed under county supervision for one year. During the next ten months or so, Robby resided in three different residential homes and a state hospital. Without warning, in violation of Wisconsin statutes and a court order, and over Barbara’s objections, on August 27, 1982 Robby’s social worker, James Chorlton, sent Robby back to Barbara’s house. On September 7, 1982, Robby shot and seriously injured both Barbara and her son, Douglas Kinney.

Barbara and Douglas sued Dane County and Chorlton. They argued that the county and Chorlton were negligent and that the defendants violated their procedural and substantive due process rights under the federal constitution’s fourteenth amendment when Chorlton placed Robby back into Barbara’s home without providing her notice or allowing her to file an

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<sup>18</sup> See, for example, discriminatory prosecution of prostitutes, *State v. McCollum*, 159 Wis. 2d 184 (1990); when selective prosecution of prostitutes and Johns is discriminatory, *State v. Johnson*, 72 Wis. 2d 169 (1976); and, when gender-based rules do not violate equal protection, *Marshfield Clinic v. Discher*, 105 Wis. 2d 506 (1982).

<sup>19</sup> *Jones v. Dane County*, 195 Wis. 2d 892 (1995).

objection with the court. Barbara and Douglas' section 1983 claim was dismissed on summary judgment by the circuit court and the negligence claim went to trial. While the jury did find that Chorlton was negligent, they did not find that his negligence was the cause of Barbara and Douglas' injuries. Barbara and Douglas appealed both decisions.<sup>20</sup>

The appellate court affirmed the dismissal of the section 1983 lawsuit for the violation of Barbara and Douglas' substantive and procedural due process rights. Regarding their procedural due process claim, the Court held that the state did provide adequate due process, that it could not have foreseen Chorlton's violation of proper procedure, and that it also provided adequate post-deprivation remedies to Barbara and Douglas. The Court delved deeper into the substantive due process claim, holding, among other things, "the state has no duty to protect persons from private violence when that person is not in custody."<sup>21</sup> Citing *Deshaney v. Winnebago*, and refusing to consider non-binding federal circuit court rulings that did find violations of substantive due process in cases involving private violence<sup>22</sup>, the Wisconsin appellate court narrowly construed Barbara and Douglas' substantive due process rights.<sup>23</sup> The Court further found that there was no special relationship between Robby and the state after he was placed into Barbara's house, despite the fact there was still a court order requiring him to be under state care

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<sup>20</sup> Barbara and Douglas argued that the Court of Appeals should overturn the jury's negligence verdict due to multiple prejudicial errors, including issues with the jury instructions, cross-examination, witness testimony, and the admission of evidence. The Court declined to do so, however.

<sup>21</sup> *Jones v. Dane County*, 1995: 910.

<sup>22</sup> See, for example: *Ross v. U.S.*, 910 F. 2d 1422 (7<sup>th</sup> Cir. 1990), *Freeman v. Ferguson*, 911 F. 2d 52 (8<sup>th</sup> Cir. 1990), *Wood v. Ostrander*, 897 F. 2d 538 (9<sup>th</sup> Cir. 1989), and *Estate of Sinthasomphone*, 785 F. Supp 1343 (E.D. Wis 1992).

<sup>23</sup> The dissent distinguished the present case from *Deshaney* by arguing that while Robby was under a juvenile court order to be removed from his home, Joshua Deshaney was not. Justice Sundby argued that "because the state assumed the duty to care for Robby and his family, and its agents were recklessly indifferent to that duty, it deprived appellants of their liberty interest in their personal safety under the substantive component of the due process clause. I further conclude that because respondents forced Robby's father and stepmother to accept Robby back into their home without notice and an opportunity to object as required by [Wisconsin statutes] they deprived them of procedural due process." *Jones v. Dane County*, 1995: 944-5.

outside of the home. And finally, the Court held that there was never a special relationship between Barbara and Douglas and the state, since their freedom was never restrained. Thus, the state had no obligation to protect them from private violence.

This case is important because it demonstrates the reluctance of the courts to apply constitutional rights to private violence situations. In this case, one of the plaintiffs' main avenues for accountability is the federal Due Process Clause because the County and its officers violated established procedures and protocols legally required in child delinquency situations and the state did not provide adequate remedies for these violations. Thus, despite the tragedy, the claimants must fit their situation into a narrowly constructed understanding of the federal constitution's fourteenth amendment because of how Wisconsin Supreme Court interprets state constitutional guarantees. As a result, although the Wisconsin constitution states that the purpose of the government is, in part, to secure its citizens' rights to life, no such claim is made. So although the state actively created a dangerous situation in this case through the violation of a court order and state procedure, the victims have no constitutionally-guaranteed remedy because the court's majority found no violation of due process. To have received protection, the plaintiffs would have potentially had better luck with more relevant constitutional protections, which do not exist in current Wisconsin and federal constitutional jurisprudence. These protections could include either affirmative individual rights guarantees or jurisprudential interpretations of rights provisions that enable the protection of life and bodily integrity. It appears, however, that such protections are not thinkable under the current Wisconsin jurisprudence.

The second case involving Article I, section one of the Wisconsin constitution concerns two children Dane County placed into a dangerous foster home. Kara B. and Mikaela R. were placed into Roxanne Smit's home, during 1989 and 1990 respectively, with their stays overlapping for one month. Both girls were sexually abused while living in the home. Smit and another man who lived in the foster home sexually abused Kara B; Mikaela fled the home after two men sexually assaulted her at knifepoint in the house's basement. The men were known to have a history of abusing children, both physically and sexually.

In separate actions, both girls sued Dane County, alleging section 1983 violations as well as state law negligence and professional malpractice claims for the physical and sexual abuse they were subjected to during their residence at the Smit house.<sup>24</sup> In Kara's case, the circuit court judge granted Dane County's motion for summary judgment, stating that the county was entitled to immunity from suit. In Mikaela's case, however, the circuit court judge denied Dane County's motion for summary judgment, stating that the county was not entitled to immunity because it had a clearly established constitutional duty to protect Mikaela while she was in the Smit home.<sup>25</sup>

The cases were combined on appeal. The Court of Appeals held, among other things, that Dane County and its public officials were not entitled to immunity.<sup>26</sup> Upon review, the Wisconsin Supreme Court upheld this decision, allowing the lawsuits against the county and its

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<sup>24</sup> *Kara B. by Albert v. Dane County*, 205 Wis. 2d 140 (1996).

<sup>25</sup> One of the exceptions to immunity is when the municipality, via its officers, violates an individual's clearly established constitutional rights. See discussion of immunity in *Kara B. v. Dane County* (1996).

<sup>26</sup> *Kara B. by Albert v. Dane County*, 198 Wis. 2d 24 (1995).

officials to proceed.<sup>27</sup> Distinguishing this case from *DeShaney*, the court held that in 1989, foster children had a clearly established right to safe placement and that Dane County and its officials violated that right when it placed Kara and Mikaela in the Smit home. Although I will discuss the nuance of federal due process rights in chapter six, it is important to note that although Kara and Mikaela were eventually successful in obtaining a trial, these results were dependent upon the fact that the girls were injured by individuals residing in the homes where the state placed them. As a result, because the state had assumed responsibility for the children by removing them from their biological homes and placing them in new homes, it had a heightened responsibility to protect the children. If the girls had been assaulted in their own homes, they would have been unable to bring a successful lawsuit against the state, because the state had not assumed physical custody of the children.

Since none of these cases makes claims based on the Wisconsin state constitution, why do they matter? I argue that they are as important for what they do not say, as for what they do say. These cases are among the many cases listed in the annotated constitution as clarifying the interpretation of due process rights in Wisconsin. As discussed above, Wisconsin's equality provision has taken the role of both the Equal Protection and Due Process Clause in the state constitution. As a result, its interpretation has strayed from a plain text analysis to a more conceptual one based on federal fourteenth amendment jurisprudence. Thus, although the federal fourteenth amendment is only cursorily mentioned in the cases, these decisions reflect the development of due process rights in Wisconsin. As a result, the state has essentially adopted

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<sup>27</sup> At issue in this case, in part, was whether or not there was a clearly established constitutional right of foster children to be placed in a safe home in 1989. See *Kara B. v. Dane County* (1996) for a discussion of the development of case law requiring certain protections for foster children.

the federal division of the public and the private sphere, despite the fact that the state constitution might allow for a slightly different reformulation of that division. In replicating the federal conception of the public and private sphere through a strict interpretation of the equality section as identical to the federal fourteenth amendment, justices have demonstrated that it is difficult to conceive of alternative formulations once one interpretation has taken root—even when a plain textual analysis clearly allows for such alternatives.

Furthermore, these cases help to highlight the different types of claims brought in Wisconsin from those brought in Montana and Colorado. They demonstrate that the constitution is not the basis for private violence rights claims in Wisconsin. Instead, victims of private violence who have taken their claims to civil courts have relied upon federal constitutional rights and state statutory rights, largely foreclosing any opportunity for a successful claim, given the U.S. Supreme Court’s interpretations of the fourteenth amendment in private violence situations and state courts’ willingness to grant immunity to officials who have mishandled private violence cases.

The second constitutional section that is potentially relevant to issues of state responses to domestic violence is Article I, section nine. The section, a “remedy for wrongs” reads:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Article I, section nine is part of the original 1849 constitution and creates a right to a remedy for wrongs against a person, although it does not identify a specific remedy. According to state Supreme Court interpretation, however, the section does not create a constitutional right to sue

the state.<sup>28</sup> This clarification is particularly important in domestic violence cases, as domestic violence victims have attempted to force policy changes and hold municipalities and public officials responsible for policy failures by suing the state. As discussed above, however, many of these cases fail to overcome sovereign and qualified immunity. Although Article I, section nine recognizes the right to have a remedy for wrongs, Article IV, section 27 directs the legislature to decide how and in what manner lawsuits can be brought against the state,<sup>29</sup> thereby allowing the limitation of lawsuits against the state.

Also relevant to a discussion of the “remedy for wrongs” provision is the ability of courts to fashion adequate remedies when no such remedy exists.<sup>30</sup> This interpretation of the section could provide important precedent for a court-created remedy for domestic violence victims. It has not, however, been used in that manner.

The final constitutional provision that is potentially relevant in an analysis of domestic violence law is the “victims of crime” provision added to the Wisconsin constitution in April 1993. The section reads, in part:

This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: ...reasonable protection from the accused throughout the criminal justice process; ...restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.<sup>31</sup>

To date, however, this constitutional provision has not been fleshed out in case law. In addition, it has not been used by victims of domestic violence to try to hold municipalities and public

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<sup>28</sup> See *Cords v. State*, 62 Wis. 2d 42 (1974).

<sup>29</sup> Article IV, section 27, “suits against state” reads: “The legislature shall direct by law in what manner and in what courts suits may be brought against the state.”

<sup>30</sup> *Collins v. Eli Lilly Co.* 116 Wis. 2d 166 (1984).

<sup>31</sup> Wisconsin Constitution, Article I, section 9m.

officials accountable for failing to protect them from private violence. While it is unclear how successful such efforts would be, creative attorneys could try to use this section to remedy police failures in private violence situations.

As demonstrated above, the Wisconsin constitution has not been used as a means of protecting victims of intimate violence. Although victims have brought claims in Wisconsin courts, the constitutional claims are largely based on the federal constitution and Wisconsin-based legal claims are primarily grounded in statutes. Both types of claims are frequently unsuccessful because courts' willingness to grant immunity to public officials and municipalities, and the victims are unable to assert constitutional rights that would enable their claims to defeat the state's assertion of immunity. In this context, the wholesale importation of the federal delineation of the public-private divide undermines the ability of the state constitution to support private violence victims' legal claims against the state. As a result, Wisconsin provides a glaring example of what can happen when both the federal and state constitutions do not offer robust protection of individual rights.<sup>32</sup> In the absence of both types of protection—state and federal—victims of intimate violence have little recourse for either justice or policy changes that could help future victims.

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<sup>32</sup> Although the U.S. federal constitution provides for some individual rights, they largely protect individual's property and criminal defense rights. Protection of property rights has led to a controversial protection of some privacy rights, but those rights are tenuous under the current Supreme Court.



### *III. Wisconsin Statutes*

There are several statutes regarding domestic violence in Wisconsin, which is legally known as domestic abuse in the state. Before beginning a discussion of the different statutes, however, it is important to note that in Wisconsin the civil and criminal definitions of domestic abuse differ in both their application (i.e. what is considered domestic abuse) and their scope (i.e. what types of relationships qualify under the law). Under criminal law:

“Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. [First, second, or third degree sexual assault].
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2, or 3.<sup>33</sup>

In contrast, the definition of domestic abuse under the civil restraining order statute is significantly more expansive. Wisconsin Statute §813.12 (am) reads in its entirety:

“Domestic abuse” means any of the following engaged in by an adult family member or adult household member against another adult family member or adult household member, by an adult caregiver against an adult who is under the caregivers care, by an adult against his or her adult former spouse, by an adult against an adult with whom the individual has or had a dating relationship, or by an adult against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness
2. Intentional impairment of physical condition
3. [First, second, or third degree sexual assault]
5. [Property damage] involving property that belongs to the individual
6. A threat to engage in the conduct under subd. 1, 2, 3, or 5.

Although subsection four (an act that may cause a victim to fear imminent harm) is not included in the civil definition of domestic abuse, the civil definition includes subsections one to three, as well as property damage<sup>34</sup>, and a threat to engage in any of the actions that qualify as domestic

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<sup>33</sup> Wis. Stat. § 968.075(a).

<sup>34</sup> Wis. Stat. § 943.01.

abuse under civil law. In addition, the application of the civil domestic abuse law not only includes all of the relationships listed in the criminal domestic abuse law, but also adult family and household members, caregivers, as well as individuals in a current or former dating relationship.

It is important to note three things about these definitions. First, criminal domestic abuse does not apply to people in a dating relationship. Thus, unless two people have lived or have a child together, couples who are not married are not covered by the criminal domestic abuse statute. Second, homosexual couples are protected under these definitions of domestic abuse. Although same sex marriage is explicitly prohibited in the Wisconsin constitution, as is any legal status approximating same sex marriage,<sup>35</sup> homosexual domestic violence is still prosecutable under Wisconsin law if the relationships and actions qualify under the relevant statute. Finally, stalking is not covered under either definition of domestic abuse. Criminal stalking is dealt with in a separate criminal statute<sup>36</sup> and to obtain a restraining order against a stalker that has not engaged in any legally recognized form of domestic abuse, an individual must obtain a harassment injunction.<sup>37</sup> Although generally there is a fee associated with obtaining harassment injunctions, that fee is waived if the petitioner is seeking an injunction for stalking.<sup>38</sup>

Because the statutes have different domestic abuse definitions, I will discuss their development separately. For each law I will discuss the original piece of legislation enacted and

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<sup>35</sup> Article XIII, section 13 was created in November 2006. It states: “Only a marriage between one man and one woman shall be valid or recognized as marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”

<sup>36</sup> Wis. Stat. § 940.32.

<sup>37</sup> Wis. Stat. § 813.125.

<sup>38</sup> The legislature could easily include stalking as a form of domestic abuse by treating it the same way it does sexual assault, and in fact, many state legislatures do. It is unclear why the Wisconsin legislature has not, however, and what, if any, consequences this decision has on the safety of domestic violence stalking victims.

will briefly highlight important changes that have occurred since then. I summarize the majority of the changes in two tables in the appendix to this chapter. The initial laws and subsequent changes will provide a window into how the state conceives of the problem of domestic violence. For simplicity and clarity's sake, I divided the development of the domestic abuse definitions and other changes into two separate tables. The development of the definitions appears in table one. The changes in other aspects of the civil and criminal laws appear in table two. In this section I will also discuss important court challenges to each piece of legislation to examine how the courts have interpreted Wisconsin domestic violence law. By following the development of these definitions and laws, and the courts' interpretations, we can see how the state has gradually, but not radically, expanded its understanding of domestic violence.

### *Civil Domestic Violence Law*

#### Civil Legislation

The first significant domestic abuse legislation passed in Wisconsin was in 1979. Assembly Bill 169 accomplished several things. Most importantly, it made a legislative finding regarding domestic violence<sup>39</sup>, defined domestic violence for the purposes of creating state domestic violence grants<sup>40</sup>, created domestic abuse restraining orders<sup>41</sup>, provided criminal

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<sup>39</sup> Anticipating some of the issues to follow, the legislature made four findings: “1) Domestic abuse is a serious social problem which requires a comprehensive, informed and determined response by a concerned society. 2) There is a need to promote public understanding of domestic abuse and to provide specialized training for persons who must deal directly with the problem. 3) There is a critical need for specialized assistance to victims of domestic abuse, as well as their abusers, and the state should share in supplying this assistance. 4) Domestic abuse poses unusual challenges to government agencies and the legal system and additional methods and resources are necessary to meet these challenges.”

<sup>40</sup> Originally Wis. Stat. § 46.95, the domestic abuse grant statute was renumbered to 49.165 in 2007.

<sup>41</sup> Wis. Stat. § 813.025.

consequences for violations of domestic abuse restraining orders<sup>42</sup>, and created the domestic abuse assessment<sup>43</sup>.

In that first piece of legislation, the Wisconsin state legislature created domestic abuse grants as part of a holistic approach to confronting domestic abuse.<sup>44</sup> Although the intricacies of domestic abuse grants are not important for our purposes, the legislature did define domestic violence for the purposes of the statute—and that definition has been referred to elsewhere (e.g. Wis. Stat. § 973.055).

The 1979 legislature defined domestic abuse as “physical abuse or threats of physical abuse between persons living in a spousal relationship or persons who formerly lived in a spousal relationship.”<sup>45</sup> Spousal relationship was further defined either as a marital relationship or two people approximating a marital relationship by living together with their minor children.<sup>46</sup>

As part of that same initial bill (AB 169), the legislature also created domestic violence restraining orders.<sup>47</sup> Based on a statute permitting judges in divorce proceedings to issue temporary restraining orders that was repealed that same year<sup>48</sup>, the new legislation stated that a judge could issue a temporary restraining order (TRO) requiring someone to avoid a location occupied by, or to not contact, someone with whom the person was living or had lived in a spousal relationship. A judge could issue a temporary restraining order if s/he had reasonable

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<sup>42</sup> Wis. Stat. § 940.33.

<sup>43</sup> Wis. Stat. § 973.055. The domestic abuse assessment allows the state to collect fines for domestic abuse crimes designated in the statutes. Although the details have changed, the current statute requires the court to impose a \$100 fine for each offense unless the court finds that the fine would have a negative impact on the offender’s family. The fine is to be used in accordance with Wis. Stat. §49.165 (Domestic Abuse Grants).

<sup>44</sup> 1979 Wis ALS 111, 1979 Wis AB 169.

<sup>45</sup> Wis. Stat. § 46.95(1)(a).

<sup>46</sup> Wis. Stat. § 46.95(1)(c).

<sup>47</sup> Wis. Stat. § 813.025(2).

<sup>48</sup> See *Blazel v. Bradley*, 698 F. Supp. 756 (1988) for a brief discussion of the divorce law (Wis. Stat. § 247.23(1)) and its constitutionality.

grounds to believe the respondent had or may batter the petitioner. Under the statute, no notification was necessary to grant a temporary restraining order. The orders were effective for five days unless extended, which required notice and a hearing, or written consent of the parties. Upon extension, an injunction could not be in effect for more than two years.<sup>49</sup> That same bill criminalized violation of a restraining order,<sup>50</sup> classifying such behavior as a class “C” misdemeanor, punishable by a maximum of 30 days in jail, \$500 fine, or both.

In 1983 the Wisconsin legislature renumbered the domestic abuse restraining order statute and reworked its contents, creating the framework for the current legislation.<sup>51</sup> One of the most important changes implemented by the legislature was mandatory arrest for restraining order violations. Under the new law, if a law enforcement officer had probable cause to believe the respondent had violated a TRO or an injunction, the legislation stated that an officer *shall* arrest the respondent.<sup>52</sup> Ten years later the legislature again amended the legislation.<sup>53</sup> Included in these changes was the explicit declaration that a petitioner could not violate his/her own order. This clarification was important for both law enforcement and the parties, as abusers have been known to threaten their victims with arrest if a victim agrees to meet with or talk to his/her abuser after an order is in place.<sup>54</sup> In 1995, the legislature barred individuals who had an

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<sup>49</sup> An injunction is considered permanent in Wisconsin even though it can currently only be in effect for up to four years. In addition, as opposed to a temporary restraining order, the respondent (person against whom the victim is seeking a restraining order) has a right to appear before a commissioner and fight the order, whereas a TRO can be obtained ex-parte by the victim (without notice to the respondent).

<sup>50</sup> Wis.Stat. § 940.33.

<sup>51</sup> 1983 Wis ALS 204, 1983 Wis AB 698.

<sup>52</sup> Wis. Stat. § 813.12(7).

<sup>53</sup> 1993 Wis ALS 319, 1993 Wis AB 735.

<sup>54</sup> That same year the legislature also included committing further acts of domestic abuse to the list of activities that could be prohibited under a restraining order. Although seemingly odd to include prohibiting the respondent from committing additional acts of domestic abuse in a restraining order, not all restraining orders prohibit contact between the petitioner (victim) and respondent (abuser). Some just prohibit certain behaviors, such as violence or harassment, but still allow contact between the petitioner and respondent.

injunction issued against them from possessing firearms, except for law enforcement personnel who are required to have firearms as a condition of employment.<sup>55</sup> Finally, in 2001 the legislature expanded the definition of domestic abuse to include dating relationships as qualifying relationships for obtaining a domestic abuse restraining order. For a more detailed look at the developments of civil domestic violence law, see tables one and two in the appendix to this chapter.

Current law offers a relatively broad application and scope of civil domestic violence restraining orders. There is strong legislative direction on how and when orders should be issued, as well as what behaviors orders can prohibit. Petitioners are able to obtain an order ex-parte<sup>56</sup>, but before an order is valid a respondent must be served. In addition, respondents have a right to appear before in court to challenge the granting of a permanent injunction. Although different aspects of the law have been challenged in court, the legislation has been upheld.

### Court Challenges to Civil Legislation

Wisconsin courts have addressed both the constitutionality and the interpretation of the restraining order statute. The most important state court challenge to the statute was decided in 1988.<sup>57</sup> In the case, Thomas Schramek obtained a temporary restraining order against his wife, Sue Schramek, based on allegations that she had abused him. Sue appealed the order in part by

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<sup>55</sup> 1995 Wis ALS 71, 1995 Wis SB 144.

<sup>56</sup> Ex-parte means that the temporary order can be executed “for the benefit of one party only, and without notice to, or argument by, any person adversely affected.” *Blacks Law Dictionary*, 8<sup>th</sup> Ed., Thompson West Publishing, 2004.

<sup>57</sup> *Schramek v. Bohren*, 145 Wis. 2d 695 (1988). Three years later the statute was challenged again in *Master v. Eisenbart*, 162 Wis. 2d 751 (1991). Eisenbart challenged the restraining order statute, claiming the statute: deprived him of liberty interests in his home, family, and reputation; resulted in cruel and unusual punishment; and, violated the ninth amendment of the federal constitution. The court was wholly unconvinced by Eisenbart’s arguments. Not only was his claim dismissed, he was also assessed attorney’s fees for filing a frivolous lawsuit.

challenging the restraining order statute's constitutionality. Sue challenged the statute both on its face and its application, claiming "(1) inadequate notice of hearing and denial of a pre-TRO hearing; (2) denial of a right to a jury; (3) vagueness; (4) overbreadth; and (5) denial of equal protection."<sup>58</sup>

The first two claims were easily dismissed based upon precedent.<sup>59</sup> The Court also dismissed Sue's vagueness claim, holding that the prohibited conduct was clearly outlined in the statute and that a reasonable person could easily understand what s/he was not permitted to do. Likewise, the Court held that the statute was not overbroad as it did not prohibit constitutionally protected conduct. Finally, and perhaps the most interesting argument Sue made, was whether or not the restraining order statute violated equal protection guarantees. She argued that the statute denied "the rights to which defendants charged with battery are under the criminal code are entitled to solely because of their status as adult family members or household members."<sup>60</sup> Despite the creativity of the argument, the Court held that the legal distinction between household and non-household batterers was reasonable under equal protection<sup>61</sup>, and was therefore constitutional.<sup>62</sup>

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<sup>58</sup> *Schramek*, 701.

<sup>59</sup> In *Bachowski v. Salamone*, 139 Wis. 2d 397 (1987) the Supreme Court of Wisconsin held that the harassment restraining order was constitutional and did not require notice before granting a temporary restraining order and that the statute was neither vague nor overbroad.

<sup>60</sup> *Schramek*, 710.

<sup>61</sup> There are three possible tests to determine whether or not a classification scheme is constitutional: strict scrutiny, intermediate scrutiny, and rational basis. This case required the rational basis test because no fundamental rights or special categories of people were implicated. Thus, to determine whether or not this classification scheme was constitutional, the Court had to do two things under the rational basis test. First, it had to decide whether or not there was a rational basis for distinguishing two groups. Second, that classification had to be rationally related to a legitimate state interest.

<sup>62</sup> See also *Hayen v. Hayen*, 232 Wis. 2d 447 (1999) for a reprisal of the equal protection argument.

Although the Court did not accept it, Sue’s equal protection argument is important for two reasons. First, it demonstrates the double-edged nature of constitutional provisions. Constitutional provisions apply to all people. Thus, when feminists attempt to enshrine specific rights into constitutions, they must contemplate not only how those rights could be used to protect victims of intimate violence, but also how they can be used to protect their abusers. Second, it demonstrates a creative application of the Equal Protection Clause. The Equal Protection Clause of the federal constitution was not originally drafted to protect batterers. However, it is the creative use of the clause that has unwittingly brought about many important equal rights developments, such as the invalidation of the spousal rape exemption in New York.<sup>63</sup>

The courts have also clarified various aspects of the domestic abuse restraining order statute, such as requiring only one act of domestic violence before granting an injunction<sup>64</sup>, clarifying the definitions of “household member”<sup>65</sup> and “threat”<sup>66</sup>, banning the issuance of mutual restraining orders without cause<sup>67</sup>, and requiring that if an injunction expires before the

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<sup>63</sup> See, for example, *People v. Liberta*, 64 N.Y. 2d 152 (1984). Mario Liberta was charged with raping and sodomizing his estranged wife, Denise. At the time, New York had a marital exemption in its sexual assault statute, but spouses not living together were not considered married for purposes of the law. Denise had a restraining order against Mario at the time of the assault and the couple was not living together. Mario challenged his classification as not married for purposes of the statute under the equal protection clause. The Court eventually held that the marital exemption had no rational basis and struck it down. Thus, although Mario was attempting to have the Court rule that his rape was not prosecutable under the marital rape exemption statute—that separated spouses should be treated the same as non-separated spouses—instead the Court ruled that there was no reason to treat spouses and non-spouses differently for the purposes of rape. As a result, the entire statute was deemed unconstitutional and Mario’s prosecution was upheld.

<sup>64</sup> See *Krueger v. Harris*, 306 Wis. 2d 850 (2007), where a man admitted that he choked his girlfriend; or *Eder v. Merline*, 229 Wis. 2d 255 (1999), where a husband twisted his wife’s wrists and caused her physical pain.

<sup>65</sup> See *Petrowsky v. Krause*, 223 Wis. 2d 32 (1988), although since the legislature added dating relationship to the list of relationships that qualify under the restraining order statute, the case is not as important.

<sup>66</sup> *Wittig v. Hoffart*, 287 Wis. 2d 353 (2005) reiterates that the constitutional boundaries of a “true threat” apply in domestic abuse restraining order cases.

<sup>67</sup> *Laluzerne v. Strange*, 200 Wis. 2d 179 (1996).



possible four years have ended, a court must extend the injunction if the petitioner requests it<sup>68</sup>.

Also important, however, is that lower courts have been instructed that it is an error to not grant an injunction for the amount of time requested by the petitioner and to refuse to instruct the sheriff to help the petitioner take possession of his/her home.<sup>69</sup>

The Wisconsin domestic abuse restraining order statute was also challenged in federal court in 1988.<sup>70</sup> It was the first time a federal court weighed in on the issue of the constitutionality of ex-parte restraining orders. In that case, Alvin Blazel challenged the restraining order statute arguing that the statute authorized unconstitutional procedures by permitting the granting of temporary restraining orders without notice of a hearing for the defendant/respondent.<sup>71</sup> Citing *Schramek* to justify, in part, upholding the statute, the Court held that the required finding of physical violence was a proxy for a showing of imminent danger and that only with a showing of imminent danger could an ex-parte temporary restraining order be issued and not violate constitutional due process protections. As a result, the Court held that the Wisconsin statute did not violate the Due Process Clause of the federal constitution.<sup>72</sup>

The Wisconsin courts have also weighed in on clarifying different aspects of the statute governing violations of domestic violence restraining orders. Perhaps most importantly, the

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<sup>68</sup> *Switzer v. Switzer*, 289 Wis. 2d 83 (2006).

<sup>69</sup> *Hayen v. Hayen*, 287 Wis. 2d 353 (2005).

<sup>70</sup> *Blazel v. Bradley*, 698 F. Supp. 756 (1988). The statute was again challenged in 2008 in federal court with the same outcome. See *United States v. Luedtke*, 589 F. Supp. 2d 1018 (E.D. Wis. 2008).

<sup>71</sup> This is a due process violation argument and is based on the fourteenth amendment of the federal constitution.

<sup>72</sup> The Court did hold that as applied to Blazel, the statute denied him of his constitutionally protected due process rights because he was denied his liberty and property interests without a showing of a risk of immediate harm. Although the Court acknowledged that the victim, Donna, accused Alvin of multiple, recent assaults “[the petitions] contain no allegation of a risk of immediate harm. In the first, [Donna] states only that Alvin Blazel has assaulted her some two weeks before. There is no allegation that she feared he would attack her again in the near future. In the second petition, she adds allegations of previous assaults, but again, there is no allegation of a risk of imminent harm.” (*Blazel* 768) As a result, the Court held that the state courts’ issuance of two separate restraining orders prohibiting Alvin from entering the family home and denying him custody of his children for a week with each order violated Alvin’s due process rights.

courts have definitively stated that a defendant must *intentionally* violate an order to be charged with violation of a temporary or permanent injunction.<sup>73</sup> It is not enough, the appellate court held, to simply knowingly violate an order; to be convicted of violating an order the jury must find that the defendant intentionally violated the injunction. This decision makes enforcing restraining orders more difficult, although not impossible.

### Criminal Domestic Violence Law

#### Criminal Legislation

Eight years after creating the first domestic abuse restraining order legislation, the legislature enacted a statute<sup>74</sup> governing arrest and prosecution in criminal domestic abuse incidents<sup>75</sup> and created an increased penalty for certain domestic abuse events<sup>76</sup>. This piece of legislation, rather than criminalizing the act of domestic violence, is a mandate for how to treat domestic violence crimes and a sentence enhancer for individuals convicted of domestic abuse. The current version of the law is nearly identical to the original piece of legislation.

The Act began with a legislative intent section, clarifying the purpose of the law. It specifically stated that in the past, law enforcement had varied its response depending upon the relationship between the offender and the victim and that only recently has the public begun to recognize that domestic violence has serious social consequences and necessitates early intervention by the criminal justice system. Furthermore, the legislature stated that “[t]he

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<sup>73</sup> *State v. Clements*, 246 Wis. 2d 990 (2001). Although the case was not published and is only citable in limited circumstances, it can be cited to support the law in a case. See Wisconsin rule 809.23 of appellate procedure for additional information on citing unpublished cases.

<sup>74</sup> 1987 Wis ALS 346, 1987 AB 224.

<sup>75</sup> Wis. Stat. § 968.075.

<sup>76</sup> Wis. Stat. § 939.621.

purpose of this act is to recognize domestic violence as involving serious criminal offenses and to provide increased protection for the victims of domestic violence.”<sup>77</sup>

In the new law, the legislature defined domestic abuse for criminal purposes, established limited mandatory arrest, mandated law enforcement and prosecutorial policy development, required a report when no arrest was made, created criminal no contact orders as well as conditional release, education, and training guidelines, and required every district attorney to submit an annual report to the justice department regarding domestic abuse arrests, prosecutions, and convictions.<sup>78</sup>

As discussed above, the definition of domestic abuse includes the intentional infliction of physical pain, injury, or illness; intentional impairment of any physical condition; first, second, or third degree sexual assault; or a physical act, or threat in combination with a physical act, that causes someone to reasonably fear the imminent occurrence of one of the three aforementioned categories of activity by “an adult person against his or her spouse, former spouse or adult relative or against an adult with whom the person resides or formerly resided.”<sup>79</sup> A relative is defined as “a parent, grandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, aunt, stepbrother, stepsister, child, stepchild, father-in-law, mother-in-law, daughter-in-law or son-in-law.”<sup>80</sup>

Under the new law, limited mandatory arrest was provided for in specific domestic abuse circumstances. First, the officer must have a reasonable basis to believe that the offender is or

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<sup>77</sup> 1987 Wis ALS 346, section 1.

<sup>78</sup> Wis. Stat. § 968.075.

<sup>79</sup> Wis. Stat. § 968.075(1)(a).

<sup>80</sup> Wis. Stat. § 968.075(1)(c). This definition has changed little since its enactment in 1987. The most significant changes have come to the application of the crime, not in the scope of the behavior covered.

has committed abuse and that the abuse constitutes a commission of a crime.<sup>81</sup> In addition, at least one of the two following must be true: the officer must have a reasonable basis to believe the offender, if not arrested, will possibly continue to assault the alleged victim; or, the alleged offender injured the alleged victim in the assault.<sup>82</sup>

The Act also included guidance for law enforcement personnel. The law declared that arrest was the preferred policy, especially when the officer had reasonable grounds to believe domestic abuse occurred<sup>83</sup>; arrest should be of the primary physical aggressor, not both parties, even if there is evidence of mutual combat<sup>84</sup>; the decision to arrest cannot be based on the victim's consent to further prosecution or the relationship between the offender and victim<sup>85</sup>; the decision to arrest cannot be made solely on the presence of visible injury or impairment<sup>86</sup>; finally, if an officer had reasonable grounds to believe domestic violence had occurred and did not arrest the alleged offender, the officer must file a report with the district attorney explaining why no arrest was made<sup>87</sup>. District attorneys were similarly charged with establishing policies encouraging the prosecution of domestic violence.<sup>88</sup>

The final important section of the new law included the creation of 24 hour criminal no contact orders. These orders could be waived by the alleged victim. Violation of the no contact order could result in a fine of up to \$1000 and arrest.<sup>89</sup>

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<sup>81</sup> Wis. Stat. § 968.075(2)(a).

<sup>82</sup> Wis. Stat. § 968.075(2)(b).

<sup>83</sup> Wis. Stat. § 968.075(3)(a).

<sup>84</sup> Wis. Stat. § 968.075(3)(b).

<sup>85</sup> Wis. Stat. § 968.075(3)(c).

<sup>86</sup> Wis. Stat. § 968.075(3)(d).

<sup>87</sup> Wis. Stat. § 968.075(4).

<sup>88</sup> Wis. Stat. § 968.075(7).

<sup>89</sup> Wis. Stat. § 968.075(5).

Although there have been some minor changes to the statute, none fundamentally altered the legislation. For a list of changes see tables one and two in the appendix to this chapter.

### Court Challenges to Criminal Legislation

There have been relatively few clarifications of the domestic abuse criminal statute by the Wisconsin courts. This is most likely due to the fact that the criminal statute does not actually create a chargeable crime but instead increases the sentences on crimes involving domestic violence and mandates specific treatment of domestic abuse incidents. Most importantly, the courts have ruled that domestic abuse includes all behavior that *may* cause fear in the victim—not only conduct that actually does cause fear.<sup>90</sup> Citing statutory language, the Court of Appeals held that if the legislature had wanted to criminalize behavior that caused fear, it could have easily done so. Instead, the legislature criminalized behavior that “may” cause fear, even if in actuality it does not.

### ***IV. Wisconsin Case Law***

There are several cases that are relevant to a discussion of domestic violence law in Wisconsin. Before beginning, it is important to reiterate that none of these cases explicitly use the Wisconsin constitution as the basis for their claims. Instead, the claims are based on rights derived from either the federal constitution or state statutes.

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<sup>90</sup> *State v. Close*, 302 Wis. 2d 263 (2007). This case is unpublished.

I will begin with two important Wisconsin cases that, while neither has anything to do with intimate violence, are cited in subsequent intimate violence and state-created danger cases, and deal with the omnipresent issues of discretion and immunity that appear in domestic violence cases. The first case is *Cords v. Anderson*<sup>91</sup>. Two cases discussed below (*Barillari* and *Ottinger*) cite *Cords* to support their claims as to why the courts should not uphold defendants' immunity, without success. The case is important, however, because it demonstrates how a court could allow individuals to hold the state and its officers liable in different situations.

The *Cords* case began in May 1970 when a group of UW-Madison students visited Parfrey's Glen State Park. Three women in the group fell off a dangerous trail at night into a gorge, receiving serious, lifelong injuries. They sued the manager of the park<sup>92</sup>, claiming he had a ministerial duty to either notify his superiors about the dangerous trail features or to erect signs to notify the public about the dangerous trail conditions.

The trial, appellate, and supreme courts agreed. The Supreme Court stated:

The question here is whether the defendant Anderson had an absolute, certain, or imperative duty to either place the signs warning the public of the dangerous conditions existing on the upper trail or to advise his superiors of the condition with a view toward adequate protection of the public responding to the invitation to use this facility. There comes a time when "the buck stops." Anderson knew the terrain at the glen was dangerous particularly at night; he was in a position as a park manager to do something about it; he failed to do anything about it. He is liable for the breach of this duty.<sup>93</sup>

The state Supreme Court held that a manager of a state park was liable for hikers' injuries because he should have warned—and thereby, protected—the public about this known, dangerous condition. Thus, the Court held that the manager's (in)action fell under an exception

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<sup>91</sup> *Cords v. Anderson*, 80 Wis. 2d 525 (1977).

<sup>92</sup> The state was granted immunity under Article IV, section 27 of the state constitution. The legislature has translated this section to mean that the state must give permission to a claimant before a lawsuit can proceed.

<sup>93</sup> *Cords*, 543.

to immunity as the manager had a ministerial duty to warn hikers of a known dangerous condition and he failed to do so.

The second important case is *Domino v. Walworth*<sup>94</sup>. In that case, Susan Domino was injured when she hit a tree lying across the road while riding her motorcycle. Her case was initially dismissed by the circuit court and she appealed. The Court of Appeals reversed, holding that the situation was analogous to *Cords* and that the county and its officers were liable for Domino's injuries. Importantly, the Court held that "simply allowing for the exercise of discretion does not suffice to bring the actions under the blanket of immunity provided by sex. 893.80(4), Stats., when the facts or the allegations reveal a duty so clear and absolute that it falls within the concept of a ministerial duty."<sup>95</sup>

Although in *Domino* the plaintiff was able to hold the state and its officers liable for the injuries she experienced, and in *Cords* the plaintiffs were able to hold the state's officers liable, others have not been as successful. One such case is *Ottinger v. Pinel*, a case emanating from a prison escape.<sup>96</sup> Christopher Melik, a prisoner at Kenosha Correctional Center, was on work release when he went to the mall, in violation of his work release conditions. Sergeant Jose Pinel, an off-duty guard from the Center, saw Melik and called the Center for guidance on how to handle the situation. The superintendent decided to confront Melik when he returned to the Center. Upon arriving, guards asked Melik to enter the temporary lock-up room, at which time Melik commandeered a state-owned van and fled. While fleeing in the van, he hit Bruce

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<sup>94</sup> *Domino v. Walworth County*, 118 Wis. 2d 488 (1984).

<sup>95</sup> *Domino*, 491.

<sup>96</sup> 215 Wis. 2d 266 (1997). Although Ottinger was unsuccessful in his attempt to hold the state accountable for his injuries following a prison escape, this is not a required outcome. Compare this case to *Van Eeden v. Minister of Safety and Security*, 2003 (1) SA 389 (SCA), the South African case in which the Court of Appeals held that the police officers who allowed a serial rapist to escape who then went on to rape other women had a duty to protect the subsequent victims from the rapist and were liable for damages. The case is discussed further in chapter seven.

Ottinger. Ottinger, a minor, was trying to cross the street at the time of the accident, and was seriously injured. He and his mother subsequently brought a negligence claim against the guards who, they argued, allowed Melik to escape.<sup>97</sup>

Ottinger's lawsuit against the guards was dismissed on summary judgment and he appealed. Ottinger argued that although public employees are immune from personal liability from injuries relating to negligent performance of discretionary acts, the guards' actions on the day of the escape fell under two of the three exceptions to immunity.<sup>98</sup> In essence, Ottinger argued that the guards' actions on the day Melik escaped were not discretionary—they were ministerial and therefore required certain responses from the officers. In addition, he argued that Melik's escape created a risk to the public, and that the guards were aware of that risk. The Court of Appeals upheld the circuit court's dismissal, holding that the guards' actions fell under their discretionary duty to prevent escape and that the guards were not aware Melik presented any particular danger to the public.<sup>99</sup> Distinguishing this case from *Cords*, the Court held that because Melik was housed at a minimum security facility and was on work release, there was no "known and present danger" like the drop in *Cords*.<sup>100</sup> As a result, the lawsuit against the guards and the county was dismissed and Ottinger was denied a trial on his negligence claims.

*Barillari* is the final case requiring discussion, as it is the only Wisconsin Supreme Court case addressing the argument that the state has a duty, in some circumstances, to protect

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<sup>97</sup> Ottinger argued that the guards failed in several ways in their ministerial duty to prevent escape: "(1) when Melik left work release to go to the mall, he was an escapee and the Guards had a ministerial duty to apprehend him at the mall or at work; (2) failure to handcuff Melik while in the lock-up room; (3) failure to secure the lock-up room; and (4) failure to stop him as he ran out of the lock-up room and out the front door" (*Ottinger*, 273).

<sup>98</sup> The two exceptions Ottinger identifies are the negligent performance of ministerial duties and when a public employee is aware of a danger that requires him to act.

<sup>99</sup> It is not clear if Melik had been a violent offender, and if he had escaped and committed a violent felony, if the result would have been any different.

<sup>100</sup> *Ottinger*, 277.



individuals from intimate violence. Although I outlined the facts in the introduction, the legal issues raised merit additional consideration here. The lawsuit dealt with the wrongful death of eighteen year-old Shannon Barillari at the hands of her ex-boyfriend, Charles Estergard, after the police promised, but failed, to protect her. The lawsuit sought damages for the wrongful death of Shannon Barillari under Wisconsin's wrongful death statute<sup>101</sup> and a civil rights claim<sup>102</sup> based on the fourteenth amendment of the U.S. constitution<sup>103</sup>. The federal civil rights claim was dismissed by the district court for eastern Wisconsin<sup>104</sup>, and the state negligence claim was remanded to the Milwaukee County Circuit Court for consideration. The circuit court granted summary judgment on the state negligence claim, holding that, among other things<sup>105</sup>, Wisconsin statutes grant immunity<sup>106</sup> to the city of Milwaukee and its officers.

The Barillari family appealed the circuit court's decision to the Wisconsin Court of Appeals<sup>107</sup>, which reversed the lower court's decision and held that summary judgment was inappropriate in this case because the alleged promise of protection and arrest established a claim on which relief could be granted. Citing a Seventh Circuit ruling on a Wisconsin domestic

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<sup>101</sup> Wis. Stat. § 895.04.

<sup>102</sup> The claim based on the fourteenth amendment is a section 1983 lawsuit based on the Civil Rights Act (42 U.S.C. § 1983). Section 1983 lawsuits create liability for a state actor who under color of state authority subjects an individual to, or causes an individual to be subjected to, a deprivation of any rights, privileges or immunities secured by the constitution. See the chapter one for additional information on section 1983 claims.

<sup>103</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Fourteenth amendment, Section 1, U.S. Constitution.

<sup>104</sup> The Court cited *DeShaney v. Winnebago County Department of Social Services* (1989) to support its decision.

<sup>105</sup> The circuit court also held that the complaint did not state a cause of action; the police conduct that was the subject of the lawsuit fell under the category of discretionary acts; discretionary acts are immune from liability (Wis. Stat. § 893.80(4)); and, "absent compelling and immediate danger, with evidence that the police officer had the opportunity to act, the officer should not face a lawsuit regarding his or her actions while conducting an investigation of a case." *Barillari v. City of Milwaukee*, 194 Wis 2d 247 (1995), 255.

<sup>106</sup> Wis. Stat. § 893.80(4).

<sup>107</sup> *Barillari v. City of Milwaukee*, 186 Wis. 2d 415 (1994).

violence homicide<sup>108</sup>, the Court of Appeals held that “once the detectives made the alleged promise, the discretion that may otherwise attach to their position dwindled. The detectives retained a certain measure of discretion as to *how* best to fulfill the promise... What was no longer discretionary, however, was their fulfillment of that promise.”<sup>109</sup> Essentially, the Court held that although the police did not have an obligation to protect each individual citizen from private violence, once the police promised an individual they would protect him/her from a discrete act of violence, the police then had an obligation to fulfill that promise.

Although the Court of Appeals remanded the case for trial, the defendants appealed the Court’s ruling to the Wisconsin Supreme Court, which granted review.<sup>110</sup> The Supreme Court reversed the Court of Appeals’ decision and held that the detectives’ failures to follow through on their alleged promises to protect Shannon, as well as to notify Shannon that they did not arrest Charles, were discretionary acts.<sup>111 112</sup> Consequently, both the city and the police officers were immune from suit.<sup>113</sup> Making a public policy argument, the Supreme Court stated:

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<sup>108</sup> *Losinski v. County of Trempealeau*, 946 F2d. 544 (7<sup>th</sup> Cir. 1991). In this case the court found that a deputy assumed a duty to protect a domestic violence woman when he accompanied her to her home to gather her things. While there, the victim’s husband shot and killed her in their bedroom while the deputy waited outside the door.

<sup>109</sup> *Barillari v. Milwaukee*, 1994: 424-5.

<sup>110</sup> *Barillari v. City of Milwaukee*, 194 Wis 2d 247 (1995).

<sup>111</sup> Specifically, the Court held that, “the police detectives’ ‘promise’ to apprehend and arrest Estergard for the alleged sexual assault of Shannon or otherwise notify Shannon and her mother that he had not been arrested did not transform the character of their discretionary acts during the investigation of the case into ministerial duties” (*Barillari v. City of Milwaukee*, 1995: 251).

<sup>112</sup> Wisconsin courts have been used to enforce alleged promises in different circumstances, so it is not without precedent that the Barillari family would try to enforce the police officers’ promises of protection. For example, in *Bonnieview Enterprises v. McMonagle* the manager of a bar supply company was held liable for financial damages after a dishwasher he promised a bar would arrive within 30 days was never ordered and did not arrive (157 Wis. 2d 505 (1990)). The court of appeals held that the manager should have known that the bar supply company’s serious financial problems would have made the delivery difficult, and that as a result he was personally liable to the bar owners for promising delivery of the dishwasher within 30 days.

<sup>113</sup> Under Wisconsin law, public officials and employees are generally immune from personal liability for injuries resulting from acts performed within the scope of the individual’s employment. There are three exceptions to this rule, however, in addition to the federally-recognized waiver when public officials violate an individual’s clearly established constitutional rights. First, there is no immunity for actions which are malicious, willful, or intentional

The dissent argues that ‘an officer’s promise to send law enforcement officers to an agreed upon place at a specified time to arrest an assailant’ transforms the subsequent police activity from discretionary acts to ministerial duties...however, we conclude that the nature of law enforcement requires moment-to-moment decision making and crisis management which, in turn, requires that the police department have the latitude to decide how to best utilize law enforcement resources. Unlike those professionals who have a set daily calendar they follow, police officers have no such luxury. For these reasons, it is clear that law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities.<sup>114</sup>

The Court continued, stating:

We look to our police departments to enforce our laws and to maintain order in what is becoming an increasingly dangerous society...Faced with escalating violence, they must continuously use their discretion to set priorities and decide how best to handle specific incidents. Police officers must be free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their allegedly negligent discretionary decisions.<sup>115</sup>

This case is a strong statement in support of police discretion. In essence, the Wisconsin Supreme Court ruled that police officers have near total discretion in how they carry out their duties and that the judicial system, and potentially the legislature as well, cannot require specific actions or constrain others.<sup>116</sup> According to the Wisconsin Supreme Court, it would seem to be inappropriate to put many restrictions on police discretion, even when their discretion leads to tragic and preventable outcomes. Largely unchecked by the state and federal constitutions, the legislature, and the courts, police departments, their officers, and district attorneys are essentially unfettered in their ability to prioritize crimes and determine responses to crimes. Victims of domestic violence, thus, cannot rely on the police to assist in their protection, nor can they use

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(*Barillari* 1995, 257 citing *Olson* citing *Ibrahim*). Second, there is no immunity for negligent performance of ministerial duties (*Barillari* 1995, 257 citing *Olson* citing *Lister*). Finally, an official is not immune from “liability when he or she is aware of a danger that is of ‘such quality that the public officer’s duty to act becomes ‘absolute, certain and imperative.’” (*Barillari* 1995, 258 quoting *Olson*, 143 Wis. 2d at 715, quoting *Cords*, 80 Wis. 2d at 541).

<sup>114</sup> *Barillari v. City of Milwaukee*, 1995 at 260.

<sup>115</sup> *Barillari v. Milwaukee*, 1995 at 261-262.

<sup>116</sup> The fact that the legislature has mandated certain actions when dealing with criminal domestic abuse is not addressed in case. This is mostly likely due to the fact that under Wisconsin criminal law, Charles’s rape and murder of Shannon was not legally considered to be domestic abuse because they were merely boyfriend-girlfriend.

the courts to reform problematic and potentially discriminatory uses of discretion because although discretion frequently has discriminatory outcomes, under current law only intentional acts of discrimination violate federal constitutional law.<sup>117</sup>

Although *Barillari* seems analogous to both *Cords* and *Domino* in many ways, the courts were able to distinguish the cases. In *Barillari*, the Supreme Court held that the detectives could not predict that Charles would kill Shannon, and so they were consequently not liable for her death. Citing the appellate court decision, the Supreme Court held that:

[U]nlike the 80-foot drop in *Cords*, or the tree lying across a roadway in *Domino*, the police in this case could not look at this situation and see a homicide just waiting to happen. Complaints of sexual assault and threats are, unfortunately, not rare in interspousal and boyfriend-girlfriend relationships. Nevertheless, as tragic and horrifying as these crimes are, the situations do not always lead to an immediately dangerous escalation of violence to the point of homicide.<sup>118</sup>

Two issues raised in the above paragraph warrant further discussion. First, the Wisconsin Supreme Court essentially outlines what they consider thinkable. The Court appears to believe certain events are inevitable and problematic—like falling off a trail or an accident with a fallen tree—but recurrence of abuse in a domestic violence situation is not one of them. While to them it is impossible not to predict the accidents in *Cords* and *Domino*, it is similarly impractical to predict when a man who has raped his ex-girlfriend at knifepoint and threatened to kill both her and himself would actually follow through on that threat. Indeed, the Court is almost dismissive of domestic abuse because of its frequency. Furthermore, while advocates have long identified a woman's attempt to leave a domestic violence situation as the most dangerous time for her—and again, Charles had already violently assaulted and threatened to kill Shannon—the Court held

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<sup>117</sup> This issue will be discussed in detail in chapter six which deals with federal claims based on the fourteenth amendment of the U.S. constitution.

<sup>118</sup> *Barillari* 1995: 261, citing *Barillari* 1994: 422-3.

that this sort of thing was so commonplace as to neither warrant protection of the victim by prioritizing the arrest of her assailant, nor any notification or warning to the victim that the police had failed to do so.

Second, the Court presented the *Barillari* facts in a very specific manner. It stated that since the homicide was not foreseeable, the police officers and city could not be held liable for Shannon's wrongful death. While homicide might not have been the guaranteed outcome in this situation, further criminal action by Charles against Shannon was nearly ensured. Charles raped Shannon and knifepoint and threatened to kill her and himself. He only relented in holding her against her will (also a crime) when she promised to move in with him. When she did not appear at the designated time the following day, it is almost impossible to imagine that Charles would let the situation be, move on with his life, and leave Shannon alone. Thus the Court presents a false test: if the police could not have predicted homicide, they had no duty to act. But homicide should not have been the test—none of the women in *Cords* or *Domino* died, they were injured. And their specific injuries did not have to be foreseeable, just the likelihood that some injury would result from the dangerous conditions. Thus, the test should be whether or not Charles presented a “known and present danger” to Shannon by causing her further injury, not whether or not it was foreseeable that he would kill her the following week.

The *Barillari* case demonstrates what happens when there is little constitutional guidance on the area of gender, violence, and specific rights. In that space—absent a specific constitutional directive requiring action or a structure strongly suggesting action—the courts imagine the inability to act and constrain the state. It is literally unthinkable to require police officers to follow through on a discrete promise of protection when there is a substantial

likelihood of future harm. Thus, the imagined inability of the courts and the legislature to regulate or structure police officers' actions inhibits the development of police procedure in a way that adequately addresses domestic violence. Thus, if police officers, using their "experience, training, and good judgment" carry out their duties in ways that subtly undermine women's personal security—or in some cases dramatically impede a woman's ability to protect herself—there is no accountability.<sup>119</sup> In Wisconsin, without a strong constitutional statement to the contrary, it appears to be unthinkable that the state will redraw the public-private divide in a manner that could maximize the personal safety individuals in the private sphere by increasing accountability in the public sphere.

At present, two of largest impediments to increasing accountability in the public sphere are judicial interpretations of discretion and immunity. In light of *Barillari*, the relationship between discretion and immunity to each other and private violence warrant a brief discussion. Most importantly, negligence only overrides assertions of immunity when a public official performs a ministerial duty—not a discretionary duty—in a negligent fashion. Thus, one of the primary ways local officials and municipalities escape liability for wrongs that result from a public worker's negligence is to define the action that led to the tragedy as a discretionary task, as opposed to a ministerial task. While judges cite to the exceptions as if they are sacrosanct, the legislative rule—immunity—has been operationalized by judges. These exceptions are judge made law, and their application rests with judges. Thus, there is nothing that prevents judges from determining certain actions are ministerial instead of discretionary (e.g. "[t]here comes a time when 'the buck stops.'" ), that certain domestic violence situations create a "known and

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<sup>119</sup> *Barillari*, 1995: 262.

present danger”, or from creating an additional exception. These are choices that judges make based upon their legal training, the arguments lawyers make, and their general worldview. Thus, these choices, and consequently when immunity is granted, are strongly constrained by what individual judges consider thinkable, and what they do not consider thinkable.

### *V. Articles*

The final type of research I conducted on Wisconsin law was an article archival search for domestic violence in the state’s major papers. For the Wisconsin State Journal I was only able to access articles since 1992, but for the Milwaukee Journal Sentinel<sup>120</sup> I was able to search from 1884 to present. While the searches provided little specific information, there was a dramatic increase in the discussion of domestic violence in 1994-5, during the O.J. Simpson murder trial of Nicole Brown Simpson and Ronald Goldman. During this time, not only was there significant coverage of the trial itself, there was also generally more discussion about domestic violence both locally and nationally. Unfortunately, there was little public discussion of new domestic violence legislation in the editorial and letters sections of the papers. Thus, it appears that a major, national domestic violence story, such as the O.J. Simpson trial can spur the national consciousness and inspire action on the national and state level. However, such awareness does not last without a concerted movement behind it, and did not translate into a serious, public discussion about the possible legal responses to domestic violence in Wisconsin.

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<sup>120</sup> The Milwaukee Journal Sentinel is the current Milwaukee-area paper. It was formed by the merger of the Milwaukee Journal and the Milwaukee Sentinel in April 1995. I searched both papers prior to April 1995, and the Journal Sentinel from 1995 to present.

## ***VI. Conclusion***

Wisconsin domestic violence law is an example of what happens in a state with minimum constitutional and statutory protections against private violence—combined with strong immunity protections for localities and state agents—in the face of the U.S. Supreme Court’s failure to uphold any federal constitutional protections for victims of intimate violence. While the state has domestic violence legislation, it is fairly basic in nature. First, there is a divided definition of domestic violence in criminal and civil contexts. While in civil law the scope of domestic violence law is somewhat expansive in that it includes dating relationships, the criminal law does not. The criminal law is quite restricted in its scope, as it only includes limited types of relationships. This divided definition did not appear to cause any problems in case law, but is an interesting and unexplained legislative decision, largely because Wisconsin does not document legislative debate and there was no information in the available article archives. As for the application of the definitions, they are also fairly limited, focusing primarily on actual and threats of physical and sexual assault. Whereas other states include harassment, emotional abuse, and stalking, Wisconsin does not. Furthermore, while other states have created repeat offender statutes, the only increased penalty for domestic violence abusers attaches if an abuser reoffends during the 72 hour no contact period after arrest (but this does not apply to dating relationship domestic abuse because it is in the criminal context) or with repeated stalking offenses.<sup>121</sup>

Unfortunately, as discussed above, there is no record of Wisconsin legislative debates so I cannot determine how or if legislators’ understanding to the constitution affected their

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<sup>121</sup> This changed in early 2012 when the Wisconsin legislature passed, and the Governor signed, a repeat domestic violence offender law. The legislation is still relatively limited, and it remains to be seen what the impact of the new law will be.



decisions in the statehouse. Furthermore, because the state generally grants immunity to government workers and municipalities, it essentially requires victims to assert a constitutional violation or to fit into one of the other exceptions for immunity to be able to successfully file a civil lawsuit against the state and its officers for a domestic violence policy or law implementation failure. At a minimum I can conclude that having no strong state constitutional provisions does not help Wisconsin victims of domestic abuse. Left mostly to rely upon state statutes and the federal constitution, victims of intimate violence in Wisconsin have little protection from either their abusers or from ineffective and haphazard state intervention in their lives.

While constitutional provisions are not a panacea for victims of intimate violence, they have the ability to do several things. First, constitutional provisions shape the formulation of citizens' legal rights and protections, thereby constructing the public-private divide. These formulations, undertaken both by legislators and judges, can be seen both in legislation and in case law interpretations of statutes and constitutional rights. It is here that thinkability enters into the analysis because constitutional provisions must be interpreted in some manner. How a constitution is interpreted speaks both to the thinkability of certain actions as well as to the role of the government in modern society. Second, constitutional provisions create a minimum bar. While both Montana and Colorado citizens enjoy additional rights in areas that impact intimate violence than those guaranteed under the federal constitution, Wisconsinites do not have that benefit. Although these additional rights have not necessarily increased the safety of individuals in the private sphere, the fact that they exist allow for the possibility of future invocation. In contrast, the floor for Wisconsinites' rights is the federal constitution, which federal courts have

largely interpreted to provide no rights to victims of intimate violence. Finally, constitutions can be aspirational documents. They can indicate where the state wants to go. While no one is so naïve as to believe that sex equality follows the passage of an equal rights amendment, it serves as an important signpost to both the citizenry and legal system.

Thus, Wisconsin serves as an example of how a strong vertical interpretation of a constitution with few individual right guarantees undermines domestic violence victims' attempts to seek protection and accountability from the state. Although nothing in the Wisconsin constitution precludes the application of the *Cords* Court's logic to domestic violence situations, the fact that nothing requires it suggests that it will not happen absent a seismic shift in the way legal professionals, legislators, and judges understand both the role of the law and the government in contemporary society.

*Appendix*

**Table 1: Wisconsin Domestic Abuse Definitions**

| Year | Bill   | Domestic abuse                            |  | Civil Restraining Order   |  | Criminal Domestic Abuse  |  |
|------|--------|---|--|---|--|--|--|
|      |        | Application                               | Scope  | Application   | Scope  | Application  | Scope  |
| 1979 | AB 169 | Physical abuse; threats of physical abuse | Current or former spousal relationship; Couple with minor children   | Reasonable grounds to believe respondent had or may batter the petitioner; valid up to two years  | Current or former spousal relationship; Couple with minor children                       |  |  |
| 1983 | AB 698 | <b>Added:</b> sexual assault              | <b>Added:</b> adult or minor against family or household members<br><br><b>Subtracted:</b> former spouses not explicitly covered | <b>Added:</b> Intentional infliction of pain, injury or illness; intentional impairment of a physical condition; sexual assault; or a threat to do any of the above | <b>Added:</b> parent, child, or other blood relative; current or former household member |  |  |
| 1987 | AB 224 |   |  |   |  | Intentional infliction of physical pain, injury, or illness; intentional impairment of any physical condition; sexual assault; threat to do any of the above; limited mandatory arrest | An adult person acting against his/her spouse, former spouse, adult relative, adult current or former cohabitant |
| 1989 | AB 249 |   |  |   |  | <b>Subtracted:</b> threat to commit domestic abuse   | <b>Added:</b> Individuals who have a child together<br><br><b>Subtracted:</b> adult relative                     |
| 1993 | AB 735 | <b>Subtracted:</b> child abuse            | <b>Added:</b> Individuals who have had a child together; former spouses  |   | <b>Added:</b> Individuals who have a child together; former spouses                      |  |  |
| 2001 | AB 1   |   |  | <b>Added:</b> Criminal damage to petitioner's property; valid up to four years  | <b>Added:</b> Current and former dating relationships                                    |  |  |

**Table 2: Wisconsin Domestic Abuse Statute Development**

| <b>Year</b> | <b>Bill</b> | <b>Civil Restraining Orders</b>  | <b>Criminal Domestic Abuse</b>  |
|-------------|-------------|--|---|
| 1979        | AB 169      | Law first introduced   |   |
| 1983        | AB 698      | <ul style="list-style-type: none"> <li>- Fundamental reworking of statute, created framework for current legislation</li> <li>- Amended definition of domestic abuse</li> <li>- Established procedure for obtaining a TRO and a domestic abuse injunction</li> <li>- Outlined possible restrictions on respondent available to petitioner, including barring a respondent from a common residence</li> <li>- Established that a hearing for an injunction must occur within seven days of issuing a TRO</li> <li>- Allowed injunctions to be enforceable for two years</li> <li>- Directed the sheriff to help serve and enforce the orders</li> <li>- Created mandatory arrest</li> <li>- Established the penalty for violating an order was up to nine months in jail and up to a \$1000 fine</li> </ul> |   |
| 1987        | AB 224      |  | Law first introduced  |
| 1989        | AB 249      |  | - Amended definition of domestic abuse  |
| 1993        | AB 735      | <ul style="list-style-type: none"> <li>- Amended definition of domestic abuse</li> <li>- Increased possible restrictions on respondent available to petitioner, including prohibiting a respondent from abusing the petitioner</li> <li>- Provided guidance to courts on when to issue a TRO</li> <li>- Clarified that courts could only grant remedies requested by petitioner</li> <li>- Extended the amount of time between the TRO and injunction hearing to fourteen days</li> <li>- Stated that a petitioner cannot violate his/her own order</li> </ul>   |   |
| 1995        | SB 144      | - Barred individuals subject to an injunction from possessing firearms, except for law enforcement personnel required to have a weapon as a condition of employment  |   |
|             | AB 229      |  | - Increased no contact order from 24 to 72 hours  |
| 2001        | AB 1        | <ul style="list-style-type: none"> <li>- Amended the definition of domestic abuse to include dating relationships</li> <li>- Extended the amount of time injunctions could be valid for up to four years</li> </ul>  |   |
| 2005        | AB 436      |  | <ul style="list-style-type: none"> <li>- Clarified definitions of key terms</li> <li>- Provided guidance to law enforcement for arrest of predominant aggressor</li> <li>- Prohibited the immediate release of an individual arrested under the domestic abuse statute</li> </ul> |

### Chapter 3

#### Colorado

##### ***I. Introduction***

In January 1988, Chanh Van Duong shot and killed his estranged wife in front of their daughter while they stood in a hallway of the Arapahoe County Justice Center waiting for a hearing in their divorce proceedings. At the time of the hearing Ms. Duong had a permanent protection order against her husband. The order had been issued six months earlier, after Mr. Duong admitted to the family court judge that he had threatened to kill his wife on multiple occasions. Concerned for her safety at the upcoming hearing—the first since the permanent protection order had been issued and one Ms. Duong was required to attend—the decedent’s attorney requested additional security. The judge requested an additional uniformed deputy be on duty at the time of the hearing with a metal detector. The hearing was scheduled for 1:30pm; the shooting occurred sometime after 1:00pm, but before the deputy and metal detector arrived.

The decedent’s children sued the county and various officials.<sup>1</sup> They alleged that the defendants had a duty to protect their mother under the Due Process Clause of the federal constitution. In addition to filing a federal civil rights claim<sup>2</sup> and a tort claims, the children also alleged several state constitutional violations, among which were violations of sections three (inalienable rights), 25 (due process), and 29 (equality of the sexes).

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<sup>1</sup> *Duong v. County of Arapahoe*, 837 P.2d 226 (1992).

<sup>2</sup> A federal civil rights claim in another way of referring to section 1983 lawsuits. See the introduction for a description of the origin and status of these types of suits.

The trial court granted the defendants' motion for summary judgment and the plaintiffs appealed. The appellate court was wholly unconvinced by any of the plaintiffs' many arguments and affirmed the trial court's decision to grant summary judgment. Although the plaintiffs appealed the appellate court's ruling to the Colorado Supreme Court, the Supreme Court declined to review the case later that same year.

As a result of the appellate court's ruling, Ms. Duong's children did not have a trial. Additionally, other domestic violence victims who had sought and were promised—but who did not adequately receive—state protection in the form of protection orders, were prevented from holding any people or institutions accountable when that protection failed. But at its most basic, this case stands for the fact that the county did not breach any state or federal constitutional duties “by failing to protect a wife from [her] husband where a permanent restraining order had been issued and the judge specifically requested security.”<sup>3</sup>

This case illustrates some of the challenges domestic violence victims face when seeking legal assistance for or redress from private violence in the state of Colorado. The state may issue protection orders and a judge can even order additional security, but failing to actually protect an individual from private violence—even in a county building someone is under a court order to be in—does not violate any of the victims' federal or state constitutional rights. As a result, a domestic violence victim in Colorado can neither rely upon the state to assist in protecting him/her from his/her batter, nor can s/he seek any redress when the state fails to follow through on its own promises and procedures. Importantly, there is nothing requiring this outcome in either the state or, as we will see in subsequent chapters, federal constitutions. This is an

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<sup>3</sup> *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) at 1119. The quote is from the dissenting opinion.

interpretive choice judges made. While state judges are limited in their interpretations of the federal constitution, they are not as constrained, especially the state Supreme Court, in their interpretations of the state constitution. Thus, one of the primary impediments to Colorado judges interpreting state constitutional provisions in a manner that would require enhanced protection of victims of private violence—or at a minimum, would allow for accountability after a failure to provide minimum protection—is the thinkability of such an interpretation.

### *Why Colorado?*

Colorado has several important characteristics that make it an interesting case study for an analysis of how constitutions structure state responses to domestic violence. From a constitutional perspective, it is the model of what many would consider an ideal vertical constitution for women: it has both a sex equality and a general “inherent rights” provision. These provisions, under some feminist constitutional analyses, should provide important additional legal protections for women. My analysis demonstrates, however, that these provisions, while providing some protection in other realms, are unable to provide any increased bodily security to women as individuals or as a group. In addition, the inherent rights provision of the Colorado constitution also provides an opportunity for a horizontal construction of a rights provision in Colorado. Despite the possibility of a horizontal interpretation—and the fact that it was applied in that manner at least once in a racial discrimination case—the Colorado Supreme Court has not generally interpreted the section in that manner. Indeed, the provision has not really been used to promote either a horizontal application of the constitution or to increase individual personal security.

From a legislative prospective, Colorado has excellent domestic violence legislation with an expansive definition of the crime and a broad application of the law. In addition, Colorado has repeat offender legislation, civil and criminal mandatory arrest laws, and the courts have the ability to require abusers to continue financial support of their domestic violence victims, in certain situations, for up to 120 days. There is little missing from Colorado legislation that domestic violence advocates could hope to include. Despite this legislation, however, domestic violence victims in Colorado have no more legal *right* to protection than victims anywhere else in the United States. Although this is partially due to the Supreme Court's decision in *Castle Rock v. Gonzales*<sup>4</sup>, it is also because the state Supreme Court has not interpreted the state constitution in a manner to provide meaningful rights or protection in domestic violence situations. In addition, an in-depth analysis of Colorado's domestic violence legislation will provide additional insight into the *Castle Rock v. Gonzales* decision discussed in chapter six.

Finally, from a judicial perspective, as discussed above, one of the most important cases in the federal interpretation of federal due process rights came out of Colorado. To better understand that case, *Castle Rock*, it helps to have an appreciation of state case law to comprehend why Jessica Gonzales filed her case in federal court. In addition, Colorado chooses its judges through a merit selection process, which provides some insulation from voter fickleness. While it is difficult to ascertain what affect judicial selection processes have on legal interpretation, it seems probable that novel interpretations might be more likely where judges are somewhat insulated from popular opinion and potential voter retribution. As discussed in the

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<sup>4</sup> 545 U.S. 748 (2005). *Castle Rock* will be discussed in detail in chapter six.



previous chapter, however, there did not appear to be any correlation between the method of judicial selection and the judicial decisions in private violence cases.

### Chapter Outline

In this chapter I will summarize Colorado's domestic violence law. I will begin with an analysis of state constitutional protections that could be, but have not yet been, applied to domestic violence victims. The constitutional analysis will include a discussion of cases that have invoked relevant Colorado constitutional provisions to determine how these rights have been not only asserted, but also implemented.

I will then discuss the development of statutory law, focusing on civil restraining orders and criminal domestic violence, as well as including a separate analysis of mandatory arrest law in Colorado. In this section I will also analyze court challenges to the legislation to see how Colorado courts have interpreted and applied civil and criminal domestic violence law. The brief separate analysis of mandatory arrest is included because the mandatory arrest provision of the restraining order violation law was essentially deemed not mandatory by the U.S. Supreme Court in 2005 in *Castle Rock v. Gonzales*. Thus, I wanted to track the development of mandatory arrest law and see if there was any significant reaction to the Supreme Court's decision in *Castle Rock*. To that end, in this section I will also briefly discuss newspaper archival research which largely confirmed that the O.J. Simpson arrest and trial proved a catalyst for domestic violence legislation reform, as well as the divided opinions of Coloradoans about their mandatory arrest law. Although there was some discussion of both national and state domestic violence legislation in the papers, what was most notable was the absence of any real

debate or meaningful dialogue on the subject matter, nor any attempt to revive mandatory arrest after *Castle Rock*.

In section four I will review how Colorado judges have developed the common law surrounding issues of intimate violence, thereby setting broad boundaries for the application of Colorado law in domestic violence situations. Finally, I will conclude with thoughts on how the state and federal constitutions have shaped Colorado's domestic violence law.

## ***II. The Colorado State Constitution***

Colorado still has its original constitution adopted in 1876 upon becoming the 38<sup>th</sup> U.S. state. The constitution generally adheres to a vertical construction, creating obligations between the state and individuals. Thus, the constitution is essentially a contract between the government and its citizens, and does not create many obligations between individuals. In doing so, it draws a fairly rigid and traditional division between the public and private spheres. Article II contains the Bill of Rights, listing specific protections for Coloradoans. Among the Article II rights, there are four relevant sections for an analysis of how constitutions shape state responses to intimate violence: sections three (inalienable rights), sixteen 'a' (victims' rights), 25 (due process), and 29 (equality of the sexes). Each of these sections could theoretically be used to advance arguments requiring the government to provide a certain standard of protection and care to domestic violence victims. While they have not been used in that manner, the possibility remains and only requires creative attorneys and receptive judges. I will discuss each constitutional section in turn.

Despite the fact that the Colorado state constitution is generally written and interpreted as a strongly vertical document, section three could be, and in fact has been, construed to create horizontal obligations between citizens—albeit in a non-domestic violence situation. As a result of this interpretation the state had an increased obligation, in limited circumstances, to protect private violations of individual’s constitutional rights. Section three enumerates the inalienable rights of Colorado residents. It states:

All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.<sup>5</sup>

A court could view section three as providing an affirmative constitutional right<sup>6</sup> to life, liberty, and safety, both from individuals and the state, as there is no explicit reference to state action in the section.<sup>7</sup> Thus, the general phrasing that “all persons have certain natural...rights” implies that those rights are to be enjoyed and protected generally, not just from violation by state actors. Accordingly, although not explicit, section three could be interpreted to provide a constitutional basis for the right to live a life free from violence, thereby increasing the government’s obligation to provide protection from domestic violence. The courts, however, have not interpreted it in this manner in intimate violence cases.

As discussed above, the plaintiffs in *Duong v. County of Arapahoe* alleged, in part, that the defendants violated the decedent’s section three rights. In fact, in addition to rejecting the

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<sup>5</sup> Colorado Constitution, Article II, section 3.

<sup>6</sup> Affirmative rights should be differentiated from negative rights. Affirmative rights are those that the state has a duty to provide to the individual (e.g. right to water). Negative rights are rights the state has a duty to not interfere with an individual’s exercise of (e.g. right to free speech).

<sup>7</sup> Compare section three of the Colorado state constitution to the federal fourteenth amendment, which reads, in part, “No state shall...deprive any person of life, liberty, or property without due process of law” and the distinction becomes clear.

plaintiffs' other state constitutional claims, the Colorado Court of Appeals used *DeShaney* to summarily dismiss the plaintiffs' section three and state due process claims without any discussion.<sup>8</sup> This is unfortunate from a state-provided rights perspective because the Colorado Court of Appeals uses an analysis of the federal fourteenth amendment to preclude the provisions of rights under the state constitution. Thus, the courts conflate federal and state rights, without giving serious consideration to what additional rights the state constitution might provide its citizens.

Although section three has not been used to expand individual rights in intimate violence situations, it has been used in cases dealing with property<sup>9</sup>, economic<sup>10</sup>, and various due process<sup>11</sup> rights, as well as in cases concerning the protection of freedom of movement<sup>12</sup> and the regulation of access to roadways<sup>13</sup>. Thus it has found a broad and diverse application, but it has not been successfully invoked in a case involving private violence. Indeed, one of the most interesting appellate court decisions involving a section three claim by two private parties was a

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<sup>8</sup> The Court wrote: “[P]laintiffs allege violations of their rights pursuant to Colo. Const. art. II, § 3(right of enjoying life and liberty), § 6 (speedy remedy for injury and access to courts), § 10 (freedom of speech), § 24 (right to assemble and to petition government), § 25 (due process), and § 29 (equality of the sexes). Even if a damage claim could be asserted as alleged by plaintiffs and would not otherwise be precluded...we conclude as a matter of law that defendants’ conduct constitutes neither a deprivation nor a violation of the rights asserted by plaintiffs. Plaintiffs do not articulate, nor do we see, how defendants’ conduct could constitute a violation of the constitutional right to assemble and petition government or the guarantee of equality of sexes. We also do not view defendants’ conduct as depriving these plaintiffs of their right of freedom of speech, or their right of speedy remedy for injury and access to courts, and defendants’ conduct does not support a claim under the constitutional provision concerning the right of enjoying life and liberty or guaranteeing due process. See *Deshaney v. Winnebago County Department of Social Services*” (citation omitted) *Duong* at 230.

<sup>9</sup> *Wright v. City of Littleton*, 174 Colo. 318, 483 P.2d 953 (1971), *Colo. Anti-Discrimination Comm’n v. Case*, 151 Colo. 235, 380 P.2d 34 (1962).

<sup>10</sup> *Prouty v. Heron*, 127 Colo. 168, 255 P.2d 755 (1953), *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956).

<sup>11</sup> *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972).

<sup>12</sup> *Dominguez v. City County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961), *People v. Nothaus*, 147 Colo. 210, 363 P.2d 180 (1961).

<sup>13</sup> *People v. Brown*, 174 Colo. 513, 485 P.2d 500 (1971), *Cave v. Colo. Dept. of Rev.*, 31 176 Colo. 202, 491 P.2d 479 (1972). *Campbell v. State*, 176 Colo. 202, 491 P.2d 1385 (1971), *People v. Nothaus*, 147 Colo. 210, 363 P.2d 180 (1961).

civil rights case involving racial discrimination in the sale of personal property.<sup>14</sup> The case involved an unconsummated property deal in which the sellers, the Cases, reneged on the sale after discovering that the buyers, the Rhones, were black. Both argued, in part, that they had a section three claim. The Cases argued that they had an inalienable right to decide with whom they would like to contract, and that the Colorado Fair Housing Act of 1959 (the Act), which among other things prohibited racial discrimination in housing sales, violated their Article II, section three rights. The Rhones argued that their inalienable rights included the rights “of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness”<sup>15</sup> and that the Cases were preventing them from exercising of those rights.

The Supreme Court summarized the section three dilemma as follows:

In short, the argument is that the unenumerated “natural right of property” for which [the sellers] contend, can be so exercised by them as to destroy the unenumerated natural right of the [buyers] to seek and obtain safety and happiness and to acquire property unfettered by discriminations based on race and color.<sup>16</sup>

The Court ruled that although property rights cannot be unreasonably infringed upon, property rights themselves are not absolute. Thus, they held that the Act was not unconstitutional and that in application to this case, the sellers’ rights to enter contract did not trump the buyers’ rights to acquire property and to be free from discrimination. This interpretation, however, was not shared by the entirety of the Court. In fact, two justices dissented from the majority opinion, arguing that prohibiting the sellers from discriminating in their contract was akin to a

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<sup>14</sup> *Colo. Anti-Discrimination Comm’n v. Case*, 151 Colo. 235, 380 P.2d 34 (1962).

<sup>15</sup> Colorado Constitution, Article II, section 3.

<sup>16</sup> *Colo. Anti-Discrimination Commission v. Case* at 240.

government taking of private property, in violation of Article II, section fourteen of the Colorado Constitution.<sup>17</sup>

Perhaps most interesting in this case was the majority's musings on constitutional rights.

They wrote:

The constitutions of the state and the nation recognize unenumerated rights of natural endowment. These God-given rights should be protected from infringement or diminution *by any person* as well as any department of government. It is the solemn responsibility of the judiciary to 'fashion a remedy' for the violation of a right which is truly 'inalienable' in the event that no remedy has been provided by legislative enactment. An inherent human right will be upheld by this court against action *by any person* or department which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between persons of different races, creeds or color.<sup>18</sup> (Emphasis added)

There are three points in this passage that merit discussion. The first is that the Court states that individuals possess unenumerated and inherent rights that must be protected from violations not only by the state and its officers, but also by individuals. Although not binding, the Court is setting forth a horizontal interpretation of constitutional rights using Article II, section three as its rationale for their analysis by saying that individuals can violate another individual's constitutionally guaranteed inalienable rights. Also important in this passage is the Court's formulation of its role in upholding constitutional rights. It writes that even if the legislature has not created a remedy for a constitutional violation, it is the "solemn responsibility" of the courts to ensure a remedy exists.<sup>19</sup> The Court places itself in an activist<sup>20</sup> position both in postulating that you can have private violations of constitutional rights and in that the judiciary has an

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<sup>17</sup> Article II, section fourteen reads: "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes."

<sup>18</sup> *Colo. Anti-Discrimination Commission v. Case* at 240.

<sup>19</sup> *Colo. Anti-Discrimination Commission v. Case* at 245.

<sup>20</sup> When discussing activist courts, I do not mean it in the current, politicized sense. Instead, I mean jurisprudential activism as defined by Judge William Wayne Justice. See, "The Two Faces of Judicial Activism," 61 *Geo. Wash. L. Rev.* pgs. 1-13, November 1992.

obligation to ensure that there is a remedy for every constitutional violation, even if the legislature has not yet fashioned one. Unfortunately for Ms. Duong's children and for subsequent domestic violence victims, the 1992 Court<sup>21</sup> lacked a similarly expansive interpretation of both the constitution and the role of the judiciary.<sup>22</sup>

Finally, this case dealt with racial—not sex—discrimination. Racial discrimination garners additional protections under U.S. law due to the historical legacy of slavery and the creation of the fourteenth amendment, as the Supreme Court has operationalized the amendment to require strict scrutiny<sup>23</sup> for laws and policies alleging discrimination based on race. Although contemporary jurisprudence has also placed sex under the protection of the federal fourteenth amendment, and current interpretations require only intermediate scrutiny<sup>24</sup> for laws and policies that discriminate based on sex, this is not universally accepted in the judiciary.<sup>25</sup> Indeed, the judiciary cannot even agree that sex-specific discrimination is actually gender discrimination.<sup>26</sup>

Thus, while racial discrimination is often used as the starting analogy for issues involving sex

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<sup>21</sup> The thirty years that separated the two courts resulted in completely different judicial make-ups. There were, not surprisingly, no judges that sat on both courts. <http://www.state.co.us/courts/sctlib/justices.html#session> Accessed October 8, 2012.

<sup>22</sup> *Colorado Anti-Discrimination Commission v. Case* is not cited in any of the *Duong* cases. Indeed, *Colorado Anti-Discrimination Commission* is not widely cited in Colorado case law to support interpretations of Article II, section three at all.

<sup>23</sup> Strict scrutiny is applied to all laws dealing with suspect classes and fundamental rights. “Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.” *Blacks Law Dictionary*, 8<sup>th</sup> ed., Thompson-West Publishing, 2004.

<sup>24</sup> Intermediate scrutiny is reserved for “quasi-suspect” classes. “Under the standard...the classification must be substantially related to the achievement of an important governmental objective.” *Blacks Law Dictionary*, 8<sup>th</sup> ed., Thompson-West Publishing, 2004.

<sup>25</sup> In a widely discussed *California Lawyer* interview with Justice Antonin Scalia in January 2011, Justice Scalia stated that the fourteenth amendment did not apply to discrimination based on sex. See, for example, Terkel, Amanda, “Scalia: Women Don’t Have Constitutional Protection Against Discrimination,” *Huffingtonpost.com*, January 3, 2011, [http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution\\_n\\_803813.html](http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html).

<sup>26</sup> For example, the U.S. Supreme Court, in a pregnancy discrimination lawsuit, held that pregnancy discrimination did not violate equal protection guarantees in the fourteenth amendment because it merely distinguished between pregnant and non-pregnant workers; it did not discriminate against women. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

discrimination, it is generally understood to be more serious and less acceptable than sex discrimination.<sup>27</sup>

In comparing the two cases, *Colorado Anti-Discrimination Commission*, and *Duong*, several issues that were probably influential in their respective outcomes become evident. Perhaps most importantly was the timing of the two cases with regard to their related social movements. The racial discrimination case was heard in 1962, in the middle of the civil rights movement. There was a lot of activism as well as social, political, and legal change occurring at the time. Legal change was occurring not only in the legislatures, but also in the courts, with decisions like *Brown v. Board of Education* (1954)<sup>28</sup> and *Boynton v. Virginia* (1960)<sup>29</sup>. Thus, the U.S. Supreme Court sent a strong signal to other U.S. courts that it was appropriate and necessary to combat state-supported racism. Domestic violence activism, in contrast, briefly gained steam a couple years after the *Duong* case—immediately following the O.J. Simpson arrest and trial for the murders of Nicole Brown Simpson and Ronald Goldman in 1994. At the time the *Duong* case was heard, Congress still had not passed the Violence Against Women Act, and the Supreme Court had recently issued its decision in *DeShaney*, strongly signaling that these types of issues—intimate violence—did not belong in the judicial system. Thus, for an issue to be thinkable for judges and lawyers, it seems particularly helpful for there to be a society-wide framing for a particular legal change. Judges do not exist in a void, and are

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<sup>27</sup> See, for example, the contemporary political debates over equal pay for equal work. It would be unthinkable for a major political party to suggest that in 2012 it was acceptable for employers to pay black employees less than white employees for the same job, as a matter of course, and that black employees should not have ready access to any remedies for the injustice. Such is not the case for sex-based pay discrimination, however.

<sup>28</sup> 347 U.S. 483 (1954) where the U.S. Supreme Court overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896) and the doctrine of ‘separate but equal.’

<sup>29</sup> 364 U.S. 454 (1960) where the U.S. Supreme Court overturned Boynton’s conviction for trespassing after he sat in a whites’ only section of a diner as an interstate bus traveler and refused to move to the ‘colored’ section of the restaurant.



consequently influenced by what is occurring around them.<sup>30</sup> As a result, the timing of key cases is instrumental to the realization of fundamental legal changes—those occurring in the midst of major social movements are more likely to be successful than those coming before or after the movement has peaked.

A second constitutional section that could theoretically be used is section sixteen ‘a’ of the Colorado Constitution which creates a victims’ rights provision.<sup>31</sup> Not part of the original constitution, the victims’ rights provision was enacted in November 1992 and went into effect in January 1993. Section sixteen ‘a’ reads:

Any person who is a victim of a criminal act, or such person’s designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process. All terminology, including the term ‘critical stages,’ shall be defined by the general assembly.<sup>32</sup>

The amendment originated in 1982 after Ronald Regan convened a Presidential Task Force on Victims of Crime to review the treatment of crime victims across the country. The Task Force found that crime victims throughout the country were routinely ignored and mistreated. As a result, they recommended that the sixth amendment<sup>33</sup> of the federal

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<sup>30</sup> See, for example, Gerald N. Rosenberg’s *Hollow Hope: Can Courts Bring About Social Change*, Chicago, University of Chicago Press (1991).

<sup>31</sup> Article II, section sixteen codifies the rights of defendants in criminal prosecutions and was part of the original 1876 constitution. It states: “In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”

<sup>32</sup> Colorado Constitution, Article II, section 16(a).

<sup>33</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and course of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” (US Constitution, 6<sup>th</sup> amendment).

constitution be amended to include crime victims' rights.<sup>34</sup> While that recommendation was not successfully implemented, eight states did amend their constitutions shortly thereafter, and in 1992 five more states, including Colorado, were voting on state constitutional amendments on victim's rights.<sup>35 36</sup>

Initially in response to the Task Force's recommendations the Colorado General Assembly passed statutory protections for crime victims, they did not immediately attempt to amend the state constitution. The legislation they passed strengthened the crime victim compensation system, established the Victims and Witnesses Assistance and Law Enforcement Fund (VALE Fund) to help victims and witnesses, and established guidelines to encourage law enforcement and criminal justice system officials to protect and uphold victims' rights. Some argued, however, that these provisions were inadequate since the state was merely encouraged to protect victims' rights; they were not required to do so under the law, and so an amendment was proposed.<sup>37</sup>

Before Coloradoans even voted on the amendment, however, the legislature had already passed enabling legislation; as a result, immediately upon going into effect, the amendment had the full force of a constitutional right. The legislation defined terms and listed crimes for which the victims' rights provisions would be assured.<sup>38</sup> It also enumerated rights granted to victims, including the critical stages at which victims would have a right to be present and informed, as

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<sup>34</sup> National Center for Victims of Crime, "Constitutional Rights for Crime Victims," 1999 <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32463> Accessed September 21, 2011; Colorado Legislative Council, "An Analysis of 1992 Ballot Proposals" Report Publication No. 369, 1992.

<sup>35</sup> Colorado Legislative Council, 1992.

<sup>36</sup> According to the National Center for Victims of Crime, 31 states provide constitutional rights for crime victims and one state, Montana, broadened constitutional protections for crime victims but did not provide them with any constitutional rights (1999).

<sup>37</sup> Colorado Legislative Council, 1992.

<sup>38</sup> CRS 24-4.1-302.

well as explicitly stated that victims have a right to be treated with fairness, dignity, and respect.<sup>39</sup> Perhaps most interestingly, the Colorado Legislative Council's analysis of the constitutional amendment and enabling legislation made clear that the promotion of victim's rights was not to come at the expense of defendant's rights. They wrote that "none of the enumerated rights in the enabling legislation diminish the rights of the defendant. If granting a particular right to a victim infringes on the defendant's right to a fair trial, the court has the discretion to deny granting the victim's rights."<sup>40</sup>

There have been relatively few appellate cases that have invoked section sixteen 'a', and none explicitly involved domestic violence. The case that is most relevant for our purposes involves a victim's attempt to challenge the district attorney's decision to dismiss charges against her alleged attacker using section sixteen 'a' to give her standing.<sup>41</sup> The details of the assault are not explained in either of the appellate opinions, but what we do know is that in August 1992 Bradley John Herron was charged with the second-degree assault of Sarah Jane Gansz. Herron waived his preliminary hearing and was bound over<sup>42</sup> for trial. In February 1993 the prosecutor filed a motion to dismiss the case, based on his assessment that the state could not prove the charges beyond a reasonable doubt. The trial court dismissed the charges, but Gansz protested the dismissal. The trial court then vacated its order and scheduled a hearing on the issue. At that hearing, the deputy district attorney testified that Gansz was not a credible witness, and that was the reason the state was dismissing the charges. The trial court held that Gansz did not have

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<sup>39</sup> CRS 24-4.1-302.5.

<sup>40</sup> Colorado Legislative Council, 1992: 2.

<sup>41</sup> *People v. Herron*, 874 P.2d 435 (1993).

<sup>42</sup> 'Bound over' means that a judge found there was probable cause to charge the defendant with the crime of which s/he was accused.

standing to challenge the district attorney's decision to dismiss the charges. The Court of Appeals agreed that neither sixteen 'a' nor its enabling legislation gave crime victims standing to appeal the dismissal of criminal charges; that discretion, they held, rests squarely with the district attorney.<sup>43</sup> The Supreme Court granted Gansz's appeal,<sup>44</sup> but affirmed the lower courts' ruling.

As a result of the Supreme Court's decision in *Gansz*, victims in Colorado cannot use section sixteen 'a' to force prosecutions. Instead, victims can only agree to cooperate and hope that the district attorney presses charges. This matters in an analysis of domestic violence for several reasons. First, prosecutors are often accused by domestic violence victims and advocates of downgrading domestic violence crimes (e.g. charging a misdemeanor instead of a felony), or not charging crimes at all, because of the relationship between the victim and the assailant.<sup>45</sup> When this happens, domestic violence victims have no recourse. Second, the deputy district attorney testified that Gansz was not a credible witness, and that was the reason the state dismissed the charges. While this might have been the case, domestic violence victims face a particular challenge in explaining their actions and are often judged to be irrational and erratic—and not credible—by individuals outside the domestic violence community.<sup>46</sup> Finally, the *Gansz*

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<sup>43</sup> Prosecutorial discretion is a fundamental tenant of the U.S. criminal justice system. Prosecutors are given wide leeway to make charging decisions they feel are in the best interest of the state and society. In this case, the Court describes the district attorney offices' authority in the following manner: "The office of the district attorney is established by Colo. Const. art. VI, § 13, and the district attorney has been vested with 'constitutional power' to exercise discretion in determining which charges, if any, to pursue in any prosecution. That discretion is limited only to the extent that it is established in a proceeding commenced pursuant to § 16-5-209, C.R.S. . . . that the district attorney's decision was 'arbitrary or capricious and without reasonable excuse.'" (citations omitted, *People v. Herron* at 437).

<sup>44</sup> *Gansz v. People*, 888 P.2d 256 (1995).

<sup>45</sup> See the Violence Against Women Act hearings for extensive documentation of how prosecutors, among other players in the criminal justice system, consistently use their discretionary power to undercharge or dismiss charges in cases involving intimate or domestic violence.

<sup>46</sup> The development of battered wife syndrome and the cycle of violence are two examples of how domestic violence advocates and researchers have attempted to explain domestic violence victims' behavior to those outside the

decision clearly declares that despite the codification of victims' rights in the Colorado state constitution, victims still do not have any decision-making power when it comes to obtaining justice for the crime they experienced. It demonstrates the underlying notion that the crime is both against the victim, but more importantly, against society, and that the state's primary concern is the harm to society, not the harm to the victim.<sup>47</sup> It reveals the fundamental orientation of the criminal justice system, highlighting the fact that it is neither designed to, nor primarily concerned with, protecting individuals as individuals.

Colorado's state due process guarantee is similar to the federal constitutional clause, though it differs in one important respect: it does not specify state action. Section 25 reads in its entirety, "[t]hat no person shall be deprived of life, liberty, or property, without due process of law."<sup>48</sup> Although this section could be interpreted to apply horizontally because it does not specify that it only forbids problematic state action, as discussed above in the analysis of *Duong*, the Colorado due process guarantee has been interpreted in an identical manner as the federal Due Process Clause with regards to private violence. Indeed, *Duong* even cites *DeShaney* to dismiss the state due process claim. Although the section comes up in cases, it is primarily invoked in criminal<sup>49</sup> and parental rights<sup>50</sup> appeals. The case is not widely cited in private

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situation. Both attempt to explain why it might be rational for an abused spouse to choose to remain in a violent situation, despite how irrational it might appear to someone who does not understand domestic violence.

<sup>47</sup> In *Castle Rock v. Gonzales*, citing Blackstone, the majority held, "The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, ... strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.' ... This principle underlies, for example, a Colorado district attorney's discretion to prosecute a domestic assault, even though the victim withdraws her charge" (citations removed, 765).

<sup>48</sup> Colorado Constitution, Article II, section 25.

<sup>49</sup> See, for example: *State v. Klinck*, 259 P.3d 489 (2011); *Sanchez-Martinez v. People*, 250 P.3d 1248 (2011); *People v. Garcia*, 113 P.3d 775 (2005); *Lopez v. People*, 113 P.3d 713 (2005).

<sup>50</sup> See, for example: *People ex rel. L.B.*, 254 P.3d 1203 (2011); *People ex rel. A.M.*, 2010 Colo. App. LEXIS 1986; *People ex rel. E.C.*, 259 P.3d 1272 (2010); *People ex rel. M.M.*, 215 P.3d 1237 (2009).

violence civil cases. Had Colorado judges interpreted the state due process guarantee in a horizontal manner, it would have increased the burden on the state to protect individuals from private violence. Although not creating an affirmative right, if individuals had a constitutional right to life and liberty and could not be deprived of those things without due process from either individuals or the state, the government would have an additional onus to help each individual realize that constitutional right.

The final constitutional provision that could possibly be used in domestic and intimate violence cases is Article II, section 29. Section 29 guarantees that “[e]quality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.” The amendment was added in 1972 in the midst of the federal Equal Rights Amendment (ERA) struggle. Indeed, the General Assembly referred the state amendment to the voters during the same session in which they ratified the federal ERA. The voting public overwhelmingly approved the state amendment by a vote of 64 percent in favor to 36 percent opposed.

Soon after its passage section 29 was used to remedy some statutory and common law biases against women<sup>51</sup> and men<sup>52</sup> as well as to clarify that statutory distinctions based on gender

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<sup>51</sup> See, for example *Musso v. Musso*, 932 P.2d 853 (1997) where, in a probate action, a court of appeals rejected the rebuttable common law presumption that a married couple’s household goods are owned exclusively by the husband; *Commercial Union Ins. Co. v. State Farm Fire Cas. Co.*, 546 F. Supp. 543 (D. Colo. 1982) where a district court forcefully declared that the separateness of spouses must be upheld under the Colorado ERA, and *Civil Rights Comm’n v. Travelers Ins.*, 759 P.2d 1358 (1988) where the Colorado Supreme Court held that an employer discriminated on the basis of sex when denied pregnancy benefits to its female employees but offered its male employees comprehensive health benefits.

<sup>52</sup> See, for example, *R. McG v. J.W.*, 200 Colo.345, 615 P.2d 666 (1980) where a natural father was constitutionally entitled to bring a paternity action for his child when the child was conceived while the mother was married to another man.

would receive strict judicial scrutiny in Colorado courts<sup>53</sup>. The only intimate violence appellate case that stated a claim based on section 29 was *Duong*, which was unsuccessful. Thus, although the state equality of rights provision could provide constitutional protections for victims of domestic or intimate violence by requiring additional protection of victims due to the gendered nature of the violence they experience, the courts forestalled that possibility in 1992 with the *Duong* decision. Although it would be possible for a future court to either distinguish or overturn *Duong*, it appears unlikely that without a fundamental rethinking of sex equality and domestic violence this will occur.

Although I have already discussed most of the facts and legal issues raised in *Duong v. County of Arapahoe* in the introduction and as they related to state constitution above, there are a few additional matters I must highlight since the case presented such a wide variety of constitutional and statutory problems for victims of intimate violence. Most importantly, this case foreclosed the possibility of suing a local government and police officers for failing to protect an individual from fatal domestic violence, even when it occurred in a county building and additional security had been ordered by a judge. As discussed above, the plaintiffs raised both state and federal claims to support their case. The Court of Appeals held that the county and its officers had no duty to protect the decedent because she was killed by a third party, but they had to do so in three separate analyses, addressing both federal and state constitutional claims, as well as state tort law claims.

Citing *Deshaney* to defeat the plaintiffs' federal claims, the Court of Appeals stated:

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<sup>53</sup> *People v. Green*, 183 Colo. 25, 514 P.2d 769 (1973).

[t]he language of the Due Process Clause does not require the state to protect the life, liberty, and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security.<sup>54</sup>

Although it is not at all surprising that the Court denied the federal claim following *Deshaney*, it also was not a foregone conclusion. Ms. Duong was not killed in her own house by her estranged husband. Instead, she was under a court order to be in a county building with inadequate security—recognized as inadequate by a judge since he ordered additional security for her. Thus, the facts could have permitted the court to distinguish the case from *DeShaney*, although it clearly did not do so.

What is more important for this discussion is the way the Court also dismissed all of the plaintiffs' state constitutional claims. The plaintiffs argued that by failing to protect their mother's life the county and its officers violated her rights under the state constitution. The Court dismissed these claims in a cursory manner, stating, "[e]ven if a damage claim could be asserted as alleged by plaintiffs and would not otherwise be precluded...we conclude as a matter of law that defendants' conduct constitutes neither a deprivation nor a violation of the rights asserted by plaintiffs."<sup>55</sup> Thus, there were no rights guaranteed under the state constitution that could have provided Ms. Duong some measure of protection.<sup>56</sup>

In addition to rejecting the federal and state constitutional claims, the Court of Appeals also rejected the plaintiffs' appeal based on common law tort claims. While the details are not as

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<sup>54</sup> *Duong*, 227.

<sup>55</sup> *Duong*, 230.

<sup>56</sup> Three of the seven justices on the Colorado Supreme Court wanted to review *Duong* based on different theories. Two of the justices wanted to grant review based on the plaintiff's federal civil rights claim and the plaintiffs' arguments that the trial court improperly dismissed their tort claims based on sovereign immunity. A third justice wanted to hear the case based on the plaintiffs' arguments that the state constitution created a cause of action for the damages. Thus, only one of seven justices thought that the Duong children's state constitutional claims might be valid.



relevant to our discussion, the outcome is. The Court held that both the county and the county officials were entitled to immunity and that none of the necessary conditions to overcome sovereign or qualified immunity had been met in this case.<sup>57</sup>

As a result of the Court's holding in *Duong*, lawsuits brought after domestic violence homicides that were connected to a failure of the state to protect an individual were forced into the federal courts. The most significant case to take that route was *Castle Rock v. Gonzales*, a case that eventually made it to the U.S. Supreme Court and significantly altered the domestic violence legal landscape in the United States. I will discuss *Castle Rock* in more detail in chapter six, which focuses on the federal fourteenth amendment and domestic violence.

As a result of constitutional interpretation, Colorado victims of private violence have no state constitutional basis upon which to make their claims. At present they cannot invoke the constitution to force the state to provide them with additional protection, nor can they use the constitution to hold the state responsible for failing to protect them from private violence. Although there are several sections that could be used to increase protection for victims of intimate violence, state courts have foreclosed those opportunities through incorporating a federal interpretation of the proper role of the state and the appropriate division of the public and private spheres.

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<sup>57</sup> Outside of constitutional violations, to overcome sovereign immunity for the county in this case there must have been a "dangerous condition of any public building" (*Duong*, 230). To overcome qualified immunity for public officials, the plaintiffs must demonstrate that the act or omission committed by the public official was "willful and wanton" (*Duong*, 231).

### *III. Colorado Statutes*

Statutory analysis plays an important role in an examination of how constitutions structure state responses to domestic violence because they are the legislative interpretation of a state's priorities, concerns, and obligations. In addition, they are also ideally guided by legislators' understandings of the constitution and citizen's constitutional rights. There are two categories of legislation I will focus on in my analysis of Colorado domestic violence law: civil and criminal domestic violence legislation. I will address each separately because, although they are related, they deal with a similar issue in fundamentally different manners. For each section I will briefly discuss the initial law enacted and any major innovations over time. A more list of definitional changes are included in table one and a more comprehensive list of legislative changes is contained in table two in the appendix of this chapter. Before beginning the analysis, it is important to note that while the definitions for domestic violence under civil and criminal law are similar, they are not identical. While in Wisconsin the definitions differ significantly in both their scope and application, in Colorado the scope of civil legislation includes household members, whereas the scope of criminal law only includes individuals who have been in intimate relationships. In addition, I will separately address Colorado's mandatory arrest legislation as it falls under both civil and criminal domestic violence statutes. Colorado's mandatory arrest legislation warrants its own brief section as there was some debate throughout the state regarding its enactment and it will figure prominently in the U.S. federal analysis due to the Supreme Court's ruling in *Castle Rock v. Gonzales*.

Over time, Colorado domestic violence law has incorporated new provisions, making it a comprehensive legal approach to domestic violence. Although the application and scope of both

civil and criminal domestic violence law has remained relatively stable after significant initial changes, the state has periodically adopted important provisions, such as repeat offender laws, mandatory arrest, and requirements to continue financial support, in certain situations, for up to six months. There is little missing from Colorado domestic violence law that exists elsewhere in the United States.

### *Civil Domestic Violence Law*

#### Civil Legislation

The primary, and by far the most important, piece of civil domestic violence law is the civil restraining order. Civil restraining orders are civil court orders that individuals can seek if they feel they are being harassed or abused by another individual. There are multiple types of civil restraining orders, one of them being the domestic violence restraining order. To obtain a domestic violence restraining order under Colorado law several conditions must be met: 1) a qualifying relationship between petitioner and respondent; 2) specific behaviors that violate the statute; and 3) an initial finding of imminent danger. Although it is a civil—not a criminal—order, violations of a restraining order can have criminal consequences.

Although restraining and protection orders are generally interchangeable terms for the same thing, under current law, Colorado distinguishes between the two. Protection orders are issued following a successful petition by a victim<sup>58</sup>, while restraining orders are automatically issued in divorce proceedings to prevent either party from disposing of or transferring any marital property, removing a child from the state, harassing or molesting the other party, as well

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<sup>58</sup> CRS 13-14-101 et seq.

as canceling or modifying any insurance without a fourteen day notification and consent of the other spouse<sup>59</sup>. In discussing the development of domestic violence law in Colorado, I will focus on, and use the language of, protection orders, even though throughout history the Colorado legislature has used both terms to designate the court order victims can seek to protect themselves against abusers. In addition, I will only highlight important changes in protection order laws, rather than discuss every change the legislature made, as some changes were more significant than others and merit emphasis. For a more thorough look at legislative changes over the years see table two in the appendix.

The first legal provision explicitly created to provide protection orders in domestic violence situations was enacted in 1978. The statute enabled district and county courts to issue protection orders to “prevent assaults and threatened bodily harm in a family setting.”<sup>60</sup> For the purposes of the statute, family setting “refers to persons who are spouses or other persons related by consanguinity or affinity if such persons are living together.”<sup>61</sup> The 1978 statute was the first reference to family violence in Colorado statutes—civil or criminal. Thus, it is not surprising that the first definition of family was fairly narrow, and did not include dating partners or former relationships. Four years later the legislature reorganized the protection order legislation and implemented the current structure.

Over the subsequent decade the legislature experimented with various legal changes in the protection order statutes, including the gradual increase of penalties for first and subsequent violations of a protection order. In 1994 the legislature undertook a dramatic reworking of the

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<sup>59</sup> CRS 14-10-107(4)(b)(I)(A-D).

<sup>60</sup> CRS 13-6-104(5)(a).

<sup>61</sup> Ibid.

protection order statutes and implemented some important new protections for victims of domestic violence. Although the legislature had been experimenting with arrest as the preferred policy for protection order violators, it was not until 1994 that they enacted a mandatory arrest law (see mandatory arrest section for a more detailed discussion). That same year the legislature also banned the sale of handguns to individuals subject to a restraining order and barred the granting of mutual protection orders to prevent domestic violence unless each party had met the burden of proof<sup>62</sup>.

In 2007 the legislature recognized that domestic violence can include financial, document, and property control, so protection order authority was clarified to permit courts to issue financial orders.<sup>63</sup> Although apparently many in the legislature had for some time thought that the “other relief as the court deems appropriate” included the ability to issue financial orders, that authority was not universally appreciated by judges. Indeed, although some judges had been issuing financial orders for years, other judges refused because they were not explicitly granted that authority in the statute.<sup>64</sup> In a bizarre turn of events, during the legislative debate on the explicit inclusion of financial orders there was significant discussion about protecting the abuser

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<sup>62</sup> The legislature also prohibited either party from waiving these requirements to obtain a mutual protection order—thus requiring each individual to establish the foundation for his/her own protection order. When abusers find out their victim is seeking a protection order, they will also frequently request a protection order against the victim. In these situations, judges, rather than try to figure out what is happening in a particular situation, would grant a mutual protection order forbidding either party from engaging in certain actions. As a result, the victim would be subject to a protection order forbidding certain activities, including being within a certain vicinity of the abuser. This offered abusers the ability to use the coercive authority of the state against their victims, threatening them with jail time and fines for certain behaviors. Thus, it was an important safety development for victims when the legislature required each individual to prove his/her own need for a protection order.

<sup>63</sup> SB 07-136. The bill provides for orders that “[restrain] the defendant from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the defendant has a prior existing duty or legal obligation, or from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities or life. The restrained party shall be required to account to the court for all extraordinary expenditures made after the injunction is in effect.” Enacted as CRS 13-14-102 (1)(b)(I) and CRS 13-14-102 (15)(g)(I).

<sup>64</sup> CRS 13-14-102(15)(f).

if s/he was the financial dependent person in the relationship. Several legislators were concerned that an abuser could be put in a financially precarious situation were the victim to cease supporting his/her abuser. In the end, rationality prevailed and only the respondent/abuser could be ordered to maintain certain financial obligations if s/he had a prior existing duty or legal obligation, and only for 120 days.<sup>65</sup>

In summary, current civil protection law has come a long way since 1978. Domestic abuse is now defined as any act or threat of violence by a current or former relation, cohabitant, or intimate partner, and includes acts or threats against animals<sup>66</sup> and minor children. In addition to simply restraining or enjoining an individual from threatening, harassing, contacting, or injuring another individual, current law authorizes courts to issue orders: to exclude an individual from the family home or from the home of another individual; to award temporary custody of common minor children; to restrain an individual from injuring, concealing, or disposing of an animal owned by either party; to specify arrangements for possession and care of an animal; to prohibit the restrained individual from ceasing to meet certain financial obligations for a maximum of 120 days and from disposing of personal effects or real property; and, to issue any “other relief as the court deems appropriate.” The penalty for violating a restraining order is a class one or two misdemeanor<sup>67</sup> and subsequent violations are class one misdemeanors and subject to increased maximum penalties.<sup>68</sup>

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<sup>65</sup> See Senate Judiciary Committee, February 28, 2007.

<sup>66</sup> Violence against animals was included in the definition of domestic abuse in 2007 with HB 07-1235. Under current law, violence or threatened violence against an animal constitutes domestic violence when the threat or violence “is intended to coerce, control, punish, intimidate, or exact revenge upon” the victim or the victim’s minor child (CRS 13-14-101(2)(b)).

<sup>67</sup> It depends upon the specific type of protection order whether the violation constitutes a class one or class two misdemeanor (CRS 18-6-803.5(2)(a)).

<sup>68</sup> CRS 18-6-803.5(2)(a.5) and CRS 18-1.3-501(3).

Procedurally, Colorado has developed a system of temporary and permanent protection orders. Temporary orders require showing imminent danger to the person seeking protection by a person in a qualifying relationship, and are valid upon being properly served to the respondent. The respondent will be summoned to court, no more than fourteen days from when the temporary order is granted, to show why the order should not be made permanent. If the respondent is not served during the fourteen days, the temporary order can be extended.<sup>69</sup>

At the hearing the judge can dismiss the temporary order, extend the temporary order for up to 120 days, or make the temporary order permanent. If the judge finds that the respondent has committed requisite acts for granting a protection order and that unless restrained s/he will continue to commit such acts, the judge can either extend the temporary order or make the temporary order permanent. If the judge alters the order at all during the hearing, the respondent must be served again; however, if the order is not altered no service is required for the order to be effective.<sup>70</sup>

### Court Challenges to Civil Legislation

There have been remarkably few challenges to Colorado's civil protection order legislation. The most significant challenge came from *In re Marriage of Fiffe*, a 2005 Court of Appeals case.<sup>71</sup> In this case, Kara Fiffe requested and was granted first a temporary, and subsequently a permanent, protection order restraining her husband, Patrick Fiffe, from having contact with or coming within 100 yards of her. Mr. Fiffe appealed the district court's decision

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<sup>69</sup> CRS 13-14-102(4)(a), (5), (7).

<sup>70</sup> CRS 13-14-102(9)(a) & (b).

<sup>71</sup> *In re Marriage of Fiffe*, 2005 Colo. App. LEXIS 2001 (Colo. Ct. App., Dec. 1, 2005).

to grant the permanent protection order without first finding that the Ms. Fiffe was in “imminent danger.” The Court of Appeals disagreed with Mr. Fiffe, holding that based on the plain language of the statute, a finding of imminent danger was only required for granting a temporary protection order. Mr. Fiffe again appealed, but the state Supreme Court denied review.<sup>72</sup> This case is significant because as a result it only requires a showing of imminent danger initially, with the procurement of the temporary order, as opposed to twice. This makes it slightly easier to get a temporary order made permanent, but it does not eliminate the burden on the petitioner to demonstrate imminent danger entirely—thereby attempting to balance the rights of both the petitioner and the respondent.<sup>73</sup>

While there are precious few cases involving the manner of granting civil protection orders, there have been several challenges to the statute designating the crime of violating a civil protection order. The first case that challenged the actual designation of violating a protection order as a crime was decided in 1999.<sup>74</sup> In 1996, Jeffrey Widhalm broke into his estranged wife’s apartment, in violation of a protection order, threatened to kill himself several times, and fired a gun inside the apartment. He was convicted of first degree burglary<sup>75</sup>, reckless endangerment, violation of a protection order, and two counts of prohibited use of a weapon. Among other

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<sup>72</sup> *Fiffe v. Fiffe*, 2006 Colo. LEXIS 684 (Colo., Aug. 14, 2006).

<sup>73</sup> From a defendants’ rights perspective, this ruling is problematic. Since temporary protection orders can be obtained ex-parte—e.g. without the respondent present—the finding of imminent danger is done with only the testimony of the petitioner/victim and without the presence or testimony of the respondent/abuser. Thus, the respondent has no opportunity to rebut the specific allegations that result in the imminent danger finding. Although presumably the judge will take all of the evidence into account at the permanent protection order hearing, the fact that there is no explicit obligation to make a finding of imminent danger potentially negatively impacts defendants’ rights.

<sup>74</sup> *People v. Widhalm*, 991 P.2d 291; 1999 Colo. App. LEXIS 31.

<sup>75</sup> In 1996 Colorado statutes defined first degree burglary as occurring when a person “knowingly enters or remains unlawfully in a building or occupied structure with intent to commit therein a crime, other than trespass...against a person or property, and if...he or another participant in the crime assaults or menaces any person, or he or another participant is armed with explosives or a deadly weapon” (CRS 18-4-202(1)).



things, on appeal Widhalm challenged his burglary conviction, arguing that violating a protection order is not a crime, and that was therefore no predicate offense to substantiate a burglary conviction.<sup>76</sup> The Court of Appeals did not agree and upheld Widhalm's convictions and the basic notion that violating a protection order is a crime. If the Court had not upheld Widhalm's convictions, it would have undermined the primary enforcement mechanism for civil protection orders—the state's coercive power via criminal sanctions for violating a court order.

The next challenge to the statute dealt with the requisite mental state for a protection order violation conviction.<sup>77</sup> Although the case is short on facts, what we do know is that Mr. Colbey was charged with violating a protection order prohibiting him from contacting his ex-wife. At trial the county court instructed the jury that the crime of violating a protection order required doing so both knowingly and intentionally<sup>78</sup>, and the jury acquitted Mr. Colbey of the offense. The State appealed the decision based on the jury instructions and the district court agreed with the prosecutors that violating a protection order only required doing so knowingly. The Supreme Court accepted review and upheld the district court's decision. The Court held that violating a protection order required a knowing violation, not an intentional violation, thereby

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<sup>76</sup> Burglary, as an element of the crime, requires an individual to illegally be present in a building *with the intent* to commit another crime while there. Widhalm argued that there is no underlying crime to sustain his burglary conviction because violating a protection order is not in itself a crime. Without an underlying crime—or predicate offense—there could be no burglary conviction.

<sup>77</sup> *People v. Coleby*, 34 P.3d 422; 2001 Colo. LEXIS 924.

<sup>78</sup> The difference between knowingly and intentionally might seem semantic, but it has very real implications for enforcement. For example, if a restrained individual goes to his/her closest grocery store where s/he knows the petitioner works with the intent to buy milk, s/he is knowingly violating the protection order, but s/he is not doing it intentionally—the intention of going to the store is to buy milk. In addition, it is easier to prove knowledge than intent. As a result, this decision made it easier to convict an individual of violating a protection order and provided more meaningful protection to domestic violence victims.

providing as broad an interpretation of the protection order statute as possible.<sup>79</sup> As a result, if a restrained person happens to find him/herself in the vicinity of the protected person, s/he still must leave even if the restrained person did not go to that location to be near the protected person. The case was an important victory for anyone who would seek a protection order as part of a strategy to remain safe.

The final challenge to the protection order violation legislation was whether or not prosecuting both stalking and violation of a protection order violated double jeopardy.<sup>80</sup> The defendant, Lawrence Carey, Jr. appealed a guilty verdict of harassment by stalking, violation of a protection order, and violation of a bail bond condition. On appeal he argued that the conviction on both stalking and violation of protection order charges violated his constitutional right to be protected from double jeopardy. Using the “same elements” test<sup>81</sup>, the appellate court held that stalking and violation of a protection order are not the same offense, nor is one a lesser included offense for the other, and that the conviction of both crimes therefore does not violate double jeopardy. The Colorado Supreme Court denied review,<sup>82</sup> thereby upholding the appellate court’s decision.

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<sup>79</sup> Contrast this decision with the Wisconsin Court of Appeals decision in *State v. Clements*, 246 Wis. 2d 990 (2001) where the Court held that to be convicted of violating a restraining order a defendant must do so both knowingly *and* intentionally.

<sup>80</sup> *People v. Carey*, 198 P.3d 1223; 2008 Colo. App. LEXIS 623.

<sup>81</sup> The same elements test involves comparing two charges originating from a single criminal incident to see if each charge contains at least one element that the other charge does not contain. If each charge does contain a different element, double jeopardy does not apply and the defendant can be charged with both crimes.

<sup>82</sup> *Carey v. People*, 2009 Colo. LEXIS 72.

## Criminal Domestic Violence Law

### Criminal Legislation

Colorado first criminalized domestic violence in 1988 with the creation of Colorado Revised Statute's section 18-6-801. Under the statute domestic violence occurred when a person "inflicts or threatens to inflict on a person with whom the actor is involved in an ongoing intimate relationship or with whom the actor has been involved in such a relationship any bodily injury or the destruction of property or threat thereof as a method of coercion, control, revenge, or punishment."<sup>83</sup> Such a violation was a class one misdemeanor and the court was authorized to order the abuser complete a counseling program as a condition to a domestic violence sentence. Interestingly, the entire statute had a sunset clause and the entirety of the legislation was to be repealed three years after implementation, on July 1, 1991.<sup>84</sup>

Before the statute could expire on its own, however, the legislature repealed the existing criminal domestic violence legislation and fundamentally reconceived the crime the following year with House Bill 1124. Rather than being a standalone crime, domestic violence became a sentence enhancer—meaning that in domestic violence cases there is an underlying crime, such as battery or assault, with the added element of a qualifying relationship that carries an increased sentence following conviction. As a result, upon being convicted of both the underlying crime and domestic violence, the defendant was required to undergo a domestic violence evaluation in addition to serving the penalty for the underlying crime committed. This change was instituted because of problems with the enforcement and application of the 1988 misdemeanor law. The revision was done not only to bring more crimes under the purview of domestic violence, but

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<sup>83</sup> CRS 18-6-801(1).

<sup>84</sup> CRS 18-6-804.

also because the 1989 legislature was concerned about the constitutionality of the previous statute due to vagueness or overbreadth.<sup>85</sup>

In addition to the fundamental revamping of criminal domestic violence law, in the revision the definition of domestic violence was also slightly expanded upon and developed.<sup>86</sup> Sentencing was rewritten to require an individual convicted of domestic violence to complete an evaluation in accordance with the state's standards for treatment of domestic violence perpetrators. According to the new statute, if the evaluation recommended treatment, and the court agreed, the individual was required to complete a certified treatment program.<sup>87</sup>

In 1994, the same year the legislature created mandatory arrest for protection order violators, they also created mandatory arrest in criminal domestic violence incidents. Police were also to make a reasonable effort to collect and preserve relevant evidence, but officers could not be held civilly or criminally responsible if they acted in good faith and without malice in enforcing criminal domestic violence legislation. Also in 1994, the legislature prohibited individuals convicted of assault against a spouse or former spouse from acquiring a handgun. In a final significant change, the Colorado legislature also increased the penalty for habitual domestic violence offenders several years later.

Criminal domestic violence law has changed significantly since 1988. Introduced initially as a criminal statute, the legislature quickly changed the law from a standalone crime to

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<sup>85</sup> See discussion in *People v. Disher*, 257.

<sup>86</sup> HB 89-1124 redefined domestic violence as “the infliction or threat of infliction of any bodily injury or harmful physical contact or the destruction or property or threat thereof as a method of coercion, control, revenge or punishment upon a person with whom the actor is involved in an intimate relationship.” Intimate relationship was defined as “a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of a child regardless of whether the persons have been married or have lived together at any time.” CRS 18-6-800.3(1) and (2).

<sup>87</sup> CRS 18-6-801.

a sentence enhancer on underlying crimes. Both the application and the scope are quite broad, with general categories mentioned rather than specific relationships and activities. Instead of just listing crimes that qualify as domestic violence, the legislature has focused on the purpose of the crime—be it for coercion, control, punishment, intimidation, or revenge—rather on the act itself. In addition, the legislature has included repeat offender enhancements, mandatory arrest, and has required prosecutors and police to vigorously enforce the domestic violence law. All of this indicates that the Colorado legislature has undertaken a serious attempt to address domestic violence through trying to incorporate the motivation, as well as the consequences of the crime, into criminal statutes.

### Court Challenges to Criminal Legislation

Despite the fact that the criminal legislation does not create an independent crime, Colorado courts have weighed in on the interpretation of various parts of criminal domestic violence legislation. One of the most important challenges to domestic violence law came in 2010. That year the Colorado Supreme Court ruled<sup>88</sup> that there did not need to be evidence of a sexual relationship to establish the existence of an intimate relationship under the domestic violence statute.<sup>89</sup>

The defendant in the case, James Disher, was convicted of harassing a woman he had dated. The County Court held that there had to be evidence of a sexual relationship for the court to find there was an intimate relationship between the defendant and the victim. Because there was no evidence of a sexual relationship, the County Court held that Disher could not be ordered

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<sup>88</sup> *People v. Disher*, 224 P.3d 254; 2010 Colo. LEXIS 113.

<sup>89</sup> CRS 18-6-800.3(2).

to undergo a domestic violence evaluation. The District Attorney's office appealed and the District Court affirmed the County Court's decision, holding that intimate relationships and sexual relationships are synonymous. The Supreme Court, upon review, reversed the lower courts' decisions. In addition, the Court provided three factors that lower courts could take into account to determine whether or not a defendant and alleged victim were engaged in an intimate relationship: 1) the duration of the relationship; 2) the type of relationship; and, 3) the regularity of interaction between the individuals. Thus, while a sexual relationship could be an indicator of an intimate relationship, it is not a necessary precondition. This decision was extremely important. Had the Supreme Court upheld the lower courts' decisions, the only dating relationships that would have qualified under domestic violence legislation would have been sexual relationships, thereby excluding a significant portion of dating relationships from the purview of the domestic violence law.

The courts have also clarified different aspects of the legislation permitting the introduction of evidence of prior acts of domestic violence in domestic violence trials. The first significant challenge to this legislation arose out of a domestic violence homicide case, after Alfred Raglin stabbed and killed a woman with whom he had an intimate relationship.<sup>90</sup> Included in the appeals filed by Raglin, he argued that because he and his victim were not married, his prior acts of domestic violence against her should not have been admitted at trial. The Appellate Court disagreed, holding that the admission of prior acts of domestic violence applies to anyone in an intimate relationship, married or otherwise.

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<sup>90</sup> *People v. Raglin*, 21 P.3d 419 (2000). There is no indication in the case what exactly the relationship between Raglin and his victim was. The opinion merely stated that "[t]here is no dispute here that defendant and the victim were engaged in such an intimate relationship" (425) and that the couple was not married. Other than that, there was no information regarding the nature of the relationship or its status at the time of the attack.

The final challenges warranting discussion also focused on the prior acts legislation, specifically on the necessary proof required to establish the prior acts. In *People v. Hung Ma*<sup>91</sup> the Appellate Court held that despite the fact there was nothing regarding the evidentiary burden to introducing prior acts in the statute, the correct standard was a preponderance of the evidence.<sup>92</sup> Finally, In *People v. Torres*<sup>93</sup>, Manuel Torres challenged the admission or prior acts at his trial for burglary, kidnapping, assault, child abuse, criminal mischief, and a domestic violence sentence-enhancing count. On appeal he argued that the introduction of the evidence served to impugn his character rather than be used to support the evidence about what Torres did while in the house of his ex-girlfriend. The Court disagreed, however, and held that the trial court had discretion to determine whether the evidence should be admitted, and that in this case the trial court did not abuse that discretion.

### Mandatory Arrest

Mandatory arrest deserves a brief discussion on its own. The progress toward mandatory arrest began in 1982. That year the legislature created title fourteen to address domestic matters, and in so doing also created protection orders to prevent domestic abuse.<sup>94</sup> Although the legislature did not implement mandatory arrest at this time, it did state that police officers “shall use every reasonable means to enforce an order of the court issued pursuant to section 14-4-102

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<sup>91</sup> 104 P.3d 273; 2004 Colo. App. LEXIS 1356.

<sup>92</sup> Preponderance of the evidence is “the greater weight of the evidence...superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other.” *Blacks Law Dictionary*, 8<sup>th</sup> Ed. Thompson West Publishing, 2004.

<sup>93</sup> 141 P.3d 931; 2006 Colo. App. LEXIS 483, Torres was convicted of second degree kidnapping, third degree assault, and criminal mischief.

<sup>94</sup> CRS 14-4-102.

or 14-4-103.”<sup>95</sup> Perhaps to assuage critics, the legislature simultaneously included police officer immunity for enforcing protection orders as long as they acted “in good faith and without malice”.<sup>96</sup> Thus, at this early stage, the legislature attempted to increase the pressure on police officers to enforce protection orders, while at the same time shielding them from any personal responsibility from lawsuits brought by aggrieved respondents who thought they had been wrongly arrested or removed from particular locations. In 1985 the legislature clarified the expected police response to violations of protection orders, requiring that police officers either remove or arrest individuals who violated the orders.

The state began experimenting with actual mandatory arrest as a policy in 1992. That year, the legislature created a partial mandatory arrest policy. Under the new statute, police were required to arrest a protection order violator if the violator was present and the officer had probable cause to believe a violation occurred. The police were not required to issue an arrest warrant if the violator had fled, however, until 1994. That same year the legislature also created a mandatory arrest policy in criminal domestic violent incidents. Similar to civil statutes, the criminal statutes also provided officers with immunity who implemented the legislation in good faith and without malice. Thus, 1994 marks the implementation of a true mandatory arrest policy for both violators of a protection order and for criminal domestic violence incidents.<sup>97</sup>

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<sup>95</sup> Ibid.

<sup>96</sup> CRS 14-4-104.

<sup>97</sup> As of 2011, twenty-three states and the District of Columbia have some type of mandatory arrest law in criminal domestic violence situations. However, only six states and DC have a pure mandatory arrest law in criminal domestic violence situations. See the American Bar Association Commission on Domestic and Sexual Violence statutory summary domestic violence arrest policies by state.

[http://www.americanbar.org/content/dam/aba/multimedia/domestic\\_violence/Resources/statutorysummarycharts/Domestic%20Violence%20Arrest%20Policies%20by%20State%202011%20%28complete%29.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/multimedia/domestic_violence/Resources/statutorysummarycharts/Domestic%20Violence%20Arrest%20Policies%20by%20State%202011%20%28complete%29.authcheckdam.pdf)

Accessed October 11, 2012.



Although I was unable to access the legislative debates surrounding the enactment of mandatory arrest policies, a decade later a legislative finding on the subject provides some insight. In 2004, one year before the U.S. Supreme Court ruled that the Colorado legislature did not intentionally create a truly mandatory arrest law, the General Assembly added a brief legislative finding to the civil protection order law. The legislature found that:

[T]he issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death. In order to improve the public's access to protection orders...there shall be two processes for obtaining protection orders within the state of Colorado, a simplified civil process and a mandatory criminal process.<sup>98</sup>

Although not specifically mentioning mandatory arrest as a policy of “paramount importance”, it seems likely that when discussing the enforcement of protection orders the legislature means mandatory arrest, as that is the primary mode of enforcement provided for in the law. This legislative finding actually foreshadows the consequences of lax enforcement in Jessica Gonzales’ case, as her three daughters were murdered while police officers refused to even attempt to enforce her protection order. I will discuss Colorado’s mandatory arrest law and Jessica Gonzales’ case further in chapter six, as the U.S. Supreme Court held in 2005 that Colorado’s mandatory arrest law did not create a federal cause of action when not enforced.<sup>99</sup>

In the Colorado newspapers, mandatory arrest received mixed treatment. In 2000 there was spike of interest after the Colorado Avalanche’s goaltender, Patrick Roy, was arrested on domestic violence charges. Roy’s wife hung up during a 911 call she placed during an argument with her husband. Upon arriving at the scene, the police arrested Roy because there was physical damage in the house. While the columnist and op-ed contributors generally favored the

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<sup>98</sup> HB 04-1305. Enacted as CRS 13-14-102(1)(a).

<sup>99</sup> See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

mandatory arrest policy, the letters to the editor were more divided. While there were the typical letters both for and against, one interesting letter against mandatory arrest advocated the repeal of the law because it is not universally applied. The author was a victim of domestic abuse and argued that the uneven enforcement was problematic and voided any benefits from the law.<sup>100</sup> Unfortunately, there was little discussion about either the creation of the law or what, if anything, should have been done after the U.S. Supreme Court's decision in *Castle Rock*.

#### ***IV. Colorado Case Law***

The only remaining case requiring discussion that is relevant to domestic violence law in Colorado and does not involve either the state constitution or statutory development is an attempt to preserve an important prosecutorial tactic in the face of a federal Supreme Court ruling that fundamentally altered domestic violence prosecutions nationwide. The U.S. Supreme Court case, *Crawford v. Washington*<sup>101</sup> upended the manner in which domestic violence prosecutions could occur, as the Supreme Court severely limited the type of testimony that could be admitted at trial. For our purposes, a brief summary will suffice. The facts of the case are as follows: Michael Crawford was tried and convicted of assault after stabbing a man who allegedly tried to rape his wife, Sylvia Crawford. Sylvia did not testify at trial, but she described the stabbing incident in a recorded statement to the police. This tape recording, which contradicted Michael's

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<sup>100</sup> "Letters," *Denver Post*, November 12, 2000.

<sup>101</sup> *Crawford v. Washington*, 542 U.S. 36 (2004).

version of events, was played at his trial. Sylvia did not testify because of marital privilege<sup>102</sup>, so Michael did not have the opportunity to cross-examine her in front of the jury. In part based upon the discrepancy between Michael and Sylvia's stories, Michael was convicted of assault.

Michael Crawford appealed his conviction, arguing that by admitting the tape recording of his wife's statement without her testifying, he was denied his federal sixth amendment constitutional right to confront witnesses. The Washington Supreme Court upheld Michael's conviction, and he subsequently appealed the decision to the U.S. Supreme Court. The U.S. Supreme Court accepted review and ultimately agreed with Michael. In a unanimous opinion<sup>103</sup> the Court overruled prior precedent and held that the only exceptions to the confrontation clause were those that existed at the time the framers authored the sixth amendment. The details were left to the lower courts to work out.<sup>104</sup>

*Vasquez v. People*<sup>105</sup> is an attempt to do just that in Colorado. Jimmy Vasquez killed his wife, Angela Vasquez, after she obtained a protection order against him. Jimmy repeatedly contacted his wife despite the order, eventually leading to harassment, violation of a protection order, and bail violation charges in two separate cases. Shortly after Angela reported the protection order and bail violations, and just two days before she was supposed to testify in the harassment case, Jimmy killed her and left her body in a motel room. Jimmy admitted he killed

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<sup>102</sup> Although marital privilege can prevent someone from testifying at trial, it does not extend to the hearsay exception allowing the admissibility of some out of court statements.

<sup>103</sup> Although the opinion was unanimous, Justices Rehnquist and O'Connor dissented in the decision to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>104</sup> *Crawford* signaled a major shift in domestic violence prosecutions because prior to the ruling, prosecutors would frequently use victims' 911 calls or police interviews as evidence of domestic violence when the victim refused to cooperate or testify. As a result of *Crawford*, that became impossible to do. Considering how frequently domestic violence victims decide not to cooperate, using out of court statements was necessary to pursue many cases. Now, that is no longer possible.

<sup>105</sup> *Vasquez v. People*, 173 P.3d 1099 (2007).

Angela because “she set [him] up” and was subsequently charged and convicted of first degree murder.<sup>106</sup>

In this case, Vasquez appealed his convictions for violating bail conditions and a protection order. These convictions were based in part on the use of Angela’s out of court statements to police officers. Citing *Crawford*, Vasquez argued that because he was not able to cross examine Angela his sixth amendment rights were violated. The Colorado Supreme Court disagreed. Citing its own precedent<sup>107</sup>, the Colorado Supreme Court held that three elements must be established by a preponderance of the evidence for an unavailable person’s out of court statements to be admitted at trial. First, a witness must be unavailable. Second, the defendant must be involved in or responsible for procuring the unavailability of the witness. Third, and finally, the defendant must have acted with the intent to “deprive the criminal justice system of evidence.”<sup>108</sup>

With this case the Colorado Supreme Court interpreted *Crawford* relatively broadly—requiring the prosecution to only demonstrate the intent to deprive the criminal justice system of evidence. Vasquez wanted the Colorado Supreme Court to interpret *Crawford* significantly more narrowly. He argued

that the doctrine of forfeiture by wrongdoing requires that we analyze the defendant’s intent separately regarding each case in which the prosecution seeks to admit the victim’s statements. Vasquez argues that the defendant should only be deprived of his confrontation rights in those particular proceedings that can be shown to have some direct relation to the defendant’s motive for tampering.<sup>109</sup>

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<sup>106</sup> *Vasquez*, 1102.

<sup>107</sup> *People v. Moreno*, 160 P.3d 242 (2007).

<sup>108</sup> *Vasquez*, 1124.

<sup>109</sup> *Vasquez*, 1111.

Had the Colorado Supreme Court upheld that interpretation, it would have been nearly impossible for prosecutors to use testimony from deceased or unavailable witnesses—even when the defendant admits to having killed the witness. This is particularly problematic in domestic violence cases, as a victim’s fears of violence voiced to family, friends, and police officers can be excluded because s/he is not there to testify—even though the reason the victim is dead is because the defendant has admitted to killing him/her. Perhaps most broadly, this can present a serious problem for prosecutors when the defendant alleges self-defense, and the victim’s attempts to obtain protection are excluded because of *Crawford*. Thus, the Colorado Supreme Court broadly interpreted *Crawford* and in so doing protected the constitutional rights of the defendant while not providing a get out of jail free card to defendants willing to kill their victims lest they become witnesses.<sup>110</sup>

## ***V. Conclusion***

Colorado has taken a fairly standard approach to domestic violence overall, but with proactive details sprinkled in its legislation. With regard to statutes, legislators have taken positive steps towards dealing with domestic violence. The statutory definition of domestic violence is broad, both in who is covered and what is considered prohibited action. Second and

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<sup>110</sup> In 2008 the Supreme Court decided *Giles v. California* (554 U.S. 353 (2008)). In this case, Giles challenged his homicide conviction for the death of his ex-girlfriend based on the admission of evidence at trial that he claimed violated his federal sixth amendment rights. Although Giles admitted to killing his ex-girlfriend, he claimed it was in self-defense. At trial the court had allowed statements by the deceased ex-girlfriend claiming Giles had assaulted and threatened to kill her. The Supreme Court agreed with Giles and in a 6-3 opinion held that only if a defendant killed someone to prevent him/her from testifying was the deceased’s out of court statements allowed at trial. This case has not yet been interpreted by the Colorado Supreme Court and it is unclear how it will impact future domestic violence prosecutions.

subsequent domestic violence-related offenses receive enhanced penalties, which signal not only how seriously the legislature takes such offenses, but also the fact that they recognize the repetitive nature of domestic violence.

For their part, the courts have upheld Colorado's legislation when it has been challenged. In almost every case, the statute has been enforced as written and has not been overturned in whole or in part. When it comes to applying state constitutional and tort law to domestic violence situations, the courts have been extremely conservative, however. While the Colorado Supreme Court took an activist approach to interpreting Article II, section three of the Colorado constitution in *Colorado Anti-Discrimination Commission*, it did not draw on that same interpretation in *Duong* or in other cases that attempted to use the section to increase the constitutional obligations of the state with regard to private action. Thus, while the Supreme Court could have created the space in the state constitution to ensure a certain level of protection for domestic violence victims—or to provide a remedy when that protection spectacularly fails—it chose to take the more conservative and standard approach. Had the Court continued the *Colorado Anti-Discrimination Commission* logic and holding, it could have held that Article II, section three does provide certain guarantees among citizens as well as between the state and citizens. This interpretation would consequently increase the obligation on the state to protect those rights from violation—be the violator a private citizen or the state itself. As a result, this interpretation would help victims overcome government agents and localities' assertion of immunity. Consequently, the state would be required to offer reasonable protection to individuals, or at a minimum, be responsible when they fail to adequately do so.

Colorado confirms my hypothesis that given the opportunity to create protections for women in domestic violence situations through valid interpretations of constitutional provisions, courts will generally demur absent any strong requirement in the Constitution or social movement supporting such an interpretation. This is particularly interesting in the Colorado context given the fact that the Colorado Supreme Court has found that space for cases involving racial discrimination. In 1962, when the Colorado Supreme Court decided *Colorado Anti-Discrimination Commission*, the United States was in the middle of the civil rights movement—a massive cultural and legal upheaval—and the courts were playing an important role in trying to create a more equal society. Courts were using statutes and constitutional rights to increase the space for minorities in U.S. law and society. In so doing, courts were upholding legislation that forbade private and public discrimination, despite constitutional challenges claiming the fundamental right to discriminate in private. While at the time it was novel in U.S. jurisprudence, the cultural context made such interpretations thinkable.

A similar cultural shift is necessary in the United States if courts are to similarly find such protections for women. For such a change to occur, it must be socially accepted and legally thinkable that women have a fundamental right to live their lives free from violence—and that the state cannot hide behind notions of private sphere discrimination and immunity to avoid becoming embroiled in the issue. For a court to preserve those rights, it appears that the constitution must be explicit and leave no room for misinterpretation. It is not enough to have two related constitutional provisions that together could be taken to strengthen protections for women (sections three [inalienable rights] and 29 [equality of the sexes])—there must be both a culture supporting those rights and explicit protection that leaves no room for doubt.

*Appendix*

**Table 1: Development of Criminal and Civil Domestic Violence Definitions**

| Year | <u>Criminal Domestic Violence</u>   |  | <u>Civil Domestic Violence</u>  |  |
|------|---|--|---|--|
|      | Application   | Scope  | Application   | Scope  |
| 1978 |   |  | Assaults and threatened bodily harm   | Spouses, individuals related by blood or affinity, if they live(d) together              |
| 1982 |   |  | <b>Rewritten:</b> Any act or threatened act of violence   | <b>Rewritten:</b> Adults who are current or former relations or if they live(d) together |
| 1988 | Acts or threats of bodily injury, or property destruction “as a method of coercion, control, revenge, or punishment”  | Individuals in a current or prior intimate relationship                                  |   |  |
| 1989 | <b>Repealed and reformulated:</b> Acts or threats of bodily injury, harmful physical contact, property destruction  | <b>Repealed and reformulated:</b> Spouses, past or present unmarried couples, co-parents |   | <b>Added:</b> Minors; individuals in intimate relationships                              |
| 1994 | <b>Rewritten:</b> Act or threat of violence, any crime or municipal ordinance against a person, or felony crime against property when used “as a method of coercion, control, punishment, intimidation, or revenge” |  |   |  |
| 1995 | <b>Subtracted:</b> Felony crime<br><b>Added:</b> municipal ordinance against property   |  |   |  |
| 2007 | <b>Added:</b> Animal abuse or threat of animal abuse when intended “to coerce, control, punish, intimidate, or exact revenge upon” the victim   |  | <b>Added:</b> Animal abuse or threat of animal abuse when intended “to coerce, control, punish, intimidate, or exact revenge upon” the victim |  |



**Table 2: Development of Colorado Domestic Violence Law**

| <b>Year</b> | <b>Bill</b> | <b>Civil Domestic Violence Law</b>   | <b>Criminal Domestic Violence Law</b>   |
|-------------|-------------|--|---|
| 1978        |             | Law Introduced   |   |
| 1982        | HB 1175     | <ul style="list-style-type: none"> <li>- Required officers to enforce protection orders under certain circumstances</li> <li>- Created emergency protection orders</li> <li>- Outlined duties of police officers</li> <li>- Created immunity for officers acting “in good faith and without malice”</li> </ul>   |   |
| 1985        | HB 1035     | - Required police officers to remove or arrest a protection order violator   |   |
| 1988        | HB 1094     |  | Law introduced  |
| 1989        | HB 1124     |  | Law fundamentally restructured  |
| 1992        | HB 1075     | <ul style="list-style-type: none"> <li>- Partial mandatory arrest</li> <li>- Progressive penalties instituted for violations of protection orders</li> </ul>   |   |
| 1994        | HB 1090     | <ul style="list-style-type: none"> <li>- Consolidated and unified procedures for obtaining and enforcing orders</li> <li>- Allowed courts to award temporary child custody as part of a protection order</li> <li>- Increased penalty for repeat offenders</li> <li>- Created true mandatory arrest</li> <li>- Created a computerized registry of orders</li> </ul>  |   |
|             | HB 1253     | <ul style="list-style-type: none"> <li>- Required police to provide information to victims following an arrest of a violator</li> <li>- Authorized police to use reasonable means to protect victims</li> <li>- Provided guidance on the definition of “imminent danger”</li> <li>- Enabled violators to access family home to retrieve belongings</li> <li>- Forbade granting mutual protection orders</li> </ul> | <ul style="list-style-type: none"> <li>- Redefined DV for criminal purposes</li> <li>- Prohibited a defendant charged with DV from pleading to a non-DV crime unless certain circumstances are met</li> <li>- Required individuals convicted of DV to participate in treatment programs</li> <li>- Required the court to consider victim safety before granting probation</li> <li>- Required arrest if police have probable cause to believe DV occurred</li> <li>- Authorized police to use reasonable means to protect victims</li> <li>- Created immunity for officers acting “in good faith and without malice”</li> </ul> |
|             | HB 1226     | - Expanded types of orders courts could issue  |   |
|             | HB 1276     | - Prohibited the sale or transfer of a handgun to someone subject to a DV protection order   | - Prohibited the sale or transfer of a handgun to someone convicted of DV   |
|             | SB 51       |  | - Amended definition of domestic violence - Allowed introduction of similar acts of DV  |
| 1999        | HB 1204     | <ul style="list-style-type: none"> <li>- Consolidated orders</li> <li>- Reiterated courts could issue additional orders as necessary and appropriate</li> </ul>  |   |
| 2000        | HB 1158     |  | - Increased penalty for habitual DV offenders   |
| 2001        | HB 1187     |  | - Expanded admissibility DV evidence  |
| 2004        | HB 1305     | - Added a legislative finding on the importance of granting and enforcing orders   |   |
| 2007        | SB 136      | - Added a leg finding on the role of financial control in DV   |   |

## Chapter 4

### Montana

#### ***I. Introduction***

Vickie and Ray Doggett were married in 1990; seven years later, Ray shot and killed Vickie and then himself in their home after numerous failed interventions by local sheriffs. Vicki had three children from a previous marriage—James, Michael, and Marcus Masee—who mostly lived with the Doggetts. The facts surrounding the failed relationship of Vickie and Ray are lengthy and complicated, but a certain level of detail is required to understand the outcome of the subsequent wrongful death suit Vickie’s boys filed against the Sheriff and the county.

During the Doggetts’ marriage, the local sheriff’s department and the Sheriff, Richard Thompson, were significantly involved in the couple’s relationship.<sup>1</sup> The couple appears to have had their most significant problems after at least one, if not both, of them had been drinking. The first law enforcement interaction occurred in 1991 after the couple got into a physical altercation, each hitting and injuring the other, for which both were sentenced to counseling. Although the sheriff’s department was not contacted for several years after that incident, in late 1994 the sheriffs were again called upon to diffuse a volatile situation that included Ray threatening suicide with a handgun.

Several weeks later, the sheriffs were again called to the home. The deputies called Sheriff Thompson, who spoke with Ray. After their phone conversation, Ray retrieved his handgun and threatened the two deputies who were present. Sheriff Thompson instructed the

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<sup>1</sup> The facts all come from the Montana Supreme Court’s opinion, *Masee v. Thompson*, 2004 MT 121.

deputies to leave the premises. The sheriff's dispatcher called the home shortly thereafter and Vickie told the dispatcher that Ray had the gun to her head. One deputy later testified at the wrongful death trial that he had seen Ray holding the gun to Vickie's head. Following the call, three deputies converged on the home and waited outside for Sheriff Thompson to arrive. Sheriff Thompson and a deputy entered the home, at which time Ray turned the gun on himself. The sheriffs wrestled the gun away from Ray, and Sheriff Thompson remained in the home to talk to Ray. Ray was not arrested during this incident, although Sheriff Thompson did confiscate the handgun. At trial, Sheriff Thompson testified that he did not know that Ray had threatened Vickie during the incident, although his report indicates he was aware that a deputy informed the dispatcher that Ray was pointing a gun at Vickie.

Two years later, in October 1996, Ray called the sheriff's department three times between 4:00am and 4:30am and asked Sheriff Thompson to come to his house because he needed a friend. Over the next couple months, Ray called again several times on two separate incidents. During one of the responses, Vickie informed a deputy that Ray was constantly threatening to kill himself and she needed to leave the relationship. Ray also threatened James, one of Vickie's sons, and his friend on one of the occasions, after the boys tried to return to the house to retrieve some of Vickie's possessions so she could stay elsewhere. The boys reported the incident to the sheriff's department. That same night, Ray called the friend and threatened to kill him and hunt down Vickie and her sons. The friend reported these threats to the sheriff's department.

In April 1997 Vickie's the sheriff's department was again called, but this time by Vickie's eight year-old son who was hiding with his older brother in a bedroom, with a rifle,

because Ray and Vickie were arguing. One of Vickie's sons testified at trial that Ray was waiving the gun at Vickie during the argument, and that Ray had followed Vickie into the boys' bedroom at one point, still waiving the gun. When the deputy arrived, the boys told him that Ray's gun was in his bedroom; the deputy unloaded the gun and left the gun in the house and the bullets on the dresser.

A couple weeks later, Ray stopped by the sheriff's department and was extremely depressed. That same night he called the department multiple times, prompting concerns that he was suicidal. Fewer than three weeks later Ray killed both Vickie and then himself, with the gun that had been left in his possession from the April incident.

Vickie's sons sued Sheriff Thompson and the county for negligently failing to prevent Ray from killing their mother. Their case went to jury, and they received a \$358,000 verdict. On appeal the verdict was overturned. The district court, acting as a court of appeal, held that the weapons seizure and arrest statutes were discretionary, not mandatory, and therefore did not impose any duty on Sheriff Thompson. The Supreme Court disagreed, however, and reinstated the verdict. The Court held that the statutes were not discretionary and that they created a special relationship between the Sheriff and Vickie, thereby obligating Sheriff Thompson to protect Vickie as a domestic violence victim.

This is the only case in the three state case studies where a domestic violence victim (or his/her family) prevailed under state law. What is not obvious from the fact scenario is one of the primary reasons why Vickie's sons prevailed: Sheriff Thompson and the county could not assert immunity to shield themselves from the lawsuit. The Supreme Court held that the Sheriff had a special relationship with the victim "by virtue of her being within a statutorily-protected

class”<sup>2</sup> and could not, therefore, avail himself of immunity based on the public duty doctrine. Thus, because the state has severely limited access to immunity both through a constitutional provision, state statutory law, and common law interpretation, Vickie’s family was able to have their case heard and decided on the facts.

### Why Montana?

Montana has several important characteristics that make it an important case study in an analysis of how constitutions structure state responses to domestic violence. Most unique is the constitution. The Montana constitution has several notable characteristics that warrant examination, two of which are unique among U.S. states. Most importantly, Montana is the only U.S. state constitution with a horizontal sex equality provision.<sup>3</sup> In addition, the Montana Constitution also prohibits blanket immunity for state entities, except as provided by the legislature. Thus, while the horizontal sex equality provision has the power to allow lawyers and judges to reshape fundamental principles of American law, the immunity prohibition enables lawsuits to get to juries even without major legal change—or having to invoke the constitution to overcome assertions of immunity.

From a legislative perspective, Montana has extremely uncomplicated laws governing civil and criminal domestic violence. The law has had two main iterations—the 1985 and 1995

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<sup>2</sup> *Massee*, 226.

<sup>3</sup> The only other state constitution with an explicit horizontal rights provision is New York. The New York provision does not include sex, however. It reads, “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.” (New York State Constitution, Article I, Section 11) Although women are included in the provision in that their rights cannot be discriminated against because of their race, etc., the provision does not include either sex or gender as protected categories.

versions—and remain largely unchanged since the 1995 version. The scope and application of the law is fairly representative of domestic violence legislation around the country and is therefore useful to the larger analysis.

Finally, from a judicial perspective, Montana judges are elected. While elected judges have been critiqued as potentially too responsive to popular will, I wanted to examine how they would interpret a progressive—from a women’s rights perspective—and recent constitution. In addition, having two states with elected judges, Montana and Wisconsin, allowed me to better isolate the role of the constitution in judicial decision-making, as the Montanan and Wisconsin constitutions are at the opposite end of the rights provision spectrum.

### Chapter Outline

In this chapter I will summarize the current status and development of Montana’s domestic violence legislation. To do this, I begin with the Montana State Constitution, looking at relevant, or potentially relevant, provisions. Because the Montana constitution is relatively young, and the debates have been preserved, I include the constitutional debates that occurred among the delegates for the various provisions I analyze. Next, I examine Montana’s civil restraining order and criminal domestic violence legislation. These laws are relatively uncomplicated, as they were largely addressed in a holistic manner in two separate legislative sessions—1985 and 1995. Montana is also rare in that I have legislative committee debate summaries beginning with the 1985 legislation. Although not verbatim, the summaries give us a flavor of the concerns and interests of the relevant legislative committees. Finally, I address the case law not involved in clarifying constitutional or statutory law. Montana, it is important to

note, is the only state case study that has a successful lawsuit brought by a domestic violence victim's family against ineffective police involvement in the domestic situation. Although I discussed the facts of the case in the introduction, I will highlight the legal significance in the case law section. In conclusion, I will discuss what Montana adds to an analysis of how constitutions structure state responses to domestic violence.

## *II. The Montana State Constitution*

The Montana Constitution was narrowly ratified by popular referendum in 1972. According to the Constitution, the population must decide every 20 years whether or not to rewrite it. Montanans passed on the opportunity in 1992 and in 2012.<sup>4</sup>

Elected delegates wrote the Constitution, drawing on the original 1889 Montana Constitution, other U.S. constitutions, and relevant theorists and academics. The Bill of Rights Committee presented each section to the larger Convention and delegates had the opportunity to debate each section. Some of the sections passed as presented, and others were altered. As a result, the debates provide important insight into what the delegates intended the Constitution to achieve.

There are five distinct sections in the Montana constitution that are potentially relevant for a discussion of domestic violence and law: inalienable rights, individual dignity, the right to privacy, due process, and sovereign immunity. All these provisions are found in Article II of the Montana constitution, which is also called the Declaration of Rights.

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<sup>4</sup> The vote for holding a constitutional convention actually occurs two years earlier—in 1990 and 2010, respectively—so that the state can prepare for the convention should voters support it.

The first relevant provision, “inalienable rights,” is section three of the Declaration of Rights. It reads,

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.<sup>5</sup>

The “inalienable rights” section was based upon an existing provision (Article III, section three) in the 1889 Montana constitution. For the 1972 constitution, three different wordings were proposed to the delegates, all of which were slight variants on the existing constitution’s provision.<sup>6</sup> Potentially most relevant for domestic violence law is the clause stating that inalienable rights include the right of people to enjoy and defend their lives. This clause was original to the 1889 Constitution. Also potentially relevant to domestic violence and law is the right to pursue life’s basic necessities, a new and slightly controversial addition to the Constitution.

During the Constitutional Convention debates, there was no discussion about the right of an individual to enjoy and protect his/her life specifically. The right to pursue life’s basic necessities was debated, although not in a domestic violence context. Delegates to the Constitutional Convention were concerned that this section could be interpreted to strengthen the welfare state. Delegates were very insistent that the purpose of the clause was not to create “a substantive right for all of the necessities of life to be provided by the public treasury.”<sup>7</sup>

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<sup>5</sup> Montana Constitution, Article II, section 3.

<sup>6</sup> Article III, section three of the 1889 Constitution read: “All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.”

<sup>7</sup> Constitutional Convention Proceedings, vol 5, 1972: 1636.



Section three has not been asserted in the domestic violence context, or in the context of private violence more generally.<sup>8</sup> Despite the fact it has not been used, however, the section could easily be construed to have horizontal implications and to increase the responsibility of the state to enable its citizens to enjoy their lives free from violence and abuse.

The second potentially relevant constitutional provision is section four, “individual dignity.” Section four reads,

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.<sup>9</sup>

Montana is unique among U.S. state constitutions in that it is the only constitution that has a horizontal sex equality provision.<sup>10</sup> There were five different proposals submitted at the constitutional convention for section four. The proposals varied from a simple, vertical equal rights type amendment<sup>11</sup> to more expansive equality provisions including other minority groups and horizontality. The final version drew heavily from the constitutional equality and anti-discrimination clauses of Puerto Rico<sup>12</sup>, New York<sup>13</sup>, Michigan<sup>14</sup>, and Illinois<sup>15, 16</sup>.

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<sup>8</sup> The section has been used in various mining, property, regulation, and commercial speech cases.

<sup>9</sup> Montana Constitution, Article II, section 4.

<sup>10</sup> 20 U.S. states have either a sex or gender equality provision; only Montana and New York have horizontal equality provisions. As noted above, New York’s equality provision, while singling out several groups for specific protection, does not include either sex or gender.

<sup>11</sup> Delegate Proposal No. 10, “Equality of rights under the law shall not be denied or abridged by the state of Montana on the basis of sex.” This proposal was almost identical to Section 1 of the proposed Equal Rights Amendment to the U.S. Constitution. “Equality of rights under the law shall not be denied or abridged by the United States or any state on the account of sex.”

<sup>12</sup> “The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.” Constitution of Puerto Rico, Article 2, Section 1 (1952).

<sup>13</sup> “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any

It is important to pause for a moment to explore how Montana went from a not having a constitutional sex equality provision to having an expansive, horizontal constitutional recognition of dignity and equality. Indeed, the lack of an equality provision is what, in part, lead to the constitutional rewrite in 1972.<sup>17</sup> The 1889 Constitution, while providing some protections for Montanans, was largely eclipsed by the use of the federal constitution's fourteenth amendment<sup>18</sup> to protect individuals.

Before the Constitution was written and debated, the legislature created a Constitutional Convention Commission that prepared, among other things, studies relevant to writing a Bill of Rights. There are several relevant sections of the study to the framing of section four that help explain how such a dramatic change became thinkable in Montana in the early 1970s. In the study, the Commission distinguished between the equal protection and anti-discrimination components of what has become Article two, section four of the Montana state constitution. In discussing equal protection, the Commission noted that a simple reiteration of the fourteenth amendment would do nothing other than reaffirm the state's commitment to equal protection.

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other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.” New York State Constitution, Article 1, Section 11 (1938).

<sup>14</sup> “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his or her civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin. The legislature shall implement this section by appropriate legislation.” Constitution of the State of Michigan, Article 1, Section 2 (1963).

<sup>15</sup> “All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property. These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.” Constitution of the State of Illinois, Article 1, Section 17 (1970).

<sup>16</sup> Robbin, Tia Rikel, “Untouched Protection from Discrimination: Private Action in Montana’s Individual Dignity Clause,” *Montana Law Review*, vol. 51, pgs. 553-570 (1990).

<sup>17</sup> Jackson, Vicki, “Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse,” *Montana Law Review*, vol. 65, pgs. 15-40, (2004).

<sup>18</sup> “No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Constitution of the United States, 14<sup>th</sup> Amendment, Section 1 (1868).

The Commission explicitly stated that if Montana would like to expand upon the equal protection rights guaranteed in the fourteenth amendment, the constitution should include explicit rights to individuals not covered by the federal constitution, and specifically listed sex as a potential example of that expansion.<sup>19</sup> Thus, the Commission very consciously advocated expanding the equal protection rights in the state, beyond the baseline established by the federal government.

Most importantly, the Commission strongly argued for a constitutional guarantee of freedom from discrimination. As opposed to the minimal impact a commitment to equal protection could have, the Commission argued that a strong clause on freedom from discrimination could yield positive results. As part of its discussion, the Commission noted that there were few federal legal protections, and questionable gains from those laws, guaranteeing someone freedom from discrimination, especially sex discrimination. Thus, if Montana wanted its citizens to enjoy freedom from discrimination, it should include a strong provision that specifically covered previously excluded groups.<sup>20</sup>

Finally, also included in the Bill of Rights study was a discussion of safeguarding rights against private power. Although this discussion was included in a section on procedural rights and issues, it is nevertheless important for an analysis of section four, because section four contains the only explicit inclusion of private action in the Montana Declaration of Rights. The Commission's analysis highlighted the work of various political theorists who have explored how private power can be "tyrannical."<sup>21</sup> Although the Commission does not draw any firm conclusions regarding how private power should be taken into account, it is significant that the

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<sup>19</sup> Applegate, Rick, "Bill of Rights: Montana Constitutional Convention 1971-1972," *Constitutional Convention Study No. 10*, 1972.

<sup>20</sup> Ibid.

<sup>21</sup> Applegate, 1971: 191.

ability of private power to impede an individual's freedom is treated seriously in the review of issues concerning the creation of a Bill of Rights. Thus, the Commission challenges the notion that a strict public-private divide safeguards liberty by highlighting the shortcomings of an insular private sphere. As a result, the Commission, and subsequently the delegates, is able to conceive of alternative configurations of society and the constitutional rights that will support that new society. They set the stage to make fundamental change thinkable, and the delegates took up the mantle.

When the delegates came together to debate section four, Delegate Mansfield introduced the proposed section by saying that the section was written to provide a "constitutional impetus for the eradication of public and private discrimination."<sup>22</sup> Mansfield continued that the Bill of Rights committee included sex in this section despite the pending national Equal Rights Amendment because they "saw no reason for the state to wait for the adoption of the federal equal rights amendment or any amendment which would not explicitly provide as much protection as this provision."<sup>23</sup> In addition, the Committee stated that such a broad statement would require statutory embellishment to effectively eradicate discrimination.

Although the section received widespread support, including unanimous support from the Bill of Rights Committee, support was not unanimous among all the delegates at the constitutional convention. One delegate proposed to delete the prohibition of private discrimination from the section. He argued that the section, as written, would permit "a lot of challenges to the rights of other people to privacy, to things which we have considered dear."<sup>24</sup>

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<sup>22</sup> Montana Constitutional Convention Proceedings, v 5, 1972: 1642.

<sup>23</sup> Ibid.

<sup>24</sup> Montana Constitutional Convention Proceedings, v 5, 1972: 1643.

The delegate then gave the example of a club to which he belonged, The Sons of Norway, which excluded non-Norwegians. It is important to note that this is the only reference to a competing constitutional right in the debate about section four. Privacy rights, however, are often cited as a competing right to the various rights that women cite when trying to protect themselves from private violence, and feature prominently in the legislative debates for Montana domestic violence legislation.

In a back and forth between Delegate Dahood and several other delegates—and seemingly in contrast to what Delegate Mansfield just said—Delegate Dahood explained that the intent was that clubs like the Sons of Norway and men’s groups did not fall under section four. The vote to remove private discrimination from the section was defeated 76 to thirteen. Notably, when Montanans went to vote on the Constitution, section four was presented and then explained as prohibiting public and private discrimination in civil and political rights.<sup>25</sup>

In another interesting discussion during the debate on section four, a delegate expressed her concern that the section was not self-executing as it was written. She referred to the Illinois section seventeen (footnote fifteen) which explicitly stated that the section is self-executing. In response, Delegate Dahood stated that in his opinion section four was self-executing and that the presumption with all the sections was that they are either mandatory or prohibitory, depending on their content.

Although section four holds incredible legal possibilities, it has not been used in the context of violence against women or private violence more generally. Indeed, as one commentator noted in 1990, the prohibition against private discrimination had remained dormant

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<sup>25</sup> Montana Constitutional Convention, 1972.

since the constitution was adopted in 1972.<sup>26</sup> Although written over twenty years ago, she could have just as easily written that assessment in today.

The next potentially relevant section is section ten, the “right to privacy.” It reads, “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>27</sup> The right to privacy was a new right included in the 1972 Constitution, but was a common law right recognized by the Montana Supreme Court on multiple occasions.<sup>28</sup>

When section ten was first read to the Convention, it did not include “individual.” It was added by a voice vote immediately upon introduction to the Convention and then debate began. Delegate Campbell, when introducing the section, stated that its purpose was to erect a “semipermeable wall of separation between [the] individual and [the] state.”<sup>29</sup> Thus, the delegates were attempting to maintain a zone of privacy between the state and its citizens, even while reconfiguring the responsibilities of the state and individuals in section four.

The primary debate that occurred surrounding section ten was whether the Convention should include “without showing a compelling state interest” in the section, or if they should delete it. In the first day of debate, it was deleted, but several days later it was reintroduced. The main dispute centered on what would provide maximum privacy for Montanans. Some delegates worried that by including “without showing a compelling state interest” they would provide the courts with an easy excuse to violate an individual’s privacy rights. Advocates for the phrase, however, worried that without providing any guidance to the courts, privacy rights would be

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<sup>26</sup> Robbin, 1990.

<sup>27</sup> Montana Constitution, Article II, section 10.

<sup>28</sup> *State v. Brecht*, 157 Mont. 264 (1971) and *Welsh v. Roehm*, 125 Mont. 517 (1947).

<sup>29</sup> Montana Constitutional Convention Proceedings, v 5, 1972:1681.

more easily circumscribed since an absolute right to privacy is impossible to sustain. After extended debate on the matter, the phrase was reinserted and passed by a voice vote. Although there is extensive case law on section ten and privacy more generally, there is no case law specifically parsing how privacy rights might interact with domestic violence. As opposed to the other rights discussed in this section, however, privacy rights are frequently mentioned in the domestic violence legislative debates. For the legislature, section ten appears to be among the most salient constitutional provisions with regards to domestic violence, and are invoked to protect accused batterers, not victims.

The Montana Constitution also contains explicit due process protections. Contained in section seventeen, the provision reads, “no person shall be deprived of life, liberty, or property without due process of law.”<sup>30</sup> Carried over from the Montana’s original 1889 constitution, there was no debate or controversy surrounding the adoption of this section into the 1972 constitution.

Although there have been no cases testing the due process clause in intimate violence cases that do not challenge criminal laws, it could theoretically be used in civil lawsuits in which a victim sues a law enforcement agency or municipality for failing to offer adequate protection to the victim. As opposed to the federal Due Process Clause, the Montana due process provision does not require state action. Indeed, the general statement that “no person shall be deprived” enables the provision to support both a horizontal and a vertical interpretation. As a result, in Montana, the state Supreme Court could hold that neither individuals, nor the state, could deprive someone of their life, liberty, or property, without due process of law. To date, however, this has not been how the section has been interpreted.

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<sup>30</sup> Montana Constitution, Article II, section 17.

The final constitutional section that could affect state responses to domestic violence is section eighteen, or the “state subject to suit” provision. Given the lack of creative use of section four, section eighteen is perhaps the most important provision in the Montana constitution. The section strips immunity from governmental entities for injury to a person or property.<sup>31</sup>

This provision is original to the 1972 constitution and was the subject of some discussion during the constitutional convention. In his introduction of the section, Delegate Murray explained that “the doctrine of sovereign immunity...really means that the king can do whatever he wants but he doesn’t have to pay for it.”<sup>32</sup> Murray went on to argue that there was a trend in the United States to do away with the doctrine and that Montana would be following those footsteps.<sup>33</sup> Thus, the fact that other states had, or were considering, eliminating immunity made

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<sup>31</sup> The 1972 version of section eighteen read: “The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973.” In 1974, the section was amended to read, “The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.”

<sup>32</sup> Montana Constitutional Convention Proceedings, v 5, 1972:1760.

<sup>33</sup> Two main examples were raised in the course of the debates: Colorado and North Dakota. Although no real details were given in the constitutional convention, the particulars merit a brief discussion. Colorado briefly eliminated the doctrine of sovereign immunity through a trio of state Supreme Court decisions. The primary relevant case was *Evans v. Board of County Commissioners*, 174 Colo.97 (1971) (the other two decisions were *Flournoy v. School District No. 1*, 174 Colo 110 (1971) and *Proffitt v. State*, 174 Colo. 113 (1971) see *Loveland v. St. Vrain Valley School District*, Court of Appeals No. 11CA1019 (2012) pages 1-2 for a discussion). *Evans* arose out of a personal injury that occurred on the steps of the county courthouse when the plaintiff was on her way to jury duty. The trial court dismissed the case and the Supreme Court eventually reversed, overturning the common law doctrine of sovereign immunity. In the opinion the Court held that the legislature could reinstate sovereign immunity if it so chose, which it did. Effective July 1, 1972, CRS 24-10-101 to-17 reinstated the doctrine (the Colorado legislature has augmented the legislation over time). In contrast to Colorado’s approach, North Dakota took attempted constitutional change. In 1971-1972 the state held a constitutional convention that attempted to rework the original 1889 constitution. The voters defeated the new constitution in an April 1972 special election, however, and the new constitution never went into effect. (<http://history.nd.gov/archives/stateagencies/conscon1971.html>) As a result, the sovereign immunity provision presented to the people of North Dakota, “[s]uits may be brought against the state and its political subdivisions for negligent injury to a person or his property, but the Legislative Assembly may provide for reasonable limitations” was never enacted (Montana Constitutional Convention, 1761). Thus, the two named inspirations for Montana’s decision to abrogate the doctrine of sovereign immunity were either brief, in the case of Colorado, or never implemented, as in the case of North Dakota.



the decision thinkable for the Montanan constitutional delegates and facilitated making this fundamental change.

Importantly, there were two separate issues raised in the debates that are relevant for this discussion. First, Delegate Holland sought clarification as to whether section eighteen would apply to survivors, as well as to victims. Second, Delegate Dahood inquired whether or not section eighteen would apply to, among other entities, law enforcement agencies. The answer to both was, yes—section eighteen would allow survivor suits of any government entity, including law enforcement agencies. These two points of clarification are crucial for domestic violence civil lawsuits, as survivors of domestic violence homicides often seek to sue law enforcement agencies for the agency’s failure to protect the victim.

In conclusion, the Delegate Dahood summarized the provision as follows: “We submit it’s an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not.”<sup>34</sup> The provision was unanimously adopted by the convention. In the voter pamphlet sent out to Montanans, section eighteen was described as a “[n]ew provision abolishing the doctrine of sovereign immunity (“the King can do no wrong”) and allowing any person to sue the state and local governments for injuries caused by officials and employees thereof.”<sup>35</sup>

This section clearly has implications for civil lawsuits against municipalities and government employees who haphazardly and ineffectively intervene in domestic violence situations with tragic results. This section, and its resultant legislation, is what enabled the Masee children to successfully sue Sheriff Thompson, the case discussed in this chapter’s

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<sup>34</sup> Montana Constitutional Convention Proceedings, v 5, 1972:1764.

<sup>35</sup> Proposed 1972 Constitution for the State of Montana: Official Text with Explanation, 1972: 6.

introduction. Perhaps the most important case outlining the limits of immunity for government employees has nothing to do with intimate violence, however. The case, *Dorwart v. Caraway*<sup>36</sup>, is primarily a privacy case. In this case, Russell Dorwart sued deputy sheriff Paul Caraway as well as other deputies and the sheriff, the Stillwater County Sheriff's Office, and the County of Stillwater, for violating his constitutional rights to due process, privacy, and the right to be free from unreasonable searches and seizures.<sup>37</sup>

There were three issues, relevant to our discussion, raised on appeal in *Dorwart*.<sup>38</sup> First, does a violation of Montana constitutional rights give rise to a cause of action for damages? Second, if the answer to the first question is yes, did the defendants in the case have statutory immunity? And finally, if the answer to question one is yes and question two is no, should the Montana Supreme Court create qualified immunity analogous to federal qualified immunity applied in federal section 1983 claims? The Court answered the first question in the affirmative, at least with regards to the rights violated in *Dorwart*.<sup>39</sup> This decision required the Court to come to a decision on the second question. To this question, the Court held that the statutes in question did not give the defendants statutory immunity.<sup>40</sup> Finally, in answer to the third

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<sup>36</sup> 2002 MT 240.

<sup>37</sup> The case made it to the Montana Supreme Court twice. In the first case (*Dorwart v. Caraway*, 1998 MT 191) the Supreme Court held that the defendants had violated Dorwart's constitutional rights and remanded the case to the district court to consider Dorwart's claims for damages and attorney's fees. The district court held that the defendants were entitled to immunity under MCA 2-9-103, and granted summary judgment for the defendants. The statute provides immunity to law enforcement officials when they act in good faith under the authority of a law that is later declared invalid. Dorwart appealed, and the case again went to the Montana Supreme Court.

<sup>38</sup> The fourth question raised on appeal was whether or not the district court erred when it denied Plaintiff's claim for attorney's fees. The Supreme Court affirmed the district court's denial of plaintiff's attorney's fees.

<sup>39</sup> Although the Court only stated that there should be a cause of action for violations of the rights guaranteed by Article two, sections ten and eleven of the Montana State constitution, a strong argument could be made to use this case to support a cause of action for all violations of Montana State constitutional rights.

<sup>40</sup> The statute in question, MCA 2-9-103, outlines when actions that are invalid under the law will be considered valid. Namely, this occurs when actions are taken in good faith under the authority of a law that is subsequently declared invalid.

question, the Court declined to create a comparable qualified immunity to that guaranteed in the federal system, arguing that “the adoption of qualified immunity in Montana would...be inconsistent with the constitutional requirement that courts of justice afford a speedy remedy for those claims recognized by law for injury of person, property or character.”<sup>41</sup> As a result of this decision, the Court preserved the right of Montanans to sue governmental entities who have violated their state constitutional rights.

The Montana Constitution holds a lot of opportunity for creative criminal and civil approaches to domestic violence. The guarantee of rights, both vis-à-vis the state and other individuals, provides an opening to the state—and indeed could increase the pressure on the state—to affirmatively guarantee individuals’ constitutional rights. In reality, however, the most important constitutional provision for domestic violence situations has turned out to be the elimination of immunity. As a result of this provision and the subsequent Supreme Court interpretations of this provision, domestic violence victims have the ability to sue law enforcement personnel for negligent intervention. Although it is unclear how often victims avail themselves of this opportunity in Montana, even having this ability is rare in the United States and could have a significant impact on how law enforcement responds to domestic violence situations.

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<sup>41</sup> *Dorwart*, 140. The Court acknowledged that most states have followed federal suit and have created qualified immunity for state officials accused of state constitutional violations. It did cite a Maryland Supreme Court case, however, that declined to do so, as well as amicus briefs from Wade Dahood, Chairman of the Bill of Rights Committee of the 1972 Montana Constitutional Convention and the Montana Trial Lawyers Association, both of which argued against creating qualified immunity in this case.

### *III. Montana Statutes*

There are two main types of domestic violence legislation I will cover in this analysis: the criminalization of domestic violence and the creation of civil restraining orders. I focus on these two areas because they constitute the foundation of a state's response to domestic violence and because they touch on core constitutional conflicts, rights, and obligations. I will discuss both these types of legislation together in chronological order rather than approaching each separately because the Montana legislature largely rewrote both categories of law in the same bill. For a brief description of the two major legal revisions in table form, see the appendix to this chapter.

Before beginning the analysis of these two areas of law, however, it is important to note that the Montana legislature first tried to address domestic violence through its laws governing arrest. In 1967 the legislature amended existing laws to allow police officers to make a warrantless arrest if the officer had probable cause to believe a misdemeanor had been committed; previously the officer would have had to have observed the commission of the crime.<sup>42</sup> This change did little to change police approach to domestic violence,<sup>43</sup> however, so more explicit laws were subsequently debated and enacted.

In Montana it was theoretically possible for women to obtain temporary restraining orders against their husbands<sup>44</sup> even before domestic violence was criminalized as a separate crime. In reality, these orders were difficult and expensive to obtain, as the petitioner was required to retain an attorney for the proceedings. Indeed, until 1981 a woman had to file for a

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<sup>42</sup> Women's Law Caucus, "Montana's New Domestic Abuse Statutes: A New Response to an Old Problem," *Montana Law Review*, vol. 47, pgs. 403-419 (1986).

<sup>43</sup> *Ibid.*

<sup>44</sup> Early temporary restraining orders were referred to as "temporary orders" or "temporary injunctions." They first appear in Montana law in 1975, MCA 48-318, section 18. The law was proposed in Senate Bill 5, a bill that sought to reshape Montana marriage and divorce laws in 1975.

divorce or separation to be eligible to file for a temporary restraining order.<sup>45</sup> In addition, a violation of an order could only result in civil contempt—not criminal—charges, and only if the victim pursued the issue. Finally, the language and location of the statute further complicated matters for individuals seeking temporary orders. Before 1985, the temporary restraining order law was part of the marriage and divorce statute, leading to confusion about who was eligible for what types of protection.<sup>46</sup>

### *The 1985 Legislation*

The 1985 legislature both reformed restraining order law and criminalized domestic violence. The 1985 temporary restraining order law accomplished several things. First, the new law broadened the qualifying relationships eligible for temporary restraining orders to include spouses, former spouses, people who are cohabitating together, and people who have cohabitated within one year of filing a petition for a restraining order.<sup>47</sup> This was a significant expansion over the previous law that only granted temporary restraining orders for spouses.<sup>48</sup> During the debate of the bill,<sup>49</sup> there was significant discussion over what types of relationships should qualify for temporary injunctions. Although the House Bill was initially more comprehensive than the final bill—it included in-law relationships—proponents were able to fend off attempts to exclude people who had cohabitated from the final list of qualifying

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<sup>45</sup> Women's Law Caucus, 1986.

<sup>46</sup> Hearings, House Bill 310, 1985.

<sup>47</sup> MCA 40-4-121(3)(b).

<sup>48</sup> Women's Law Caucus, 1986.

<sup>49</sup> House Bill 310, 1985.

relationships.<sup>50</sup> In addition, under the new law to qualify for a restraining order, an individual had to allege physical abuse, harm, or bodily injury.<sup>51</sup>

Second, the law made it possible for individuals to file for a temporary restraining order without first hiring an attorney and created fee-waiver forms for individuals who were unable to pay the filing fees and other costs.<sup>52</sup> Both of these changes dramatically increased the accessibility of restraining orders and were widely cited during the public comment period of the legislative debate on the bill as necessary reforms in Montana domestic violence law.<sup>53</sup>

To further increase access, the law also expanded jurisdiction of temporary injunctions to justices of the peace as well as to municipal and city judges, in addition to the district court judges who were the only judges with jurisdiction under the previous law. The issue of expanding jurisdiction was extremely controversial during the legislative debates. In the House of Representatives, concerns about one-sided testimony resulting in temporary restraining orders lead to the initial removal of this section from the bill.<sup>54</sup> In the Senate, several legislators were particularly concerned that this expansion of jurisdiction would enable women to use the legal system strategically during a divorce.<sup>55</sup> As a result, there are strong provisions in the law clarifying that the existence of a temporary injunction will not prejudice divorce settlements or custody disputes<sup>56</sup> and that all temporary injunctions are immediately appealable to a district court judge<sup>57</sup>.

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<sup>50</sup> House Judiciary Hearings on HB 310, February 5, 1985.

<sup>51</sup> MCA 40-4-121(3)(a).

<sup>52</sup> MCA 40-4-122.

<sup>53</sup> House Judiciary Hearings on HB 310, February 4, 1985.

<sup>54</sup> House Judiciary Hearings on HB 310, February 5, 1985.

<sup>55</sup> Senate Judiciary Hearings on HB 310, March 21, 1985.

<sup>56</sup> MCA 40-4-121(7)(a).

<sup>57</sup> MCA 40-4-124.

Finally, the 1985 revision of temporary orders also made violating a restraining order a criminal offense.<sup>58</sup> This was the first time in Montana law that violating a restraining order became an arrestable, and independently prosecutable, offense.

In addition to the debates discussed above, during the legislative debate on the 1985 restraining order law there were several interesting points on individual rights that warrant discussion. Perhaps the most pointed mention of individual rights came from the now defunct Women's Lobbyist Fund (WLF). In her written testimony presented to the House of Representatives, Gail Kline, a WLF representative, wrote:

What we must keep in mind is our State Constitution, Section 4, which says, '[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.'<sup>59</sup> HB 310 is needed to provide that dignity and equal protection for abused family or household members.<sup>59</sup>

In another reference to the Montana Constitution, another WLF representative, Kelly Chandler, testified before the Senate, stating:

You have heard the saying: a man's home is his castle. Should not a woman's home be her castle in which she is safe?  
By giving victims increased availability to [temporary restraining orders] through a Justice of the Peace and through enforcement of temporary restraining orders, we will not be sacrificing the abused victims' rights and will be consistent with our Montana Constitution, which states, 'The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.'<sup>60</sup>

The WLF is the only group that testified that Montana had a duty to protect domestic violence victims based on Article II, section four. Indeed, their analysis of article II, section four implies that both the dignity and equal protection guarantees require the state to intervene and protect victims of domestic violence.

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<sup>58</sup> MCA 40-4-121(7)(d); MCA 45-5-626.

<sup>59</sup> House Judiciary Committee, "Exhibit E", HB 310, February 4, 1985.

<sup>60</sup> Senate Judiciary Committee, "Exhibit No. 11", HB 310, March, 11, 1985.

Despite the WLF analysis, Montana legislators did not themselves address the constitutional rights of domestic violence victims in their debate of the temporary injunction bill. The only mention of rights by a legislator was about the rights of the individual against whom a temporary restraining order is obtained. Indeed, it was over concern for the rights of the potential respondent that the legislature almost did not allow expansion of jurisdiction to justices of the peace, municipal, and city judges—a key issue of access for domestic violence victims, especially for rural Montanans.<sup>61</sup> This concern also led to requiring the demonstration of immediate physical abuse—not the threat of abuse, even when coupled with previous physical abuse—to obtain a restraining order.<sup>62</sup>

Although it is necessary and important to ensure the due process rights of respondents are respected, many in the legislature—with its significant concern that women would seek temporary restraining orders to manipulate divorce settlements—seemed to ignore, or at a minimum under-appreciate, the very real danger domestic violence victims face. Their focus seemed to be almost exclusively on how to ensure women do not abuse the temporary restraining order process, rather than on how to best protect domestic violence victims while still ensuring respondents' due process rights. The debates indicate ignorance about the realities of domestic abuse, a deep skepticism about women who claim to be victims of abuse, and an underlying sympathy for men who many in the legislature believed were too often wrongly accused of abuse for strategic purposes.

In addition to reforming restraining orders, the 1985 legislature also created the specific crime of domestic violence. Although physical domestic violence could always be charged

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<sup>61</sup> Senate Judiciary Committee Hearing, HB 310, March, 19, 1985.

<sup>62</sup> Senate Judiciary Committee Hearing, HB 310, March, 21, 1985; MCA 40-4-121(3)(a).



under assault and battery laws, the creation of a separate crime defining and prohibiting domestic violence was a symbolic step for the government to take.

Called “domestic abuse,” the Montana legislature defined the crime as “(a) purposely or knowingly caus[ing] bodily injury to a family member or household member; or/ (b) purposely or knowingly caus[ing] reasonable apprehension of bodily injury in a family member or household member.”<sup>63</sup> The legislature further defined family or household member as “a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant.”<sup>64</sup> Thus, the definition of qualifying relationships for committing the crime of domestic abuse was slightly more expansive than the definition for restraining orders.

Finally, that same year the legislature also created maximum penalties for crime of domestic abuse. The first two offenses were misdemeanors, punishable by a fine up to \$500 and six months in jail. The third and subsequent offenses could be charged as felonies and were punishable by a fine up to \$50,000 and five years in prison. There were no mandatory minimum penalties.

In addition to the criminalization of domestic abuse, the legislature also passed a series of complementary laws governing the treatment of domestic violence victims and suspects.

Although the original bill called for a mandatory arrest policy<sup>65</sup>—and was in fact defined as a bill

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<sup>63</sup> MCA 45-5-206(1)(a)(b).

<sup>64</sup> MCA 45-5-206(2).

<sup>65</sup> “Section 5. Section 46-6-401, MCA, is amended to read: ‘46-6-401. Circumstances in which a peace officer may make arrests... (2) A peace officer shall arrest a person anywhere, including his place of residence, if the police officer has probable cause to believe the person is committing or has committed domestic abuse or aggravated assault against a family member or household member, even if the offense did not take place in the presence of the peace officer. A police officer may not issue a notice to appear in lieu of arrest under this new subsection.’” Introduced Bill, SB 449, February 19, 1985.

“requiring arrest in cases of domestic abuse”<sup>66</sup>—the legislature instead passed legislation stating that arrest was the preferred response in domestic violence situations involving victim injury, use or threatened use of a weapon, violating a restraining order, or other imminent danger to the victim.<sup>67</sup>

Although there was significant debate surrounding the removal of the mandatory arrest policy in domestic violence situations—the language was deleted, reinserted, and then finally deleted again—the decision was ultimately made in committee after the general debates concluded. The first mention of the mandatory arrest language was made by the American Civil Liberties Union (ACLU) in their public testimony before the Senate Judiciary Committee. They testified that while they were not categorically opposed to the mandatory arrest language in the bill, they were concerned about potential problems associated with requiring arrest. To remedy the issue, the ACLU suggested strengthening the probable cause language in the bill.<sup>68</sup>

The most vocal opposition to the mandatory arrest language came from the Sheriff and Police Officers Association. The organization opposed the bill primarily because of the mandatory arrest provision. In his testimony before the Senate Judiciary Committee on behalf of the organization, John Scully argued that a mandatory arrest provision might cause police to arrest both parties rather than arrest neither or instead of just arresting the predominant aggressor. He also expressed concern that failure to arrest the correct individual could also leave police officers vulnerable to liability.<sup>69</sup>

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<sup>66</sup> Introduced Bill, SB 449, February 19, 1985.

<sup>67</sup> MCA 46-6-601(2).

<sup>68</sup> Senate Judiciary Committee Hearing, Bill SB 449, February 22, 1985.

<sup>69</sup> Scully argued this despite the fact the original bill also gave police officers immunity for executing the mandatory arrest policy. “Section 2. Immunity. Any peace officer acting in good faith in making an arrest pursuant to 46-6-

These two testimonies critical of the mandatory arrest policy stand in vivid contrast to the numerous testimonies supporting the policy by domestic violence victims, women's rights groups, and even a County Attorney's Office. Victims emphasized that a mandatory arrest policy would both send the message to the abuser that his behavior was not acceptable and relieve the victim of having to press charges against her partner. According to domestic violence victims, the latter consequence presented two benefits. First, it would discourage the abuser from retaliating against the victim for his arrest because it was not her specific doing (i.e. it was the police officer's decision to arrest, not the victim's decision). Second, it would not force the victim to make the arrest decision in the middle of a traumatic and volatile situation, and instead allow her to focus on her (and her children's) safety.

Both the Women's Law Caucus and the Women's Legal Fund testified in favor of the mandatory arrest policy. The Women's Law Caucus argued that there was an unwarranted discrepancy in the criminal justice system in the treatment of domestic and stranger assault. They argued that the reluctance of the police to arrest and prosecutors to press charges—and the relatively minor punishments meted out when those two things did occur—signaled that domestic violence is not an important or serious crime. Thus, they argued that “[t]he law should not stop at the front door of the family home” because domestic abuse is a crime against the individual, community, and the state.<sup>70</sup> In contrast, the Women's Legal Fund used Lenore

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401(2) is immune from civil liability that might otherwise result by his action.” Introduced Bill, SB 449, February 19, 1985.

<sup>70</sup> Pfeifer, Amy, “Testimony before the Senate Judiciary Hearing,” Bill SB 449, February 22, 1985.

Walker's<sup>71</sup> “learned helplessness” theory to explain to the Senators why a mandatory arrest policy might be necessary.<sup>72</sup>

The following day the Committee met again to debate the bill and several proposed amendments. One amendment proposed deleting section two—the provision granting civil immunity to police officers who arrest individuals under the mandatory arrest provision—although there was no debate on the issue. Instead, the focus was on the mandatory arrest language in Senate Bill 449. Several of the senators thought that the mandatory arrest provision was problematic. The two dominant concerns surrounding the mandatory arrest language were that: 1) police would arrest both parties to protect themselves; and, 2) women would use the mandatory arrest provision strategically against their partners. At the end of the hearing, the senators voted to change the mandatory arrest language to permissible arrest.<sup>73</sup>

Before the House Judiciary Committee the bill sponsor presented Senate Bill 449 and stated that although the bill originally contained mandatory arrest language, it was removed by the Senate Judiciary Committee. The sponsor urged reinstatement of the language and highlighted Washington and Oregon, two states with mandatory arrest language in their domestic violence legislation.

Testimony before the House Judiciary Committee elicited multiple interesting and perennial critiques of domestic violence law. A domestic violence counselor, Marti Adrian, testified before the committee on behalf of her clients, who wanted the state to do something

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<sup>71</sup> Walker, Lenore, *The Battered Woman*, New York, Harper and Row, 1979.

<sup>72</sup> The testimony focuses exclusively on the perceived disempowerment that occurs to victims of domestic violence (i.e. learned helplessness). It was not until 1988 that Edward Gondolf and Ellen Fisher published their critique of Walker's theory, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness*. Lexington, Lexington Books, 1988.

<sup>73</sup> Senate Judiciary Committee Hearing, Bill SB 449, February 23, 1985.

with and for the batterer. The summary of her testimony highlights two important issues in domestic violence law. Her summarized testimony in support of the mandatory arrest language reads:

She said that men tend to treat women as property. She feels that society needs to take a close look at the sanctity of marriage and the right to privacy and further look at who those rights are working for and who they are working against. We need to deal with a women's right to privacy in her own home as well as the man's right to privacy in his home. We need to look at the right of the government to protect women when they are unable to do so. We need to further look at why women must leave their homes when they are victims of domestic abuse. She feels the state has a compelling need to bring suit in these instances. We need a directive law to compel law enforcement to take action in this regard.<sup>74</sup>

First, Ms. Adrian raises a prominent feminist critique about the structure and interpretation of constitutional rights as being biased toward men and the male experience.<sup>75</sup> Indeed, the constitutional right to privacy—either explicit or implicit—is often cited as the reason a state is unable to pass and enforce stronger domestic violence provisions. Second, Ms. Adrian highlights the problems facing victims of domestic violence who are forced to flee, leaving their property and lives behind, while the abuser is able to continue his life without interruption.

Amy Pfeifer of the Women's Law Caucus, a Montana Law School Association, testified more pointedly about the issue of the constitutional right to privacy. As part of her testimony, she wrote:

An individual's right to privacy in his home is no bar to the arrest of an assaulter. The right of individual privacy is a fundamental constitutional right expressly recognized in the Montana Constitution as essential to the well-being of a free society, but the constitutional guarantee is not absolute and it must be interpreted or construed and applied in light of other constitutional guarantees. It must yield to a compelling state interest which exists where the state enforces its criminal laws for the benefit and protection of other fundamental rights of its citizens...The state's compelling interest in enforcing it's (sic) assault laws justifies arresting an abuser in the home.<sup>76</sup>

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<sup>74</sup> House Judiciary Committee Hearing Bill SB 449, March 21, 1985.

<sup>75</sup> MacKinnon, Catharine A., *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989; Brown, Wendy, "Finding the Man in the State," *Feminist Studies*, vol. 18, no.1. pg. 7-34 (Spring 1992); Rhode, Deborah L., "Feminist Critical Theories," *Stanford Law Review*, vol. 42, no. 3, pgs. 617-638 (Feb 1990).

<sup>76</sup> House Judiciary Committee Hearing Bill SB 449, March 21, 1985.

Although she directly references the Montana Constitution and possible abuser's constitutional rights, she only hints at victim's constitutional rights. Indeed, in her analysis, the more important constitutional issue is the state's ability to limit the abuser's constitutional right to privacy. There is not a strong statement of a victim's constitutional rights to privacy, to enjoy his/her life and health, dignity, and to be free from discrimination.

In addition to these two testimonies, there were multiple other supporters for the reinsertion of the mandatory arrest provision. One supporter of the changed language was Ms. Cottingham of the ACLU. In her testimony, Ms. Cottingham stated that the ACLU supported the changed language and opposed the mandatory arrest language in the bill.

The following week, the House of Representatives Judiciary Committee reinserted mandatory arrest language. Several representatives objected. One representative offered three pointed critiques that resonate throughout the national mandatory arrest debate. Representative Addy first argued that the bill implies that the state knows better how to deal with an individual's situation than the individual does. Second, he argued that it would put pressure on the criminal justice system that the system was not designed to take. Finally, he argued that it removes discretion from the criminal justice system.<sup>77</sup> The mandatory arrest language was eventually removed, as was the corresponding immunity clause.

Although the mandatory arrest language dominated the legislative debates on Senate Bill 449, there was another significant change that is relevant for the *Massee* case discussed above. The bill required police to take certain procedural actions in domestic violence situations. First, police officers, if no arrest was made in a domestic violence situation, were required to file a

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<sup>77</sup> House Judiciary Committee Hearing, Bill SB 449, March 28, 1985.

written report explaining why.<sup>78</sup> Second, upon arresting an abuser, police officers were required to provide written information to domestic violence victims detailing their legal rights and options, as well as outlining available social services in the community.<sup>79</sup>

### The 1995 Reform

The 1995 legislature undertook a major overhaul of Montana's domestic violence laws with Senate Bill 278. I will first address restraining order law reform before discussing changes to the crime of domestic violence.

There were several important changes to the civil restraining order law by the 1995 legislature. Most obviously, the legislature changed the name of temporary injunctions to temporary orders of protection.<sup>80</sup> The rationale behind the name change was to more effectively communicate the purpose of the statute to the citizenry. At the same time, the legislature relocated orders of protection, removing it from the marriage and divorce statutes and placing it into its own section.<sup>81</sup> In addition to domestic violence orders of protection, renamed partner and family member assault in the bill, the bill also created protection orders specifically for sexual assault and stalking victims.<sup>82</sup>

In addition to relocating the orders of protection, the 1995 legislation also rewrote it, adding nine sections to the law. The revision was largely designed to simplify and clarify the

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<sup>78</sup> MCA 46-6-421.

<sup>79</sup> MCA 46-6-422.

<sup>80</sup> MCA 40-15-201.

<sup>81</sup> MCA 40-15-102 through 204.

<sup>82</sup> MCA 40-15-102(2).

existing law. In addition to adding a stated legislative purpose<sup>83</sup>, the law also specified eligibility for an order of protection<sup>84</sup> and detailed the requirements and remedies to obtain a temporary order of protection<sup>85</sup>. Senate Bill 728 also revamped the hearing component for an order of protection, prohibiting the court from granting mutual restraining orders without cause and allowing the respondent to request an emergency hearing before the standard twenty day hearing.<sup>86</sup> Additionally, the legislature clarified that temporary orders could be made for any requested amount of time and be terminated by the petitioner as well as that permanent orders of protection must be served on respondents if there were any amendments to the temporary order. Finally, the new sections detailed administrative and jurisdictional issues.

During the legislative hearings on the civil restraining order portion of the law, there were two notable points of contention discussed by House and Senate members. Although the public testimony was overwhelming for the majority of the aforementioned changes—domestic violence advocates and victims being well-represented among the witnesses—legislators raised two separate issues. First, in the House Judiciary Hearings, Representative Molnar proposed

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<sup>83</sup> “The purpose of [sections 21 through 29] is to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking.” Montana Session Laws 1995, Chapter 350, Section 21.

<sup>84</sup> There are two requirements for obtaining a domestic violence order of protection: 1) “the petitioner is in reasonable apprehension of bodily injury by” his/her “partner or family member” and 2) “the petitioner is a victim of one” of a list of offenses, “committed by a partner or family member.” The list includes assault, intimidation, partner or family member assault, criminal or negligent endangerment, unlawful restraint, kidnapping, and arson. Stalking and sexual assault victims are not required to demonstrate a qualifying relationship to receive an order of protection. Montana Session Laws 1995, Chapter 350, Section 22.

<sup>85</sup> Section 23 restated the requirement that a court must find that “the petitioner is in danger of harm if the court does not act immediately.” Additionally, the section listed the remedies available for a petitioner seeking an order of protection, including prohibiting the respondent from: future violence or threats of violence, harassment, removing a child from the court’s jurisdiction, coming within 1500 feet of the petitioner and designated locations, possessing or using a firearm *used in the assault*, and transferring or concealing assets. Orders can also transfer possession of the residence or other essential property to the petitioner, require the respondent to complete counseling, or providing other relief as deemed necessary. Temporary orders are effective for up to 20 days. Montana Session Laws 1995, Chapter 350, Section 23.

<sup>86</sup> Senate Bill 728, section 24, 1995.



changing the legislation to require criminal charges be filed if the victim wanted to seek a protection order as well as expressed confusion about the prohibition on mutual restraining orders. He argued requiring criminal charges would reduce recidivism. Other representatives disagreed, and, along with witnesses, explained the importance of both portions of the bill.<sup>87</sup>

More importantly, there was significant dissent among senators, in particular, regarding the initial version of the bill's prohibition on firearm possession or ownership for petitioners. The initial version of Senate Bill 278 would have allowed protection orders to prohibit the respondent from possessing or using any firearm. After much discussion, the legislation was changed to only allow the court to prohibit the respondent from possessing or using the firearm *used in the assault* against the petitioner. I will discuss the change in more detail in the discussion of the criminal law changes brought by Senate Bill 278, as that was the main thrust of the debate and the protection order was changed to comply with the criminal law language.<sup>88</sup>

Senate Bill 278 also altered the law governing violation of protection orders. In addition to rendering the legislation gender neutral—the legislature replaced “he” with “the person”—the Bill also clarified that only the respondent can be charged with violating the protection order and it increased existing penalties for violation.<sup>89</sup> During the testimony on these changes, there was

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<sup>87</sup> House Judiciary Committee, March 7, 1995 and March 9, 1995.

<sup>88</sup> The 1994 federal omnibus crime bill prohibited the possession of firearms by individuals subject to a domestic violence restraining order and people who had been convicted of domestic violence offenses, including misdemeanors. Although the crime legislation required an interstate component to the crime—i.e. the weapon was transported over state lines at some point after its manufacture—it would largely apply to firearm possession in Montana, unless an abuser had a firearm manufactured in Montana. There was no discussion of the existing federal law in the Montana legislative debate on the issue, or how the federal law would affect the Montana legislation.

<sup>89</sup> Senate Bill 278, Section 12, 1995.

no opposition raised, and domestic violence advocates strongly supported creating mandatory minimum penalties for second and subsequent offenses.<sup>90</sup>

From a criminal law perspective, the legislature made significant changes to the existing domestic violence law.<sup>91</sup> Most notably, the legislature changed the name of the crime from domestic abuse to partner or family member assault (PFMA).<sup>92</sup> The name of the law was changed to make domestic violence sound more like a crime.<sup>93</sup> It also expanded the scope of the criminal law, adding in-laws and co-parents to the list of qualifying relationships. Although there was debate about allowing same sex partners to qualify under the new PFMA, and a senator proposed an amendment to delete the opposite sex requirement, the amendment failed by a vote of three to eight. Surprisingly, there was almost no opposition raised to the senator's amendment<sup>94</sup>, despite the amendment's failure.<sup>95</sup> The bill also created mandatory minimum sentences for individuals convicted of PFMA as well as creating penalties for a second offense—there were already penalties for third and subsequent offenses.<sup>96</sup>

The final two changes to the legislation were fairly significant. First, and less controversial, the bill required that police officers notify domestic violence victims of their legal rights outside of the presence of the offender whenever the police responded to a domestic

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<sup>90</sup> Senate Judiciary Committee Debate, February 3, 1995.

<sup>91</sup> Senate Bill 278, Section 10, 1995.

<sup>92</sup> MCA 45-5-206.

<sup>93</sup> Senate Judiciary Committee Debate, February 3, 1995.

<sup>94</sup> The only opposition raised was by Chairman Crippen, who argued that removing the opposite sex requirement “goes way beyond the intent of the bill as originally drafted.” Senate Judiciary Committee, February 7, 1995.

<sup>95</sup> Senate Judiciary Committee, February 7, 1995.

<sup>96</sup> For the first offense, the minimum fine was \$100 and the maximum fine \$1000 and a minimum of twenty-four hours, but no more than one year, in jail. For the second offense, the fine would be no less than \$300 and no more than \$1000 and a sentence of no less than 72 hours, and no more than one year in jail. For the third and subsequent offenses, the sentence stayed the same, except the minimum jail term was increased from ten to thirty days. The maximum prison sentence remained 5 years, and the fine remained unchanged as a minimum of \$500 and a maximum of \$50,000.

violence call, regardless of whether or not an arrest is made. This differed from the previous requirement of notifying a victim of his/her rights only after an arrest. This change was an issue in the case discussed in the introduction, *Massee v. Thompson*, and will be discussed in more detail in the following section. In addition, the content of the required notification was also changed, rewording the information on custody, highlighting what protection a victim can obtain from a protection order, restitution options, and a list of agencies that can provide assistance to victims of domestic violence.

More controversial was the provision that permitted a court to prohibit an individual convicted or charged under the PFMA statute from possessing or using a firearm. Although there was little discussion during the initial Senate debate on February 3<sup>rd</sup>, before the February 7<sup>th</sup> debate several amendments were offered to alter the firearm language in the original bill. The amendments only permitted police officers to confiscate the firearm used in the assault and only allowed a court to ban the offender from possessing or using the firearm used in the assault.

Many senators were extremely concerned about the offender's second amendment rights if the police were able to confiscate and the court was able to prohibit firearm possession generally. The Department of Justice representative stated that despite the limited authority granted in the statute, under his interpretation the police would be able to confiscate whatever weapons were appropriate at the time of the arrest because the intent behind the law was to protect the victim. In response, the Chairman of the Senate Judiciary Committee, offered a fatalistic interpretation of domestic violence situations, arguing that it did not matter if the police confiscated all of the weapons in the home, if the offender was inclined to assault the victim again, there would be no way to keep the victim and family safe. Senator Baer joined in, arguing

that the state “can’t infringe upon someone’s constitutional rights from a prosecutorial standpoint because of [its] interest in protecting the victim.”<sup>97</sup> He continued, vowing the bill would be killed if the amendments were not passed. Although there was push back, including from Senator Al Bishop, who argued that it did not make sense to remove one weapon from the home but to allow the abuser to keep other weapons, the amendments were overwhelmingly adopted.

During the House Judiciary Committee hearing the following month, there was additional discussion over the firearm provisions. A representative from the Montana Sheriffs’ and Peace Officers’ Association supported permitting police officers to remove all weapons from the home in the case of a domestic violence assault. He argued that not allowing police officers to remove all of the weapons placed both responding officers and victims at great risk. Not all law enforcement agreed, however. A representative from the Montana Police Association supported the Senate version of the bill, with its changes.<sup>98</sup> The House Judiciary Committee passed the Senate version of the bill, and the bill, with its limited firearm provision, became law later that year.<sup>99</sup>

### Subsequent Changes

Since the major 1995 revision of Montana’s domestic violence laws, there have been relatively few changes. In 2003 the legislature changed the basis for arrest from the primary to

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<sup>97</sup> Senate Judiciary Committee, February 7, 1995.

<sup>98</sup> House Judiciary Committee, March 7, 1995.

<sup>99</sup> Although there was dissent among the legislators surrounding the different provisions in the bill, only one member of the committees expressed outright opposition to it. Representative McGee argued that the bill was unnecessary and that it was just a “feel-good” measure. He argued that the name should not be changed and that the entire piece of legislation was biased in favor of women. (House Judiciary Committee, March 9, 1995: 9).

the predominant aggressor.<sup>100</sup> The bill's sponsor, Representative Parker argued that the change was necessary because police officers would still frequently arrest both parties upon arriving at a domestic violence call, rather than the primary—or predominant—aggressor. Other witnesses testified that the previous language of primary aggressor lead police officers to believe they were supposed to arrest the individual who initiated the altercation, rather than the person who did the most damage.<sup>101</sup>

Two years later two bills aimed at reshaping domestic violence legislation failed, and the legislature passed minor changes to the counseling and punishment portions of the PFMA penalty legislation.<sup>102</sup> The two bills that failed, however, were much more significant than the one that passed. Senate Bill 283 would have accomplished two main things. First, it would have removed the heterosexuality requirement to have a qualifying relationship under the domestic violence statutes—both civil and criminal. Second, it would have made strangulation in the course of PFMA a felony. While there were many supporters from the domestic violence

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<sup>100</sup> MCA 46-6-311.

<sup>101</sup> House Committee of the Judiciary testimony on HB 456, February 10, 2003. In the Senate Committee on Judiciary testimony, one Senator in particular, Senator McGee, took issue with the term predominant, asking the sponsor if his intent was to require law enforcement to always arrest the man in a domestic violence situation. McGee was unhappy with the sponsor's response, and then read the definition of "predominant" aloud, stating that it was a person with "superior strength, influence, or authority." The senator then asked the sponsor "under what conditions a female would have the superior strength, influence, or authority" in a heterosexual relationship. The back and forth continued for several minutes, with McGee unable to fathom, despite the sponsor citing a specific example of a female abuser, how a woman would ever have superior strength, influence, or authority over a man. Other than the exchange between McGee and Parker, there was little dissent. The majority of the Senate Judiciary Committee hearing focused on clarification and explanation of the proposed change. One notable issue that came up was a clarification that the problem with dual arrest was an implementation problem at the law enforcement level—it was not an interpretation issue originating in the courts. (March 21, 2003: 11-12).

<sup>102</sup> MCA 45-5-206.

advocacy community, there was also significant opposition. The opponents were largely against including homosexual relationships in PFMA law.<sup>103</sup> The bill died in committee.

The second unsuccessful piece of domestic violence legislation from 2005 would have increased the penalties for PFMA.<sup>104</sup> During the House Judiciary Hearing there was significant testimony in favor of the bill, with no opponents testifying. During the debate portion of the hearing, the representatives expressed concern regarding prison capacity and how increasing minimum sentences would impact that issue.<sup>105</sup> In the Senate hearing, senators also expressed concern regarding prison capacity and the increase of mandatory minimum sentences.<sup>106</sup> House Bill 611 also died in committee.

### Court Challenges

While there have been some court challenges to the various domestic violence legislation, none have proved fatal. The civil protection order legislation has been largely unchallenged. The only notable challenge to the legislation occurred in 2011, when the Supreme Court reversed the trial court's decision that only a petitioner could request the termination of a restraining

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<sup>103</sup> The Montana Family Foundation testified against the entire bill, including the very existence of a domestic violence law. While their representative stated that the Foundation opposed domestic violence, domestic violence laws were "the epitome of a designer crime" and should presumably be dealt with under the assault laws. (Senate Judiciary Committee, January 31, 2005:4).

<sup>104</sup> House Bill 611, 2005. The bill would have increased the minimum penalties for the first offense to a \$250 fine (max fine remained at \$1000) and a jail sentence of 72 hours (maximum sentence remained at one year). Second offense would increase minimum penalties to a \$350 fine (maximum fine would remain \$1000) and a jail sentence of seven days (maximum sentence remained at one year). Third and subsequent offenses would maintain the same fine (\$500-\$50,000) and would increase the minimum jail sentence to 90 days (maximum sentence would remain five years).

<sup>105</sup> House Judiciary Committee Hearings, February 15, 2005.

<sup>106</sup> Senator McGee again jumped into the debate by noting the potential tension between a man and a woman in any kind of relationship and advocated for introducing a "human decency training" program into the process (March 22, 2005:8). Another Senator, Senator Laslovich proclaimed that he hated mandatory minimum sentences and argued that the judge must to have some discretion. He argued that the bill would just result in increased prison costs.

order.<sup>107</sup> The Supreme Court held that the trial court misinterpreted the protection order legislation and that either the petitioner or the respondent had the right to request the termination of a protection order.

The violation of a protection order legislation was challenged for vagueness in 2000.<sup>108</sup> The defendant in the case was accused of violating a protection order, stalking, and PFMA against his ex-girlfriend. The defendant argued that the violation of a protection order statute<sup>109</sup> was void for vagueness because it required demonstrating knowledge of the order but did not define how knowledge would be communicated. The Supreme Court held that the term ‘knowledge’ did not require a legislative definition as it had a commonly understood meaning.

Several cases have challenged aspects of the criminal PFMA statute, although no case has tried to strike the legislation down completely. Although most of the challenges were about the application of the facts to the law, two cases in particular provided important clarifications regarding the contours of the criminal PFMA statute in Montana. In *City of Missoula v. Dunn*<sup>110</sup>, the defendant sought to dismiss his PFMA charge, arguing the alleged victim in the case was not his partner and that the statute’s definition of partner was vague. The victim and the defendant had had a three year relationship that ended ten years before the alleged assault occurred. The Supreme Court disagreed with the defendant and upheld the charge, holding that the statute clearly included individuals currently and previously involved in intimate relationships. This was important as the Court upheld the plain meaning of the statute, and in so doing preserved additional protection to victims of domestic violence.

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<sup>107</sup> *Albrecht v. Albrecht*, 2011 MT 316.

<sup>108</sup> *State v. Baugatz*, 2000 MT 165N.

<sup>109</sup> MCA 45-5-626.

<sup>110</sup> 2008 MT 291N.

In *Baca v. State*<sup>111</sup>, the Supreme Court clarified the repeat offender requirements. Following an alleged altercation between Baca and his girlfriend, the state charged Baca with PFMA as a felony, based on its assertion that Baca had two prior PFMA convictions. Baca appealed, arguing he had only one prior PFMA conviction, one simple assault conviction that should not be considered a prior conviction under the PFMA statute. The Supreme Court agreed, holding that the state could not count the simple assault conviction as a prior conviction under the PFMA statute and that consequently, Baca could only be charged with a second offense under the PFMA statute, which was a misdemeanor. In this case, the Court upheld an important provision of the repeat offender law, while still preserving defendants' rights. This holding is potentially problematic for victims, however, as prosecutors will sometimes allow defendants to plead to non-PFMA crimes, thereby escaping repeat offender laws.

### Legislation Summary

The legislative histories of the civil and criminal domestic violence statutes are surprisingly uncontroversial in Montana. Although there was some disagreement during the legislative debates, primarily on mandatory arrest and weapons prohibitions laws, the legislature largely supported domestic violence reform, and the courts have overwhelmingly upheld and applied the law without dispute or disagreement. Despite the state's expansive constitutional rights, this has not translated into particularly innovative or unique domestic violence law, however. In addition, victims' constitutional rights have been largely overlooked by legislators, who either ignore their existence completely, or instead focus nearly exclusively on defendants'

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<sup>111</sup> 2008 MT 371.



and abusers' rights. Thus, it seems evident that merely having strong, horizontal constitutional rights is not alone sufficient to reshape legislators' understanding of the roles and responsibilities of the state vis-à-vis its citizens.

#### ***IV. Montana Case Law***

The most important case involving domestic violence in Montana is *Massee v. Thompson*. Although I outlined the facts in the introduction, the legal issues raised in the case warrant additional discussion. To briefly summarize, the case made it to the Montana Supreme Court on appeal after a lower court vacated a jury verdict awarding the Massee boys \$358,000 for the wrongful death of their mother. In some ways, the case is very simple—but it is that simplicity that marks its departure from other states' domestic violence civil lawsuits filed against law enforcement agencies and officials.<sup>112</sup>

The primary issue in the case was whether, by failing to comply with statutory obligations toward domestic violence victims, the Sheriff was liable for Vickie Doggett's death. Implicated in this analysis was whether or not the state statutes actually created mandatory obligations on the Sheriff, or if instead his actions fell entirely under the purview of his discretionary authority. Although Montana does not have a mandatory arrest law, it did have a

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<sup>112</sup> The defendants also made a technical argument about whether or not the Massee boys had properly appealed the legal issues that arose in the course of the case and the appeals. The issue stemmed from the difference between negligence *per se* and common law negligence, and which type of negligence was supported by the jury's verdict. "To establish negligence *per se*, a plaintiff must prove that 1) the defendant violated the particular statute; 2) the statute was enacted to protect a specific class of persons; 3) the plaintiff is a member of that class; 4) the plaintiff's injury is of the sort the statute was enacted to prevent; and 5) the statute was intended to regulate members of defendant's class... Common law negligence, on the other hand, is the failure to use the degree of care that an ordinarily prudent person would have used under the same circumstance. The four elements of a common law negligence claim are duty, a breach of that duty, causation and damages." (citations omitted 220).

preferred arrest statute, which would have governed all of the Doggett's domestic violence incidents.<sup>113</sup> In addition, as we saw above, Montana domestic violence law underwent significant revisions in 1995. The new laws required the Sheriff to notify Vickie of her rights every time the Sheriff or a deputy responded to a domestic violence call at the Doggett house.<sup>114</sup> Furthermore, in 1995 the legislature also enacted MCA 46-6-603, which required law enforcement personnel to seize any weapon used or threatened to be used in a domestic violence situation. The violence in the relationship initially began in 1991, although it did not begin in earnest until 1994, and the fatal encounter occurred in 1997. Thus, while the preferred arrest statute was valid for the entirety of the relationship, the victim notification and weapon seizure statutes were only in effect for the last two years.

To determine if Sheriff Thompson was negligent, and therefore liable for Vickie's death, the Court first had to determine if the public duty doctrine applied. The public duty doctrine holds that "a governmental entity cannot be held liable for an individual plaintiff's injury resulting from a governmental officer's breach of a duty owed to the general public rather than to the individual plaintiff."<sup>115</sup> The public official does owe a duty to an individual, however, if a special relationship is created between them.<sup>116</sup> Special relationships are created in one of several situations.<sup>117</sup>

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<sup>113</sup> The 1993 version of the statute, which governed the majority of the violent incidences between the Doggetts, read: "Arrest is the preferred response in domestic abuse cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim" (MCA 46-6-311).

<sup>114</sup> In the incidents that occurred before 1995, law enforcement was only required to notify domestic violence victims of their rights if an arrest occurred.

<sup>115</sup> *Massee*, 225.

<sup>116</sup> *Nelson v. Driscoll* (1999 MT 193) established the criteria for creating a special relationship in Montana. The case originated from a situation in which a police officer stopped the plaintiff and decedent for alleged erratic driving. Because of the weather conditions, the police officer did not think that it was safe to conduct field sobriety testing, and told them that they should not drive. While walking along the road's shoulder, the decedent was struck

The Massees argued that the domestic violence statutes created a special relationship between Sheriff Thompson and their mother. Sheriff Thompson did not contest that assertion and the district court agreed. Sheriff Thompson did argue, however, and the district court also agreed, that the facts presented at trial did not support the jury's verdict. The Montana Supreme Court, however, disagreed. Their conclusion is worth citing at length, as it draws a sharp contrast with other courts' decisions regarding the obligations of law enforcement personnel toward domestic violence victims. The Court wrote:

Throughout this Opinion, we have set forth significant testimony—from the Masee sons and other witnesses, and, most importantly, from the Sheriff and his deputies—that the Sheriff negligently failed to give notice to Vickie of her statutory rights, that he failed to confiscate Ray's gun, and that he failed to arrest Ray when he should have. There was also undisputed testimony from the Massees' experts that these failures were a substantial factor in bringing about Vickie's death. This being so, it was error for the District Court to conclude as a matter of law that, 1) violation of the mandatory notice statute could not support a verdict of negligence; 2) the mandatory "weapon seizure" statute did not apply to the December 1996 family member and domestic assault incident; and 3) because the "arrest" statute imposed no mandatory duties on the Sheriff, its violation could not support a verdict of negligence against the Sheriff. As we discussed above, a jury may base a finding of negligence upon evidence of violation of a statute, even if violation of the statute is not necessarily negligence *per se*.<sup>118</sup>

Thus, the Court overruled the district court's decision and reinstated the jury's verdict.

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and killed. The plaintiff bought a lawsuit, alleging the violation of the decedent's constitutional rights. The Montana Supreme Court held that after stopping the car and preventing the decedent from driving, the police officer assumed responsibility to protect the decedent and the plaintiff from harm, thereby creating a special relationship between the decedent and the officer.

<sup>117</sup> In *Nelson*, the Supreme Court outlined the four circumstances under which a special duty could be established: "1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; 2) when a government agent undertakes specific action to protect a person or property; 3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and 4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff" (*Massee* 225, quoting *Nelson* P22).

<sup>118</sup> *Massee*, 231. In contrast to the U.S. Supreme Court's holding in *Castle Rock v. Gonzales*, in which the majority ruled that Colorado's mandatory arrest law did not truly create a mandatory action, the *Massee* Court held that a preferred arrest statute could still support a negligence decision. While *Castle Rock* implicated federal constitutional rights and *Massee* is a state law negligence claim, the distinction in how the different state statutes are conceived, and indeed what requirements they were found to create for law enforcement, merits highlighting.

As a result of the state constitutional and statutory<sup>119</sup> provisions governing immunity, the baseline assumption in Montana law is that a government entity does not have immunity, unless explicitly granted statutory immunity by the legislature. Although the public duty doctrine does potentially provide common law immunity to government personnel<sup>120</sup>, based on their analysis in *Masse*, the Montana Supreme Court has taken a liberal interpretation of the “special relationship” exception to that immunity, holding that statutes can and do create obligations between law enforcement personnel and legislatively designated vulnerable individuals. Despite the general presumption against immunity in Montana, as discussed earlier, specific statutes do provide some officials with immunity from lawsuit.<sup>121</sup> Thus, in any lawsuit brought by a private citizen against a governmental officer or entity, the initial issue is whether or not the legislature has specifically granted immunity or if the public duty doctrine applies to the defendant. If the defendant does not have statutory or judicial immunity, then the issue of liability is generally one for trial. Just because a defendant is denied immunity, however, does not mean they are liable

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<sup>119</sup> The general statutory statement on immunity was enacted in 1973. MCA 2-9-102 states, “Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, section 18, of The Constitution of the State of Montana.” Although the legislature has singled out specific professions and situations for immunity, they have not granted blanket immunity to law enforcement personnel.

<sup>120</sup> In a concurrence and dissent written by Justice James Nelson in the *Masse* opinion, Justice Nelson argues that the public duty doctrine has no role in Montana law as it violates the constitutional elimination of immunity without explicit legislative action, and should be abolished.

<sup>121</sup> See, for example, *Emanuel v. Great Falls School District*, 2009 MT 185, where a school principal was found to have statutory immunity from suit following an incident where a student made a New Year’s Resolution list stating he wanted to get a driver’s license so that he could do horrible things to people. The principal and the student’s parents met, and they decided the list was a bad joke. Seventeen months later, the student ran over a jogger. The jogger sued the school district, and later tried to amend her complaint to include the principal, for negligence. See also *Eklund v. Trost*, 2006 MT 333, where a youth ran away from a detention center and during the resultant high speed chase with the police stuck Donald Eklund. Eklund sued the probation officer for negligence for transferring the youth to the unsecured wing of the detention center.

for the damages alleged by the plaintiff, it just means that the plaintiff will be able to present his/her case to the court.<sup>122</sup>

## ***V. Conclusion***

Montana is an outlier in U.S.—both state and federal—case studies. Although originally the horizontal sex equality provision seemed as if it held the greatest amount of promise for structuring state responses to domestic violence fundamentally differently than other states and the federal system, it has not been used to challenge orthodox approaches to intimate violence. Indeed, it has not really been used at all to its full potential. This anomaly—the existence of a fundamentally different conception of how to organize the relationship between the state and its citizens—demonstrates that merely having constitutional provisions does not ensure dramatic change. This change must be accompanied by a legal culture that is ready to push for, and implement, this new structure. Although the constitutional convention was attempting to alter the status quo, they were swimming upstream against an American legal system that rigidly structures the state-citizen relationship in a way to reinforce the public-private divide first codified centuries ago.

Surprisingly, the constitutional provision that has had the biggest impact on state domestic violence policy was the elimination of immunity. This provision enabled the Masee boys to sue the county and sheriff for negligently handling their mother's domestic violence

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<sup>122</sup> See, for example, *Eklund v. Trost*, *Prindel v. Ravalli County* (2006 MT 62), *Latray v. City of Havre* (2000 MT 119) where the Supreme Court held that liability must be decided by a jury. For cases where liability was a question for the jury, and the defendants were found to not be liable, see *Gonzales v. City of Bozeman* (2009 MT 277), *Phillips v. City of Billings* (233 Mont. 249 (1988)), and *Emanuel v. Great Falls School District*.

situation and ignoring state statutory obligations toward domestic violence victims. As a result, law enforcement entities were put on notice that ignoring state statutes could result in liability for tragic domestic violence outcomes. Thus, officers and their government employers have increased incentives to follow statutory provisions dictating how to intervene in domestic violence situations. This holding stands in stark contrast to other court decisions, for example the *Barillari*<sup>123</sup> case in Wisconsin and the *Duong*<sup>124</sup> case in Colorado, where state courts held that victims of domestic violence were unable to sue localities and law enforcement personnel for haphazard and ineffective intervention in domestic violence situations.

Thus, two important conclusions can be drawn from the Montana case study. First, given the current legal culture in the United States, it is not sufficient to simply have new or different constitutional provisions. Constitutions, while strongly influencing the thinkability of various legal approaches, do not dictate specific outcomes. Cultural inertia, combined with strong statements from the federal Supreme Court on the structure and nature of U.S. law, make it difficult to fundamentally alter the nature of U.S. law, even individual state law, without an accompanying movement that helps change the understanding of the structure and relationship of law, the state, and its citizens. This underlying cultural movement, in conjunction with constitutional structure, is what enables changing the thinkability of different legal options.

Second, eliminating immunity could hold the short-term answer for domestic violence advocates who are attempting to put pressure on localities, law enforcement agencies, and their personnel to address domestic violence differently, with greater consistency, and with a better appreciation of the danger and volatility of domestic violence situations. Although much focus

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<sup>123</sup> *Barillari v. Milwaukee* 186 Wis. 2d 415 (1994).

<sup>124</sup> *Duong v. County of Arapahoe*, 837 P.2d 226 (1992).

has been on changing domestic violence legislation—increasing penalties, having repeat offender legislation, mandatory arrest and notification laws, and removing discretion from judges by creating mandatory minimum punishments—a potentially more effective way to affect change is to make law enforcement officers, agencies, and localities subject to lawsuits for negligence. As we will see during the brief window of successful federal equal protection lawsuits discussed in chapter six, and as we saw with *Massee*, exposing these entities to liability is perhaps the greatest motivation for implementing effective and consistent domestic violence policy. Thus, domestic violence advocates should consider attacking this fundamental legal issue—immunity—rather than simply focusing on explicit domestic violence law.

*Appendix*

**Table 1: Civil Restraining Orders Legislation**

|                                   | <b>1985</b>  | <b>1995</b>  |
|-----------------------------------|--|--|
| <b>Name</b>                       | Temporary injunctions  | Temporary orders of protection   |
| <b>Qualifying relationships</b>   | Spouses, former spouses, cohabitants, people who have cohabitated within one year of filing a restraining order  | Partner (spouses, former spouses, co-parents, current or former dating relationship of the opposite sex)<br>Family member (parents, siblings, past or present members of a household, regardless of adoption or remarriage, including stepchildren, stepparents, and in-laws)  |
| <b>Qualifying actions</b>         | Physical abuse, harm, or bodily injury   | Petitioner is in reasonable apprehension of bodily injury or is a victim of assault, intimidation, domestic abuse, criminal or negligent endangerment, unlawful restraint, kidnapping, and arson   |
| <b>Types of orders</b>            | Orders to stop domestic abuse  | Orders to stop domestic violence, sexual assault, and stalking   |
| <b>Possible injunctive relief</b> | Stop the abuse; leave the family home; avoid petitioner's residence, the petitioner, or any children; refrain from removing a child from the court's jurisdiction; other appropriate injunctive relief | Prohibit violence or threats of violence, harassment, removing a child from the court's jurisdiction, coming within 1500 feet of the petitioner and designated locations, possessing or using a firearm used in the assault, transferring or concealing assets, transfer a residence, require the respondent to complete counseling, other appropriate injunctive relief |

**Table 2: Criminal Domestic Violence Legislation**

|                                 | <b>1985</b>   | <b>1995</b>   |
|---------------------------------|---|---|
| <b>Name</b>                     | Domestic abuse  | Partner and Family Member Assault   |
| <b>Qualifying relationships</b> | Spouse, former spouse, adult person related by blood or marriage, adult person in a heterosexual relationship who lives with or has lived with the abuser | Partner (spouses, former spouses, co-parents, current or former dating relationship of the opposite sex)<br>Family member (parents, siblings, past or present members of a household, regardless of adoption or remarriage, including stepchildren, stepparents, and in-laws) |
| <b>Qualifying actions</b>       | Bodily injury or causing reasonable fear of bodily injury   | Bodily injury or causing reasonable apprehension of bodily injury; negligently causing bodily injury with a weapon  |



## Chapter 5

### The U.S. Federal System: The Violence Against Women Act and United States v. Morrison

#### ***I. Introduction***

The previous three chapters have demonstrated the problems associated with addressing domestic violence at the state level. State constitutional protections are largely interpreted through a federal lens (which will be addressed in this and the following chapter) and therefore do not provide any meaningful protection from private violence. Put another way, the public-private divide established at the federal level trickles down to the states, overriding attempts to restructure state configurations of the public and private spheres. Thus, even though a state might offer additional constitutional or statutory protections, those rights are interpreted through the federal prism that establishes a barrier to state entry into the private sphere. As a result, it is not thinkable to interpret constitutional provisions in a manner that would fundamentally reconstruct, or alter, legal rights at the state level. Although there were nuanced differences in the approaches each state took in their domestic violence legislation, those differences did not fundamentally alter a victim's ability to invoke the state to obtain protection, or to hold the state accountable when that protection failed. While Montana does allow accountability for failed state intervention, success is achieved through the lack of sovereign and qualified immunity. Success is not due to increased legal protections from legislation or the constitution, despite the fact that the Montanan constitution does theoretically provide additional rights and protections to its citizens. This chapter continues the U.S. analysis by exploring the federal legislation

addressing domestic violence, the Violence Against Women Act (VAWA) of 1994, before delving into federal fourteenth amendment case law in the following chapter.

Introduced in 1990, VAWA faced significant challenges to passage, due primarily, although not exclusively, to the creation of a civil rights remedy that created a federal civil cause of action for victims of private gender-based violence. After several years of revision and debate, VAWA eventually passed the legislature as part of the 1994 omnibus crime bill. Although the majority of the Act has been upheld after multiple court challenges, in 2000 the U.S. Supreme Court held that the civil rights remedy was unconstitutional in *United States v. Morrison*<sup>1</sup>. Although there was briefly an attempt to revive the civil rights remedy in Congress after *Morrison*, it was unsuccessful. As a result, the *Morrison* decision was the death knell to a controversial piece of legislation that tried to fashion an unconventional approach (at least in the United States) to gender-based violence.

The Act is the primary piece of federal legislation dealing with various types of gender-motivated violence, including domestic violence, in the United States. An analysis of the legislation and subsequent court challenges provide important insights into the role the constitution plays in shaping the federal response to domestic violence, as VAWA is the main affirmative approach the federal government has taken to address gender-motivated violence. In the inception and debate of VAWA, the proponents and opponents of the bill invoked important concepts, such as civil rights and federalism, that had significant constitutional implications. These central constitutional issues were further developed during the court challenges, as different federal judges revealed their fundamental understanding of the constitution, the public-

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<sup>1</sup> 529 U.S. 598 (2000).

private divide, and the role of the government through the process of trying to address, at a national level, an issue that has traditionally been completely under the purview of state and local authorities. These legislative debates and subsequent court decisions highlight the crucial role that thinkability plays in constitutional interpretation, as reasonable and well-meaning legislators and judges found themselves on opposite sides of the civil rights-federalism dispute.

Through analyzing the history of the first<sup>2</sup> VAWA, in this chapter I show how the U.S. federal constitution, while allowing for some action on domestic violence at the national level, is a significant impediment to federal involvement in the effort to combat private gendered violence. Importantly, through analyzing the debates leading up to VAWA and the subsequent court challenges I show that this is not because the constitution itself precludes action, but instead because content gaps, structural issues, and interpretative choices, when combined, make action on issues of private gendered violence more difficult. From a content perspective, the absence of specific rights creates challenges for action. At the most basic level, the U.S. federal constitution does not have any sex or gender equality guarantees in the constitution. As a result, it makes it more difficult—although not impossible—to address gender-specific problems at the national level. In addition, the federal constitution also lacks specific individual rights, such as the right to bodily integrity or the right to be free from assault, that could strengthen victims' claims and increase the obligation on the government to provide some assistance with personal security.

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<sup>2</sup> Although first passed in 1994, the Violence Against Women Act must be periodically reauthorized to continue spending appropriations. Overall, there have been three versions of VAWA that have become law in the United States: in 1994, 2000, and 2005. In addition to reauthorizing spending provisions, each new law builds upon previous iterations, including adding new programs and laws to the Act. Most recently there has been a conflict over the 2012 bill, with disparate versions passing in the House of Representatives and the Senate. In particular, Congress cannot agree on specific provisions in the bill involving gay and lesbian, immigrant, and Native American communities. After much conflict and debate, the Act was reauthorized in February 2013.

From a structural perspective, there are two principal issues presented in the constitution making action on private violence more difficult. At the most basic level, Congress' lack of broad legislative authority makes it more difficult to pass laws on a variety of subjects. In addition to legislative authority, the manner in which the existing rights are structured plays a crucial role in constructing how both the legal and lay community think about the role of government. Strongly vertical in their orientation, the rights provisions contained in the federal constitution shape and reinforce the existing public-private divide. This divide is one that significantly limits the ability of the government to remedy private wrongs by jealously guarding the private sphere as a zone of limited government interference. Both of these structural features combine to play prominently in the VAWA debates and court decisions, as they influence the understanding of the proper role of the federal government. Thus, as I will demonstrate, to overcome the inclination towards federalism, violence against women advocates framed the subject as a civil rights issue. If violence against women is a civil rights issue, Congress has the authority to intervene; if it is not, however, federalism concerns become far more powerful and Congress has no authority to act, thereby leaving the states to address violence against women on their own.

Finally, the constitution's age and vagueness is the last impediment to government intervention in private gendered violence. This final factor has allowed specific worldviews to become entrenched in the jurisprudence and common interpretations of the constitution that are not necessarily dictated by the text itself. Thus, absent any concrete requirement to the contrary, the popular understandings of the role of government and the proper public-private divide continue to govern, despite attempts at reformulation. Taken together, the combination of these

three issues create a situation in which innovation and the expansion of constitutional concepts or rights is difficult. As a result, what I dub the thinkability of different legal interpretations, rather than concrete constitutional requirements, increasingly determines the outcome of various pieces of legislation and case law.

In this chapter I demonstrate the role thinkability plays in constitutional analysis through exploring VAWA. In section two I provide an overview of the legislation, looking briefly at the legislation generally, but focusing most of my analysis on the federal civil rights remedy it created. I focus more on the federal civil rights remedy not only because that was the most controversial aspect of the law, but also because it is the only part that has been overturned by the Supreme Court. In section three I look at VAWA's court challenges. This section will briefly include challenges to different parts of the law that were upheld, but will primarily focus on *United States v. Morrison*. Analyzing *Morrison* allows me to delve into how the constitution is used to prevent significant change in U.S. gendered private violence law and demonstrate that the constitution itself does not require the outcome. I conclude the chapter with a brief summary to highlight how the different constitutional components influence and determine the ability of the U.S. federal government to address domestic violence.

## *II. Legislation*

### *The Violence Against Women Act*

VAWA was first introduced in the Senate on June 19, 1990 by then Senator Biden.<sup>3</sup> The bill had three major titles when introduced: title I dealt with the prosecution, policing, and sentencing of sex crimes; title II addressed domestic violence and created a new federal criminal offense for interstate domestic violence; and, title III created the federal civil rights remedy for victims of gender-motivated violence. Over the following four and a half years there were a total of fourteen different versions of the bill.<sup>4</sup> Instrumental to its final passage, however, was the 1993 compromise struck by Senators Joe Biden and Orrin Hatch. The compromise bill maintained the core of the original bill, but also included several titles from previous Congresses in addition to titles from Hatch's rival bill<sup>5, 6</sup>. As a result of this compromise<sup>7</sup>, VAWA was eventually passed as part of the 1994 omnibus crime bill<sup>8</sup> with seven subtitles<sup>9, 10</sup>. Thus, while

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<sup>3</sup> S. 2754.

<sup>4</sup> Nourse, Victoria, "Where Violence, Relationship and Equality Meet: The Violence Against Women Act's Civil Rights Remedy," *Wisconsin Women's Law Journal*, vol.11 no. 1, pgs. 1-36, (1996). For a detailed look at the legislative history of VAWA, see Nourse 1996 and Victoria Nourse, "The Violence Against Women Act: A Legislative History," in *Violence Against Women: Law and Litigation*, edited by David Frazee, Ann M. Noel, and Andrea Brenneke, pgs. 5-1 – 5-50. Minnesota, West Group Publishing, 1998.

<sup>5</sup> Hatch introduced his bill Jan 21, 1993, the same day Biden reintroduced VAWA for the third time. Hatch's bill, S.6 addressed sexual violence, child abuse, and victim's rights. Nourse, 1998.

<sup>6</sup> Nourse 1996, 1998.

<sup>7</sup> Victoria Nourse, at the time the special counsel to the Senate Judiciary Committee, argues that the bill's passage was in no small part due to two important events that occurred in the early 1990s: Anita Hill's 1992 allegations of sexual harassment against Clarence Thomas in his confirmation hearings for the Supreme Court and the 1994 arrest and subsequent trial of O.J. Simpson for the alleged murder of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. These two events catapulted issues of sex discrimination and violence against women into the headlines, bringing much needed public awareness to the issues facing women in the United States. (1996, 1998)

<sup>8</sup> The Violence Against Women Act was Title IV of the Violence Crime Control and Law Enforcement Act of 1994, Public Law No. 103-322. The bill was signed into law by President Bill Clinton on September 14, 1994.

<sup>9</sup> The seven subtitles include: Safe Streets for Women; Safe Homes for Women; Civil Rights for Women; Equal Justice for Women in the Courts Act; Violence Against Women Act Improvements; National Stalker and Domestic Violence Reduction; and Protections for Battered Immigrant Women and Children.

<sup>10</sup> Nourse, 1996.

each state has its own state criminal and civil law regarding domestic violence, VAWA forms the core of the federal response to the problem.

The Violence Against Women Act of 1994 was a far-reaching piece of legislation that accomplished multiple things through a combination of spending and the creation of civil remedies and criminal penalties for violence against women. Perhaps most notably, the Act increased federal criminal penalties for sex crimes, added rape shield laws to the federal rules of evidence, created grants to help law enforcement and prosecutors deal with violent crimes against women, provided for the interstate enforcement of protection orders, criminalized interstate domestic violence, encouraged mandatory arrest policies in domestic violence cases, provided grants for shelters and the creation of a national domestic abuse hotline, created a federal civil rights remedy for gender-motivated violence, created grants for judicial training in state and federal courts, and provided some protection for immigrant women and children who were victims of domestic violence. Finally, although not contained in VAWA itself, the omnibus crime bill also prohibited the transfer of firearms to, or the possession of firearms by, individuals who have been convicted of domestic violence offenses.<sup>11</sup> See table one in the appendix of this chapter for a side by side comparison of the initial and final versions of the 1994 Violence Against Women Act.

### *Title III—The Civil Rights Remedy for Women*

Although much of VAWA was relatively uncontroversial, Title III of VAWA, later codified as section 13981, Civil Rights for Women, was contentious. Indeed, it is the only

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<sup>11</sup> Title XI: Firearms—Subtitle D: Domestic Violence.

section of VAWA that has been overturned by the U.S. Supreme Court. Before discussing the court challenges to the section, however, it is important to understand its content, as well as the controversy surrounding the civil rights remedy and the arguments—constitutionally and policy based—presented for and against the measure.

The civil rights remedy developed significantly over the four years before it was enacted. In the first VAWA bill, the civil rights remedy contained four subsections. The first two subsections established the need for a civil rights remedy. Subsection one listed three legislative findings. Included was the finding that gender-motivated crime was a bias crime that violated a victims' right to equal protection and her privileges and immunities<sup>12</sup> under the laws, as well as “the victim's right to be free from discrimination on the basis of gender.”<sup>13</sup> The findings also asserted that although there was a civil rights remedy for gender-motivated crimes that occurred in the workplace, there was no remedy for similar crimes occurring on the streets or in the home and that state and federal criminal laws do not adequately protect against gender-motivated bias crimes.<sup>14</sup> Subsection two affirmatively created a right to be free from gender-based violence. It read, “[a]ll persons within the United States shall have the same rights, privileges and immunities in every State as is enjoyed by all other persons to be free from crimes of violence motivated by the victim's gender.”<sup>15</sup>

The final two subsections actually created and defined the remedy. The cause of action heavily borrowed from existing civil rights statutes, with a couple important differences. It read,

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<sup>12</sup> Section one of the fourteenth amendment reads, in part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...”

<sup>13</sup> S. 2754, Title III—Civil Rights, Sec. 301(a)(1).

<sup>14</sup> S. 2754, Title III—Civil Rights, Sec. 301(a)(2)-(3).

<sup>15</sup> S. 2754, Title III—Civil Rights, Sec. 301(b).



[a]ny person, including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State, who deprives another of the rights, privileges or immunities secured by the Constitution and laws as enumerated in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages.<sup>16</sup>

There are two important features of this cause of action. Most notably, the subsection creates a cause of action for private rights violations. Although this approach was not unprecedented in U.S. civil rights law<sup>17</sup>, it was not standard by any means—most civil rights law requires some type of state action<sup>18</sup>. The civil rights remedy purposefully included private action, thereby providing victims of gender-based violence with a self-help provision to liberate them from the biases in and ineffectiveness of criminal law and the legal impediments in state civil law. This would allow women to directly sue their attackers in federal court, rather than have to use problematic state tort law or depend upon a biased criminal justice system to receive justice.

In addition, the proposed subsection cites to a citizen's privileges and immunities, a fourteenth amendment clause that has been largely abandoned in U.S. jurisprudence since the infamous *Slaughter-House Cases*.<sup>19</sup> The abandonment of the Privileges and Immunities Clause

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<sup>16</sup> S. 2754, Title III—Civil Rights, Sec. 301(c).

<sup>17</sup> Although many civil rights laws provide a remedy for actions taken “under color of state law,” some do provide remedies for private action. Following the Civil War, Congress enacted several statutes that included a civil rights remedy for private violations of an individual's rights. See, for example, the Civil Rights Act of 1870, which prohibited racial discrimination in public and private employment contracts; the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, which prohibited conspiracies to deprive individuals of their constitutional rights; and, the Civil Rights Act of 1875, which prohibited racial discrimination in places of public accommodation, like restaurants, public transportation, theaters, etc. While part of the Civil Rights Act of 1875 was invalidated by the Supreme Court in *The Civil Rights Cases*, 109 U.S. 3 (1883), Sections 1982 and 1985(c), created in the Civil Rights Acts of 1870 and 1871, respectively, have maintained a remedy for private violations of rights.

<sup>18</sup> State action is, at its most basic, “anything done by a government.” *Blacks Law Dictionary*, 8<sup>th</sup> ed.. Thompson-West Publishing, 2004. Modern state action has been expanded to include the public function doctrine, state coercion, and intractable state entanglement in private affairs. The general idea behind the state action doctrine is that a state actor has to either do the action that is being complained about, or somehow be instrumental in the action, for a constitutional violation to have occurred. Otherwise, if the offense was carried out by a private actor, there is no constitutional violation under U.S. law.

<sup>19</sup> The *Slaughter-House Cases*, 83 U.S. 36 (1873) were three cases that were combined to challenge a Louisiana law regulating slaughtering in New Orleans. The statute outlawed slaughtering within the city and granted one company the sole rights to slaughter. New Orleans butchers challenged the statute under the thirteenth and fourteenth

is U.S. jurisprudence is unfortunate as it eliminates one of the few potentially useful constitutional clauses that could be used to secure additional individual rights. This reference to and reliance on the Privileges and Immunities Clause was replaced in the final version, following testimony of constitutional law experts before the Senate Judiciary Committee that more effective constitutional language should be invoked.<sup>20</sup>

The final subsection of the first version of the civil rights remedy defined a gender-motivated crime as “any rape, sexual assault, or abusive sexual contact motivated by gender-based animus.”<sup>21</sup> By specifically mentioning only sex crimes, the civil rights remedy seemed to omit other gender-motivated crimes such as domestic violence. As a result, if passed, the remedy could have been interpreted to exclude a wide variety of violent discrimination women face in their everyday lives. Confirming this intention, in his testimony before the House Judiciary Committee, Senator Biden stated that domestic violence cases would be difficult to qualify under the federal civil rights cause of action. In cases where an assault occurs

between a husband and a wife, it would be very hard for that woman to prove that the reason she was battered was merely because she was a woman—as opposed to her being battered because she was the wife of, she had a relationship with, they had arguments about, they had disagreements of, it related to power within the family and so on.<sup>22</sup>

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amendments. The state Supreme Court upheld the law and the butchers appealed to the United States Supreme Court. The U.S. Supreme Court affirmed the state court’s ruling, holding that under its police power, the state had the exclusive right to regulate animal slaughtering. With regards to privileges and immunities, the Court held that the clause applied only to federal rights of citizenship, not state rights of citizenship. This interpretation of privileges and immunities omits civil rights from the purview of the clause. Recently, a case originating in Illinois, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) argued that city ordinances prohibiting the possession of handguns by private citizens violated the second amendment. The petitioner argued, among other things, that the Privileges and Immunities Clause of the fourteenth amendment applied the second amendment to the States. In the plurality opinion, the Supreme Court declined to overrule the *Slaughter-House Cases* holding and to instead use the due process clause to invalidate the Chicago ordinance. As a result, the Privileges and Immunity Clause remains largely impotent in U.S. law.

<sup>20</sup> See Cass Sunstein, Written and Oral Testimony before the Senate Judiciary Committee Hearing on Violence Against Women, April 9, 1991.

<sup>21</sup> S. 2754, Title III—Civil Rights, Sec. 301(d).

<sup>22</sup> Hearing before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, House of Representatives, 102d Congress, 2d Sess, February 6, 1992.

It is important to note that Biden, despite his ability to see violence against women as discrimination, seems to not understand—despite actually spelling it out in his statement—that domestic violence is ultimately about power and respect in the household. Fortunately, this definition of gender-motivated crime was dramatically altered and expanded in the final version of the bill to allow for a broader experience of gender-based violence to qualify under the remedy.<sup>23</sup>

Despite the controversies surrounding the civil rights remedy, the final version remained largely true to its original purpose. Most of the changes to the civil rights remedy occurred in Senate Judiciary Committee negotiations and compromises, most notably the 1993 Biden-Hatch compromise. The 1993 compromise produced the final substantive changes to Title III. The modifications included procedural changes, the narrowing of the definitions of a crime of violence, and the definition of gender-motivation. The procedural changes clearly responded to the concerns raised by state and federal judges during the debates. These changes included making explicit the concurrent jurisdiction of federal and state courts, limiting the ability of defendants to move state court claims to federal courts, and the explicit prohibition of federal jurisdiction over family law claims. The definition of the crime of violence that would qualify under the civil rights remedy was narrowed to include only felonies that posed a physical risk to the victim, but purposely severed the acts from the relationship to try to avoid the extant problem

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<sup>23</sup> The first case involving the federal civil rights remedy was a domestic violence case. See my discussion of *Doe v. Doe* 929 F. Supp. 608 (Conn. 1996), in section three of this chapter.

of downgrading crimes involving women.<sup>24</sup> Finally, the compromise bill established that to qualify for a civil rights claim under the law, the requisite motivation underlying an attack had to be a crime motivated by gender “animus”.

The final version of the civil rights remedy was organized into three main subtitles. First, in outlining its purpose, Congress asserted that it had the authority to create the civil rights cause of action under the fourteenth amendment and the Commerce Clause. It then defined the purpose of the subtitle “to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.”<sup>25</sup> Second, it declared that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.”<sup>26</sup> Finally, Congress created the cause of action:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.<sup>27</sup>

The cause of action is similar to the original remedy proposed, including permitting lawsuits emanating from private and state action.

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<sup>24</sup> Congress was trying to address the problem of violent crimes committed against women being downgraded because of the relationship between the victim and the assailant. This most often arises in the domestic violence situation where domestic abuse incidents would be charged as misdemeanors, but the same act committed against a stranger would be charged as a felony.

<sup>25</sup> Sec 40302(a).

<sup>26</sup> Sec 40302(b).

<sup>27</sup> Sec 40302(c).

This version passed both houses of the Congress in August 1994 and was signed into law by President Bill Clinton in September 1994.<sup>28</sup> It was quickly used and challenged in courts across the country. Before discussing the court challenges, we must first review the debates surrounding VAWA generally and the civil rights remedy specifically. See table two in the appendix for a side by side comparison of the original and final versions of the federal civil rights remedy contained in the Violence Against Women Act of 1994.

### The Debate

Although the majority of the bill was a fairly standard approach to violence against women, largely building off the previous two decades of women's legal progress, the civil rights remedy was unprecedented as applied to gender.<sup>29</sup> As a result, while there was some controversy surrounding the criminal portions of the bill, there was significant dissention regarding the civil rights remedy. Although there were multiple hearings in both the House and the Senate, there were two hearings that primarily dealt with the bill's constitutional questions. The first occurred in the Senate Judiciary Committee in April 1991 and the second occurred in the House Judiciary Committee in November 1993.

### *Opposition*

Opponents raised two important arguments against VAWA's civil rights remedy. First, there was some, though very little, concern that Congress did not have the authority to enact the

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<sup>28</sup> The House passed the conference report 235-195 on August 21, 1994. The Senate passed it 61-38 on August 24, 1994. Clinton signed the law September 13, 1994. (Nourse 1996).

<sup>29</sup> Nourse, 1998.

legislation. Most prominently, Bruce Fein, a former associate deputy attorney general in the Reagan administration, argued that the civil rights remedy was borderline unconstitutional. He also argued that it was bad policy<sup>30</sup> because it would intrude into state law by granting a remedy that might not be available in a state.<sup>31</sup> Though this was not the dominant critique in the debates, the Supreme Court later held that Congress did not have the authority to enact the civil rights remedy, thereby increasing the importance of this seemingly minority-held objection.

Following the testimony of constitutional law scholars and state Attorneys General in the 1991 Senate Judiciary committee, opponents to the bill quickly abandoned constitutionality arguments and moved to focus on the proper role of the federal and state governments. This raised the second, and by far the dominant critique of the legislation, which was that even if Congress did have the authority to enact the remedy, it should not because of federalism

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<sup>30</sup> There were also some general policy arguments made against the federal civil rights remedy. For example, the American Civil Liberties Union (ACLU) testified at the November 16, 1993 House Judiciary Committee hearing that while Congress seemed to have the authority to enact the remedy, it should not because it was bad law or policy. A discussion between Representative Barney Frank and ALCU representative Elizabeth Symonds makes it clear that thinkability was a major impediment to the ACLU not endorsing Title III:

Frank: "But it sort of does violence to a conceptual framework of the law rather than damage to individual civil liberties?...Is it more to the kind of concept of good lawyering and good law rather than harm to any civil liberty? That is, it may seem to you a little sloppy, but not damaging or dangerous?"

Symonds: "I think that's right. I would frame it this way. Passage of Title III will not reduce the civil liberties of the litigants involved. But I think the additional question for this committee is, is it good public policy. I think it's on that basis that I bring my questions to you for your consideration."

Frank: "That may be why you are not taking a formal position for the Civil Liberties Union. Seriously, because it's not a civil liberties question, it's more a lawyer's concern about the shape and state of the law."

Symonds: "That's right...But this is not unconstitutional." (86)

<sup>31</sup> Fein argued that a "[s]tate may choose, for a variety of reasons, not to make [marital rape] a crime in part because they think the elements of proof are so horrendous that they don't want to criminalize that particular circumstance or otherwise./ But it seems highly improper for the Federal Government to be instructing the States as to how they ought to grant or withhold spousal immunity on something that's so particularly local and responsive to local customs and more" (Hearing before the subcommittee on civil and constitutional rights of the Committee on the Judiciary, House of Representatives, 103<sup>rd</sup> Congress, 1<sup>st</sup> session, November 16, 1993: 28). Thus, the one person at the House of Representatives' November 1993 hearing to argue that Title III was borderline unconstitutional also argued that men might have legitimate claims to their wives' bodies because of local custom, and that the federal government should not interfere if a state allows one citizen to violently assault another because of the victim's gender and marital status.

concerns. While the two criticisms are related, as Congress' constitutional authority helps to outline the acceptable roles of federal and state governments, it is important to note that federalism concerns do not necessarily result in a constitutionality argument. The remainder of this analysis of the opponents' position will focus on federalism concerns since it was the primary objection raised to the civil rights remedy in the legislative debates.

State and federal judges formed some of the most influential opposition to the bill. Their primary argument against the bill was based on their understanding of federalism—a rigid division of state and federal courts in which all domestic relations and criminal issues should be heard in state courts. In addition to the two major judicial conferences expressing concerns regarding the bill, then Chief Justice William Rehnquist also singled the bill out for disapproval in his 1991 year-end report on the judiciary. In both his initial and extended remarks he cautioned Congress about VAWA. In his remarks the Chief Justice opposed both the creation of a federal crime of domestic violence as well as the creation of the civil rights remedy for victims of gender-motivated crime. Such expansions of federal jurisdiction, he claimed, would “involve the federal courts in a whole host of domestic relations disputes.”<sup>32</sup> In his extended remarks he elaborated, stating that “the question should be asked as to whether the state courts presently deal, and deal with reasonable effectiveness, with these same matters. If the answer is in the affirmative, it is probably better to follow the maxim ‘if it ain't broke, don't fix it.’”<sup>33</sup> He continued, using the previous expansion of federal drug statutes to demonstrate that the federal courts were seriously over-burdened.

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<sup>32</sup> Rehnquist, William, “1991 Year-End Report on the Federal Judiciary,” January 27, 1992.

<sup>33</sup> Rehnquist, William, “Chief Justice Rehnquist Discusses Long-Range Planning for U.S. Courts,” Extension of Remarks, E 747, March 19, 1992.

The Chief Justice's comments were notable for two main reasons. First, he was commenting on pending legislation, which is not standard procedure for a sitting justice.<sup>34</sup> Second, he was either dismissive of the mountains of evidence Congress was amassing regarding the inadequate handling of violence against women at the state level, or he was unaware that the evidence existed. He neither addressed nor refuted the fact that many state supreme court analyses indicated, and state Attorneys General agreed, that there was significant bias at every level of the criminal justice system relating to violent crimes predominantly affecting women—rape and domestic violence, in particular. In fact, the very premise of his statement would indicate that if the state court method of dealing with violent gendered crime is “broken” than it should be “fixed”—presumably by the federal legislature and courts. However, even with evidence amassed by Congress, he was unable to see the gross gender bias at work in state criminal and civil justice systems. Such bias appears to be unthinkable to Chief Justice Rehnquist.

Federalism was also the main argument against Title III from the Conference of Chief Justices, an organization comprised of the chief justices from each U.S. state and the federal territories. The Conference is primarily concerned with improving the administration of justice and state courts, although it does periodically weigh in on legislative matters. The organization was the most vocal opponent to the bill and continued to oppose the measure throughout its development in Congress. In January 1991 the Conference adopted a resolution supporting the

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<sup>34</sup> In his remarks, Rehnquist commented that “modest curtailment of federal jurisdiction is important.” In addition to discouraging Congress from enacting VAWA as written, he also discouraged Congress from potentially readopting a firearm homicide provision that was removed from the 1991 crime bill. VAWA was the only pending piece of legislation singled out in his address.



general purposes and most of the provisions of VAWA, but that “took exception” to Title III.<sup>35</sup>

The Conference was concerned that the civil rights remedy could “cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts.”<sup>36</sup>

In an argument that harkened back to nineteenth and early-twentieth century rationales against state intervention in domestic violence situations<sup>37</sup>, the Justices claimed that “it can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is” (ibid). Senator Biden responded to this argument, stating that it “is not only wrong but verges on the offensive to the extent that it suggests that women have a greater propensity to file

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<sup>35</sup> “Statement by Conference of Chief Justices on S. 15—Violence Against Women Act of 1991” Submitted to the Senate Judiciary Committee, April 9, 1991: 315.

<sup>36</sup> Ibid.

<sup>37</sup> See, for example, *Bradley v. State*, 1 Miss 156 (1824), “However abhorrent to the feelings of every member of the bench, must be the exercise of this remnant of feudal authority, to inflict pain and suffering, when all the finer feelings of the heart should be warmed into devotion, by our most affectionate regards, yet every principle of public policy and expediency, in reference to the domestic relations, would seem to require, the establishment of the rule we have laid down, in order to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice.--Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.” (158). Or *State v. Rhodes*, 61 NC 453 (1868), “[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive, and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.” (456-7). Or *Thompson v. Thompson*, 218 U.S. 611 (1910), “Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question.” (617-8).

false claims than men do. It is outrageous.”<sup>38</sup> In addition to assuming that women are more likely than men to make false accusations to gain legal advantage, the argument also trivializes violence against women and the legal bias victims face when seeking justice. The perspective is not unusual, however.<sup>39</sup>

The justices continued, arguing “that the very nature of marriage as a sexual union raises the possibility that every form of violence can be interpreted as gender-based” and emphasized the fact that contemporary federal law included a marital exemption to rape.<sup>40</sup> Highlighting the delicate nature of the issue, the judges stressed that “the issue of inter-spousal litigation goes to the very core of familial relationships and is a very sensitive policy issue in most states.”<sup>41</sup> Thus, the fact that there was demonstrated discrimination in the application of state law—including at this point marital exemptions to rape and inter-spousal immunity in state tort claims—is secondary to jurisdictional turf for the Chief Justices and concerns about male privilege.

Two years later, the State Chief Justices reiterated their opposition to Title III in a letter to the Chairman of the House Judiciary Committee citing “grave concerns” about the federal civil rights remedy.<sup>42</sup> Acknowledging the persistent legal discrimination faced by women, the Justices argued that state governments were attempting to address the problem, so federal

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<sup>38</sup> Senator Biden, testifying before the House Judiciary Committee’s Subcommittee on Crime and Criminal Justice on February 6, 1992.

<sup>39</sup> Some legislators and judges—male ones, particularly—are vocally concerned that any increase in women’s ability to use the state to protect themselves will result in men becoming the unwitting and underserving victims of lying and conniving women. For example, in Montana’s Senate Judiciary Hearing on February 23, 1985, Senator Towe argued that mandatory arrest would be used as a weapon by women during quotidian arguments since they could just call the police and get their partners arrested by simply claiming they had been abused.

<sup>40</sup> “Statement by Conference of Chief Justices on S. 15—Violence Against Women Act of 1991” Submitted to the Senate Judiciary Committee, April 9, 1991:316.

<sup>41</sup> “Statement by Conference of Chief Justices on S. 15—Violence Against Women Act of 1991” Submitted to the Senate Judiciary Committee, April 9, 1991:315.

<sup>42</sup> Conference of Chief Justices letter to the House Judiciary Committee, Subcommittee on Civil Rights, November 16, 1993:77.

intervention was not necessary. The letter did not mention that part of the states' attempt to address the problem was the states' Attorneys General soliciting Congress for help. In addition, the State Chief Justices argued that the civil rights remedy would provide greater protection to victims of gender-motivated crime than to other disadvantaged groups, such as race. Although no recommendation is given, it is left for the reader to assume that this is problematic, as victims of gender-motivated crime should definitely not receive greater protection than victims of racial discrimination, regardless of the type of discrimination (e.g. race-based employment discrimination vs. gender-motivated violent assault). Finally, the Justices argued that the courts were already at capacity, and that they could not accommodate the increase in caseloads that would presumably follow the enactment of Title III. They requested that if Title III was not eliminated, then it should at least be significantly narrowed to address only gender-motivated violence that occurred "under color of state law."

Following the state court justices' lead, the federal judges also opposed VAWA in September of 1991. The Judicial Conference of the United States is comprised of select federal judges and is tasked with making policy for the administration of federal courts. In their September 1991 report the Justices opposed parts of VAWA, including Title III. The group, as part of their rationale for opposing Title III, specifically cited and agreed with the Chief Justices' concern that civil rights claims would be used as a bargaining tool in divorce actions.<sup>43</sup> They also argued that VAWA would increase the federal court docket adding to the already serious problem of over-burdened federal courts and cause "major state-federal jurisdictional problems

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<sup>43</sup> Report of the Proceedings of the Judicial Conference of the United States, September 23-24, 1991: 57.

and disruptions in the processing of domestic relations cases in state courts.”<sup>44</sup> Finally, the justices stated that violence against women was an extremely complex issue, but that the Conference was willing to work with Congress “to ensure the most efficient utilization of scarce judicial resources and to fashion an appropriate response to violence directed against women.”<sup>45</sup>

Notwithstanding previous strong disagreement with the bill, the federal justices withdrew their opposition to VAWA in 1993.<sup>46</sup> Despite removing their opposition, they did not endorse it; rather, they took no position except to reiterate their concern about the increased federalization of state law crimes and causes of action. The one portion of the bill the justices did endorse was a portion of Title V that encouraged circuit judicial councils to conduct studies of gender bias in their courts.

### *Proponents*

There were many vocal proponents of VAWA from state and federal government as well as advocacy and victim circles. The proponents of the civil rights remedy argued both that it was constitutional and that it was necessary as women’s civil rights were regularly being violated and victims were largely left without recourse. There were three main voices arguing for Title III’s constitutionality and two sources supporting Title III from a policy perspective. From the federal government<sup>47</sup>, the acting Assistant Attorney General for the Civil Rights Division of the Department of Justice, James Turner, testified at the November 1993 House Judiciary Committee

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<sup>44</sup> Report of the Proceedings of the Judicial Conference of the United States, September 23-24, 1991: 58.

<sup>45</sup> Ibid.

<sup>46</sup> Report of the Proceedings of the Judicial Conference of the United States, March 16, 1993.

<sup>47</sup> Under the Bush administration, the Department of Justice (DOJ) expressed concern over the constitutionality of Title III. The Clinton administration’s DOJ supported VAWA, including Title III, citing multiple constitutional authorities under which Congress could enact the provision. See also Biden’s comments during the Senate Judiciary Committee’s hearing on S. 15, “Violence Against Women: Victims of the System,” April 9, 1991.

that Congress had the authority under both the fourteenth amendment and the Commerce Clause to enact VAWA and the civil rights remedy.<sup>48</sup>

Turner argued that Congress had the authority to enact the civil rights remedy under the fourteenth amendment because “federal and state criminal laws do not adequately protect against the bias element of gender-motivated crimes” and that the Senate had collected ample evidence of “a classic denial of equal protection.”<sup>49</sup> He argued that the findings section should be expanded to include statements about the inadequacy of state remedies because “standard State tort remedies...are not tailored to remedy gender-motivated violence, but they address standard tort concepts such as assault and battery.”<sup>50</sup> Thus, Turner argued that the problem is not just certain state law immunities that prevent women from pursuing civil claims in state court, but that the structure of the remedies is inadequate to deal with this issue, as violence against women has been shoehorned into preexisting battery and assault remedies.

Turner also argued that Congress had the authority to enact the civil rights remedy under the Commerce Clause. He argued that all that was required under the Commerce Clause was a “rational basis for concluding that a class of activities affects interstate commerce” and that the evidenced amassed by Congress “satisfied” that standard.<sup>51</sup> He further argued, in response to the opponents’ contention that a flood of lawsuits would result from the remedy, that while there would undoubtedly be an increase in the federal courts’ workload, there were adequate limitations on the remedy to ensure that only gender-motivated crimes qualified.

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<sup>48</sup> House Judiciary Committee, Subcommittee on Civil Rights, November 16, 1993.

<sup>49</sup> House Judiciary Committee, Subcommittee on Civil Rights, November 16, 1993: 96.

<sup>50</sup> *Ibid.*

<sup>51</sup> House Judiciary Committee, Subcommittee on Civil Rights, November 16, 1993: 97.

The other two prominent sources supporting the constitutionality of VAWA generally, and the civil rights remedy specifically, were constitutional law professors invited to testify at the Senate Judiciary Committee.<sup>52</sup> Both scholars enumerated multiple authorities under which they thought that Congress could enact VAWA and Title III. Burt Neuborne, a law professor at New York University and founder of the Brennan Center for Justice, identified four separate sources of constitutional authority for Title III: the Commerce Clause, section five of the fourteenth amendment, the Privileges and Immunities Clause, and the thirteenth amendment. Cass Sunstein, a law professor at the University of Chicago, testified that there were two primary authorities under which Congress could enact Title III of VAWA, the Commerce Clause and section five of the fourteenth amendment.<sup>53</sup> I will address the professors' Commerce Clause and fourteenth amendment claims together, before discussing Neuborne's Privileges and Immunities Clause and thirteenth amendment arguments.

Both Sunstein and Neuborne argued that due to the role of women in the economic sphere of American life, the aggregate impact of violence against women on the nation's economy allowed Congress to create the civil rights remedy. The professors outlined the history of the Supreme Court's modern interpretation of the Commerce Clause, arguing that under existing interpretations, Congress could regulate any activity that, in the aggregate, had a

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<sup>52</sup> Although both Neuborne and Sunstein are both prominent constitutional law scholars, it is not clear why they specifically were chosen, and why prominent feminist constitutional scholars were also not also invited to testify.

<sup>53</sup> Sunstein argued that while Title III was constitutional under the Commerce Clause and section five of the fourteenth amendment, the remainder of the Act was constitutional under multiple constitutional sections: Congress' authority to provide for the general welfare of the United States, the Commerce Clause, section five of the fourteenth amendment, and the ability of Congress to enact laws that are Necessary and Proper for the operation of the government. Cass Sunstein, Written and Oral Testimony before the Senate Judiciary Committee Hearing on Violence Against Women, April 9, 1991.

“substantial economic effect” on interstate commerce.<sup>54</sup> Both cited several civil rights and other cases involving local issues in which the Supreme Court upheld federal statutes based on Congress’ authority to regulate intrastate activity that had an aggregate effect on the economy.<sup>55</sup> Sunstein emphasized that the standard of review was so low—rational basis—that it would be extremely difficult for the Supreme Court to invalidate the law. Neuborne agreed, arguing that “the Commerce Clause makes it so clearly within [Congress’] authority that the other three [constitutional rationales] are simply backstops.”<sup>56</sup>

The second source of constitutional authority under which Congress could enact VAWA, according to both the professors, was section five of the fourteenth amendment. Section five allows Congress “to enforce, by appropriate legislation, the provisions of this Article.” The real controversy for using the fourteenth amendment to justify Congressional action on violence against women was whether or not Congress could use the amendment to regulate private action.<sup>57</sup> Neuborne argued that the Supreme Court had twice ruled that the fourteenth

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<sup>54</sup> The “substantial economic effect” language comes from *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937). Subsequent cases clarified that the substantial economic effect need only be in the aggregate, not in each individual action. See *Wickard v. Fillburn*, 317 U.S. 111 (1942).

<sup>55</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) where the Supreme Court unanimously upheld Title II of the 1964 Civil Rights Act which prohibited discrimination in public accommodations because of the aggregate effect such discrimination had on the ability of blacks to travel and move goods in the South. *Katzenbach v. McClung*, 379 U.S. 294 (1964) where the Supreme Court unanimously upheld the Civil Rights Act of 1964’s prohibition on discrimination in restaurants. The Court held that discrimination burdened the movement of food and products interstate, as well as hindering the ability of blacks to travel interstate. *Maryland v. Wirtz*, 392 U.S. 183 (1968) where the Supreme Court upheld minimum wage requirements to local governments in a 6-2 decision. *Perez v. United States*, 402 U.S. 146 (1971) where the Supreme Court, in an 8-1 decision, upheld a federal loan sharking statute that was applied to exclusively intrastate loan sharking activities because of the aggregate economic effect on interstate commerce.

<sup>56</sup> Neuborne, Testimony before the Senate Judiciary Committee on Violence Against Women, April 9, 1991: 56.

<sup>57</sup> Feminist constitutional scholars have different answers to this question. In a post-mortem of *Morrison*, Catherine MacKinnon argued that the combined authorities under the Commerce Clause and section five of the fourteenth amendment allowed Congress to reach private action that violated equal protection. See, “Disputing Male Sovereignty: On *United States v. Morrison*,” *Harvard Law Review*, vol. 114 no. 1, pgs. 135-178 (2000-2001). Reva Siegel argued that the fourteenth amendment has to be interpreted in light of the nineteenth amendment. While we now commonly think of the nineteenth amendment as purely providing women the right to vote, Siegel argues that

amendment could reach private action in *United States v. Guest*<sup>58</sup> and *Griffin v. Breckenridge*,<sup>59</sup> and as a result could do so again to uphold Title III of VAWA.

Sunstein argued that Congress should frame the fourteenth amendment question as a remedy originating from the failure of the state to provide equal protection to women from violent crime, rather than as a simple private action remedy. He argued that since this failure to protect and address gender-motivated crime derived, at least in part, from the fact that the victims are women, it is an equal protection violation. Analogizing to race, Sunstein argued that “Congress is responding to an equal protection problem in the administration of state and local law by state and local governmental authorities. It is not responding to private acts at all—no more than the equal protection clause itself does so by requiring states to protect blacks as well as whites from private violence.”<sup>60</sup> Although Sunstein recommended including legislative findings that dealt with the inequitable application of state and local law with regard to gender-motivated crimes, particularly rape and domestic violence, and framing the issue as a violation of

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the ratification process revealed that the amendment was more about the abrogation of male dominance and procuring equal citizenship for women. Read together, the nineteenth amendment provides the context for an interpretation of the fourteenth amendment that allows Congress to address laws that in effect deny women equal citizenship or that perpetuate women’s subordinate status. See “She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family,” *Harvard Law Review*, vol. 115 no. 4, pgs. 947-1046 (2001-2002).

<sup>58</sup> *United States v. Guest*, 383 U.S. 745 (1966) in which the federal conspiracy trial of six members of the Klu Klux Klan was allowed to proceed. The six men had been involved in the 1964 homicide of Lt. Col. Lemuel Penn and the three shooters who stood trial were acquitted by an all-white jury in state court. Following the state trial, all six men were charged with conspiracy to deprive African-American citizens of their constitutional rights in federal court. Although the case does deal with a federal criminal trial arising from private acts of violence, this case was distinguished by the *Morrison* court because the *Guest* Court found express state action in the case as the conspirators also allegedly filed false arrest reports to harass African Americans. This involvement of state authorities, even tangentially and not as the primary means of depriving African Americans of their constitutional rights, allows the case to survive dismissal.

<sup>59</sup> *Griffin v. Breckenridge*, 403 U.S. 88 (1971) where the Supreme Court unanimously held that a lawsuit brought by a group of black Mississippi citizens against two white citizens could proceed under Section 1985(3) after the two white men blocked a roadway and beat the black occupants of the vehicle they had detained could proceed. The Court held that Congress had the authority to reach the private conduct under the thirteenth amendment, which prohibits badges and incidents of slavery among private citizens and between citizens and the state.

<sup>60</sup> Sunstein, Written Testimony submitted to the Senate Judiciary Committee, April 9, 1991 at 17-18.



women’s equal protection rather than a violation of their privileges and immunities, he argued there was no “serious” constitutional challenge to Title III.<sup>61</sup>

Neuborne’s final two arguments providing constitutional authority for Congress to enact Title III are the Privileges and Immunities Clause and the thirteenth amendment. While seriously underdeveloped from a jurisprudential perspective, Neuborne argues the Privileges and Immunities Clause does cover the right to travel and the right to enjoy the benefits of federal and state law equally—both of which are denied to women as a class. Thus, analogizing to the deprivation of rights experienced by blacks post-Civil War through the civil rights movement, he argues the Privileges and Immunities Clause gives Congress the authority to enact VAWA.

Finally, Neuborne argues that the thirteenth amendment could be applied to women’s status in the United States, as “[g]ender-motivated violence is a crude form of physical subordination that tracks the badges and incidents of slavery and involuntary servitude.”<sup>62</sup>

Although the thirteenth amendment was clearly adopted to eradicate the enslavement of blacks, the Supreme Court has applied it to whites, via Section 1981, a civil rights, employment anti-discrimination statute. Thus, Neuborne argues that

Since the Court has recognized Congress’ power to legislate on behalf of whites under Section 2 of the 13<sup>th</sup> amendment, no principled basis exists to deny Congress a similar power on behalf of women. To the extent pervasive gender-based violence is denying women an equal status in society, it is precisely analogous to the badges and incidents of Afro-American slavery swept away by Congress and the courts.<sup>63</sup>

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<sup>61</sup> Sunstein, Written Testimony submitted to the Senate Judiciary Committee, April 9, 1991: 19.

<sup>62</sup> Neuborne, Written Testimony submitted to the Senate Judiciary Committee hearing on Violence Against Women, April 9, 1991: 12.

<sup>63</sup> Neuborne, Written Testimony submitted to the Senate Judiciary Committee Hearing on Violence Against Women, April 9, 1991: 13.

Although Neuborne is not the first to try to use the thirteenth amendment to address gender inequality and discrimination in the courts<sup>64</sup>, Congress did not adopt that justification and the government did not include the thirteenth amendment authority in their defense of VAWA before the Supreme Court in *Morrison*.

Neuborne's creativity does highlight two important constitutional realities, however. First, because the U.S. constitution lacks explicit gender equality protections, neither sex/gender discrimination nor private discriminatory action neatly fits under the United States' current constitutional framework. Instead, the federal constitution operates on the assumption that tyranny and oppression result from excessive government intrusion into individuals' lives—not from other individuals. In this view, government is not the source of social change or equality, but instead of domination, and to enjoy freedom citizens must be liberated from the yoke of government intervention. This worldview has carried through to modern times and has caused U.S. policymakers and citizens to struggle with how to best address contemporary social ills.

Second, this argument demonstrates how creative lawyers are able to take the limited protections afforded in the U.S. constitution and try to apply them to the particular situation they deem problematic. In this way, issues such as abortion and birth control have been designated

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<sup>64</sup> Others have argued that the thirteenth amendment should be applied in some child abuse cases. See Akhil Reed Amar and Daniel Widawsky's response to *DeShaney*, arguing that future similar cases should explore the protections offered in the thirteenth, rather than the fourteenth amendments. They explain:

“Whereas the Fourteenth Amendment applies only to state conduct, the Thirteenth applies to private conduct as well. The absence of a 'state action' trigger in the Thirteenth Amendment does more than just allow the slave to bring suit against the private master; the Amendment's broad mandatory language that slavery 'shall [not] exist' commands the state to affirmatively protect the child once it knows of concrete, identifiable, de facto slavery within its borders. To carry out this obligation, the state must enact and actively enforce child abuse laws within its jurisdiction. Thus, the Amendment prohibits both private action *and* state inaction whenever the state is aware of private slavery.” (1364)

“Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*,” *Harvard Law Review*, vol. 105 no. 6, pgs. 1359-1385 (1991-2).

constitutional matters in the United States, despite the fact there was clearly no intention of addressing such issues by the framers or authors of the Civil War amendments. These arguments, while perhaps seeming ridiculous initially, help determine what is thinkable by supporting certain expansions of rights and inspiring creative thinking in other legal professionals.

From a policy perspective, perhaps the most influential arguments supporting the civil rights remedy came from state Attorneys General. At the Senate Judiciary Committee's hearing in April 1991 the Attorneys General of Iowa and Illinois testified for the need for federal support of state efforts to combat violence against women. They also both communicated their strong support for Title III, arguing that it would help transform violence against women into a hate crime. In addition, the National Association of Attorneys General submitted a letter voicing their unanimous support of VAWA, including Title III. They wrote that "the Attorneys General of this nation believe that it is necessary to provide new remedies and sanctions in regard to violent crimes against women."<sup>65</sup> At the House Judiciary Committee hearing two years later, Robert Adams, the Attorney General of New York, submitted an another letter signed by 41 state Attorneys General supporting VAWA. The Attorneys General stated "that the current system for dealing with violence against women is inadequate" and that "the problem of violence against women is a national concern requiring federal attention, federal leadership, and federal funds."<sup>66</sup>

Although there was significant judicial opposition to VAWA and the civil rights remedy, not all judges and judicial organizations opposed the legislation. The National Association of Women Judges, an organization comprised of both state and federal judges, women as well as

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<sup>65</sup> National Association of Attorneys General, Winter Meeting, Dec 4-7, 1990.

<sup>66</sup> Letter by Attorneys Generals to Jack Brooks, Chair of the House Judiciary Committee, July 22, 1993: 35.

men, supported VAWA generally, and Title III specifically. In a letter to the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights in 1993, the president of the Association reiterated the group's endorsement of VAWA from the previous year. The group stated that the civil rights remedy helped ensure the "complementary role" of state and federal courts while helping to "avoid the risk of overloading the federal courts with disputes that fall within traditional state court functions" by limiting jurisdiction and the types of incidents that would result in a cause of action under the provision.<sup>67</sup> In conclusion, the Association argued that the civil rights remedy served a larger purpose as it "[would] provide needed congressional recognition that gender based violence is a national problem...without interfering with the administration of justice in either the state or federal courts."<sup>68</sup>

### *Discussion of the Debate*

There are a couple important things to note in this debate. Most importantly, the constitutionality of the bill is not seriously questioned during this stage. It is relevant to the discussion, however, because the Supreme Court eventually ruled in *Morrison* that Congress did not have the authority to enact the civil rights remedy component of VAWA. Following the presentations by Neuborne and Sustain, opponents and proponents alike seemed to accept the constitutionality of the legislation and move on to debate the policy issues surrounding the law.

It is also important to highlight the judicial conflict surrounding VAWA for several reasons. First, judicial opposition to VAWA never raises the issue of constitutionality. While there are constitutional implications for federalism arguments, the judges focus on two main

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<sup>67</sup> National Association of Women Judges, Written testimony of Judith Billings, November 16, 1993: 31.

<sup>68</sup> National Association of Women Judges, Written testimony of Judith Billings, November 16, 1993: 32.

reasons for opposing Title III without ever stating that the provision might be unconstitutional. The judges primarily argue that the civil rights remedy will increase the already overburdened state and federal court dockets. There are no constitutional implications for this argument, except in the denial or protracted nature of justice—but nothing regarding the authority of Congress to enact VAWA. Instead, it is primarily a workload issue. The judges also argue that VAWA is shifting the traditional division of labor between state and federal governments. This objection has clearer constitutional implications. State governments have always been exclusively tasked with domestic relations issues and have also been concerned with the majority of criminal law. While this is not a hard and fast constitutional rule, the constitutional limits on how Congress may enact legislation has largely served to codify this division of labor. It is important to note however, that the judges concern does not seem to be the constitutional limits on federal power—instead they address policy concerns. They are primarily concerned with whether Congress *should* enact VAWA, not with whether Congress *could* enact it. Indeed, the fact that the federal Judicial Conference withdrew their opposition would seem to imply that they did not have constitutional concerns with the legislation. In the end, the only judicial conference actively opposing the legislation is the *state* Supreme Court chief justices—not the federal judges tasked with interpreting the federal constitution.

Second, the fact that there is disagreement among the judges—the National Association of Women Judges supported the legislation, the Conference of Chief Justices opposed it, and the federal judges' Judicial Conference eventually took no position at all on VAWA—would seem to indicate a widely divergent perspective on the role of the judiciary and its ability to interpret law to be a tool to empower women. These arguments also portend the future problems VAWA

encountered in the judiciary, although it was not at all clear at this point that the Supreme Court would later invalidate the civil rights remedy. The fact that the Chief Justice and judicial conferences lobbied against Title III would indicate that while they oppose Congress' *policy* choices, the law was not unconstitutional and must therefore be blocked in the legislature.

Finally, the language used by the Chief Justices and later echoed by the 1991 Judicial Conference reveals that the judiciary's leadership has ingrained in it deeply gendered understandings of the role of the judiciary and the implications of violence against women. Rather than fully engaging with the issues raised in Senator Biden's bill, the judiciary only sees how the bill will upset the established—patriarchal—hierarchy that they reinforce in the courts.<sup>69</sup> Title III, at its core, is an attempt to fundamentally upend existing legal hierarchies that reinforce and reproduce women's subordinate status in the U.S. legal system. In creating a civil rights remedy, Congress intended to establish a "self-help" mechanism where women were no longer reliant upon police and prosecutors for obtaining justice. Instead, women would be able to pursue their own cases, even when prosecutors refused to press charges or police bungled investigations.<sup>70</sup> In addition, it attempted to get women's civil rights claims into federal courts, where the hope was that unelected judges would be able to have the political space to treat

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<sup>69</sup> By no means do I wish to imply here that the judges are *purposefully* reinforcing a patriarchal hierarchy. Instead, I argue that the status quo is gendered—based on patriarchal norms and values entrenched into the system years ago—and that in propagating that system the judges unwittingly perpetuate a patriarchal organization and practice.

<sup>70</sup> Burt Neuborne argued during his testimony before the Senate Judiciary Committee that the civil rights remedy "would be, in my perspective as an equality law enforcement official, one of the most important steps toward arming the victims of sustained violence against women based on gender. One of the most important tools that could be put into their hands is a self-help tool. It is a civil self-help cause of action that doesn't require the cooperation of the Government, that doesn't cost any resources except for the very important resource, of course, of court time. But it does not require a self-sustaining bureaucracy. It places into the hands of the victims a serious tool to fight back, and it seems to me that on that basis we ought to enthusiastically support it." (86) Senate Judiciary Committee, April 9, 1991.

violence against women for what it is—gender discrimination and a civil rights violation.<sup>71</sup> Such a radical reformulation of existing rights and privileges would inevitably ruffle feathers, particularly in a group—judges—that was named as a contributing factor to existing bias.

The debate foreshadows what is confirmed in the court challenges: the clearest evidence of the thinkability of a civil rights remedy for victims of gender-motivated crime is revealed in the issue's framing. Supporters of Title III generally conceived of the provision as a civil rights remedy—both proponents during the debate on the bill but also, as we will see, in court cases that upheld the measure. Proponents saw the issue of violence against women as a civil rights violation that had been, if not facilitated, then certainly implicitly condoned, by existing legal and social structures.<sup>72</sup> Going further, these supporters also saw violence against women as a major impediment to women's equal status and rights in the United States. As a result, to the proponents, federal jurisdiction was not in doubt, as it has long been accepted that the federal government has authority over civil rights issues.<sup>73</sup> Thus, these individuals were not concerned about the traditional division of legal labor and authority in the United States, because the states had clearly failed in their duty to women and therefore were no longer able to claim sole jurisdiction over the problem.

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<sup>71</sup> See Sally Goldfarb's testimony before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, "Crimes of Violence Motivated by Gender," 103d Cong., 1 Sess., November 16, 1993.

<sup>72</sup> Many feminist theorists argue that violence is the ultimate means of controlling women and maintaining a patriarchal society. See, Patricia Ireland and Sally Goldfarb's testimony before the House Judiciary Committee, Burt Neuborne and Leslie Wolfe's testimony before the Senate Judiciary Committee, April 9, 1991. The patriarchal society simply implies a structure and system that has been established and maintained based on male dominance and privilege, which is reproduced by the system's existence regardless of the various participants involved. See, Beechey, Veronica, "On patriarchy," *Feminist Review*, no. 3, pgs. 66-82, 1979.

<sup>73</sup> During his testimony before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice, Joe Biden best expressed this phenomenon: "No one would say today that laws barring violent attacks motivated by race or ethnicity fall outside the Federal courts' jurisdiction. Then why are they saying that violent discrimination motivated by gender is not a traditional civil rights violation? This jurisdictional argument is just the latest in a series of strawmen raised to prevent the bill from moving forward." (11) Violence Against Women, February 6, 1992.

Opponents, however, never mentioned civil rights or the many consequences of violence against women, except in the obligatory introductory sentence in which the opponent would say something to the effect that violence against women was serious and s/he agreed with the goals of VAWA. Again, this includes both opponents to the bill but also the courts that overturned the legislation. Instead, opponents were focused on the proper division of legal authority and court workloads, as well as being concerned that women would use Title III to gain advantage against their partners in family law proceedings.

### ***III. Court Challenges***

Now that we have analyzed the legislation and the controversy surrounding the legislation, we must look at court challenges to VAWA. Several sections of VAWA have been challenged in federal courts. The challenges can be broken down into three main types of challenges. The first category involves the criminal penalties for interstate domestic violence. These cases include both challenges to the criminal penalties for traveling over state lines to commit a domestic violence crime<sup>74</sup> and for interstate traveling to violate a domestic violence protection order<sup>75</sup>. The second group focuses on the federal firearm prohibition. These cases include challenges to the prohibition on possessing firearms while the being the subject of a

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<sup>74</sup> See, for example: *United States v. Page*, 167 F.3d 325 (6<sup>th</sup> Cir. 1999), *United States v. Gluzman*, 154 F.3d 49, (2<sup>nd</sup> Cir. 1998), *United States v. Lankford*, 196 F.3d 563 (5<sup>th</sup> Cir. 1999), *United States v. Bailey*, 112 F.3d 758 (4<sup>th</sup> Cir. 1997), *United States v. Larsen*, 615 F.3d 780 (7<sup>th</sup> Cir. 2010).

<sup>75</sup> See, for example: *United States v. Von Foekel*, 136 F.3d 339 (2<sup>nd</sup> Cir. 1998), *United States v. Wright*, 128 F.3d 1274 (8<sup>th</sup> Cir. 1997), *United States v. Ruggles*, 2000 U.S. App. LEXIS 5847 (6<sup>th</sup> Cir. 2000), *United States v. Hayes*, 135 F.3d 133 (2<sup>nd</sup> Cir. 1998), *United States v. Casciano*, 124 F.3d 106 (2<sup>nd</sup> Cir. 1997).



domestic violence protection order<sup>76</sup> and after having committed a domestic violence misdemeanor<sup>77</sup>. And most importantly for our purposes, the final category of challenges deals with the federal civil rights remedy.<sup>78</sup>

Most district courts and all circuit courts have upheld the legislation in the first two groups of challenges. Courts have generally ruled that the interstate nature of the crimes and the legitimate state interest in curtailing domestic violence allowed Congress to prohibit those categories of action. The final category—cases challenging the civil rights remedy—was more hotly contested, however, thereby presenting interesting constitutional debates and opposing constitutional interpretations.

Before discussing the specific court challenges to VAWA, however, we must first look at a seemingly unrelated case that fundamentally altered the constitutional landscape governing Congress' authority to enact legislation under the Commerce Clause: *United States v. Lopez*.<sup>79</sup> *Lopez* involved a challenge to the Gun-Free School Zones Act of 1990. The law, enacted under Congress' Commerce Clause power, prohibited any individual from knowingly carrying a gun

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<sup>76</sup> *United States v. Pierson*, 139 F.3d 501 (5<sup>th</sup> Cir. 1998), *United States v. Bostic*, 168 F.3d 718 (4<sup>th</sup> Cir. 1999), *United States v. Wilson*, 159 F.3d 280 (7<sup>th</sup> Cir. 1998), *United States v. Hutzell*, 217 F.3d 966 (8<sup>th</sup> Cir. 2000), *United States v. Reddick*, 203 F.3d 767 (10<sup>th</sup> Cir. 2000), *United States v. Jones*, 231 F.3d 508 (9<sup>th</sup> Cir. 2000), *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7<sup>th</sup> Cir. 1999), *United States v. Baker*, 197 F.3d 211 (6<sup>th</sup> Cir. 1999).

<sup>77</sup> Since Congress passed the Gun Control Act of 1968, it has been a federal crime for a felon to possess a firearm in the United States (Pub.L. 90-618). The 1994 omnibus crime bill extended that ban to misdemeanor domestic violence offenses, thereby provoking a round of court challenges. *United States v. President*, 10 Fed. Appx. 225 (4<sup>th</sup> Cir. 2001), *United States v. Hancock*, 231 F.3d 557 (9<sup>th</sup> Cir. 2000), *United States v. Lewis*, 236 F.3d 948 (8<sup>th</sup> Cir. 2001), *United States v. Lewitzke*, 176 F.3d 1022 (7<sup>th</sup> Cir. 1999), *FOP v. United States*, 152 F.3d 998 (4<sup>th</sup> Cir. 1998).

<sup>78</sup> While I will discuss three challenges to the civil rights remedy, there are many more. For other examples, see: *Doe v. Hartz*, 970 F. Supp. 1375 (W.D. Iowa 1997), *Anisimov v. Lake*, 982 F. Supp. 531 (E.D. Illinois 1997), *Crisonino v. New York Housing Authority*, 985 F. Supp. 385 (S.D. New York 1997), *Timm v. Delong*, 59 F. Supp. 2d 944 (Nebraska 1998), *C.R.K. by and Through N.K. v. Martin*, 1998 U.S. Dist. LEXIS 22305 (Kansas 1998), *Doe v. Mercer*, 37 F. Supp. 2d 64 (Mass 1999), *Bergeron v. Bergeron*, 48 F. Supp. 2d 628 (M.D. Louisiana 1999), *Kuhn v. Kuhn*, 1999 U.S. Dist. LEXIS 11010 (E.D. Illinois 1999), *Culberson v. Doan*, 65 F. Supp. 2d 701 (S.D. Ohio 1999), *Burgess v. Cahall*, 88 F. Supp. 2d 319 (Delaware 2000). Of the above cases, all courts determined the civil rights remedy was constitutional except for *Bergeron*.

<sup>79</sup> 514 U.S. 549 (1995).

within 1000 feet of a school. Alfonzo Lopez, a twelfth grader, challenged the law's constitutionality after he was convicted under the Act for bringing a gun to school. The case eventually made it to the Supreme Court, which invalidated the Act after finding that Congress did not have the authority to enact the law under the Commerce Clause. The Court held that the Act had nothing to do with commerce or economic activity and could thus not be regulated under the authority of the Commerce Clause.<sup>80</sup> The case, decided in the year *following* VAWA's passage, signaled a significant shift in the Court's analysis of Congress' Commerce Clause authority, and was the first in a line of cases—including *Morrison*—that significantly limited Congress' legislative powers. It is difficult to overstate the sea change *Lopez* signaled both in Supreme Court Commerce Clause jurisprudence, but also in the ability of Congress to pass legislation. Thus, *Lopez* presented a major hurdle to VAWA post-passage that neither Congress nor the law's proponents were able to anticipate or foreshadow.

### Challenges to VAWA's Criminal Components

Before beginning an analysis of the civil rights remedy, it is necessary to look with some detail at how the criminal provisions and firearms prohibitions were upheld because it provides a window into how the courts allow Congress to use its limited powers creatively to tackle novel contemporary problems. In the first appellate challenge to the criminalization of interstate domestic violence, the Fourth Circuit upheld VAWA penalties holding that Congress had the

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<sup>80</sup> In the *Lopez* opinion the Supreme Court outlined three broad categories of activity Congress can regulate under the Commerce Clause. First, it can regulate the use of the channels of interstate commerce; second it can regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce; and third, Congress can regulate activities that have a substantial effect on interstate commerce.

authority under the Commerce Clause to enact the statute.<sup>81</sup> In that case, a husband challenged his conviction for kidnapping and interstate domestic violence against his wife, arguing that after *Lopez*, Congress did not have the authority to enact VAWA's criminal provisions. The Fourth Circuit disagreed with the husband, holding that the Supreme Court has always recognized Congress' authority to regulate the channels and instrumentalities of interstate commerce. Since VAWA's criminal provisions required both interstate movement and the commission of a violent crime, the statute was constitutional.

Overruling a rare district court opinion invalidating a criminal portion of VAWA, the Eighth Circuit also upheld VAWA's prohibition on crossing state lines to violate a restraining order in *Wright*.<sup>82</sup> In *Wright*, the district court initially held that Congress exceeded its authority under the Commerce Clause since violating a protection order was not an economic activity.<sup>83</sup> Reversing the district court's holding that the statute was unconstitutional, the Eight Circuit, citing the U.S. Supreme Court, held that "crossing state lines is interstate commerce regardless of whether any commercial activity is involved."<sup>84</sup>

Challenges to the firearms restrictions were seemingly more problematic post-*Lopez*. However, circuit courts were able to distinguish *Lopez* from cases restricting gun possession for individuals subject to restraining orders and cases prohibiting gun possession by individuals convicted of misdemeanor domestic violence offenses. With regards to individuals subject to restraining orders, the Fifth Circuit held in *Pierson*<sup>85</sup> that the federal statute was constitutional

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<sup>81</sup> *United States v. Bailey*, 112 F.3d 758 (4<sup>th</sup> Cir. 1997).

<sup>82</sup> *United States v. Wright*, 128 F.3d 1274 (8<sup>th</sup> Cir. 1997).

<sup>83</sup> *United States v. Wright*, 965 F. Supp. 1307 (Nebraska 1997).

<sup>84</sup> *United States v. Wright*, 128 F.3d 1274 (8<sup>th</sup> Cir. 1997) at 1275.

<sup>85</sup> *United States v. Pierson*, 139 F.3d 501 (5<sup>th</sup> Cir. 1998).

because it carried a jurisdictional element, prohibiting only firearms and ammunition that have been “ship[ped] or transport[ed] in interstate or foreign commerce, or possess[ed] in or affecting commerce.”<sup>86</sup> Since Pierson possessed two weapons manufactured out of his home state of Texas, he possessed a firearm that was part of interstate commerce. Consequently, the Court determined that the statute was neither unconstitutional on its face, nor as it applied to Pierson.

Courts also upheld the extension of the firearm prohibition to individuals convicted of misdemeanor domestic violence offenses.<sup>87</sup> Kirk Lewitzke<sup>88</sup> challenged the legislation on equal protection grounds after he was tried and convicted of possessing six firearms and three thousand rounds of ammunition, ten years after having pled guilty to misdemeanor domestic battery. The guns were all found to have been manufactured outside of Wisconsin, Lewitzke’s home state. In their analysis of the equal protection claim<sup>89</sup>, the Seventh Circuit held that it “is eminently reasonable” to keep guns out of the hands of people who have committed domestic violence misdemeanors as “Congress could reasonably believe that such individuals may resort to violence again, and that in the event they do, access to a firearm would increase the risk they might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.”<sup>90</sup>

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<sup>86</sup> 18 USCS § 922(g).

<sup>87</sup> 18 USCS § 921(a)(33)(A)(i)-(ii) defines a misdemeanor domestic violence offense as any misdemeanor under Federal, State, or Tribal law that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”

<sup>88</sup> *United States v. Lewitzke*, 176 F.3d 1022 (7<sup>th</sup> Cir. 1999).

<sup>89</sup> Lewitzke argued that it was unreasonable to prohibit individuals convicted of misdemeanor domestic violence offenses from possessing weapons, but not individuals convicted of non-domestic violence misdemeanors. This constitutional challenge recognized that Congress had the authority under the Commerce Clause to enact the prohibition, but argued that the restriction violated the fourteenth amendment’s equal protection clause. Because the activity involved was not a fundamental right, the Court only had to apply a rational basis test to the statute.

<sup>90</sup> *Lewitzke* at 1026.

In a post-*Morrison* challenge to the firearm prohibition, Nathaniel President appealed his conviction of possession of a firearm by a person who had previously been convicted of a misdemeanor domestic violence offense. In a one paragraph opinion, the Fourth Circuit dismissed his appeal, holding that Congress did have the authority under the Commerce Clause to enact the statute as the legislation contained a specific jurisdictional element requiring the firearms to have some connection to interstate commerce.<sup>91</sup> Thus, although the federal civil rights remedy was invalidated by the Supreme Court in *Morrison*, that holding did not affect other VAWA provisions that had already been upheld in lower courts.

#### Court Challenges to VAWA's Civil Rights Remedy

The first challenge to VAWA came in 1996 in a Connecticut district court.<sup>92</sup> Interestingly enough, despite Senator Biden's comments that domestic violence would be difficult to fit into the civil rights remedy<sup>93</sup>, the lawsuit was brought by a woman who alleged that her husband had physically and mentally abused her for seventeen years. The woman's husband filed a motion to dismiss the lawsuit, arguing that the civil rights remedy was unconstitutional, as Congress did not have the authority under either the Commerce Clause or section five of the fourteenth amendment to enact the statute. Framing the issue as a civil rights issue, the judge denied the husband's motion. She held that Congress had a rational basis for concluding that gender-based violence has a substantial impact on interstate commerce and that the remedy crafted was reasonably related to a constitutionally permitted objective. She

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<sup>91</sup> *United States v. President*, 10 Fed. Appx. 225 (4<sup>th</sup> Cir. 2001).

<sup>92</sup> *Doe v. Doe*, 929 F. Supp. 608 (Conn. 1996).

<sup>93</sup> Testimony before the House Judiciary's Subcommittee on Crime and Criminal Justice, 1993.

distinguished *Lopez*, arguing that in passing the Gun Free School Zone Act Congress did not document how gun possession in a school zone affected interstate commerce. With VAWA, the judge stated that Congress both “qualitatively and quantitatively demonstrate[d] the substantial effect on interstate commerce of gender-based violence.”<sup>94</sup>

The husband also argued that VAWA encroached on traditional state police powers and as a result federalized criminal, family, and state tort law. The judge rejected this argument, stating:

The Civil Remedy section of VAWA...does nothing to infringe on a state's authority to arrest and prosecute an alleged batterer on applicable criminal charges. VAWA does not encroach on traditional areas of state law; it complements them by recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence, and through the Civil Rights Remedy, makes operative the Act's remedial and deterrent purposes, by making violators of this right personally answerable to the victims in compensatory and punitive damages. Defendant's assertion that the Act "federalizes" family law is clearly contradicted by the VAWA's express language under which federal jurisdiction excludes ". . . any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4)./ Moreover, nothing in VAWA precludes a victim of domestic violence from bringing a tort action in state court for assault and battery or intentional infliction of emotional distress. The significance of this Act is its recognition of a federal civil right, with attendant remedies, which is distinct in remedy and purpose from state tort claims.<sup>95</sup>

Thus, the judge rejected the both the husband’s arguments, which closely paralleled the issues raised during the legislative debates regarding the remedy.

In another early challenge, *Seaton v. Seaton*<sup>96</sup>, Laurel Seaton alleged her husband had sexually and physically abused her for years. After a final assault, she initiated divorce proceedings and brought a lawsuit against her husband for damages resulting from years of abuse. She filed both state and federal claims. Mr. Seaton challenged the federal claims, arguing that the civil rights remedy was unconstitutional. The Court “reluctantly” disagreed.<sup>97</sup> Before

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<sup>94</sup> *Doe* at 613.

<sup>95</sup> *Doe* at 615-616.

<sup>96</sup> 970 F. Supp. 1375 (E.D. Tenn 1997).

<sup>97</sup> *Seaton* at 1193.

beginning its analysis, the Court went so far as to say that it “must note its extreme discomfort with the sweeping nature of VAWA.”<sup>98</sup> It continued:

While there is no doubt that violence against women is a serious matter in our society, that particular remedy created by Congress, because of its extreme overbreadth, opens the doors of the federal courts to parties seeking leverage in settlements rather than true justice. The framers of the constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states. Nevertheless, the court must heed the well-settled precedent extant in Commerce Clause jurisprudence in an effort to determine whether VAWA, even in view of its sweeping nature, passes muster under the Commerce Clause.<sup>99</sup>

Distinguishing the case from *Lopez*, the Tennessee district court found that the extensive congressional findings on how violence against women affects interstate commerce were sufficient to pass constitutional muster under a rational basis standard. Having concluded that violence against women affects interstate commerce, the Court then had to determine whether or not Congress used appropriate means to achieve a legitimate end. Citing state self-assessments of bias and discrimination in the application of law, the Court held that since states were unable to offer adequate protection from gender-based crimes, using a civil rights remedy to rectify those deficiencies was not unreasonable. Indeed, “[t]he same course was followed in efforts to correct other pressing social ills such as racial discrimination.”<sup>100</sup> The Court dismissed Seaton’s state tort claims, which were barred by a one year statute of limitations, and permitted her federal civil rights claim to proceed.

Both the *Doe* and *Seaton* Courts framed the constitutionality of the federal remedy as a civil rights issue. Thus, while the *Seaton* Court was hostile to the method, it still framed the underlying issue as one of civil rights, analogizing to racial civil rights statutes and the court cases that upheld them. Echoing the Chief Justices Conference and the Judicial Conference, the

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<sup>98</sup> *Seaton* at 1190.

<sup>99</sup> *Seaton* at 1190-1191.

<sup>100</sup> *Seaton* at 1194.

judge in the *Seaton* case also expressed his concern that women would use this statute as leverage in divorce proceedings. Despite that belief, he was still compelled, because of the Commerce Clause jurisprudence established by the Supreme Court, to find the statute constitutional.

### United States v. Morrison

The final, and most important, case I will discuss here started as *Brzonkala v. Virginia Polytechnic & State University*<sup>101</sup> and eventually made it to the Supreme Court as *United States v. Morrison*<sup>102</sup>. The case was brought by a young woman who was allegedly gang raped by two football players in the fall of 1994 while attending Virginia Tech (VT). According to the record, Christy Brzonkala and a friend were talking to Antonio Morrison and James Crawford in a university dorm room. The group had just met. After about fifteen minutes of conversation, Brzonkala's friend and Crawford left the room. Morrison immediately requested to have sex with Brzonkala, which she twice refused. Morrison did not dispute the facts up to this point, including Brzonkala's audible refusal to have sex with him and the fact that he did eventually have sex with her.

According to Brzonkala, despite her refusal, Morrison held her down and raped her. Brzonkala tried to push him off of her, but was unable. She then claimed that before she could recover, Crawford came in, exchanged places with Morrison and raped her. Again, before she could recover, Morrison came back into the room and raped Brzonkala again. As he was

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<sup>101</sup> 935 F. Supp. 779 (W.D. Virginia 1996).

<sup>102</sup> 529 U.S. 598 (2000).



leaving, Morrison told Brzonkala, “You better not have any fucking diseases.”<sup>103</sup> Neither Morrison nor Crawford used a condom during the assaults.

In the months following the assaults, Morrison allegedly publically announced in the dining hall, “I like to get girls drunk and fuck the shit out of them.”<sup>104</sup> In February 1995, Brzonkala recognized her two assailants and two months later she decided to file a complaint against them under VT’s Sexual Assault Policy. After filing her complaint, another student allegedly overheard another male VT student tell Crawford that he should have “killed the bitch.”<sup>105</sup>

Eventually VT held two disciplinary hearings about the assault. At the first hearing, Morrison acknowledged that Brzonkala had twice told him “no” and Crawford confirmed that Morrison had had sexual contact with Brzonkala, although he denied that he had also had sex with her. Crawford also claimed that Brzonkala was intoxicated at the time of the incident, a claim Brzonkala denied. The disciplinary committee found Morrison guilty of sexual assault and suspended him for two semesters but found insufficient evidence to punish Crawford. Morrison appealed the decision within the University in May 1995, but it was upheld.

Over the summer, Morrison again appealed the committee’s decision to the University based on the fact that the sexual assault policy under which he was convicted had not been distributed to the students after its adoption the previous year. Morrison was retried before the disciplinary committee and found guilty of abusive conduct and the sentence was reinstated. He immediately appealed his punishment and, without notifying Brzonkala, the University set his

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<sup>103</sup> *Brzonkala* 1996: 782.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

punishment aside. Morrison returned to campus that fall, but after reading about the University's decision in the paper, Brzonkala did not return because she feared for her safety. After local authorities refused to pursue criminal charges against Morrison and Crawford<sup>106</sup>, Brzonkala brought a federal civil rights suit against Morrison and Crawford and a Title IX lawsuit against VT for their handling of her case in December 1995.

*The District Court Case—Brzonkala v. Virginia Polytechnic & State University (1996)*

The federal district court dismissed Brzonkala's civil rights lawsuit, holding that Congress did not have the authority under either the Commerce Clause or section five of the fourteenth amendment to enact the civil rights remedy. But first, the Court determined whether or not Brzonkala would have a cause of action under the statute. In a superfluous discourse on rape, the judge intertwines his personal opinion of rape with the facts of the case. Demonstrating some of the prejudice rape victims face at trial, it is worth quoting at length:

All rapes are not the same, and the characteristics of the rapes here alleged, when compared to other rapes, indicate that gender animus more likely played a part in these rapes than in some other types of rape. First, the assault involved a gang rape. While any rape is egregious, all other factors the same, gang rape generally is more egregious than one-on-one rape. Where, as here, two men rape one woman, this indicates a conspiracy of disrespect for that woman. Second, these rapes fall somewhere in between stranger rape and date rape, and are probably closer to stranger rape. Again, while any rape is egregious, stranger rape and rapes such as the one in question generally are more egregious than date rape. Additionally, stranger rape generally more likely than date rape involves gender animus. For example, date rape could involve a misunderstanding and is often less violent than stranger rape. By the facts alleged, the case at hand does not involve any misunderstanding. Date rape could also involve a situation where a man's sexual passion provokes the rape by decreasing the man's control. Here there is no indication that sexual passion caused Morrison to initiate intercourse. Finally, date rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim's personality to some extent. In the case at hand, the facts indicate that Morrison and Crawford had little if any knowledge of Brzonkala's personality. Therefore, by process of elimination, an inference of gender animus is more reasonable in this situation than in some other rapes.<sup>107 108</sup>

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<sup>106</sup> MacKinnon, 2000-2001.

<sup>107</sup> *Brzonkala* 1996: 784-785.

<sup>108</sup> Judge Jackson Kiser is not the only man involved in this legislation to opine on the nature of rape. Orrin Hatch, in an interview with the New Republic, said the following about the civil rights remedy:

Thus, the court concluded that Brzonkala's rape did likely emanate, at least in part, from gender animus, and would consequently qualify as a cause of action under VAWA. However, while the judge found that Brzonkala's rape involved some amount of gender animus, he also created a hierarchy of rape, in which he largely dismissed date rape as not as serious—primarily as a victim would experience the assault—as stranger rape. A man incapable of controlling his passion who violently assaults a woman is not as egregious as a man who simply decides to violently assault a woman for other reasons. The judge implied that this distinction matters from a victim's perspective, though how he is able to make such an assertion is unclear. In an ironic twist, the judge, in his decision overturning VAWA, demonstrated some of the very problems Congress identified as a reason VAWA was necessary—judicial bias and hostility towards rape victims.

The Court's conclusion that the assaults were likely motivated by gender animus is irrelevant, however, because it also held that the civil rights remedy was unconstitutional. The judge ruled both that Congress did not have the authority under either the Commerce Clause or the fourteenth amendment to enact the civil rights provision, and that it did not use legitimate

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“We're not opening the federal doors to all gender-motivated crimes. Say you have a man who believes a woman is attractive. He feels encouraged by her and he's so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let's say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, 'You're wearing a skirt! You're a woman! I hate women! I'm going to show you, you woman!' Now, the first one's terrible. But the other's much worse. If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus” (quoted in Siegel 1995, 2200).

Judge Kiser also later comments, that Morrison's statement regarding getting girls drunk and having sex with them that “[a]lthough Morrison did not state that he likes to rape women, his statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent.” (785) In fact, Morrison did state that he liked to rape women. Sobriety is an important element of consent in sexual assault. But from the judge's perspective, while getting someone drunk so that you can “fuck the shit out of them” is bad and does demonstrate some amount of gender animus, it is not the same as saying he liked to rape women.

ends or means to address the problem. The Court dismissed the ability of Congress to use the Commerce Clause to enact the civil rights cause of action, stating that Congress cannot regulate activities that do not involve interstate commerce even if they have an economic impact. This was particularly a problem for the civil rights cause of action, as violence against women is not an economic activity, nor did the cause of action require any movement between states or on the national transportation system. Grounding the holding in federalism principles, the Court opined that without this limitation Congress' power would be "excessively extend[ed]" and would "inappropriately [tip] the balance away from the states."<sup>109</sup>

The Court also ruled that Congress did not have the authority under the enforcement clause of the fourteenth amendment. Citing the state action requirement, the Court held that Congress cannot reach "purely private action" through the amendment.<sup>110</sup> In a footnote the Court explains the importance of the state action requirement, stating that it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct which they cannot be fairly blamed."<sup>111</sup>

The district court's perspective demonstrates a commitment to a particular conception of freedom and liberty that requires carving out a rigid private sphere into which the state can only tread very lightly. An unintended, but very real consequence of this structure is that the state largely abandons women to the benevolence of the men they live with and encounter in their everyday lives. While it does not and should not mean that if women's rights to bodily integrity

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<sup>109</sup> *Brzonkala* 1996: 792.

<sup>110</sup> *Brzonkala* 1996: 794.

<sup>111</sup> *Ibid.*

are to be protected there can be no private sphere, it does mean that a state cannot completely ignore private conduct if it is to ensure or promote equality and the civil rights of all of its citizens. Although criminal penalties for violence against women are clearly one important step, they have not adequately increased women's safety in the private sphere, in part because of the biased implementation by the criminal justice system.

In addition, the perspective disregards the states' role in perpetuating violence against women by treating it less seriously than other comparable types of violence. State self-analyses uncovered widespread bias at all levels in the justice system against women victims of gendered violence. Thus, from this perspective, the state could be "fairly blamed" for their role in the biased application of the law and biased state laws that disproportionately negatively impact women. The judge, however, largely ignored this systemic problem, which is demonstrated in his discussion of the remedy Congress employed to address violence against women.

In addition, the Court questioned the ends and means of using the fourteenth amendment to enact the civil rights cause of action. With regards to the ends, the Court held that there was no connection between any state action and violence against women. The court elaborated, arguing that

[t]he deprivation cause by private individuals who commit crimes against women due to gender is not caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible...The private individual's decision to discriminate by committing a gender-based violence act against a woman cannot be ascribed to any governmental decision.<sup>112</sup>

The judge had a point—no state official told Morrison and Crawford to gang rape Brzonkala.

What he was unable to appreciate, however, is the relationship between entrenched cultural and

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<sup>112</sup> *Brzonkala* 1996: 797.

legal norms and violence against women. Only recently has most violence against women been considered an assault against a woman as an individual. Just a few years before this case was heard, for example, it was completely legal for a man to rape his wife in multiple states throughout the country. Even under federal law, women had no right to self-determination or bodily integrity in marriage. These factors, combined with the discounting of assaults in intimate relationships, police and prosecutors' reluctance to believe or pursue violent crimes against women, or judicial and jury bias in cases where there was eventually a trial make it difficult to accept that the state is blameless in violence against women. From another perspective, this is all state action that created a permissive environment in which men are able to use violence to subordinate women. Although the Court did acknowledge widespread discrimination in the state's response to violence against women, it argued that these acts were unrelated—two separate acts of discrimination against a victim—and therefore the state action requirement remained unmet.

The Court also held that Congress' method—the civil rights remedy—for addressing violence against women was not legitimate. Although it did not elaborate since it had already held that the ends were not legitimate, the Court did reiterate that there was “no reasonable possibility” that “VAWA will help remedy this legitimate Fourteenth Amendment concern.”<sup>113</sup> Any violation of the fourteenth amendment, the Court wrote, is by the state for its discrimination in handling violence against women claims. These violations take two primary forms: state inaction and equal protection violations,<sup>114</sup> both of which present significant hurdles for victims.

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<sup>113</sup> *Brzonkala* 1996: 800.

<sup>114</sup> Both of these forms of discrimination, and the inability of victims to remedy them, will be discussed in the following chapter.

*The Court of Appeals, Take One—Brzonkala v. Virginia Polytechnic & State University (1997)*

Brzonkala appealed the district court's ruling to dismiss her case and the appeal was heard by the Fourth Circuit Court of Appeals.<sup>115</sup> The appellate court agreed with the district court that Brzonkala did have a cause of action under VAWA. However, it overturned the district court's ruling that Congress did not have the authority under the constitution to enact the civil rights remedy. The Court began its discussion of the provision's constitutionality by asserting that "every act of Congress is entitled to a 'strong presumption of validity and constitutionality' ...and will be invalidated only 'for the most compelling constitutional reasons'."<sup>116</sup> It continued, stating that Court's role is to determine whether Congress had a rational basis for concluding that violence against women substantially affects interstate commerce. Using the rational basis standard, the Court held that there were substantial congressional findings to support Congress' conclusion that violence against women did indeed affect interstate commerce.<sup>117</sup>

In addition to distinguishing *Brzonkala* from *Lopez*<sup>118</sup>, the Court was also explicit about the fact that VAWA did not trespass on traditional state police powers. The Court explains,

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<sup>115</sup> *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949 (4<sup>th</sup> Cir. 1997).

<sup>116</sup> *Brzonkala* 1997: 964.

<sup>117</sup> The Court stated, "our role is simply to determine if Congress had a rational basis for concluding that a regulated activity 'substantially affects interstate commerce.' After four years of hearings and extensive legislative findings, Congress has adjudged that violence against women substantially affects interstate commerce. It is 'abundantly clear that our job in this case is not to second-guess the legislative judgment of Congress that' violence against women 'substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion.' In light of Congress' findings, well supported by testimony and data, we hold that Congress had such a rational basis in enacting VAWA" (973).

<sup>118</sup> The Court held that *Lopez* did not require Congress to regulate economic activity, but rather that it required some basis for Congress to conclude that the regulated activity had a substantial impact on interstate commerce. The Court held that this was more than accomplished by the mountains of evidence accumulated during the congressional hearings on the economic impact of violence against women not only on women and the victim's ability to work but also on the overall cost of violence against women to society. In a rare upbraiding of the appellants, the Fourth Circuit dismissed their characterization that if the Court upheld VAWA's constitutionality, it

stating that Congress specifically and self-consciously designed VAWA to “harmonize”<sup>119</sup> with state laws, not “supplant”<sup>120</sup> them. Perhaps most importantly, the Court asserted that VAWA was legislating in an area traditionally reserved for the federal government—civil rights. Comparing the VAWA civil rights remedy to racial civil rights legislation, the Court held that “federal action is particularly appropriate when, as here, there is persuasive evidence that the States have not successfully protected the rights of a class of citizens.”<sup>121</sup>

The dissent disagreed. Arguing that *Lopez* fundamentally altered Commerce Clause analyses going forward, Justice Luttig argued that the majority misread the new standards outlined by the Supreme Court. Instead of simply having a rational basis for concluding that an activity significantly impacted interstate commerce, he argued that *Lopez* required an “independent evaluation” of the affect violence against women has on interstate commerce.<sup>122</sup> He ended his dissent with a plea to the Supreme Court to accept cert and review the case.

*The Court of Appeals, Take Two—Brzonkala v. Virginia Polytechnic & State University (1998)*

Justice Luttig did not need to wait for the Supreme Court to act, however, because the defendants successfully requested a rehearing by the entire Fourth Circuit.<sup>123</sup> Writing for the majority, Justice Luttig opened with the following:

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would allow Congress to regulate everything, including “diet and exercise habits” (973). The Court responded to that assertion, stating that their “argument ignores the four years of hearings on the need for VAWA and the reams of congressional findings made in support of VAWA” and “[i]t belittles the seriousness of the national problem that discriminatory violence against women presents” (ibid).

<sup>119</sup> *Brzonkala* 1997: 970.

<sup>120</sup> *Brzonkala* 1997: 971.

<sup>121</sup> Ibid.

<sup>122</sup> *Brzonkala* 1997: 974.

<sup>123</sup> *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4<sup>th</sup> Cir. 1998).



We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves...These foundational principles of our constitutional government dictate resolution of the matter before us...Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded.<sup>124</sup>

Such lofty language of liberty, freedom, and fundamental principles seems misplaced to justify eliminating a civil rights remedy for victims of gender-based violence. In framing the case in that manner, however, the majority presented their decision as inevitable—the only legitimate interpretation of the constitution and the purpose behind the structure of the United States. Perhaps most importantly, it demonstrated that the judges understand freedom from a classically liberal perspective. From this viewpoint, oppression comes from the government, not from private citizens. For the woman who cannot walk in her neighborhood after dark, or a woman who has no peace in her home, however, oppression is more likely to come from the men who assault her than the government that works to remedy that violence.

Although the appellants' argument originally focused on the ability of Congress to enact VAWA under both the Commerce Clause and the fourteenth amendment, legal developments between the first and second Fourth Circuit cases caused the appellants to shift their argument almost exclusively to the Commerce Clause.<sup>125</sup> For good measure, however, the Fourth Circuit made sure to explicitly state that Congress did not have the authority under the fourteenth

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<sup>124</sup> *Brzonkala* 1998: 825-826.

<sup>125</sup> The primary case forcing this shift in tactics was *City of Boerne v. Flores*, 521, U.S. 507 (1997). The case dealt with a challenge to the Religious Freedom Restoration Act of 1993 (RFRA). The Supreme Court held that although Congress has broad authority under section five of the fourteenth amendment, in most cases where the RFRA was applied the state laws were not motivated by bigotry and therefore the RFRA was not an appropriate remedy for the perceived wrong. The Court further held that the Act “appears...to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit” (507). In ruling that the RFRA was unconstitutional, the Court significantly limited the ability of Congress to use the enforcement clause of the fourteenth amendment to remedy non-purposeful discrimination by states.

amendment either. Echoing the district court's interpretations, the Fourth Circuit argued that since the gender discrimination by the states was not purposeful, there was no equal protection violation.<sup>126</sup>

The Fourth Circuit also held that to uphold the civil rights remedy, the fourteenth amendment would have to allow Congress to regulate purely private conduct, but that it does not. The Court rejected Professor Cass Sunstein's framing of the fourteenth amendment argument that the civil rights remedy did not regulate private conduct, but was rather a self-help measure created to remedy states' failure to adequately deal with gender-motivated violence. Instead, the Court held that the fourteenth amendment can only reach state action.

The appellants attempted to remedy the issue by arguing both that there was Supreme Court precedent that supported the use of the fourteenth amendment to regulate private action and that contradictory precedent was outdated. Indeed, the majority of the case law proscribing the regulation of private conduct was from the reconstruction era civil rights legislation.<sup>127</sup> Thus, the appellants attempted to frame the issue as having developed over time—the older precedents that did not support a civil rights remedy reaching private action had been altered and developed to a point that the Court must now hold that the civil rights remedy was constitutional. The

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<sup>126</sup> Equal protection violations will be discussed in the following chapter.

<sup>127</sup> See *United States v. Harris*, 106 U.S. 629 (1883) where the Supreme Court struck down criminal conspiracy provisions in the Civil Rights Act of 1871 (also known as the Klu Klux Klan Act of 1871) because Congress was usurping state functions; and *The Civil Rights Cases*, 109 U.S. 3 (1883) where the Supreme Court struck down part of the Civil Rights Act of 1875 that banned racial discrimination in places of private accommodation, transportation, and entertainment, holding that the fourteenth amendment only permitted regulation of state action. The Court held that “[i]t is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection” (13).

Fourth Circuit disagreed.<sup>128</sup> This holding again presents the conundrum of what women, who are disproportionately the victims of state inaction or biased state action, are to do to remedy violent discrimination. While the federal judiciary would have women pursue their claims in state courts, as discussed in the state case study chapters, these claims have largely been ineffective, forcing women into federal court.

Perhaps most importantly, the Court held that section 13981, the civil rights remedy, was also not constitutional under the Commerce Clause. The remedy “not only...regulate[s] wholly intrastate and private conduct, but the conduct regulated also falls within the most traditional of state concerns.”<sup>129</sup> Thus, at a fundamental level the majority of the Fourth Circuit conceived of gender-motivated violence not as a civil rights violation but instead as a federalism issue. As a result, violence against women is a state criminal issue that must be addressed exclusively by the states—even though forty-one state attorneys general signed a letter asking the federal government for assistance because the states were overwhelmed by the issue.

The Court elaborated in a footnote, stating that even if civil rights law was relevant precedent for section 13981, those cases all addressed crimes that either violated specific constitutional protections or were designed to deprive an individual of his/her constitutional

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<sup>128</sup> Using gendered language and severely mischaracterizing the appellants’ argument, the Court wrote: “the appellants really have no argument other than that we should *ignore* these decisions because they are ‘too old’ to be controlling. *To the point of histrionics*, in fact, appellants incant that *Harris* and the *Civil Rights Cases* are simply ‘outdated’...” (emphasis mine, 880). In contrast to the Court’s characterization of the appellants’ argument, Brzonkala’s brief references ‘modern’ only twice; her reply brief mentions the issue twice; and the United States’ briefs mentions the time period of the precedents twice. While the appellants do make the argument, it is hardly “to the point of histrionics,” a interestingly gendered way to denigrate a rape victim’s attempt to use a civil rights remedy that was created, in part, because of the bias women victims of violence experience in the courts.

<sup>129</sup> *Brzonkala* 1998: 853.

rights.<sup>130</sup> Although Brzonkala cited three Supreme Court cases that involved section 1985(3)<sup>131</sup> and the right to interstate travel<sup>132</sup>, the appellate court could not identify a constitutional right violated by gender-motivated violence.<sup>133</sup> Thus, although Congress created a federal right to be free from gender-motivated violence in VAWA, the Court held that there was nothing in the constitution creating a right to bodily integrity or to be free from violent assault. In addition, the Court was also unable to conceive of violence against women as impeding interstate movement, the constitutional right frequently cited in race-based civil rights legislation.<sup>134</sup>

While the Court acknowledged that there is discrimination in state law, it did not formulate violence against women, and the states' inability to adequately address it, as a civil rights issue. In an ironic recognition of the widespread discrimination women face in the justice

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<sup>130</sup> Elsewhere the majority also noted that, “[t]he reach of *section 13981* is not even limited to private acts of violence committed with the active connivance of the States or their officials, or to private acts of violence purposely aimed at depriving the victims of equal access to legal redress or other constitutional rights. Accordingly, not even appellants seriously contend that the purely private gender-motivated violence reached by *section 13981* itself violates the Constitution” (853). Thus, it is important to note that the Court is explicitly stating that there is no constitutional right in the United States to bodily integrity or the right to live your life free from violence and discrimination. In addition, there is no private application of the constitutional rights to life and liberty. This is an important juxtaposition to South African constitutional provisions and interpretations, which will be discussed in chapter seven.

<sup>131</sup> Section 1985(3) was part of the Civil Rights Act of 1871. It created a cause of action against private conspiracies to deprive individuals of civil rights. It does not itself create any additional civil rights; it is merely a vehicle for enforcing rights derived from other sources of law.

<sup>132</sup> *Griffin v. Breckenridge*, 403 U.S. 88 (1971) see footnote 32; *United States v. Guest*, 383 U.S. 745 (1966) see footnote 31; *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993) where the Supreme Court did not permit a lawsuit alleging violations of section 1985(3) against anti-abortion protesters to proceed. The plaintiffs alleged, in part, that the anti-abortion protesters conspired to deprive women of their right to interstate travel; the Court rejected this argument, holding that the protestors did not have impeding the rights of women heading to the clinic to interstate travel as a “conscious objective” (275). Plaintiffs also argued that opposition to abortion demonstrated either paternalism toward or opposition to women and that the protestors conspired to deprive women the right to have an abortion. The Court did not agree and reversed the lower courts’ decisions allowing the civil rights lawsuit to proceed.

<sup>133</sup> The majority held: “the desirability of section 13981 is, as it must be under a Constitution that separates the powers one from the other, a matter that has been placed beyond our cognizance by the Constitution we interpret” (889).

<sup>134</sup> See *Griffin* and *Guest* for civil remedy statutes upheld, in part, for impeding interstate movement of black Americans; see *Heart of Atlanta Motel* and *Katzenbach* for criminal legislation upheld in part for impeding interstate movement by minorities.

system, the Court argued that if section 13981 was allowed to stand, Congress could not only federalize all violence against women, but it could also regulate all family law. Instead, the Court argued that the federal government cannot try to remedy the most serious form of sex discrimination—violence—because otherwise it might have jurisdiction over all sex discrimination, or worse yet, “plenary power over every aspect of human affairs—no matter how private, no matter how local, not matter how remote from commerce.”<sup>135</sup>

For good measure, the majority ended with the same lofty language with which it began.

It wrote:

We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the later... The judicial decisionmaking contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels... And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.<sup>136</sup>

Again, the judges held that while they are sympathetic to the problem of violence against women, they were required by the constitution to invalidate Congress’s innovative approach to address with the issue.

The decision was not unanimous. The dissent argued that “proper judicial review” required the justices to conclude that Congress had a rational basis to determine that violence against women substantially affects interstate commerce.<sup>137</sup> In addition, the dissent asserted that “even when subjected to the most searching examination, it is clear that this carefully drawn statute neither interferes with state regulation nor legislates in an area of traditional state concern.”<sup>138</sup> The dissent continued by identifying three mistakes the majority made in its analysis

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<sup>135</sup> *Brzonkala* 1998: 889.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Brzonkala* 1998: 905.

<sup>138</sup> *Ibid.*

to support their argument.<sup>139</sup> Most importantly for our purposes, however, the dissent conceived of section 13981 as a civil rights remedy that was undoubtedly under the federal government's purview. Thus, the dissent argued that the primary concern of the Court should have been whether Congress had a rational basis to conclude violence against women substantially affected interstate commerce. Because the dissent found that Congress had the authority under the Commerce Clause to enact the civil rights remedy, it did not address the fourteenth amendment issues.

*The Supreme Court—United States v. Morrison (2000)*

The United States and Brzonkala again appealed the decision, this time to the Supreme Court. In a 5-4 decision, the Supreme Court upheld the Fourth Circuit ruling striking down the civil rights remedy in VAWA. Writing for the majority<sup>140</sup>, Chief Justice Rehnquist explained that Congress cannot aggregate the effects of noneconomic activity to regulate it. Although the majority did not adopt a bright line rule, it essentially stated that for Congress to be able to regulate purely intrastate activity under the Commerce Clause, the activity had to be economic in nature. Aggregate effects were no longer sufficient.

By way of explanation, the Court highlighted federalism concerns—which signaled the rejection of framing violence against women as a civil rights violation. Indeed, their rationale was to ensure individual freedom, arguing that “the Framers crafted the federal system of

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<sup>139</sup> The three mistakes the dissent identified are: 1) the Court creates a new rule that Congress can only act under the Commerce Clause to directly regulate economic activities or enact statutes with jurisdictional elements; 2) the majority fails to apply the correct standard of judicial review and give proper deference to Congress; and, 3) the majority misunderstands the nature and extent of federalism.

<sup>140</sup> The majority opinion was signed by Justices O'Connor, Scalia, Kennedy, and Thomas. In addition to joining the majority opinion, Justice Thomas also filed a concurring opinion that stated the Court should abandon the “substantial effects” test under the Commerce Clause.

government so that the people's rights would be secured by the division of power."<sup>141</sup> The fact that women's rights *as women* are weakened by this division of authority is either not appreciated or not understood by the majority, who are unable to see how violent discrimination impedes women's full participation in society. Going one step further, the majority actually held that Congress' findings indicate that gender-based violence is not a national problem.<sup>142</sup> Thus, according to the majority, even if violence against women was an issue that needed to be addressed, it would be inappropriate to craft a national remedy for a localized problem.

Explaining their choice of constitutional interpretation, the majority went on to assert that they "reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution, they held, requires a distinction between what is truly national and what is truly local."<sup>143</sup> In making their interpretive choice clear, the majority outlined what they considered to be thinkable under the federal constitution. To them, the Commerce Clause allows Congress to regulate a farmer's wheat production that is entirely consumed by animals on his farm, because of the aggregate effect on interstate commerce.<sup>144</sup> Thus, growing your own food for your own animals is an economic activity that can be regulated.<sup>145</sup> Furthermore, the Court can uphold civil rights laws

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<sup>141</sup> *Morrison* at 616.

<sup>142</sup> Despite four years of hearings, testimony from experts and victims, twenty-one state self-assessments that found significant bias in the treatment in women victims of violent crime, and a letter from forty-one state Attorneys General stating that their states needed federal assistance to combat violence against women, the majority concluded that Congress had not demonstrated a national problem. Indeed, the majority interpreted the findings to have demonstrated the opposite of what Congress thought they demonstrated—an isolated problem in some areas. As a result, the Court concluded that even if there were a civil rights issue, such a remedy would not have been acceptable under section five of the fourteenth amendment because it was not tailored to the problematic locations (626).

<sup>143</sup> *Morrison* at 617-618.

<sup>144</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>145</sup> The assumption in *Wickard* is that the farmer would have purchased food for his animals had he not grown his own and would have therefore been a market participant but for the food production. There are several steps the

that forbid racial discrimination in restaurants because the intrastate discrimination impacts minorities' interstate movement.<sup>146</sup> The significant economic effects of violence against women, however, are not addressable at the national level. Women's issues are local; civil rights and economic issues are national.

For good measure, the Court also dismissed the appellants' argument under the fourteenth amendment. Focusing on the state action doctrine, the Court argued that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."<sup>147</sup> Unfortunately for women, the area of individual freedom preserved undermines their ability to seek legal remedies for the violence and discrimination they encounter both by private individuals and by the state. The majority emphasizes the strong vertical nature of the federal constitution, clarifying that the fourteenth amendment "adds nothing to the rights of one citizen as against another."<sup>148</sup> All the amendment does, according to the majority, is prohibit states from violating the fundamental rights of its citizens.

The majority concludes:

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under §5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.<sup>149</sup>

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Court had to make to reach this conclusion. Perhaps most importantly, it interpreted individual inaction to be a type of action—something the Court is unwilling to do in the case of state inaction. In addition, it also assumes that the individual would continue to be a farmer and buy food for his animals, rather than seek other types of employment. Given the inability to produce his own cattle feed, it is entirely possible that the farmer might seek another form of employment, either different type of farming or a different career altogether, thereby not engaging in the wheat market.

<sup>146</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>147</sup> *Morrison* at 622.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Morrison* at 627.



The majority thereby appears to foreclose any possibility for victims of gender-based violence—even victims who do not have adequate state remedies and who are thereby denied justice—to obtain justice under the federal constitution via federal legislation. It is important to remember, however, that while “no civilized system of justice could fail to provide” Brzonkala a remedy against her assailants, local prosecutors in Virginia declined to pursue criminal charges against Morrison and Crawford<sup>150</sup>, leaving Brzonkala with limited options for justice.

Two separate dissents were filed in the case, one by Justice Souter and one by Justice Breyer. Justice Souter filed the primary dissent<sup>151</sup>, arguing that since the civil rights provision was constitutional under the Commerce Clause, it was unnecessary to address the fourteenth amendment issues. In his dissent, Justice Souter distinguished *Morrison* from *Lopez*, primarily based on the extensive congressional findings that gave Congress a rational basis to conclude that violence against women substantially affects interstate commerce. He elaborated further, analogizing the VAWA civil rights provision to the Civil Rights Act of 1964.<sup>152</sup> Although Souter acknowledged that the enumeration of powers “implies that other powers are withheld,” it is “a non sequitur” that “some particular categories of subject matter are...beyond the reach of the commerce power.”<sup>153</sup>

To emphasize the interpretative choice the majority is making in striking down the civil rights provision, Souter elaborated:

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<sup>150</sup> MacKinnon, 2000-2001.

<sup>151</sup> Justice Souter’s dissent was joined by Justices Stevens, Ginsburg, and Breyer.

<sup>152</sup> Souter argued that “gender-based violence in the 1990’s was shown to operate in a manner similar to racial discrimination in the 1960’s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, gender-based violence bars its most likely targets—women—from full participation in the national economy” (internal cite omitted, 635-6).

<sup>153</sup> *Morrison* at 639.

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare ‘noncommercial’ primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in light of the final sentence of Article 1, §8, authorizing Congress to make ‘all Laws...necessary and proper’ to give effect to its enumerated powers such as commerce.<sup>154 155</sup>

In acknowledging the interpretive choice, Souter places the discussion into one of judicial ideology and philosophy. Using federalism as its legal shield, Souter notes that the majority ignored both the state requests for the federal government to act and states’ failures to adequately deal with gender-based violence. He notes the irony of this development, concluding that states would be “forced to enjoy the new federalism.”<sup>156</sup>

In addition to signing Souter’s dissent, Justice Breyer also authored a dissent.<sup>157</sup> Justice Breyer began his dissent by expounding on what the appropriate standard under the Commerce Clause should be. In response to the majority’s concern that anything in the aggregate becomes interstate commerce, Breyer noted that this was a reality of modern society, not a problem with constitutional interpretation. More importantly, however, Breyer addressed section five of the fourteenth amendment. As well as arguing that the civil rights provision was a remedy for failed state action—thereby supporting Professor Cass Sunstein’s argument from so many years ago—

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<sup>154</sup> *Morrison* at 640.

<sup>155</sup> Souter later elaborates on this argument, stating:

“If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power” (644-5).

<sup>156</sup> *Morrison* at 654.

<sup>157</sup> Justice Stevens joined the entirety of Breyer’s dissent, while Justices Souter and Ginsburg joined in part.

Breyer also disputed the majority's contention that Congress could not provide a remedy against private actors. Breyer concluded without definitively answering the fourteenth amendment question, however, as he would have upheld section 13981 under the Commerce Clause.

With *Morrison*, a truly innovative attempt to address violence against women at the federal level in the United States was invalidated. Although VAWA still has important criminal and funding provisions, it no longer has the "self-help" mechanism that victims of gender-based violence could use to circumvent bias in state law and state law application. In response to *Morrison* there was one attempt to revive the civil rights remedy. In July 2000, Representative Conyers of Michigan introduced H.R. 5021, the Violence Against Women Civil Rights Restoration Act of 2000. The bill restructured the remedy to include an interstate jurisdictional element. The remedy would permit a federal civil rights lawsuit if there was an explicit interstate connection. Although the bill had fifty-one co-sponsors in the House, it died in the House Subcommittee on Crime. No comparable bill was ever introduced in the Senate and no subsequent actions were ever taken.

#### ***IV. Conclusion***

The Violence Against Women Act and the subsequent cases challenging the law are vitally important to the understanding of how the U.S. constitution has structured the federal and state responses to domestic violence in the United States. Perhaps most importantly, in drafting VAWA, Congress acknowledged not only the inadequate responses by the states in addressing and preventing violence against women, but it also catalogued widespread bias against female

victims of gender-based violence at nearly every stage in the justice system. By attempting to frame violence against women as a civil rights issue, Congress attempted to bring a problem largely considered to be a private and state issue into the public, federal realm. While this was in part the result of increased public recognition of the problem, it also served to increase public understanding of the severity and complexity of the problem.

The drafting of the law, as well as the subsequent court battles, also exposed an awkward reality of the U.S. federal constitution—namely that it guarantees very few individual rights and that Congress is limited in its ability to pass legislation. With regards to individual rights, the Constitution does not explicitly enumerate, nor has the Supreme Court widely held, that individuals have a right to life, interpreted broadly, or to bodily integrity. Thus, civil rights provisions have been upheld in part on the notion of the constitutionally protected right to interstate travel—not the right to not have a gang beat you to death because of your race.<sup>158</sup> This dearth of rights, but also the structure of these limited rights, restricts what the state and federal governments are not only *required* to do to protect citizens, but it also, as we saw in *Morrison*, constrains what the federal government *are able to* do to protect its citizens. Thus, although the U.S. federal constitution did not require action, it was through an interpretive choice, guided by legal training and ideological understandings of the constitution and the U.S. federal structure, that the Supreme Court limited not only other courts, but also Congress, in their ability to use the law to address widespread violence against women. In restricting the federal government in the name of freedom, the Supreme Court's interpretation of the constitution at best impedes the ability of—and at worst prohibits—the federal government from protecting citizens. Again, it is

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<sup>158</sup> See *Guest*, footnote 58.

important to remember that this restriction is an interpretive choice by the sitting justices—it is not required by the text of the constitution. It is the result of legal training and ideological understandings of law and society.

Further complicating things, Congress is extremely limited in its ability to actually legislate on issues that many individuals view as critically important. To the layman, it would seem absurd that the best possible argument to uphold a gender-based civil rights provision is the regulation of interstate commerce, and not the protection of equal rights. While clearly neither was successful, the majority of the congressional testimony and court challenges took the Commerce Clause argument as the clear way for Congress to legislate on the criminal and civil components of VAWA. The fact is, however, in *Morrison*, the Supreme Court foreclosed the only two clear avenues available to Congress—the Commerce Clause and the fourteenth amendment—to address the bias in the state treatment of gender-based violence, and the inability of the states to adequately protect women. Although there are other arguments circulating—such as the thirteenth amendment and the Privileges and Immunities Clause—they have not yet obtained widespread acceptance and have consequently not been tested before in the courts.

This leads to the final significant revelation from VAWA and the subsequent court battles. Women’s rights are not civil rights under the constitution; instead, federalism concerns triumphed. The Supreme Court definitively relegated “women’s issues” to the states. It, along with several lower courts, deafeningly proclaimed that issues involving women—even violence directed at women because they are women—are state issues. In reality, this results in the ghettoization of women’s rights issues. If a state cares to address the issue, it may; there is no requirement, however, and certainly no refuge should a state ignore or mishandle the problem.

This is largely the result of the structure of the constitution—both its strong federalism but also its extreme verticality that directly influences what lawyers, judges, and laymen consider thinkable responses to national problems. The structure, which guides these interpretive choices, in reality, solidifies the traditional liberal public-private divide that has been constructed in U.S. law. This outcome is also the result of the content of the constitution, however. Because the U.S. federal constitution lacks specific individual rights that courts could rely upon to protect women from private violence, they have largely interpreted that absence as an inability to act. Accordingly, in choosing to interpret gender-based violence as a state issue rather than as a civil rights issue, the Court cemented the notion that certain areas are off-limits for a federal constitution that respects “individual freedom”, even if that individual freedom is the right to be assaulted without remedy or redress.

This chapter focused on the Congress’ attempt to address violence against women and the Supreme Court’s decision partially barring that effort. In the following chapter, we will see how the Supreme Court has also foreclosed on individuals’ attempts to use the fourteenth amendment to increase state accountability for gender-based violence.

*Appendix*

**Table 1—Comparison of the original 1990 bill and final 1994 Violence Against Women Act**

|                     | <b>S 2754—1990 VAWA bill</b>  | <b>1994 final version</b>  |
|---------------------|---|--|
| <b>Bill content</b> | <p><i>Title I</i> = Safe Streets for Women<br/> <i>Title II</i> = Safe Homes for Women<br/> <i>Title III</i> = Civil Rights</p> | <p><i>Subtitle A</i> = Safe Streets for Women<br/> <i>Subtitle B</i> = Safe Homes for Women<br/> <i>Subtitle C</i> = Civil Rights for Women<br/> <i>Subtitle D</i> = Equal justice for Women in the Courts<br/> <i>Subtitle E</i> = Violence Against Women Act Improvements<br/> <i>Subtitle F</i> = National Stalker and Domestic Violence Reduction<br/> <i>Subtitle G</i> = Protections for Battered Immigrant Women and Children</p> |

**Table 2—Comparison of the original and final civil rights remedies in the 1994 version of VAWA**

|                                 | <b>S 2754—1990 VAWA bill</b>  | <b>1994 final version</b>   |
|---------------------------------|---|---|
| <b>Subsections</b>              | <p>(a) Findings<br/> (b) Rights, Privileges and Immunities<br/> (c) Cause of Action<br/> (d) Definition</p>   | <p>(a) Purpose<br/> (b) Right to be Free from Crimes of Violence<br/> (c) Cause of Action<br/> (d) Definitions<br/> (e) Limitation and Procedures</p>   |
| <b>Constitutional Authority</b> | Fourteenth Amendment  | Commerce Clause and Fourteenth Amendment  |
| <b>Rights Established</b>       | “All persons within the United States shall have the same rights, privileges and immunities in every State as is enjoyed by all other persons to be free from crimes of violence motivated by the victim’s gender”  | “All persons within the United States shall have the right to be free from crimes of violence motivated by gender”  |
| <b>Cause of Action</b>          | “Any person, including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State, who deprives another of the rights, privileges or immunities secured by the Constitution and laws as enumerated in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages.” | “A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence motivated by gender] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” |

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|---|--|--|
| Definition of a crime of violence motivated by gender | “any rape, sexual assault, or abusive sexual contact motivated by gender-based animus” | “an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another...whether or not those acts have actually resulted in criminal charges, prosecution, or conviction...” including any “act or series of acts that would constitute a felony” described above “but for the relationship between the person who takes such action and the individual against whom such action is taken”   |
| Limitations   | None specified   | <p>(1) “[R]andom acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender” are not included under this section.</p> <p>(2) Filing a criminal complaint is not required to establish a cause of action under this section</p> <p>(3) “Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle”</p> <p>(4) Nothing in this section creates federal jurisdiction “over any State law claim seeking...a divorce, alimony, equitable distribution of marital property, or child custody decree.”</p> <p>(5) “A civil action in any State court arising under [the civil rights section] of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.”</p> |



## Chapter 6

### The U.S. Federal System: The Fourteenth Amendment and Domestic Violence Federal Civil Lawsuits

#### ***I. Introduction***

The previous chapter examined how the U.S. government attempted to proactively address violence against women generally, and domestic violence specifically, through federal legislation. Congress took a novel approach and tried to treat gendered violence as a civil rights issue by creating a federal civil right for women to live their lives free of gendered violence and a corresponding federal remedy for victims to invoke when that right was violated. Although this approach was controversial, most opposition focused on the appropriate role of the federal government, not on the ability of Congress to enact such legislation. The Supreme Court, however, disagreed, and held that Congress did not have the authority to create a federal civil remedy for private gendered violence. As a result of that decision, Congress has limited options to address intimate violence.

Congressional action is only half of the federal story, however. Domestic violence victims have also attempted to avail themselves of federal remedies when their injuries are in part caused, or at a minimum exacerbated, by ineffective state intervention. As we saw in the state case study chapters, the move to the federal arena was largely driven by the fact that state law generally does not provide adequate remedies for failed or negligent state intervention because the courts allow government agents and localities to assert qualified and sovereign

immunity.<sup>1</sup> To overcome immunity, a victim must generally assert a constitutional violation or another qualifying exception to immunity. In state courts victims will generally allege a combination of state and federal constitutional violations.<sup>2</sup> In federal courts, this is generally done in a section 1983<sup>3</sup> lawsuit by asserting one of three main constitutional guarantees, all originating from the fourteenth amendment: substantive due process, procedural due process, and equal protection rights.

The process of asserting a section 1983 lawsuit is conceptually relatively simple. In a section 1983 lawsuit a claimant must assert a well-established constitutional violation, taken under color of state law, to successfully proceed to trial. From the domestic violence victim's perspective, there are two problems with these requirements. First, the victim must allege a well-established constitutional violation. As discussed previously, the U.S. federal constitution offers

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<sup>1</sup> See Jack M. Beermann, "Administrative Failure and Local Democracy: The Politics of *DeShaney*," *Duke Law Journal*, vol. 39 no. 5, pgs. 1078-1112 (1990) for a discussion of the implications of state immunity on justice. In part, Beermann argues that the Supreme Court's determination to not turn torts committed by state officials into due process violations undermines avenues of relief and that in modern society government has an obligation to protect weak members of society. He argues that there is substantial evidence that the fourteenth amendment was meant to require the government to do just that by creating a remedy for "the failure of state agents and agencies to prevent private misconduct" (1083).

<sup>2</sup> Assertion of state constitutional claims is only possible when they exist, however. In the states discussed in this dissertation, victims in both Montana and Colorado were able to assert state claims, whereas victims in Wisconsin were not. This is largely due to the fact that the Wisconsin Supreme Court's interpretation of the state constitution does not offer any relevant rights beyond that of the federal constitution. Thus, while a seemingly obvious point, this point bears mentioning because it creates a situation in which the rights and remedies available to intimate violence victims are largely dependent upon a victim's physical location.

<sup>3</sup>Originally passed in the Civil Rights Act of 1871, 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." The Supreme Court first opened this avenue in *Monroe v. Pape*, 365 U.S. 167 (1961), where a family was abused by police officers in their home and the Court said that the police officers, but not the municipality, could be sued. The Court later ruled that municipalities could also be sued when they implemented policies that violated individuals' constitutional rights in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The purpose of the legislation was to provide a federal remedy when state courts, due to prejudice or neglect, did not enforce citizens' fourteenth amendment rights. See Harper, Laura S., "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues after *DeShaney v. Winnebago Department of Social Services*," *75 Cornell Law Review*, pgs. 1392-1424 (1989).

limited obvious opportunities to address domestic violence. With regards to individual rights, there are few relevant options as the Bill of Rights deals largely with property, privacy, and criminal defendant rights. The Civil War Amendments, however, primarily the fourteenth amendment, have provided an opening for victims to bring civil lawsuits against police departments, municipalities, and their employees in cases where police officers have offered ineffective protection in domestic violence situations. For our purposes, the relevant section of the fourteenth amendment reads:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>4</sup>

There are three possible clauses in this section that could be used in domestic violence situations: the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. The Privileges and Immunities Clause was largely gutted in the mid-nineteenth century by the Supreme Court in the *Slaughter-House Cases*<sup>5</sup>. In a challenge of New Orleans' slaughter-house regulations, the Supreme Court held that the Privileges and Immunities Clause only applied to federal rights of citizenship, not state rights of citizenship, and therefore does not include civil rights that could be asserted in domestic violence situations.<sup>6</sup> Victims have invoked the second clause, the Due Process Clause, from both a substantive and procedural perspective. Substantive due process protects an individual from arbitrary and unreasonable

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<sup>4</sup> U.S. Constitution, fourteenth amendment, section 1.

<sup>5</sup> 83 U.S. 36 (1873).

<sup>6</sup> Despite the fact that civil rights are not covered by the Privileges and Immunities Clause, it could theoretically be used to increase the responsibility of the state to protect victims of domestic violence, although it has not been. The right to interstate movement is a recognized federal citizenship right. While this right has been applied to black citizens to uphold civil rights legislation, it has not been applied to women. This discrepancy again highlights the role of thinkability in the application of rights to different situations.

actions that deprive him/her of life, liberty or property whereas procedural due process protects an individual from the deprivation of life, liberty or property without acceptable procedural safeguards. Finally, domestic violence victims have also used the Equal Protection Clause to assert claims based on discriminatory treatment and impact in the implementation of state laws and police policies. Since the Privileges and Immunities Clause has been effectively neutralized, in this chapter I focus on how intimate violence victims have attempted to use the Due Process and Equal Protection Clauses in cases characterized by ineffective state intervention to assert a well-established constitutional violation, but have mostly failed.

The second crucial component for a successful section 1983 claim is that the actions complained about must have been taken under color of state law. As a result, it is not sufficient to simply allege a violation of a well-established constitutional right; the violation must also have been done by a state actor in their official capacity. Thus, whether or not there was state action becomes critical at this stage. The state action requirement is derived from the vertical structuring of various rights provisions in the federal constitution. Although in practice the doctrine lacks consistency,<sup>7</sup> state action is generally considered something a government employee affirmatively does in the course of their official duties. State inaction—the failure of a government employee to effectively complete their duties—and negligent discretionary action are not sufficient for a section 1983 lawsuit.

Both of the two elements required for a successful 1983 lawsuit are problematic for victims of intimate violence in the United States. Since there are few relevant individual rights in the U.S. federal constitution, litigants must be creative in their use of the fourteenth

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<sup>7</sup> Chemerinsky, Erwin, “Rethinking State Action,” *Northwestern University Law Review*, vol. 80 no. 3, pgs. 503-557, 1986.

amendment to assert constitutional rights violations. Even if a victim is able to assert a constitutional rights violation, however, s/he must also demonstrate that the violation was caused by affirmative state action. Considering a significant portion of injuries related to domestic violence that also involve the government are classified as resulting from a state's negligent inaction, few cases survive summary judgment motions to dismiss. Consequently, whether or not a lawsuit proceeds is frequently dependent upon how a judge classifies a particular government act. This decision reflects how a judge views the role of the government and constitutional rights, and is often a marker of thinkability in federal lawsuits as the same act can frequently be characterized as either state action or state inaction, depending upon an individual's perspective.<sup>8</sup>

These problems become evident when examining federal jurisprudence involving private violence and are crucial to understanding how the United States—at both a state and federal level—address domestic violence. Despite the fact that the vast majority of domestic violence law in the United States is state law, the federal constitution is still largely determinative when victims of domestic and intimate violence seek justice under state or federal law. There are several important federal Supreme Court cases that have largely structured how intimate violence is handled legally in the United States. These Supreme Court cases have not only determined the application of federal constitutional rights in both federal and state courts, but they have also impacted the way state law is interpreted and applied.<sup>9</sup>

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<sup>8</sup> The role perspective plays in classifying an act as either state action or inaction is highlighted in the *DeShaney* case, as the majority sees state inaction and the dissent sees state action.

<sup>9</sup> See, for example, in chapter two the way Wisconsin uses *DeShaney* to interpret its “equality, inherent rights” section of the state constitution.

In this chapter I show how these federal cases outline the constitutional terrain for private and domestic violence claims. In doing so, I demonstrate that the public-private divide that sometimes appears blurred in state and federal legislation is sharply drawn and codified by case law. In this chapter I will discuss the three areas of federal constitutional law that have been invoked, largely to no avail, to try to force better police responses in domestic violence situations. I first discuss substantive due process claims, which are largely determined by *DeShaney v. Winnebago*.<sup>10</sup> I then review procedural due process claims, the legal status of which have been determined by *Castle Rock v. Gonzales*.<sup>11</sup> Finally, I examine the current state of equal protection claims, which are not neatly summarized by a single Supreme Court case. Instead, there are multiple issues for involved in equal protection claims, which I outline. To help clarify, the development of federal case law is briefly outlined in table form in the appendix to this chapter.

Most importantly, in this chapter I demonstrate that the federal constitution offers little recourse to victims of domestic violence due to judges' interpretive choices—not because of any inherent constitutional defect. Indeed, through the case law analysis, I show that the structure of the constitution, the limited individual rights guarantees, and the entrenched interpretive tradition strongly delineating the public and private spheres has proved problematic for victims of domestic violence seeking federal remedies for ineffective state intervention. Together, these three features have severely limited the thinkability of state involvement in such an intimate problem.

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<sup>10</sup> *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

<sup>11</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

## ***II. Substantive Due Process Claims—DeShaney v. Winnebago***

While victims have tried various approaches to claim constitutional rights violations in domestic violence cases, all have failed before the Supreme Court. *DeShaney* established the proposition that there is no substantive due process violation in private violence cases unless the victim was either in state custody at the time of the assault or the state affirmatively placed the victim in harm's way. From a practical perspective, this case foreclosed substantive due process claims in most domestic violence cases. Although many victims, including Joshua DeShaney, tried to argue that state policy or action affirmatively increased a victim's vulnerability to danger, most have been unsuccessful. As a result of *DeShaney*, victims of domestic and intimate violence were forced to pursue other constitutional avenues, primarily procedural due process and equal protection claims, to overcome assertions of sovereign immunity by state actors. Before discussing those claims, however, we must first consider *DeShaney v. Winnebago County* in more detail.

Joshua DeShaney was four years old when his father beat him so severely he fell into a coma and, as a result, was rendered profoundly mentally disabled. Although the Winnebago Department of Social Services (DSS) knew that Joshua was being abused and was monitoring his situation, it ultimately failed to intervene in a manner that sufficiently protected Joshua from his father. As a result of the final assault, Joshua will live in an institution for the severely disabled for the rest of his life.

Joshua DeShaney was born in 1979 in Wyoming. The following year his parents divorced in Wyoming and his father, Randy, was granted custody of Joshua. Shortly thereafter, Randy moved with Joshua to Neenah, Wisconsin, a small town in Winnebago County. In

Wisconsin, Randy remarried and divorced, and during the divorce proceedings in January 1982 his second ex-wife notified Winnebago County officials that Joshua was being abused. DSS interviewed Randy about the allegations, but he denied abusing Joshua and the Department dropped the matter.

The following January, Joshua was admitted to a local hospital with suspicious injuries and the attending doctor notified DSS to report possible child abuse. DSS gave the hospital temporary custody of Joshua and convened a 'Child Protection Team' to discuss Joshua's situation. The Team determined they did not have sufficient evidence to retain custody of Joshua, so they instead recommended several measures to try to protect him in his home. Randy entered into a voluntary agreement with DSS and promised to cooperate with their recommendations. He then retook custody of Joshua.

A month later emergency room personnel contacted DSS to notify them that Joshua again had suspicious injuries. A caseworker determined there was no basis for action, but over the next six months conducted monthly visits to the DeShaney home. On several occasions she noted suspicious injuries on Joshua, as well as the fact that Randy was not complying with the Child Protection Team's recommendations. She noted in her file that she suspected someone was abusing Joshua, but took no further action. In November 1983, Joshua was again treated at the local hospital with suspicious injuries. During the following two visits by the social worker, she was told Joshua was too ill to see her. No further actions were taken to protect Joshua. Throughout the ordeal the social worker knew Joshua's mother lived in Wyoming, but did not contact her until after Joshua was beaten so severely he fell into a coma. Failing to contact



Joshua's mother and failing to follow-up on allegations and suspicions of child abuse all violated DSS procedure.

The final beating came in March 1984. After the assault, doctors performed emergency brain surgery to save Joshua's life. During the surgery the doctors discovered multiple hemorrhages resulting from traumatic head injuries that had occurred over an extended period of time. While Joshua did not die, he will never recover from his injuries. His father was tried and convicted for child abuse and received a prison sentence of two to four years. Randy DeShaney served fewer than two years in prison, however, before being paroled.<sup>12</sup>

Joshua and his mother brought a section 1983 lawsuit against Winnebago County, DSS, and several DSS employees for their failure to protect Joshua from his father. The lawsuit alleged that the defendants violated Joshua's fourteenth amendment rights by depriving him of his liberty without due process of law by failing to protect him from his father's abuse. Specifically, they alleged a substantive due process violation. The district court granted summary judgment to the defendants and the Seventh Circuit Court of Appeals granted Joshua's appeal. Although the petitioners argued there were two alternative theories under which Court could find violation of the Due Process Clause<sup>13</sup>, the Court disagreed. The Seventh Circuit held that there were two reasons Joshua's suit could not proceed. First, the Court held that the Due Process Clause does not require any state or local governmental entity to prevent private violence

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<sup>12</sup> "DeShaney v. Winnebago County Department of Social Services." *Supreme Court Drama*. Vol. 2. Gale Cengage, 2006. eNotes.com. <http://www.enotes.com/deshaney-v-winnabago-county-department-social-reference/deshaney-v-winnabago-county-department-social> Accessed April 24, 2010.

<sup>13</sup> "First, the defendants might be thought to have deprived him of a right—a form of liberty or property—to be protected by the Department of Social Services from the brutalities perpetrated by his father. Second, they might be thought to have deprived him of his right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause) by failing to protect him from his father." See *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 at 301 (7<sup>th</sup> Cir. 1987).

not attributable to an employee's actions. Second, the Court held that the causal connection between the defendants' conduct and Joshua's injuries were too weak to establish liability.<sup>14</sup>

The Supreme Court accepted review of the case and in a 6-3 opinion affirmed the lower courts' rulings.<sup>15</sup> In the opinion, authored by Chief Justice Rehnquist, the Supreme Court held that

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation in the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. The Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression'...Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.<sup>16 17</sup>

This strong statement about the vertical configuration of the U.S. constitution and its rights protections reflects the idea that government, not private individuals, is the source of domination

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<sup>14</sup> Although the Seventh Circuit held that there was no actionable section 1983 violation for private violence, the Second, Third, and Fourth Circuits each held in similar cases that there could be a section 1983 claim in certain circumstances involving reckless, willful and wanton misconduct, or gross negligence of state employees that resulted in private violence. See: *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2<sup>nd</sup> Cir. 1981) where a foster child sued the state for abuse suffered in a foster home; *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3<sup>rd</sup> Cir. 1985) where in a fact scenario similar to DeShaney, the Court held that state agencies could be sued for permitting private violence under certain circumstances; and, *Jenson v. Conrad*, 747 F.2d 185 (4<sup>th</sup> Cir. 1984) where a class action suit against South Carolina Social Services was dismissed, but the Court held there could be liability in private violence cases. Thus, upon receiving the petitioners' writ of cert on this case, the Supreme Court was presented with split appellate court analyses on a similar issue.

<sup>15</sup> In his analysis of *DeShaney*, Phillip M. Kannan argued that the Supreme Court reframed the issues presented in the case to limit federal power under the constitution. He asserted that the issue presented by the petitioners (the shocks the conscious standard) was not the same issue ruled upon by the majority (affirmative vs. negative rights). See, "But who will protect poor Joshua DeShaney, a four-year old with no positive due process rights," *University of Memphis Law Review*, vol. 39 no. 3, pgs. 554-598, 2008-9.

<sup>16</sup> *DeShaney* at 196.

<sup>17</sup> This conclusion is contrary to Edward Keynes' argument that both the framing of the Due Process Clause and section 1983 suggest that the intent behind both were to create an affirmative duty on the part of states to protect individuals' rights. He argued further, "the legislative record indicates [that] Congress was concerned with the failure of the states or their agents to protect the individual's constitutional rights as well as the states' active deprivation of such rights." See, "The Fourteenth Amendment, 42 U.S.C. § 1983, and State Inaction," Appendix to Reply Brief for Petitioners, 33.

in individuals' lives. While this might have been true for the individual authors of the constitution and the fourteenth amendment, it is not the case for many individuals in the United States, most notably women and minorities.

The Court continued, concluding that since

the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.<sup>18</sup>

As a result, it does not matter that the state took temporary custody of Joshua, "for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."<sup>19</sup> In reaching this conclusion, the Court rejected arguments presented in amicus briefs alleging that by intervening ineffectively, DSS<sup>20</sup> actually served to affirmatively increase Joshua's risk while simultaneously not offering any meaningful protection.<sup>21</sup> Thus, haphazard intervention, according to the Court, is not state action.

The implication of the Court's analysis is that had the state placed Joshua in foster care, and had the beating been carried out while in the foster home, the state could potentially be

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<sup>18</sup> *DeShaney* at 197.

<sup>19</sup> *DeShaney* at 201.

<sup>20</sup> DSS had a Child Protection Unit that was created in response to legislation requiring state intervention to protect abused children. See petitioner's brief for writ of certiorari, 1987 U.S. Briefs 154; 1987 U.S. S. Ct. Briefs LEXIS 225. In an amicus brief submitted by the ACLU's Children's Rights Project, et al. they argue that while, in general, there is no "generalized right to safety" under the U.S. constitution (10), when a state creates mandatory protective steps under state law victims have a liberty or property interest in those protective steps. Thus, for these organizations, it was the creation of the DSS and state legislation requiring mandatory affirmative steps to protect abused children that transformed Joshua's claim from tragic to constitutional. 1987 U.S. Briefs 154; 1988 U.S. S. Ct. Briefs LEXIS 1685.

<sup>21</sup> Brief of Massachusetts Committee for Children and Youth, in Support of Petitioners, 1987 U.S. Briefs 154; 1988 U.S. S. Ct. Briefs LEXIS 1345.

liable.<sup>22</sup> But, because the state placed Joshua with his parent—even though the state placed him with his father instead of his mother, did not notify the mother of the possible abuse, and did not follow through and investigate allegations of abuse—it was not liable for his injuries.

The issue is not quite as simple as it seems at first blush, however, because the Supreme Court has held that the state sometimes does have an affirmative duty to protect individuals from private violence. According to the *DeShaney* Court, “the affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”<sup>23</sup> Thus, when a person has been involuntarily detained—e.g. is incarcerated or is involuntarily committed—the state does have an obligation under the Due Process Clause to meet certain minimum standards of protection.

This principle is often referred to as the “special relationship” exception to the lack of liability in substantive due process claims. The general argument is that when there is a special relationship between the state and the victim, the state has an affirmative duty to protect the victim from private violence. In *DeShaney*, the plaintiffs alleged that because the state knew Joshua was in danger of abuse by living with his father and the state had “by word and by deed” declared “its intention to protect him against that danger”<sup>24</sup>, that it now had a duty, enforceable through the Due Process Clause, to protect him from the abuse. The knowledge of his plight and

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<sup>22</sup> As noted in chapter two, the right of a child to be safe in foster care has since been well-established. See, for example, *Norfleet v. Arkansas Department of Human Services* (1993). In this case a child with various medical conditions died while in foster care. The defendants were denied qualified immunity because the right of a child in foster care to receive adequate medical supervision was well-established at the time of the incident. See also, Chemerinsky, Erwin, “Government duty to protect: Post-*DeShaney* Developments,” *Touro Law Review*, vol. 19 no. 3, pgs. 679-706, 2003.

<sup>23</sup> *DeShaney* at 200.

<sup>24</sup> *DeShaney* at 197.

the actions taken by the state, plaintiffs argued, created a special relationship between Joshua and the state. The Supreme Court rejected this argument, however. In addition to stating that the special relationship exception is only triggered when the state has deprived individuals of their liberty, the Court also held that while states may create affirmative duties of protection, those duties are not necessarily rendered constitutional rights by the fourteenth amendment.<sup>25</sup>

Using the special relationship and state created danger exceptions, the dissenting justices in *DeShaney* argued that the defendants did have a duty to protect Joshua. In a dissent filed by Justice Brennan and joined by Justices Marshall and Blackmun, the Justices did not dispute the majority holding that the Due Process Clause does not guarantee “a general right to basic governmental services” and argued that the majority had mischaracterized the issue.<sup>26</sup> Instead of finding a generalized right to governmental services, they argued that the Court should focus on the actions that Wisconsin took both on behalf of Joshua and other abused children and find the requisite state action for a section 1983 lawsuit. Citing several cases in which courts found a duty to protect<sup>27</sup>, the dissenting justices argued that the majority erred by only looking at what

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<sup>25</sup> This argument will also come into play in the discussion of *Castle Rock v. Gonzales*. There is an important circle being created in these cases that must be noted. The state passes a law requiring some act or protection but fails to provide it and when sued, asserts immunity. The victim then asserts a constitutional right to overcome immunity and the Supreme Court rejects the claim, stating that if the state wants to offer certain protections, it can do so. As a result, victims are left in an impossible situation without legal recourse for their injuries. In addition, other citizens are left ignorant of the fact that the affirmative protections being passed by the legislature are essentially meaningless, because there is no way to hold any locality responsible, given the dual problems of immunity and the Supreme Court stance on not viewing state law as effectively creating a right on which an individual can depend.

<sup>26</sup> *DeShaney* at 203.

<sup>27</sup> *Youngberg v. Romero*, 457 U.S. 307 (1982) where the state owed a duty to protect a profoundly mentally disabled individual (Romero) with an I.Q. between eight and ten who was institutionalized. Dissent argued that hospitalization was critical in this situation not because Romero was unable to care for himself because he was institutionalized—he was never able to care for himself. Instead the issue was that since he was hospitalized, Romero was cut off from other sources of aid. *Estelle v. Gamble*, 429 U.S. 97 (1976) where the state owed a duty to protect prisoners. *White v. Rochford*, 592 F. 2d 381 (1979) where police officers violated the due process rights of three young children by abandoning them on the side of a busy highway after arresting their guardian.

the state did not do—it did not protect Joshua—rather than what it did do—it haphazardly and ineffectively intervened in Joshua’s life and exacerbated the problem.

Building off of analyses of prisoner and involuntarily committed individuals’ due process rights<sup>28</sup>, the minority argued that they would have those cases “stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from inaction.”<sup>29</sup> Thus, according to this analysis Wisconsin did not simply do nothing to protect Joshua. It established a child protective services agency that made the general public think the state was protecting vulnerable and abused children. As a result, when individuals were suspicious about Joshua’s abusive situation, they reported their concerns to DSS, thinking the state would step in and protect him. By establishing DSS and thereby asserting itself as the guarantor of children’s safety, the state deprived Joshua of any private means of help, thereby requiring the state to intervene and affirmatively help Joshua.<sup>30</sup>

Perhaps even more relevant to an analysis of private violence, specifically domestic violence, the minority also argued that the Supreme Court had in the past held on numerous, diverse occasions<sup>31</sup> that “a State’s actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties... Similarly *Shelley* [citation

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<sup>28</sup> See, for example, *Youngberg v. Romero*, *Estelle v. Gamble*, and *White v. Rochford* discussed in footnote 20.

<sup>29</sup> *DeShaney* at 207.

<sup>30</sup> The minority wrote, “Wisconsin’s child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs... Through its child-protection program, the State actively intervened in Joshua’s life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger” (210).

<sup>31</sup> In addition to *Youngberg* and *Estelle* the Court also cited several cases, including: *Boddie v. Connecticut*, 401 U.S. 371 (1971) where the Court struck down a filing fee for indigents seeking a divorce.

omitted]and *Burton* [citation omitted] suggest that a State may be found complicit in an injury even if it did not create the situation that caused the harm.”<sup>32 33</sup> In essence, what the minority is arguing in its dissent could be conceived of as a form of indirect horizontal application of the constitution. At a minimum, this argument advocates for a weak indirect horizontal application of constitutional rights, meaning that constitutional law should govern some private law. As discussed in chapter one, the indirect application of constitutional law to private law is perhaps best exemplified by Germany, where the spirit of the constitution guides the application and enforcement of statutory law.

In *DeShaney*, the majority argues that the Due Process Clause only limits government action to prevent the government from becoming an agent of oppression in the private sphere.

The dissent disagrees, arguing that the majority fails to appreciate

that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today’s opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the crucial moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent.<sup>34</sup>

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<sup>32</sup> *DeShaney* at 207.

<sup>33</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948) was essentially the indirect horizontal application of the federal constitution to private actors. In this case the Supreme Court refused to enforce a racially restrictive covenant holding that judicial enforcement of such covenants violated the fourteenth amendment rights of minority would-be property owners. The covenants themselves, however, as long as voluntarily adhered to, do not violate the fourteenth amendment. The Court held “these are not cases...in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights...The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing” (19). It is important to note, *Shelley* deals with the Equal Protection Clause of the fourteenth amendment, not the Due Process Clause. For the purposes of *DeShaney*, the case is important because it demonstrates how when the state is used as a coercive mechanism, it can be held responsible for resultant constitutional violations; *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) where the Supreme Court held that a restaurant that discriminated based on race was leasing public property violated the Equal Protection Clause of the fourteenth amendment.

<sup>34</sup> *DeShaney* at 212.

This formulation of the Due Process Clause, had it carried, would have had wide-ranging implications for intimate, and especially domestic, violence. The dissent argued that by establishing structures that people depend upon for safety and security, the state has an affirmative obligation to ensure those ends. Had this interpretation been successful, individuals who were victimized at home and sought protection that has been promised from the state would have a constitutionally protected right to that protection. This is fundamentally different from the current situation in which victims are dependent upon a mixture of police policy as well as local and state laws, thereby creating a patchwork of rights throughout the United States, none of which are enforceable from a constitutional perspective.

In a separate dissent by Justice Blackmun, he compared the majority's approach to Joshua's predicament in this case to that of antebellum judges who denied relief to fugitive slaves, hiding behind legal doctrine while still expressing sympathy for the position of the petitioner. Discussing the bright line between action and inaction created by the majority in this case, Blackmun argued that there is no role for such "formulistic reasoning" in the interpretation of the Due Process Clause—a clause he argued was designed to undue injustices that occurred under the legitimizing auspices of the law during slavery.<sup>35</sup> He continued,

the question presented by this case is an open one, and our *Fourteenth Amendment* precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.<sup>36</sup> (emphasis in original)

Thus, Blackmun highlighted the role that interpretation plays in determining constitutional rights in the United States. By underscoring the fact that the majority opinion is just one option

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<sup>35</sup> Ibid.

<sup>36</sup> *DeShaney* at 212-213.



presented by the constitution and precedent, he underscored the role that constitutional structure plays in shaping the thinkability of particular legal actions.

While the majority presented their holding as if they had no options and were forced to dismiss Joshua's case, Blackmun argued in his dissent that the Court actually had a decision to make about the role of the Due Process Clause in American life. At this critical juncture, he argued, the Supreme Court could have sided with the weak and disadvantaged, or it could hide behind "formulistic reasoning" and do nothing. Blackmun went further:

It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in light of the constitutional protection that 42 U.S.C. §1983 is meant to provide.<sup>37</sup>

Blackmun's dissent is at its most basic about thinkability. As mentioned above, the majority presents their holding as if there was no fundamental choice to be made. Both dissents demonstrate the contrary, as they forcefully outline a rejected alternative to the majority holding. Blackmun's dissent in particular framed the choice to be made from a legal and moral perspective. He argued that both the fourteenth amendment and section 1983 were designed to offer remedies to individuals who were wronged first by the state in some manner, and subsequently by the formalistic legal reasoning of the courts, much like many victims of intimate violence are today.

As a result of *DeShaney*, the special relationship exception to substantive due process analyses was dramatically narrowed. Prior to this case, courts had held that there were four factors that could be considered to determine whether or not there was a special relationship

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<sup>37</sup> *DeShaney* at 213-214.

between the state and the victim: 1) whether there was a custodial relationship between the state and the victim; 2) whether the state affirmatively placed the victim in a dangerous position; 3) whether the state was aware of the risk to the victim; and, 4) whether the state had promised to protect the victim.<sup>38</sup> *DeShaney* effectively eliminated the second two factors, leaving only the first two for judges to consider.

Although the clear statement in *DeShaney* that a state's obligation to protect an individual from private violence stems not from its knowledge of a dangerous situation but instead from the deprivation of an individual's liberty has largely settled the matter<sup>39</sup>, it did not entirely foreclose creative use of the exception. In *Cornelius v. Highland Lake*<sup>40</sup>, Harriet Cornelius sued the Town of Highland Lake, several city officials, and the Alabama Department of Corrections in federal district court after she was abducted at knifepoint by two prison inmates who were assigned to unsupervised work duty at the town hall where Cornelius worked. The inmates held Cornelius for three days, threatening her with physical and sexual assault as well as death, before leaving her tied to a tree in Georgia. Cornelius's lawsuit alleged a violation of her liberty interests, as protected by the fourteenth amendment's Due Process Clause.

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<sup>38</sup> *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 700 (9<sup>th</sup> Cir. 1990).

<sup>39</sup> See, for example: *O'Brien v. Maui County* (37 Fed. Appx. 269 (9<sup>th</sup> Cir. 2002)) no special relationship was created when a woman had a restraining order against her abuser and repeatedly notified the police about incidents of abuse; *Pinder v. Johnson* (54 F.3d 1169 (4<sup>th</sup> Cir. 1995)) no special relationship existed where police promised plaintiff that her ex-boyfriend would be locked up overnight, he was not, and he subsequently murdered plaintiff's children; *Jones v. Phyfer* (761 F.2d 642 (11<sup>th</sup> Cir. 1985)) no special relationship existed when a witness was raped by the man she testified against after he escaped from custody—the woman was not notified about his escape; *Liebson v. New Mexico Department of Corrections* (73 F.3d 274 (10<sup>th</sup> Cir. 1996)) no special relationship when a department of corrections librarian was kidnapped and raped by a librarian assistant after the prison failed to have an officer on duty during her shift; and *Walton v. Alexander* (44 F.3d 1297 (5<sup>th</sup> Cir. 1995)) no special relationship where a minor student attended a state school and was sexually assaulted twice while in residence.

<sup>40</sup> 880 F.2d 348 (11<sup>th</sup> Cir. 1989).

The district court dismissed Cornelius's lawsuit stating, among other things, that the defendants did not have a special relationship requiring them to protect Cornelius from the inmates. The Eleventh Circuit disagreed. The Court held that not only was there a special relationship between Cornelius and the defendants because as part of her job she was required to work at the town hall surrounded by inmates on work assignment, but the Court also held that the defendants put Cornelius in a dangerous situation by assigning violent inmates to the work program. With regard to the special relationship, the Court held that Cornelius "was required to submit to these conditions by her superiors, conditions well beyond the normal restrictive control inherent in an employer-employee relationship to which an employee agrees."<sup>41</sup> Although most people generally agree to a specific location when entering an employment contract, the Eleventh Circuit saw this situation as more restrictive than normal employer-employee agreements. Not unaware of the new standard promulgated earlier that same year in *DeShaney*, the Eleventh Circuit distinguished this fact scenario from that case, stating:

In [*Cornelius*], the defendants did indeed create the dangerous situation of the inmates' presence in the community by establishing the work squad and assigning the inmates to work around the town hall. Moreover, the defendants increased Mrs. Cornelius's vulnerability to harm by regularly exposing her to the work squad inmates by virtue of her position as Town Clerk. These actions, coupled with the degree of control the town officials exercised over Mrs. Cornelius as Town Clerk, lead us to conclude that there is a genuine issue relevant to the existence of a special relationship between the town officials and the plaintiff implicating her due process rights.<sup>42</sup>

Thus, the Eleventh Circuit Court held that while the Supreme Court did not find that a four year old who was legally placed with his abusive father was restrained in his ability to "act on his own

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<sup>41</sup> *Cornelius* at 355.

<sup>42</sup> *Cornelius* at 356.

behalf” due to a “restraint of personal liberty”<sup>43</sup>, a grown woman who worked as the town clerk surrounded by inmates on a work release program was restrained in her ability to protect herself.

The precedent did not last, however. Ten years later, the Eleventh Circuit overruled its *Cornelius* formulation of what constitutes a special relationship between an individual and the state.<sup>44</sup> Citing a 1992 Supreme Court case involving a workplace death of a Texas public employee<sup>45</sup>, the Eleventh Circuit clarified that the special relationship doctrine is triggered only when “officials cause harm by engaging in conduct that is ‘arbitrary, or conscience shocking, in a constitutional sense.’”<sup>46</sup> Thus, in addition to the *DeShaney* standard requiring a custodial relationship between the state and the individual, the Supreme Court added the requirement that the deprivation of an individual’s liberty interest be “arbitrary in the constitutional sense.”<sup>47</sup>

This added requirement purposely makes it more difficult to successfully maintain a due process violation claim in court. In their decision to further limit due process rights, the unanimous Supreme Court wrote in *Collins* that “the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking [sic] in this unchartered area are scarce and open-ended.”<sup>48</sup> Although couched in terms of judicial restraint, this decision has very real, though unaddressed, implications for vulnerable populations who depend upon the state for protection when they cannot protect themselves from private violence. As a result of *Collins*, to successfully allege a substantive due process violation, a domestic violence victim who could establish a special relationship with the state would also

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<sup>43</sup> *Cornelius* at 356 citing *DeShaney* at 200.

<sup>44</sup> *White v. Lemacks*, 183 F. 3d 1253 (11<sup>th</sup> Cir. 1999).

<sup>45</sup> *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

<sup>46</sup> *White* at 1259.

<sup>47</sup> *Collins* at 129.

<sup>48</sup> *Collins* at 125.

have to demonstrate that the state action leading to her assault was constitutionally speaking, arbitrary. It would not be sufficient to demonstrate that the state action leading to her assault was negligent. This is a significantly higher standard that creates an additional barrier to holding officials responsible for their actions in domestic and private violence cases.

The other exception to the general principle of state immunity for failure to protect an individual from private violence is the state created danger doctrine. Sometimes conceived as an extension of the special relationship doctrine, and other times considered part of the special relationship doctrine, a successfully alleged state created danger exception does allow an individual to sue the state for damages stemming from private violence. Many plaintiffs have tried to apply the state created danger exception to their fact scenarios, to varying success. While the vast majority of substantive due process claims for private violence fail<sup>49</sup>, occasionally courts find that the state has played a role in either enhancing the victim's vulnerability or in causing the danger itself.

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<sup>49</sup> See, for example: *Culp v. Rutledge* (343 Fed. Appx 128 (6<sup>th</sup> Cir. 2009)) no duty to protect where sheriff failed to arrest the victim's ex-boyfriend despite promises to do so and the ex-boyfriend subsequently shot his ex-girlfriend; *Duvall v. Ford* (U.S. App LEXIS 15161 (6<sup>th</sup> Cir. 1999)) no duty where daughter's ex-boyfriend escaped from a work-release detail and shot into plaintiff mother's mobile home; *May v. Franklin County Commissioners* (437 F.3d 579 (6<sup>th</sup> Cir. 2006)) no duty to protect where police failed to respond to three separate 911 calls and the victim was killed; *Pinder v. Johnson* (54 F.3d 1169 (4<sup>th</sup> Cir. 1995)) no duty to protect despite a promise by the defendant to the plaintiff her boyfriend would remain in custody—boyfriend killed plaintiff's children that night after plaintiff went to work, relying on the police officer's promise her boyfriend was still in jail; *Brown v. Grabowski* (922 F. 2d 1097 (3<sup>rd</sup> Cir. 1990)) no duty to protect when deceased's former boyfriend killed her after defendants failed to file kidnapping and sexual assault charges against him and failed to help deceased obtain a restraining order against the boyfriend; *Burella v. City of Philadelphia* (501 F. 3d 134 (3<sup>rd</sup> Cir. 2007)) where the police failed to arrest a fellow officer after his wife made multiple domestic violence complaints and he subsequently shot his wife and killed himself; *Soto v. Flores* (103 F.3d 1056 (1<sup>st</sup> Cir. 1997)) no duty to protect where the police, knowing that the husband threatened to kill his wife and children if the wife went to the police, told the husband about the wife's complaints and he subsequently killed himself and his two children.

One case in which a plaintiff was allowed to pursue a due process claim was *Okin v. Village of Cornwall*<sup>50</sup>. In *Okin*, the Second Circuit held that Michelle Okin could proceed with her lawsuit against several police officers in which she alleged substantive due process violations after her domestic violence complaints against her live in boyfriend and co-parent, Roy Sears, were repeatedly dismissed and ignored by local authorities. Sears co-owned a local tavern and frequently socialized with the town's police officers. Okin claimed that Sears' close relationship with the police essentially allowed him to abuse her with impunity, as officers were unwilling to act on or investigate any of Okin's claims, despite Sears admitting to having abused her.<sup>51</sup> The Court agreed.<sup>52</sup> Citing a private violence case involving protesters and counter-protesters<sup>53</sup>, the Court held that while a victim's due process rights are not implicated simply by a police officer's failure to act or protect the victim, they are implicated when a police officer's affirmative acts increase the risk of violence to the victim. According to the Second Circuit, these actions do not have to be explicit, but can be implicit. Thus, while the police officers need not have explicitly told Sears he could continue to beat Okin, their actions could implicitly communicate the same thing, thereby providing an "official sanction of private violence."<sup>54</sup>

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<sup>50</sup> *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F. 3d 415 (2<sup>nd</sup> Cir. 2009).

<sup>51</sup> In a sad statement on domestic violence policing in the Village, while the Court allowed Okin's due process claims to proceed, it affirmed the district court's grant of summary judgment on equal protection grounds, holding that there was no evidence that other domestic violence victims were treated differently than Okin.

<sup>52</sup> When an appellate court agrees with a plaintiff in a summary judgment appeal, it does not mean that the court makes a determination on an outcome. It means that the Court agrees with a legal argument and that the case can proceed based on that argument. In other words, the plaintiff can have a trial. It does not mean that the plaintiff will then win at trial—just that s/he will have his/her day in court.

<sup>53</sup> *Dwares v. City of New York*, 985 F. 2d 94 (2<sup>nd</sup> Cir. 1993), where plaintiff alleged that police made an agreement with skinheads that they (the police) would not intervene if the skinheads assaulted the flag burning protestors. Plaintiff was subsequently beaten by a skinhead while police did nothing to protect him.

<sup>54</sup> *Okin* at 429.

Similarly, in *Wood v. Ostrander*<sup>55</sup>, the Ninth Circuit held that police officers could be sued in a section 1983 lawsuit after they left a woman by the side of the road and she was raped by a third party. The woman, Linda Wood, was the passenger in a vehicle that Trooper Ostrander pulled over for a traffic violation in a high crime area at 2:30 in the morning. After arresting the driver, Robert Bell, for drunk driving, Ostrander took the car keys and called a tow truck. The petitioner and respondent disagreed about what happened next, but what is not in doubt is that on her walk home, Wood accepted a ride from a stranger who ended up driving her to a remote location and raping her. Wood sued Ostrander, among others, alleging a deprivation of constitutional rights. The district court dismissed the case, holding that the state officials were protected by qualified immunity. While the Ninth Circuit agreed in part, it reversed and remanded the claim against Ostrander. It held that Wood “raised a genuine issue of fact tending to show that Trooper Ostrander acted with deliberate indifference to Wood’s interest in personal security under the fourteenth amendment”<sup>56</sup>, and remanded her case for trial.

The Ninth Circuit distinguished *Wood* from *DeShaney* based on both the state created danger and the special relationship exceptions to the general principle that the state is not liable in cases of private violence.<sup>57</sup> At its most basic, the Court conceived of the two cases in fundamentally different ways. The Ninth Circuit held that in *Wood*, arrest created the dangerous situation. If Ostrander had not arrested Bell and impounded his car, leaving Wood on the side of the road, Wood would not have been put in the position to accept a ride from a stranger who

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<sup>55</sup> 879 F.2d 583 (9<sup>th</sup> Cir. 1989).

<sup>56</sup> *Wood* at 588.

<sup>57</sup> The Court also distinguished the case from *Ketchum v. County of Alameda*, 811 F. 2d 1243 (9<sup>th</sup> Cir. 1987). In *Ketchum* a woman was raped by an escaped inmate. The victim argued that the county was grossly negligent in handling security at the prison where the prisoner was incarcerated. The Ninth Circuit affirmed summary judgment, holding that there was no special relationship between the county and the victim or the prisoner, so she did not have a “a constitutional right to state protection from criminal attacks” (*Ketchum* at 1247, cited in *Wood* at 588).

subsequently raped her. Whereas in *DeShaney*, Joshua was already in dangerous situation before social services intervened—social services did not create the dangerous situation. Thus, it was the act of arresting Bell and impounding the car that both created a dangerous situation and a special relationship between Wood and the state, and allowed Wood’s lawsuit to proceed.

The brief discussion of post-*DeShaney* cases demonstrates how difficult it is to successfully allege a substantive due process claim in private violence cases. In part because *DeShaney* so effectively foreclosed the majority of these cases, the decision has been widely criticized.<sup>58</sup> One of the main avenues of critique is that the majority presented an incomplete historical analysis of the Due Process Clause—both of its original intent and its interpretations by the Court. In addition, critics have attacked the majority’s holding for presenting an overly simplistic view of action and inaction, negative and positive rights, as well as the public and the private spheres. In so doing, the justices obscured their deliberate choices in crafting the holding, thereby making the outcome seem inevitable rather than a choice to be made between two separate legal approaches and paths.

The majority on the Court,

presented its constructs as external mandates that yield a single conclusion to any responsible jurist willing to follow the mandate, rather than as categories that the majority had chosen to use. This strategy allowed the majority to characterize critics, including, members of the court who dissented, as driven by emotion rather than reason.<sup>59</sup>

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<sup>58</sup> See, for example: Beermann, Jack M., “Administrative Failure and Local Democracy: The Politics of *DeShaney*,” *Duke Law Journal*, vol. 39 no. 5, pgs. 1078-1112 (1990); Howard, John R., “Rearguing *DeShaney*,” *Thomas M. Cooley Law Review*, vol. 18 no. 3, pgs. 381-408 (2001); Soifer, Aviam, “Moral Ambition, Formalism and the ‘Free World’ of *DeShaney*,” *George Washington Law Review*, vol. 57 no. 6, pgs. 1513-1532 (1989); and, “The Supreme Court, 1988 Term 1—Affirmative Constitutional Obligations of Government Officials,” *Harvard Law Review*, vol. 103 no. 1 pgs. 167-198 (1989).

<sup>59</sup> Howard at 394.



Thus, the majority structured its argument to make it seem as if there were no other options. In constructing their argument, the majority demonstrated their inability to conceive of alternative approaches by denigrating justices who disagreed as being overly emotional. Other analysts have presented stronger versions of this same critique, arguing that

the court portrayed itself as the manacled and obedient interpreter of legal rules. Failing to acknowledge its exercise of political choice in a universe of legal texts and precedents far more malleable and multifaceted than it claimed, the Court took refuge in a silence resonating with unspoken premises and unstated values.<sup>60</sup>

These critiques highlight the Court's flexibility in determining U.S. constitutional law; the *DeShaney* decision was not inevitable. It was a deliberate choice made by six justices with a particular understanding of law, politics, and society. As Howard argued, Supreme Court decisions are "both a legal conclusion drawn from a reading of the document and a social choice, given that the language does not dictate a single conclusion."<sup>61</sup> The majority's conception of the U.S. system foretold a legal Armageddon of section 1983 lawsuits if individuals had substantive due process claims when private violence occurred in situations where government (in)action shocked the conscious. Instead of allowing some or all of those cases to be heard, the majority preferred—with very few exceptions—to leave the vulnerable with no constitutional rights in those situations. While the outcome is important for victims of private violence, what is more important for our purposes is the fact that the six justices either could not or would not conceive of a legal system that could manage many of the very complicated situations involving state failure to protect in private violence. Thus, while constitutional language enabled the Court to either permit or bar substantive due process claims involving private violence, constitutional

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<sup>60</sup> "The Supreme Court, 1988 Term 1—Affirmative Constitutional Obligations of Government Officials," *Harvard Law Review*, vol. 103 no. 1 pgs. 167-198 (1989): 168.

<sup>61</sup> Howard 2001:408.

structure led the majority to be unable to conceive of a legal system in which such claims were possible.

So what is the impact of *DeShaney* on legal claims today? In his analysis of constitutional claims for private violence in a post-*DeShaney* world, Erwin Chemerinsky<sup>62</sup> lays out three general requirements for claims to succeed. First, he argues, there must be some government action. Claims based on private violence completely outside the view and authority of the state cannot prevail in court. The two main categories Chemerinsky identifies are when police abandon individuals on the side of the road or when social workers transfer custody of a child. Second, the risk caused by the state's action must have actually been foreseeable. It is not enough that danger results from the state's action—the danger must have been foreseeable before the act occurred. Thus, it is entirely foreseeable that some harm might come to Linda Wood when she is abandoned on the side of the road in a high-crime neighborhood at 2:30 in the morning. It need not be necessary that the specific harm that occurred be predictable, just that harm be foreseeable. Finally, the state must have acted with deliberate indifference. This is a higher standard than mere negligence.

As a result of *DeShaney*, in practice, substantive due process claims have been effectively foreclosed where police (in)action results in serious injury or death in private violence situations. As demonstrated by the dissenting justices, this reality is the result of constitutional interpretation, not of constitutional requirements. With substantive due process claims all but barred plaintiffs in private violence cases began to explore the possibility of procedural due process claims, as the Supreme Court had not yet weighed in on the issue.

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<sup>62</sup> Chemerinsky, Erwin, "Government duty to protect: Post-*DeShaney* Developments," *Touro Law Review*, vol. 19 no. 3, pgs. 679-706 (2003).

### ***III. Procedural Due Process Claims—Castle Rock v. Gonzales***

Another possible constitutional means of protecting domestic violence victims was foreclosed in a 2005 Supreme Court case, *Castle Rock v. Gonzales*. In this case, procedural due process claims were eliminated as a means of requiring police departments to enforce domestic violence restraining orders, even in states where legislatures had enacted mandatory arrest statutes for restraining order violations. By extension, the case also effectively eliminated procedural due process claims in situations where states have any law or policy regarding domestic violence, including response and mandatory arrest in domestic violence calls as well as mandatory “cooling off” periods for abusers.

In May 1999, Jessica Gonzales obtained a temporary restraining order (TRO) against her estranged husband, Simon Gonzales, in conjunction with their divorce proceedings. Jessica sought the order, in part, because Simon had a history of erratic behavior and had made multiple suicide threats. The order prevented Simon from residing in the family home and from “molesting or disturbing the peace of” Jessica or her three minor daughters, Rebecca, Katheryn, and Leslie.<sup>63</sup> The girls were aged ten, nine, and seven. The temporary order was made permanent on June 4, with modifications to allow Simon parenting time and one, prearranged mid-week dinner visit. A couple weeks later, on June 22 between 5:00 and 5:30pm, Simon kidnapped the children while they were playing in Jessica’s front yard. He had not made arrangements for an authorized mid-week dinner visit, and was in violation of the permanent restraining order.

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<sup>63</sup> *Gonzales v. City of Castle Rock*, 2001 U.S. Dist. LEXIS 26018 (D. Colo. 2001) at 2.

At approximately 7:30pm, Jessica called the Castle Rock Police Department for assistance.<sup>64</sup> Two officers—Officers Brink and Ruisi—were sent to the Gonzales’ home. After showing them her restraining order and requesting that it be enforced and that her children be returned to her, the officers “stated that there was nothing they could do about the TRO<sup>65</sup> and suggested that [Jessica] call the Police Department again if the three children did not return home by 10:00pm.”<sup>66</sup> One hour later, Jessica reached Simon on his cell phone. He told her that he had the girls at an amusement park in Denver. After hanging up with Simon, Jessica called the Castle Rock Police Department again. She spoke with Officer Brink and asked him to have someone attempt to find and arrest Simon at the Denver amusement park. Officer Brink again told Jessica to call back if Simon had not brought the kids home by 10:00pm.

At 10:10pm, Jessica called the police department to report that Simon had not returned her children. She was again told to wait and call back if the kids were not home by midnight. Jessica then went to Simon’s apartment and called the police department again. She was told to wait at his place for an officer, but no one ever arrived. At 12:50am, Jessica went to the police department to fill out an incident report. An officer took her report and instead of trying to enforce the restraining order or locate the girls, he went to dinner.

Approximately two and a half hours later, at about 3:20am, Simon drove to the Castle Rock Police Department and opened fire with a semi-automatic handgun he purchased earlier that evening. He was shot and killed by police officers at the scene. The three girls were found

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<sup>64</sup> Although not contained in the fact summary in any of the federal court cases, Jessica claims she initially contacted the police department immediately upon discovering the kidnapping, between 5:00 and 5:30pm. Statement at the Inter-American Commission on Human Rights, February 2, 2007. <http://www.aclu.org/human-rights-womens-rights/statement-jessica-gonzales-inter-american-commission-human-rights> Accessed July 26, 2012.

<sup>65</sup> It is unclear why the discussion sometimes focused on the TRO when there was a permanent restraining order in place and Simon Gonzales was in violation of the permanent order.

<sup>66</sup> *Gonzales v. City of Castle Rock*, 307 F.3d 1258 (10<sup>th</sup> Cir. 2002) at 1261.

dead in the cab of Simon's truck. They had been shot, execution style, at approximately 10:00pm that evening.

Jessica brought a federal lawsuit against the town of Castle Rock, the police department, and several officers in the Castle Rock Police Department who ignored her complaints and made no effort to enforce her restraining order.<sup>67</sup> She alleged due process and section 1983 violations by the various defendants for failing to enforce her restraining order against Simon. Specifically, Jessica alleged that the mandatory arrest statute created a property right under the fourteenth amendment in her restraining order, creating a constitutional duty for the police officers to enforce the order. In failing to enforce the order, Jessica argued that the defendants deprived her and her daughters of their substantive and procedural constitutional rights without due process of law. The defendants sought summary judgment and argued they were entitled to qualified immunity.

There were several components to the case. With regard to the due process claim, the issue was whether or not the defendants deprived Jessica and her daughters of a constitutional right.<sup>68</sup> Jessica argued that the state of Colorado, through the Colorado Revised Statutes, created a fourteenth amendment property interest in the enforcement of her restraining order by mandating arrest when police officers had probable cause that the restrained person has violated a restraining order.<sup>69</sup>

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<sup>67</sup> *Gonzales v. City of Castle Rock, et al.*, 2001 U.S. Dist. LEXIS 26018 (D. Colo. 2001).

<sup>68</sup> As discussed in the intro to this chapter, to sustain a section 1983 claim, the plaintiff must show that (1) someone acting under color of law and (2) deprived the plaintiff of a constitutional right. In this case, both the plaintiff and defendants acknowledge that the police were acting under color of state law and do not dispute that point. Thus, the main issue was whether or not Jessica had a federal constitutional right to the enforcement of her restraining order.

<sup>69</sup> In the situation where the violator is not present, Colorado mandates that police officers seek an arrest warrant if s/he has probable cause to believe the restraining order was violated. Colo. Rev. Stat. §18-6-803.5(3)(1999).

This argument had both a substantive and procedural component. “Substantive due process protects people from arbitrary and unreasonable action that deprives them of life, liberty or property.”<sup>70</sup> From a substantive due process perspective, Jessica argued that the state “arbitrarily deprived her of a property interest created by the TRO” through its inaction.<sup>71</sup> Citing *DeShaney*, the district court reiterated that there is no affirmative right to police protection and that Jessica’s claim did not fit into the two recognized exceptions to that rule.<sup>72</sup> The district court further stated that the police officers’ behavior was not conscious shocking, despite their flagrant disregard for the mandatory arrest provisions on the restraining order and their dismissiveness towards Jessica’s concerns for her children. Echoing *DeShaney*’s logic, the district court concluded that the “Plaintiff alleges Defendants’ inaction and failure to enforce the TRO as the basis for her claim. Inaction, however, is not enough.”<sup>73</sup>

Given *DeShaney*, the Court’s conclusions regarding the substantive due process claim were not surprising. The more novel argument Jessica asserted in *Gonzales* that the Supreme Court had not yet addressed in a private violence context was the procedural due process claim. “Procedural due process protects individuals from deprivation of life, liberty or property without appropriate procedural safeguards.”<sup>74</sup> Jessica alleged a violation of a protected property interest

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<sup>70</sup> *Gonzales*, 2001 at 7.

<sup>71</sup> *Gonzales*, 2001 at 8.

<sup>72</sup> The two exceptions are the special relationship doctrine and state created danger theory were briefly discussed above. In general, the special relationship doctrine requires either involuntary restraint or custody of an individual by the government. The state created danger theory requires that: 1) the plaintiff is a member of a limited and definable group; 2) the defendants’ actions put the plaintiff at risk of incurring “serious, immediate and proximate harm”; 3) the risk was “obvious or known”; 4) defendants were reckless and consciously disregarded the risk to the plaintiff; and, 5) the defendants actions were “conscious shocking” (*Gonzales* at 10 citing *Uhlrig v. Harder*, 64 F.3d 567 (10<sup>th</sup> Cir. 1995) at 572).

<sup>73</sup> *Gonzales*, 2001 at 11.

<sup>74</sup> *Gonzales*, 2001 at 12.

in violation of her procedural due process rights. In *Board of Regents of State Colleges v. Roth*<sup>75</sup>, the Supreme Court outlined the contours of the property interest. The majority held that fourteenth amendment protected property interests are more than just “actual ownership of real estate, chattels, or money.”<sup>76</sup> Indeed, property interests “may take many forms.”<sup>77</sup> According to the Supreme Court, to have a property interest in a state-provided benefit

a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.<sup>78</sup>

Thus, Jessica argued that the defendants, “by failing to enforce the TRO as required by [Colorado state statute], deprived her of the property interest created by the TRO without proper procedure such as notice and/or a hearing to vacate the TRO.”<sup>79</sup>

Although a seemingly odd construction for a lawsuit based on the failure of the police to enforce a restraining order which resulted in the death of three children, property interests have taken many forms.<sup>80</sup> It is important to note, however, that while a property interest receives constitutional protections, property interests themselves are not created by the constitution—they are created by, among other things, state law. Thus, “the Fourteenth Amendment’s protection of property is a safeguard of the security of interests that a person has already acquired in specific

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<sup>75</sup> 408 U.S. 564 (1972).

<sup>76</sup> *Roth* at 571.

<sup>77</sup> *Roth* at 577.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Gonzales*, 2001 at 12.

<sup>80</sup> The Court has recognized property interests in public employment (*Perry v. Sindermann*, 408 U.S. 593 (1972)), free education (*Goss v. Lopez*, 419 U.S. 565 (1975)), garnished wages (*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)), professional licenses (*Barry v. Barchi*, 443 U.S. 55 (1979)), driver’s licenses (*Bell v. Burson*, 402 U.S. 535 (1971)), causes of action (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)), and receipt of government services (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)—utility services), (*Mathews v. Eldridge*, 424 U.S. 319 (1976)—disability benefits), (*Goldberg v. Kelly*, 397 U.S. 254 (1970)—welfare benefits).

benefits”<sup>81</sup>, the fourteenth amendment does not create a new state-provided benefit or right.

Accordingly, in this case the district court had to potentially decide two important issues: 1) did Colorado law create a protected property interest in the individual enforcement of a (temporary) restraining order?; and, if so 2) did the defendants deny Jessica’s due process rights by deciding not to enforce her restraining order without first providing adequate procedure?

Although unique, Jessica’s procedural due process claim was not completely without precedent. Nearly ten years earlier, two federal court cases successfully argued that a protection order could create a property right, but neither made it to the Supreme Court. The first case in which a federal court found a restraining order could create a property right was *Coffman v. Wilson Police Department*<sup>82</sup>. The suit was brought by Terry Coffman, a woman who was physically and emotionally abused by her husband, Wayne Barber. On June 9, 1988, Terry obtained a TRO against Wayne, which was finalized June 24, 1988. Although Wayne violated the order multiple times, had a known history of psychiatric problems, and Terry notified the Wilson police department repeatedly, he was never arrested. After one incident, because Terry delayed notifying the police department, the police chief told her that she had waited too long to report the incident and he could not take any action against Wayne. On another occasion, police officers were present for phone calls in violation of the restraining order. Officers assured Terry that they would try to find and arrest Wayne and that they would also notify the Eaton police department—the department with jurisdiction over Wayne’s home address. Wayne was not arrested.

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<sup>81</sup> *Roth* at 577.

<sup>82</sup> 739 F. Supp. 257 (E.D. PA 1990).



On September 6, after repeated restraining order violations with no consequences, Terry filed a contempt petition against Wayne. Later that same day, as she was leaving a bank, Wayne approached Terry and assaulted her. Terry managed to drag both herself and Wayne back into the bank, where Wayne shot Terry in the chin and neck. Terry suffered serious and permanent injuries from the assault. Terry brought suit against the Wilson Police Department, alleging federal equal protection<sup>83</sup> and due process violations, as well as state constitutional violations.

The government sought dismissal of the due process claims based on *DeShaney*. While the district court agreed that Terry did not have a substantive due process claim against the government, it did hold that she had a procedural due process claim. Although the district court judge held that Pennsylvania statutes did not generally create a property interest in the enforcement of restraining orders<sup>84</sup>, court orders mandating the enforcement of the restraining order did create an entitlement. Furthermore, the Court held that there was a state law special relationship obligation between Terry and the state of Pennsylvania, despite the fact that under federal law, Terry was not entitled to substantive due process protections. Following this analysis, the Court held that Terry had a property interest in the enforcement of her restraining order and that she was entitled to a trial to determine whether or not the denial of that right was the cause of her injuries.<sup>85</sup>

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<sup>83</sup> Terry's equal protection claim was two-fold. It claimed both that the police department improperly trained its officers to respond to women victims of domestic violence and that it created and maintained a policy of failing to properly respond to women victims of domestic violence, and that these failures were motivated by gender bias. The district court allowed Terry's equal protection claim to be heard at trial.

<sup>84</sup> The judge pointedly noted that there was no mandatory arrest statute in Pennsylvania law regarding restraining order enforcement. Indeed, the statute read that police "may" arrest a violator "without warrant" (*Coffman* 264 citing 35 Pa. Stat. Ann § 10190(c)).

<sup>85</sup> The Court was careful to address concerns regarding the increase of litigation as a result of this holding. The judge wrote, "It must be stressed that this is not a litigant's bonanza. The *Roth* interest does not even extend to all those few cases in which a special relationship may attach. Moreover, the scope of the interest is limited. As noted

The second case, *Siddle v. City of Cambridge*<sup>86</sup> was brought in an Ohio federal district court by Karen Siddle, a woman who fled her abusive husband and who argued she was denied police protection from his repeated abductions and harassment, despite having a protection order against him. In that case, the district court dismissed Karen’s substantive due process claim against the defendants, citing *DeShaney*. However, it noted that *DeShaney* only governed substantive due process claims involving private violence and it remained silent on the procedural due process issue. The district court then looked to Ohio law to determine whether or not it created a property interest in the enforcement of restraining orders.

While the Court first noted that the state typically has no duty to protect individuals from harm—the duty is instead to the general public—it did note that there are exceptions. One of these exceptions is individuals with restraining orders. According to the district court judge, granting restraining orders without imposing some type of duty on the state to enforce it, “would have no valid purpose.”<sup>87</sup> Thus, since the state does have a duty to enforce protection orders, its failure to do so “may constitute a denial of a right to procedural due process.”<sup>88</sup> The judge is explicit that just because there is a duty to protect an individual does not mean that the police must expend all of its time and resources protecting one particular individual. The duty, and

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above, Coffman did not acquire an absolute right to have the police force act at her bidding when the court signed the order. Finally, even if the Department deprived her of her property right, their deprivation may not have caused the injuries in question here. Whatever the ultimate merits of this claim may be, though, it cannot be said as a matter of law that the claim must be dismissed” (266).

<sup>86</sup> 761 F. Supp. 503 (S.D. Ohio 1991). In addition to bringing substantive and procedural due process claims against the city and various individuals, Karen Siddle also alleged equal protection violations. She argued that the defendants discriminated against her based upon her sex and marital status. The Court dismissed her equal protection claim, holding that there was no “significant” difference in the treatment of domestic violence victims from other crime victims (512).

<sup>87</sup> *Siddle* at 509.

<sup>88</sup> *Ibid.*

corresponding right, is to “reasonable” police protection.<sup>89</sup> In applying the reasonability of the police conduct to Karen’s situation, the Court found that the police did fulfill their duty to Ms. Siddle and, as a result, she did not have any procedural due process claims. Thus, although Karen Siddle’s case was dismissed, the Court still held that a restraining order could create a property interest protected by the fourteenth amendment.

Despite the persuasive opinions of *Siddle* and *Coffman*, the district court in *Gonzales* held that Colorado law did not create a protected property interest in the enforcement of restraining orders, notwithstanding the mandatory arrest language in the statute and on the order itself. Indeed, the judge ruled that the mandatory arrest language was not truly mandatory because it was only triggered when police officers had probable cause to believe the restraining order had been violated. According to the district court judge, because police exercise discretion to determine whether or not there is probable cause to believe the restraining order has been violated, the statute is, by definition, not mandatory. Because he found that the statute was not mandatory, the district court judge held that there was no protected property interest, and accordingly no claim on which relief could be granted.

Jessica appealed the district court’s ruling, and the Tenth Circuit reviewed the lower court’s decision.<sup>90</sup> Again citing *DeShaney*, the circuit court affirmed the district court’s substantive due process decision. In a unanimous decision, however, the circuit court disagreed with the district court’s decision regarding Jessica’s procedural due process claim. Taking *Roth* as their starting point, the circuit court determined that the Colorado statute mandating that officers “shall” arrest restraining order violators did convey a property interest to the holder of an

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Gonzales v. City of Castle Rock*, 307 F.3d 1258 (10<sup>th</sup> Cir. 2002).

order. Citing legislative history regarding the legislature's affirmative attempt to require consistent and criminal treatment of domestic violence offenses, the Court held that 'shall' did mean mandatory and was not discretionary.<sup>91</sup>

The Court took specific issue with the district court's decision that because officers had to determine whether probable cause existed, the statute was discretionary and not mandatory. In response, the circuit court noted that probable cause is an objective legal standard and is not subject to an officer's subjective discretion. Since the statute mandates arrest when there is probable cause to believe a restraining order has been violated, "[i]t follows that the holder of an order has a legitimate claim of entitlement to the protection provided by arrest when the officer has information amounting to probable cause."<sup>92</sup>

Because the Court found that Jessica did have a property interest in the enforcement of her restraining order, it then had to decide if she had been afforded due process before having the enforcement denied. The Court held that the facts presented, viewed in the most favorable light to Jessica<sup>93</sup>, "[indicate] that defendant police officers used no means, reasonable or otherwise, to enforce the restraining order."<sup>94</sup> Thus, the Court held that Jessica's procedural due process rights were violated and remanded her case back to the district court for trial.

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<sup>91</sup> In a footnote, the Court was clear that 'shall' will not always create a procedural due process claim. Only in cases where "shall" refers to a "specific substantive outcome rather than merely referring to procedures" would such a right attach (1265).

<sup>92</sup> *Gonzales* 2002 at 1266.

<sup>93</sup> In a summary judgment motion, the facts are viewed in the light most favorable to the Plaintiff to determine whether there is any basis, in law or fact, for the claim asserted. Thus, a court can deny summary judgment and a plaintiff can still lose at trial, because the jury makes its own, independent assessment of the facts in the case.

<sup>94</sup> *Gonzales* 2002 at 1266.

Unhappy with the decision, the Town of Castle Rock petitioned the Tenth Circuit for a rehearing en banc.<sup>95</sup> The Court accepted the rehearing and issued a very similar ruling to the panel two years prior. Again the Court upheld the district court's dismissal of Jessica's substantive due process claim, stating that such a claim was precluded by *DeShaney*, and the Court again did not agree with the district court's decision regarding Jessica's procedural due process claim.

As in the first hearing before the Tenth Circuit, the Court had to establish whether or not Colorado created an entitlement to enforcement of Jessica's restraining order and if so, did the officers violate her rights by arbitrarily denying her enforcement. Again using *Roth* as its starting point, the Court framed the question as whether or not the "court order commands the grant of a government benefit or service through the use of mandatory language and objective predicates limiting the discretion of official decision makers." If so, "a protected property interest exists."<sup>96</sup> The Court went on to conclude that "contrary to the district court's conclusion" the finding of probable cause necessary to enforce a restraining order is not at the discretion of a police officer and does not therefore undermine the "mandatory edict of the restraining order."<sup>97</sup> Thus, because Colorado created an entitlement on which Jessica reasonably relied, it created a property interest in the restraining order. With regards to the second prong of the question—was Jessica granted due process before she was denied enforcement of her restraining order—the Court held that Jessica was entitled to a meaningful hearing. Since Jessica was not granted any hearing, she was denied due process.

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<sup>95</sup> *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10<sup>th</sup> Cir. 2004).

<sup>96</sup> *Gonzales*, 2004 at 1105.

<sup>97</sup> *Ibid.*

The Court also addressed whether or not the police officers should be granted qualified immunity. Under the doctrine of qualified immunity, a government actor is not subject to liability unless it is “sufficiently clear that a reasonable official would have understood that his conduct violated the right.”<sup>98</sup> Given the circumstances in the *Gonzales* case, the Tenth Circuit held that a reasonable officer would not have known that a restraining order created a constitutionally protected property interest, and that the individual police officers were immune from suit. The full panel again sent the case back to the district court for a trial against the town and police department, but not the individual officers.

The decision was not unanimous. In four separate dissents, different critiques were outlined. While the critiques were largely focused on legal points of dispute, the arguments demonstrated fundamentally different perspectives on the role of government, how to interpret the constitution and precedent, and what remedies are available to aggrieved parties. The first main argument raised in a dissent was that the fourteenth amendment does not transform state negligence claims into constitutional violations. This argument was that the majority was inappropriately constitutionalizing state law. The second argument against the majority opinion was that Jessica raised only a substantive, and not a procedural, due process claim. According to the dissent, her substantive due process claim was rightly dismissed by the district court and upheld by the majority, and that the procedural claim was misplaced.

In a related argument, the third dissent argued that the majority was ignoring *DeShaney* and in so doing distinguished itself from other circuit courts and invited litigation.<sup>99</sup> The

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<sup>98</sup> *Gonzales*, 2004 at 1117 citing *Currier v. Doran*, 242 F.3d 905 (10<sup>th</sup> Cir. 2001) at 923.

<sup>99</sup> The justices compare Jessica’s case with breaking up a bar fight, where clearly everyone involved should not be arrested. Demonstrating a stunning lack of sensitivity and appreciation for the reality of domestic violence

argument was that the Court was using procedural due process to undermine the outcome *DeShaney* requires. The final argument was that the legislature could not have possibly intended the consequences of making the statute mandatory. Under this reasoning, the justices argued that not only was the statute discretionary and not mandatory, but that even if the majority wanted to find a protected property interest in the restraining order, there was no violation of procedural due process since Jessica was able to petition police to enforce the order. Reiterating earlier arguments, the justices posited that the decision to not enforce the order was a substantive due process issue, not a procedural one.

Together, these arguments demonstrate a fundamentally different understanding of what protections and rights the constitution provides, the role of the government, and how law should be structured. The dissenting justices argued that the Supreme Court had already established that barring certain circumstances, private violence did not implicate constitutional rights and that as a result, the state had no obligation to protect individuals from private violence. One dissent even went so far as to argue that the legislature could not have possibly have intended to create a mandatory right to enforcement, even though they consciously enacted mandatory arrest language. Thus, the dissent could not imagine a legal system in which individuals had a constitutional right to protection from domestic violence—especially a right specifically created by a legislature concerned about state inaction in domestic violence situations.

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situations, the majority explained, “[w]hen police officers break up a barroom fray and all participants promise to behave, if no one was injured the officers might simply dispatch them to their respective homes to sleep it off. Most would agree that prudent husbandry of police resources, good community relations, and a dollop of common sense would not always require the considerable inconvenience and expense occasioned by arrest, transportation, and booking when a citation or a warning would suffice—in spite of clear statutory direction to the contrary. Apparently, the police can now be hauled into federal court if, with the benefit of hindsight, it appears their judgment was flawed and one of the miscreants sent home to ruminate decided instead to resume hostilities. Under the majority decision, the victim would have an ‘entitlement to enforcement’ of the statute (apprehension of the disorderly) because the statute contains ‘objective predicates’ which ‘mandate the outcome’ and ‘limit discretion’” (1137).

The Town of Castle Rock again appealed the Tenth Circuit’s decision, and the Supreme Court accepted review.<sup>100</sup> In a 7-2 decision<sup>101</sup>, the Supreme Court overruled the Tenth Circuit’s decision, holding that Jessica did not have any due process rights—substantive or procedural—under the fourteenth amendment in this case. Echoing the district court’s decision, the majority held that Colorado law did not mandate enforcement of restraining orders. Writing for the majority, Justice Scalia stated that there is “[a] well-established tradition of police discretion” that “has long coexisted with apparently mandatory arrest statutes.”<sup>102</sup> Disregarding the Tenth Circuit’s interpretation of state law, the majority opined that “a true mandate of police action would require some stronger indication from the Colorado Legislature than ‘shall use every reasonable means to enforce a restraining order’ (or even ‘shall arrest...or...seek a warrant’)” (citation omitted).<sup>103</sup>

It is important to note that the Supreme Court generally does not interpret issues of state law. As a rule it accepts the district and circuit courts’ interpretations, or asks the state Supreme Court for certification of the state law issue, as those courts all have better understandings of the development, nuance, and intent behind particular statutes. In disregarding the Tenth Circuit’s determination, the majority stated that the Tenth Circuit “did not draw upon a deep well of state-specific expertise” because it merely looked at the language printed on the restraining order, the

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<sup>100</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>101</sup> The majority opinion was authored by Justice Scalia and joined by Justices Rehnquist, O’Connor, Kennedy, Souter, Thomas, and Breyer. A concurring opinion was filed by Souter and joined by Breyer. A dissent was filed by Justice Stevens and Justice Ginsburg.

<sup>102</sup> *Castle Rock* at 760.

<sup>103</sup> *Castle Rock* at 761.



relevant statutory text, and transcripts from the state legislative hearings on the mandatory arrest bill.<sup>104</sup>

Going further, the majority also held that Jessica, as the petitioner of the restraining order, was not entitled to enforcement of the order, even if the statute required mandatory enforcement. Making a nuanced legal point, the Court distinguished between the communal and individual purposes of the criminal justice system. This argument is based on the idea that there is a public purpose to obligating certain law enforcement actions, even if those mandates do not confer specific entitlements to individuals. As a result, any entitlement that a mandatory arrest obligation would confer to Jessica would be incidental—and there is no due process protection for the denial of incidental entitlements. Additionally, the majority reasoned, even if there was an entitlement to enforcement that does not mean it was a property interest for the purposes of the due process clause. Although not required by *Roth*, the majority noted that there was no “ascertainable monetary value” in this case that the *Roth* cases have “implicitly required.”<sup>105</sup>

With this interpretation of *Roth*, we have our second example of a key issue for women’s safety being at the mercy of the notion of property, value, or commerce. Similar to the Violence Against Women Act, there is nothing in the constitution or jurisprudence before these cases went to the Supreme Court that required a narrow interpretation of property, commerce, or monetary value. Instead, it was created by the limits the Court placed on constitutional claims. Thus, although the constitution could respond to these violence against women and domestic violence, it is the Court that places them outside of the constitution through its interpretation of the fourteenth amendment and Commerce Clause.

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<sup>104</sup> *Castile Rock* at 757.

<sup>105</sup> *Castile Rock* at 766.

Again similar to *Morrison*, the Court effectively punts the source of legal accountability to the states.<sup>106</sup> The majority held that while it would not turn the fourteenth amendment into “a front of tort law”<sup>107</sup>, the states could provide “victims with personally enforceable remedies.”<sup>108</sup> The issue thus becomes that under our current constitutional jurisprudence a state cannot remove welfare benefits or deny an individual a driver’s license without due process, but it is free to ignore mandatory arrest laws governing restraining order enforcement without any consequences.

In addition to joining the majority opinion, Justice Souter also filed a concurrence, which Justice Breyer joined. Their central argument in the concurring opinion was two-fold. First, they argued that criminal law served a public, not individual function. Second, they argued that the mandatory arrest statute merely guaranteed a certain process—not an outcome. The guaranteed process was to complain to an officer and request arrest. Thus, rather than viewing the restraining order as protecting an outcome—the arrest of the violator—the justices understood it as protecting a process.

The dissent, authored by Justice Stevens and joined by Justice Ginsburg, disagreed. Although they too asserted there is no general right to police protection under federal or state law, they argued that there is nothing in federal law that precludes a state from creating an entitlement. Thus, the main issue for the dissent was whether or not Colorado created an

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<sup>106</sup> In a feminist critique of *DeShaney*, *Castle Rock*, and *Burrella* (a 2007 case from the Third Circuit in which a police officer’s wife was denied protection by the police despite having a restraining order, and who was eventually shot by her husband before he killed himself), Kristian Miccio argues that the only recourse for women victims of domestic violence is to reform state law to enable lawsuits against the state and its actors. See, “A Cruel Deception: *Castle Rock*, Constitutional Protection, and Conceptions of State Accountability,” *Georgetown Journal of Gender & Law*, vol. 9 no. 1, pgs. 87-124 (2009).

<sup>107</sup> *Castle Rock* at 768, citing *Parratt v. Taylor*, 451 U.S. 527 (1981) at 544.

<sup>108</sup> *Castle Rock* at 768.

entitlement to enforcement of restraining orders in state law. The dissent argued that the Court should have deferred to the Tenth Circuit's holding on that issue, as they have more expertise on Colorado state law than does the Supreme Court. Short of that, they argued, the Court should have certified the question to the Colorado Supreme Court, so that they could make the Colorado state law determination. After the Colorado Supreme Court made their determination, the U.S. Supreme Court could then have applied federal law to the situation. The dissent was most critical of the majority's interpretation of Colorado state law, and in particular their willingness to ignore the fundamental shift that the legislature enacted in 1994 to revamp police treatment of domestic violence, which until that point had been plagued by under-enforcement. "Indeed, the Court fails to come to terms with the wave of domestic violence statutes that provides the crucial context for understanding Colorado's law."<sup>109</sup>

The dissent summarized the novelty of Jessica's argument:

Police enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education. The relative novelty of recognizing this type of property interest is explained by the relative novelty of domestic violence statutes creating a mandatory arrest duty; before this innovation, the unfettered discretion that characterized police enforcement defeated any citizen's 'legitimate claim of entitlement' to this service. Novel or not, respondent's claim finds strong support in the principles that underlie our due process jurisprudence. In this case, Colorado law *guaranteed* the provision of a certain service, in certain defined circumstances, to a certain class of beneficiaries, and respondent reasonably relied on that guarantee. As we observed in *Roth*, '[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.'<sup>110</sup> (citations omitted)

Thus, the dissent argued that just because restraining order enforcement is not a traditional state function, it does not mean that if the state creates an entitlement to enforcement that it can haphazardly deny or withdraw it.

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<sup>109</sup> *Castile Rock* at 784.

<sup>110</sup> *Castile Rock* at 790.

The amici briefs to the Court were a combination of policy and legal analyses of the issue. Supporters of the Town of Castle Rock made multiple arguments to support overturning the Tenth Circuit's holding that the state had a duty to enforce Jessica's restraining order. The International Municipal Lawyers, et al<sup>111</sup> argued that the legislature did not intentionally create a property interest and that municipalities could not absorb the financial consequences of such a holding. The federal government argued that "private citizens lack a judicially cognizable interest in the prosecution of another person" and even if Jessica had a property interest in the enforcement of her restraining order, she received due process.<sup>112</sup> Finally, concerned about what impact such a ruling would have on police practice, the Denver Police Protection Association, et al<sup>113</sup> argued that Jessica had no right to a pre-deprivation procedure because such a holding would unduly burden local government officials.

Jessica's supporters viewed the case differently. A diverse group of organizations and individuals argued that the Supreme Court should uphold the Tenth Circuit's en banc ruling.<sup>114</sup> A group of International Law Scholars and Women's Civil Rights and Human Rights Organizations<sup>115</sup> submitted an amicus brief supporting Jessica's due process claim, but went further and argued that the United States, under international law and treaty obligations required

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<sup>111</sup> Brief Amici Curiae International Municipal Lawyers Association and National League of Cities, National League of Cities, National Sheriffs' Association, and County Sheriffs of Colorado, submitted December 23, 2004.

<sup>112</sup> Brief for the United States as Amicus Curiae, submitted December 23, 2004.

<sup>113</sup> Brief of Amicus Curiae the Denver Police Protective Association, the Peace Officers REsearch Association of California Legal Defense Fund, and the Colorado Association of Chief's of Police, submitted December 23, 2004.

<sup>114</sup> The amici briefs supporting Jessica included a submission by AARP (2005). The group argued that protection orders in cases of elder abuse must be enforced. They discussed some of the issues raised in elder abuse, highlighting the fact that many elder abuse victims are unable to take any meaningful action to protect themselves, and therefore dependent upon external assistance. They note that while enforced protection orders can be a valuable method to "protect the oldest and most vulnerable members of our society...unenforced protective prodders are worthless" (3). See, Brief Amicus Curiae of AARP in Support of Respondent, 2004 U.S. Briefs 278, submitted February 10, 2005.

<sup>115</sup> Brief of International Law Scholars and Women's Civil Rights and Human Rights Organizations Brief as Amici Curiae, submitted February 9, 2005.

the Court to provide Jessica with a federal remedy against the Town of Castle Rock. The scholars argued that “[i]nternational human rights developments in recent decades have resulted in the emergence of a worldwide consensus that women and children have a fundamental human right to be protected from family violence, and to have effective remedies when such protection fails.”<sup>116</sup> <sup>117</sup> Additionally, the brief highlighted the fact that the United States has ratified the International Covenant on Civil and Political Rights, “a treaty whose terms are now recognized to encompass States Parties’ obligations to ensure persons, particularly women and children, the right to freedom from domestic violence.”<sup>118</sup>

The American Civil Liberties Union (ACLU) also submitted a brief supporting Jessica.<sup>119</sup> They argued that the Tenth Circuit was correct in its determination that Colorado state law created a property interest for the purposes of the due process clause.<sup>120</sup> Citing *DeShaney* to support their argument, the ACLU argued that in *DeShaney* the Supreme Court recognized that governments could create obligations to individuals if they so choose.<sup>121</sup> According to the ACLU’s analysis, that is exactly what happened in this case—the state created an obligation to

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<sup>116</sup> International Law Scholars, et al at 11.

<sup>117</sup> Among the cases cited in the brief is *State v. Baloyi*, 2000 (1) BCLR 86 (CC S. Africa). The case is discussed in the following chapter.

<sup>118</sup> International Law Scholars, et al at 11.

<sup>119</sup> Brief Amicus Curiae of the American Civil Liberties Union, Submitted February 10, 2005.

<sup>120</sup> The National Black Police Association, et al. (2005) and the Family Violence Prevention Fund, et al. (2005) briefs similarly argued that Jessica had a protected property interest under the fourteenth amendment and that she was denied due process in the police officers’ refusal to enforce the order without minimal due process. The Family Violence Prevention Fund brief also emphasized the fundamental change that occurred in Colorado law in 1994—the year the legislature enacted the mandatory arrest law, signaling a major change in domestic violence and restraining order law. See Brief of National Black Police Association, National Association of Black Law Enforcement Officers, Women in Federal Law Enforcement, the National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc. as Amicus Curiae supporting respondent, submitted February 10, 2005; and Brief of Amicus Curiae the Family Violence Prevention Fund, The National Center on Domestic and Sexual Violence [and others], submitted February 10, 2005.

<sup>121</sup> The Supreme Court did not resolve the issue because the plaintiffs did not raise the issue in a timely matter, and it was therefore not heard on appeal.

an individual. Indeed, the ACLU argued that Colorado actively increased Jessica and her children’s vulnerability by issuing the restraining order and requiring its enforcement, and then by failing to honor that responsibility.

The National Network to end Domestic Violence, et al<sup>122</sup> and the National Coalition Against Domestic Violence and National Center for Victims of Crime<sup>123</sup> made similar arguments. After arguing that the statutory language was clearly “mandatory and imperative,” The National Network argued that “[p]rotective orders only work if they are enforced. They increase danger to victims if they are not.”<sup>124</sup> They elaborated, arguing that if there was no due process protection on restraining order enforcement than

Colorado’s statutory scheme for protecting victims of domestic violence [are] a nullity. Court-issued protective orders would become nothing more than a reminder that victims should ask for police help when they are in danger. If [the Town of Castle Rock] is correct, Ms. Gonzales and women like her should not trust the plain language of state law and court orders, but rely instead on the discretion of law enforcement—just as citizens without protective orders do. But unlike ordinary citizens without a protective order, a victim of domestic violence who seeks a protective order risks enhanced danger from her batterer. When law enforcement views a protective order as a mere suggestion, it enhances the likelihood of further violence.<sup>125</sup>

Similarly, the National Coalition argued that failing to enforce restraining orders served to embolden abusers and weaken the criminal justice system. Thus, the organizations highlight that individuals with domestic violence protection orders require increased police protection or they are more vulnerable to subsequent violence.

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<sup>122</sup> Brief Amici Curiae of National Network to End Domestic Violence, et al, Submitted February 10, 2005.

<sup>123</sup> Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime, submitted February 10, 2005.

<sup>124</sup> National Network at 16.

<sup>125</sup> National Network at 17-18.

The National Association of Women Lawyers and the National Crime Victims Bar Association<sup>126</sup> argued that the purpose of section 1983 lawsuits was to address the inadequacy of state law or judicial processes and that this case demonstrated the need for that safety mechanism. The legislature enacted the mandatory arrest law “in response to a state and system-wide failure” to adequately protect domestic violence victims.<sup>127</sup> Common law was not adequate to address the failure, and the brief argued that the Court should allow this mechanism to give teeth to the plain reading and legislative intent behind the mandatory arrest law.

Finally, perhaps most interesting, Peggy Kerns, the sponsor of the Colorado mandatory arrest law, and Texas Domestic Violence Direct Service Providers<sup>128</sup> submitted a brief arguing that if the Court did not uphold the mandatory nature of the legislation, it would effectively usurp legislative power, thereby creating a separation of powers issue. They argued that the legislature intended to create a mandatory arrest law—that ‘shall’ does in fact mean ‘shall’—and that if the Court did not uphold the meaning of the law, it would be appropriating the Colorado legislature’s policy making and legislative functions.

The Supreme Court’s decision in *Castle Rock* was the death knell for due process remedies for domestic violence victims. Although *DeShaney* mostly eliminated substantive due process claims, it left open the possibility that a state could, through its own actions, create a situation in which it owed a particular individual increased protection, essentially creating the possibility for a procedural due process claim. *Castle Rock* was that test. With *Castle Rock*, the

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<sup>126</sup> Brief Amicus Curiae of the National Association of Women Lawyers and the National Crime Victims Bar Association, submitted February 10, 2005.

<sup>127</sup> The National Association of Women Lawyers and the National Crime Victims Bar Association at 6.

<sup>128</sup> Brief of Peggy Kerns, former member of House of Representatives of the State of Colorado, and Texas Domestic Violence Direct Service Providers, submitted February 10, 2005.

Supreme Court sent a clear message to domestic violence victims that their claims do not violate the constitutional guarantee of due process, regardless of state law or government malfeasance. This outcome, while not required by either the constitutional text or jurisprudence, seems to be guided by the justices' understanding of the role of government, individual rights, and constitutional structure. Combined, these factors influence the thinkability of a particular legal response. In these cases, the justices could not conceive of a system in which the government, even after promising specific actions to a particular individual, could be held accountable under the federal constitution. The constitution could not adapt to changing times and realities to require specific action in domestic violence situations.

*Castle Rock's* role of effectively eliminating any procedural due process claim arising from a domestic violence situation has been confirmed during the years since the ruling. Although there have been several subsequent challenges<sup>129</sup>, the most recent, and a truly tragic challenge came from *The Estate of Smithers v. Flint*.<sup>130</sup> This case is also a rare example of serious female-on-male domestic violence in the courts. The facts are as follows: Leon Smithers had several people over at his house, including his girlfriend, Shirley Washington. Washington got drunk and refused to leave Smithers' home, despite repeated requests to do so. Smithers called the police and requested assistance, but did not provide details. According to one of the victims, Washington reportedly threatened to kill the group of men in front of the officers. Instead of arresting her for domestic violence, which would require a minimum 20 hours in jail,

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<sup>129</sup> See, for example, *Howard v. Bayes*, 457 F.3d 568 (6<sup>th</sup> Cir. 2006) where the Court held that Kentucky statutes did not confer an entitlement or property interest to victims of domestic violence, and *Hudson v. Hudson*, 475 F.3d 741 (6<sup>th</sup> Cir. 2007) where the Court held that a Tennessee police department's repeated failure to enforce a restraining order and the subsequent multiple homicide and suicide by the restrained individual did not violate the victims' due process rights.

<sup>130</sup> 602 F. 3d 758 (6<sup>th</sup> Cir. 2010).



the police ticketed Washington for trespassing and released her shortly thereafter to her mother. Later that evening, Washington returned to Smithers' house, shot and killed him, and wounded Smithers' two friends who were present.

Smithers' estate and the other victims filed suit against, amongst others, the City of Flint and several police officers alleging procedural and substantive due process violations and an equal protection violation, stemming from the inequitable treatment Smithers received as a male victim of domestic violence. The district court dismissed the lawsuit and the Sixth Circuit affirmed the decision. Citing *DeShaney* and *Castle Rock*, the Court held that there were no due process claims.<sup>131</sup>

As a result of *Castle Rock*, it is effectively impossible to use procedural due process to remedy ineffective police protection in domestic violence situations. Again, this is not a constitutional requirement. The dissent and amicus briefs in *Castle Rock* make this clear. Instead, the Supreme Court interpreted the procedural due process jurisprudence in a way that eliminated any possible claim based upon the failure of police officers and departments to reasonably implement state law. To the majority, it was not thinkable to allow these claims to proceed, as their interpretation of constitutional structure and content as well as precedent did not allow them to bestow constitutional rights onto victims of private violence.

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<sup>131</sup> The Court also denied the equal protection claim, holding that the claimant must demonstrate intentional discrimination based on his/her membership in a protected class, and there was no evidence to support such a claim in this case.

#### *IV. Equal Protection Claims*

With both substantive and procedural due process claims largely eliminated by Supreme Court decisions, the last potential constitutional claim available to victims of domestic violence is the Equal Protection Clause of the fourteenth amendment. For our purposes, equal protection arguments have taken two main trajectories in federal jurisprudence: challenges to federal criminal law and civil lawsuits alleging violations of a domestic violence victim's equal protection rights in the application of state law.<sup>132</sup> Federal criminal law challenges were briefly discussed in the previous chapter's analysis of challenges to VAWA's criminal statutes.<sup>133</sup> In this section I focus on the second prong of federal equal protection jurisprudence, the section 1983 civil lawsuits alleging a violation of equal protection in the application of state domestic violence laws and the subsequent failure of police to provide adequate protection to domestic violence victims.

Before beginning that analysis, however, we must first briefly look at the expansion of federal equal protection to women in the United States. The first case<sup>134</sup> recognizing sex-based equal protection involved an Idaho statute that gave preference to men over women as estate

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<sup>132</sup> Equal protection has also been important in the development of some areas of state domestic violence law, although it did not feature prominently in any of the three state cases studies analyzed in this dissertation. Most notably, concepts of equal protection were used to eliminate the marital rape exemption New York statutes in 1984 (see *People v. Liberta*, 64 N.Y. 2d 152) and were suggested in New Jersey's overruling of their common law exemption in 1981 (see *State v. Smith*, 85 N.J. 193). Also notable, in the New York case, the equal protection challenge came from the husband/rapist, not from the wife/victim or the State, although the Court held that the marital rape exemption denied married women—not separated or single men excluded from the marital rape exemption—equal protection of the laws. In the civil context, the Seventh Circuit held in 1984 that an Illinois interspousal immunity statute violated the constitutional guarantee to equal protection. *Moran v. Beyer*, 734 F.2d 1245 (7<sup>th</sup> Cir. 1984).

<sup>133</sup> For cases challenging gun prohibitions, see *United States v. Lewis*, 236 F.3d 948 (8<sup>th</sup> Cir. 2001), *United States v. Hancock*, 231 F.3d 557 (9<sup>th</sup> Cir. 2000), *United States v. Lewitzke*, 176 F.3d 1022 (7<sup>th</sup> Cir. 1999), *FOP v. United States*, 173 F.3d 898 (4<sup>th</sup> Cir. 1999). For cases challenging sentencing enhancers see *United States v. Baker*, 197 F.3d 211 (6<sup>th</sup> Cir. 1999), *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11<sup>th</sup> Cir. 2007).

<sup>134</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

administrators when an individual died intestate.<sup>135</sup> In the case, a father was designated the administrator of his son's estate and the mother challenged that appointment. Although the Idaho Supreme Court upheld the statute, the U.S. Supreme Court unanimously held that the statute violated the federal constitution's equal protection clause of the fourteenth amendment.

During the next several years, the U.S. Supreme Court dealt with numerous sex discrimination cases, with various outcomes.<sup>136</sup> It was not until 1976, however, that the Supreme Court established the intermediate standard of review for cases alleging sex discrimination in *Craig v. Boren*.<sup>137</sup> Craig was a young man between the ages of 18 and 21 who challenged an Oklahoma law prohibiting the sale of 3.2 percent beer to men under 21 and to women under 18.<sup>138</sup> To decide the case, the Court adopted intermediate level scrutiny for sex discrimination cases and ruled that the Oklahoma law did indeed violate federal equal protection guarantees.

In federal courts, the first civil section 1983 lawsuit alleging equal protection violations in a domestic violence case occurred in 1984 in *Thurman v. Torrington*<sup>139</sup>. The case was brought by a domestic violence victim, Tracey Thurman, on behalf of herself and her son, against the City of Torrington, its police department, and unidentified police officers after police officers

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<sup>135</sup> The preference for men over women was not absolute, but instead depended upon the relationship to the deceased. For example, a woman whose husband died intestate was given preference over the deceased man's brothers, father, or sons. But, where a man and women were in an equal relationship to a deceased individual (e.g. parents or siblings), men were preferred as estate administrators. See *Reed v. Reed*, 73.

<sup>136</sup> See, for example, *Frontiero v. Richardson*, 411 U.S. 677 (1973) where female service members successfully challenged the military's method of determining dependent benefits and the Court identified sex as a 'suspect' class under the fourteenth amendment due to the country's "long and unfortunate history of sex discrimination" (684)—the opinion was merely a plurality opinion however, and therefore the designation of sex as a suspect class was not binding; *Kahn v. Shevin*, 416 U.S. 351 (1974) where a widower unsuccessfully challenged Florida's tax exemption for widows; and *Geduldig v. Aiello*, 417 U.S. 484 (1974) where female employees unsuccessfully challenged California's employee-funded disability insurance system that excluded pregnancy—the Supreme Court held in 6-3 opinion that pregnancy discrimination was not invidious discrimination based on sex.

<sup>137</sup> 429 U.S. 190 (1976).

<sup>138</sup> Craig's claim was rendered moot because he turned 21 after the Court noted probable jurisdiction. Whitener, a licensed vendor of 3.2 percent beer was able to challenge the law in Craig's stead and the case proceeded.

<sup>139</sup> 595 F. Supp. 1521 (D. Conn. 1984).

repeatedly ignored Tracy's attempts to have law enforcement enforce both her order of protection against her husband and her husband's conditional release restrictions. Tracy's estranged husband repeatedly threatened, harassed, and attacked her, culminating in a vicious assault in which she was stabbed multiple times and then kicked in the head several times while officers were on the scene. As a result of the assault, Tracy was left paralyzed on the right side of her body and numb on her left side.<sup>140</sup>

Arguing that the Equal Protection Clause only applied to invidious racial discrimination, the City moved to dismiss the lawsuit. In rejecting that argument, the district court allowed the case to proceed, holding:

City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship as well as to all other persons whose personal safety is threatened, including women not involved in domestic relationships. If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Failure to perform this duty would constitute a denial of equal protection of the laws.<sup>141</sup> (citation omitted)

In allowing the suit to proceed, the Court held that police department's policy was implemented in a discriminatory manner against women victims of domestic violence, thereby violating the fourteenth amendment's Equal Protection Clause. To be clear, the Court did not say that the city could not under any circumstances discriminate against women victims of domestic violence. Indeed, it held that if the city did want to discriminate against women domestic violence victims, "it must articulate an important governmental interest for doing so."<sup>142</sup> The defendants,

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<sup>140</sup> Park, Jeannie, Susan Schindehette, Maria Speidel, "Thousands of Women, Fearing for Their Lives, Hear a Scary Echo in Tracey Thurman's Cry for Help," *People Magazine*, vol. 32 no. 15, October 09, 1989. <http://www.people.com/people/archive/article/0,,20121378,00.html> accessed August 30, 2012.

<sup>141</sup> *Thurman* at 1527.

<sup>142</sup> *Ibid.*

however, did not assert any governmental interest in their defense—they merely alleged that the Equal Protection Clause did not apply to women. In light of the Court’s decision to allow the case to proceed, the city settled with Tracy for \$1.9 million the following year.<sup>143</sup>

The notion that domestic violence victims could successfully file equal protection claims against apathetic police departments gained traction several years later in *DeShaney*. Although the case was, as previously discussed, a substantive due process claim, the U.S. Supreme Court:

in footnote three provided pivotal language that has formed the foundation for contemporary Equal Protection challenges to law enforcement policies, practices, and customs toward domestic abuse. The Court stated that, ‘the State may not of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.’<sup>144 145</sup>

Thus, although there is no individual right to police protection in the United States, the police cannot discriminate in how they provide protection to the public.<sup>146</sup> As a result, one of the first questions that arises from an equal protection claim, is to what group does the plaintiff belong? In general there have been five categories of group membership alleged by domestic violence victims in equal protection claims: race, gender/sex, sexuality, domestic violence victim, and the

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<sup>143</sup> Park et al (1989).

<sup>144</sup> *Shipp v. McMahan*, 234 F.3d 907 (5<sup>th</sup> Cir. 2000) at 912 citing *DeShaney v. Winnebago* 1989 at 197.

<sup>145</sup> That same court later warned that despite footnote three, “plaintiffs cannot make an ‘end-run’ around *DeShaney* by simply attempting to convert their due process claims into equal protection ones” (citations omitted, *Kelley v. City of Wake Village*, 264 Fed Appx. 437 (5<sup>th</sup> Cir. 2008) at 442).

<sup>146</sup> For early statements of this principle, see *Bartalone v. County of Berrien*, 643 F. Supp. 574 (W.D. Mich 1986). “The equal protection clause of the fourteenth amendment guarantees to every person within the United States the right to equal protection of the laws. This clause applies to the activities of police agencies, and protects persons from irrational discrimination in either acts of commission or omission. Police officers and agencies who are under an affirmative duty to protect persons within their area of authority must fulfill this duty without intentionally discriminating against such persons on an irrational basis” (citations omitted, 576); and *Lowers v. City of Streator*, 627 F. Supp. 244 (N.D. Ill. 1985) “Generally, there is no constitutional right, in either the due process clause or the equal protection clause, to be protected against being attacked or raped by a member of the general public... However, there are two recognized exceptions to this general rule... The second exception is where the state discriminates in providing protection to members of the public; those situations ‘of course violate the equal protection clause of the Fourteenth Amendment’” (citations omitted, 246).

class of one.<sup>147</sup> The first two of these group memberships trigger an elevated level of scrutiny, but the last three trigger only a rational basis analysis of the problematic law, policy, or custom. Before discussing each class separately, however, it is important to note that oftentimes plaintiffs will allege membership in multiple groups, so some cases involve multiple issues.

Race is a suspect class in U.S. constitutional jurisprudence, so discrimination based on race triggers strict scrutiny<sup>148</sup> in the courts. Although alleged periodically in domestic violence cases, racial discrimination claims have generally been ineffective in equal protection lawsuits originating from domestic violence situations.<sup>149</sup> More successful have been allegations of sex bias in the application of domestic violence law and policy. Indeed, courts have widely acknowledged that discrimination against women victims of domestic violence does violate the fourteenth amendment's equal protection clause.<sup>150</sup> Successful allegations of sex bias trigger intermediate scrutiny.<sup>151</sup>

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<sup>147</sup> Some claims have alleged other group membership. For example in *Balistreri v. Pacifica Police Department*, 855 F.2d 1421 (9<sup>th</sup> Cir. 1988), the plaintiff alleged discrimination based on sex and marital status. In *Estate of Smithers v. City of Flint*, 602 F.3d 758 (6<sup>th</sup> Cir. 2010) the plaintiffs alleged discrimination based on sex and poverty.

<sup>148</sup> Strict scrutiny requires the government to prove its law/policy is narrowly tailored to further a compelling state interest.

<sup>149</sup> See, for example, *Smith v. City of Elyria*, 857 F. Supp 1203 (ND Ohio 1994) and *Flores v. Young*, U.S. Dist. LEXIS 34890 (Idaho 2005).

<sup>150</sup> See, for example, *Hynson v. Chester, Legal Department*, 864 F.2d 1026 (3<sup>rd</sup> Cir. 1988), *Watson v. Kansas City*, 857 F.2d 690 (10<sup>th</sup> Cir. 1988), *Balistreri v. Pacifica Police Department*, 855 F.2d 1421 (9<sup>th</sup> Cir. 1988), *Brown v. Grabowski*, 922 F.2d 1097 (3<sup>rd</sup> Cir. 1990), *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F. 3d 415 (2<sup>nd</sup> Cir. 2009), *Flores v. Young*, U.S. Dist. LEXIS 34890 (Idaho 2005), *Estate of Smithers v. City of Flint*, 602 F.3d 758 (6<sup>th</sup> Cir. 2010). *Estate of Smithers* was a slightly different fact scenario as the aggressor was female and the victims male. The plaintiffs were therefore arguing that they were denied equal protection as male victims of domestic violence—the assumption being that the police would have responded differently had the aggressor been male and the victims female. Although the Court acknowledged that such selective denial of equal protection would have been unconstitutional had it occurred, they did not find that the plaintiffs provided sufficient proof to substantiate a claim of invidious gender-based discrimination (766-7).

<sup>151</sup> Intermediate scrutiny requires the government to prove its law/policy serves to further important governmental objectives and that the law/policy is substantially related to achieving those objectives.

The remaining three categories all trigger a rational basis<sup>152</sup> analyses of discrimination. Although rare, some individuals have successfully asserted equal protection claims based on discrimination based on sexuality. For example, in *Price-Cornelison v. Brooks*<sup>153</sup>, Dana Price-Cornelison successfully alleged she was denied equal protection because she was a lesbian and the police did not treat her domestic violence situation as seriously as they would have a woman in a heterosexual relationship. More common is asserting a claim based upon being a domestic violence victim.<sup>154</sup> Although defendants sought to dismiss her claim, Stephanie Bond was able to allege an equal protection violation based upon her status as a domestic violence victim.<sup>155</sup> It is important to reiterate, however, that although this is one of the more successful categorizations in equal protection claims, domestic violence victims are explicitly not a protected group, so any equal protection violation based on that group membership triggers only a rational basis review of the law, policy, or custom.

The final category used by victims of domestic violence who are pursuing equal protection claims is the ‘class of one’ theory.<sup>156</sup> The ‘class of one’ theory alleges that the police selectively withdrew protection because of some specific fact in the domestic violence scenario before them. For example, in *Lunini*, the plaintiff alleged that the police selectively withdrew

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<sup>152</sup> Rational basis review is the default standard used by the courts when specifically protected groups or fundamental rights are not implicated. Rational basis review merely requires the government to demonstrate that the law/policy bears a rational relation to some legitimate government purpose. It is generally considered to be a very easy standard for the government to overcome and so plaintiffs generally try to assert rights that will trigger some type of elevated standard of review.

<sup>153</sup> 524 F.3d 1103, (10<sup>th</sup> Cir. 2008).

<sup>154</sup> See, for example: *Jones v. Union County*, 296 F.3d 417 (6<sup>th</sup> Cir. 2002); *McCauley v. City of Chicago*, 671 F.3d 611 (7<sup>th</sup> Cir. 2011); *Didzerekis v. Stewart*, 41 F. Supp 2d. 840 (N.D. Ill. 1999); *McDonald v. City of Chicago*, 1994 U.S. Dist. LEXIS 18445 (N.D. Ill. 1994); *Moore v. City of Chicago Heights*, 2010 U.S. Dist. LEXIS 2566, (N.D. Ill. 2010); *Doe v. Calumet City*, 161 Ill. 2d 374 (Ill. 1994), *McCauley v. City of Chicago*, 671 F.3d 611 (7<sup>th</sup> Cir. 2011).

<sup>155</sup> *Bond v. Walsh*, 2011 U.S. Dist. LEXIS 119778 (C.D. Ill. 2011).

<sup>156</sup> See, for example, *Lunini v. Grayeb*, 395 F.3d 761 (7<sup>th</sup> Cir. 2005), *Mata v. City of Kingsville*, 275 Fed. Appx 412, (5<sup>th</sup> Cir. 2008), *Kelley v. City of Wake Village*, 264 Fed Appx. 437 (5<sup>th</sup> Cir. 2008).

police protection from him because his boyfriend was a member of the city council.<sup>157</sup> To bring a ‘class of one’ equal protection claim the plaintiff must allege that s/he has been intentionally treated differently than other similarly situated individuals and that there is no rational basis for the distinction, or that distinction is based on “‘totally illegitimate animus’ toward the plaintiff by the defendants.”<sup>158</sup> The ‘class of one’ theory allows individuals to bring equal protection lawsuits in cases where domestic violence law and police policy may be constitutionally acceptable, but for some reason the police selectively did not apply the law or policy to a particular individual.

Although there has not been a Supreme Court case dealing with equal protection and domestic violence, building off of racial equal protection law<sup>159</sup> two circuit courts established the basic legal criteria for these types of cases in the late 1980s. The Tenth Circuit, in the first discussion of equal protection and domestic violence at the appellate level, established three criteria. The Court required plaintiffs to demonstrate “that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault

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<sup>157</sup> *Lunini v. Grayeb*, 395 F.3d 761 (7<sup>th</sup> Cir. 2005).

<sup>158</sup> *Lunini* at 768, citing *McDonald v. Village of Winnetka*, 371 F.3d 992 (7<sup>th</sup> Cir. 2004) at 1001.

<sup>159</sup> See *Washington v. Davis*, 426 U.S. 299 (1976) where the Supreme Court upheld the use of a police recruit test despite the fact that a greater proportion of black recruits failed the test. The appellate court held that because a disproportionate number of black recruits failed the test, discriminatory intent was not necessary—disparate impact on black recruits was sufficient to establish a constitutional violation. The Supreme Court disagreed, holding, “[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race...But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact” (239). They clarify, “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule...that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” (242) See also *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) where the Supreme Court found that absent evidence of intentional racial discrimination the respondents were unable to sustain their equal protection claim against the city. These holdings were applied to gender discrimination in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), a case in which the Supreme Court upheld a Massachusetts statute that created a hiring preference for veterans, despite the fact that less than one percent of employable women were veterans.



victims,” that “discrimination was a motivating factor for the defendants and that [the victim] was injured by operation of the policy or custom.”<sup>160</sup> <sup>161</sup> Later that same year, the Third Circuit took a slightly different approach to determine whether or not a victim of domestic violence could sue police officers for equal protection violations.<sup>162</sup> The Court held that an officer would have to “know that the policy has a discriminatory impact on women, that the bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy.”<sup>163</sup>

Today, although there are slightly different variants for the disparate jurisdictions, two important issues arise in equal protection cases: 1) did the defendants intentionally and unacceptably discriminate against the plaintiff—or against the group to which the plaintiff belongs; and 2) did the discrimination violate the plaintiff’s clearly established rights? Question two arises when defendants seek to assert qualified immunity for their actions.<sup>164</sup> Thus, the issue becomes, in part, whether or not a domestic violence victim has a clearly established right to the same level of police protection as victims of other types of violence.<sup>165</sup> While this decision regarding whether or not a clearly established right was violated is generally a relatively simple matter for a court to decide, largely depending upon when the case was heard, determining whether or not an equal protection violation occurred is slightly more complicated.

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<sup>160</sup> *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10<sup>th</sup> Cir. 1988).

<sup>161</sup> Nine years later, the First Circuit adopted the *Watson* standard. See *Soto v. Flores*, 103 F.3d 1056 (1<sup>st</sup> Cir. 1997).

<sup>162</sup> *Hynson v. Chester, Legal Department*, 864 F. 2d 1026 (3<sup>rd</sup> Cir. 1988).

<sup>163</sup> *Hynson* at 1027.

<sup>164</sup> The other prong to determine whether or not individual government officials will be held liable for violations of clearly established constitutional rights is if the defendants’ actions were objectively reasonable.

<sup>165</sup> See, for example, *Watson v. City of Kansas City* and *Brown vs. Grabowski*, 922 F.2d 1097 (3<sup>rd</sup> Cir. 1990). See also *Robinson v. City of Battle Creek* 1996 U.S. Dist. LEXIS 7978 (W.D. Mich. 1996) for a discussion of whether or not a domestic violence victim had a clearly established right to equal protection in which the Court concludes that she did not.

Courts have held that to successfully sustain an equal protection claim, the plaintiff must demonstrate intentional discrimination. Disparate impact, although perhaps useful as evidence of bias, is not sufficient to establish intent.<sup>166</sup> Thus, plaintiffs must demonstrate clear discriminatory purpose to maintain a successful equal protection claim.<sup>167</sup> There are generally three types of discriminatory law, policy, or custom that have been addressed in domestic violence equal protection law: 1) when the law, policy, or custom is discriminatory on its face; 2) when the law, policy, or custom is neutral on its face but applied in a discriminatory manner; and, 3) when the law, policy, or custom is neutral on its face but is driven by a discriminatory purpose. I will discuss each in turn.

The first category of problematic law, policy, or custom is one that is discriminatory on its face.<sup>168</sup> An example of a policy that is potentially discriminatory on its face came out of Los Angeles County in the 1990s.<sup>169</sup> In August 1989, Maria Navarro received a phone call from her estranged husband's brother, warning her that her estranged husband, Raymond Navarro, was en route to her house to kill Maria and everyone else present. Maria immediately called 911 to request assistance and to inform the dispatcher that she had a restraining order against Raymond, although in actuality the restraining order had expired earlier that year. In response, the

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<sup>166</sup> See, for example, *Ricketts v. City of Columbia*, 36 F. 3d 775 (8<sup>th</sup> Cir. 1994).

<sup>167</sup> See, for example, *Blankenship v. Cleveland*, 1998 U.S. App LEXIS 6511 (6<sup>th</sup> Cir. 1998) and *Burella v. City of Philadelphia*, 501 F.3d 134 (3<sup>rd</sup> Cir. 2007).

<sup>168</sup> Under current equal protection law, if a law or policy explicitly distinguished protection between men and women, courts would accept the overt distinction as an official gender-based categorization and proceed with its analysis from that point. It would not require a showing of intentional discrimination. In *United States v. Virginia* (518 U.S. 515 (1996)), the U.S. Supreme Court did just that. Although not a domestic violence case, the Court held that current case law governing official gender classifications requires an 'exceedingly persuasive' justification for sex-based distinctions if they are to not run afoul of the Equal Protection Clause (533 citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) at 724). Thus, while *United States v. Virginia* points to another possible interpretation of the Equal Protection Clause, under current jurisprudence it only applies to explicit sex discrimination. De facto and implicit discrimination requires demonstrating discriminatory intent.

<sup>169</sup> *Navarro v. Block*, 72 F.3d 712 (9<sup>th</sup> Cir. 1995), *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9<sup>th</sup> Cir. 1999).

dispatcher told Maria to call back if Raymond did arrive because they could not just send a police officer to the house to “see if he comes over.”<sup>170</sup> Fifteen minutes after Maria called 911 Raymond arrived, entered the Maria’s back door, shot and killed Maria and four others, and injured two more people.

The Navarros filed suit against Los Angeles County and the Los Angeles County Sheriff alleging, in part, that the Sheriff’s department had a policy or custom to not classify domestic violence calls for assistance as emergencies. The plaintiffs alleged that this policy or custom discriminated against women and minorities in violation of the fourteenth amendment. The district court granted summary judgment, concluding that the Navarros did not demonstrate the existence of a discriminatory policy or custom, nor did they provide evidence that the Sheriff deliberately deprived women or minorities of their constitutional rights. The Ninth Circuit disagreed. On appeal the Court held that through the deposition testimony of the 911 dispatcher, the Navarros demonstrated both a discriminatory policy of not equating domestic violence calls with emergency calls and not adequately training 911 dispatchers to handle domestic violence calls. Although the Navarros alleged such distinction unacceptably discriminated against women, the Ninth Circuit held that while there was no evidence that the County’s policy discriminated based on gender, the policy did unacceptably discriminate against victims of domestic violence. The County policy of equating domestic violence calls with non-emergency calls failed the rational basis test. As a result, the Court reversed the district court’s decision and remanded the case for further proceedings.<sup>171 172</sup>

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<sup>170</sup> *Navarro* at 713.

<sup>171</sup> The district court appeared to be unhappy by the Ninth Circuit’s opinion, because on remand it again held that equating domestic violence 911 calls with non-emergency calls met the rational basis test. The Navarros again

Although the Ninth Circuit held that a policy that categorized domestic assault calls as a lower priority than non-domestic violence calls could violate equal protection absent a rational basis for such a distinction, not all circuit courts have agreed. For example, the Fifth Circuit held in *Beltran v. City of El Paso*<sup>173</sup>, that a policy of classifying ‘family violence assault’ calls as a lower priority than ‘injury to a child in progress’ did not violate the fourteenth amendment’s Equal Protection Clause because there was no evidence that the distinction purposefully discriminated against women. In a tragic case in which a husband killed his wife and daughter after his daughter called 911 for assistance and police officers failed to arrive, the Court held that there was no evidence that the classification scheme did or was designed to discriminate against women. The Court did not separately consider whether the distinction denied domestic violence victims—as a group—equal protection. Citing *Shipp*, the Court reiterated that “an equal protection plaintiff must show that her injuries are the result of law enforcement ‘inaction or conduct pursuant to invidious policies’.”<sup>174 175</sup>

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appealed to the Ninth Circuit. In the second case, the Ninth Circuit reversed the district court’s holding and remanded the case for a hearing to determine whether or not the County had a policy of providing lower priority to domestic violence calls and if so, if that policy had a rational basis.

<sup>172</sup> See also *Watson*, where the Tenth Circuit found that the plaintiff presented enough evidence to argue that the Kansas City police department had a discriminatory policy or custom of affording less protection to victims of domestic assault than to victims of nondomestic attacks. Using statistics and Watson’s experience with the police department, she presented enough evidence to support an equal protection claim. Similar to the *Navarro* Court, the *Watson* Court did not find sufficient evidence to allow Nancy Watson to pursue a sex discrimination claim but did allow her to proceed based on differential treatment of domestic violence victims. It is important to note, however, that statistics themselves are not determinative. In *McKee v. Rockwall*, 877 F.2d 409 (5<sup>th</sup> Cir. 1989) the Court did not find statistics about the disparate arrest rate for domestic and nondomestic assaults useful in determining whether or not an equal protection violation occurred. Although this might have been influenced by a problem with the statistics, the Court held that even the acceptable statistics did not support McKee’s discrimination allegations.<sup>173</sup> 367 F.3d 299 (5<sup>th</sup> Cir. 2004).

<sup>174</sup> *Beltran* at 307, citing *Shipp* at 914.

<sup>175</sup> For examples of other cases that fail to successfully allege equal protection violations based on discriminatory policies see: *Brooks v. Knapp*, 221 Fed Appx. 402 (6<sup>th</sup> Cir. 2007), *Soto v. Flores*, 103 F.3d 1056 (1<sup>st</sup> Cir. 1997).

Requiring a demonstration of discriminatory intent is a huge impediment to using equal protection law to remedy police policy and custom with regards to domestic violence, something that is further demonstrated in the subsequent two categories of equal protection claims. This is an interpretive choice however, one that is not universal in equal protection analysis.<sup>176</sup> Explicit sex discrimination does not require a demonstration of discriminatory intent—it merely requires showing that the policy has a significant and constitutionally unacceptable impact on women, as individuals and as a class. Thus, although there are alternative approaches to equal protection law in U.S. constitutional jurisprudence, the one selected to deal with domestic violence is the most restrictive option available.

The second category that is susceptible to equal protection claims is when a law, policy, or custom is neutral on its face, but is applied discriminatorily. *Thurman v. Torrington*, the case discussed above, is an example of this type of claim. In *Thurman*, “[a]lthough the plaintiffs point to no law which on its face discriminates against victims abused by someone with whom they have a domestic relationship, the plaintiffs have alleged that there is an administrative classification used to implement the law in a discriminatory fashion.”<sup>177</sup> The district court denied the defendants’ motion to dismiss and allowed the case to proceed, holding that *Thurman* did provide sufficient evidence to question the defendants’ failure to respond to her situation.

In *Kelley v. City of Wake Village*<sup>178</sup> Kelley was able to adequately demonstrate that the City of Wake Village, although guided by a neutral law governing violent incidents, failed to implement the law uniformly with regard to domestic violence victims. Having cleared the first

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<sup>176</sup> See the discussion of *United States v. Virginia* in footnote 168.

<sup>177</sup> *Thurman* at 1527.

<sup>178</sup> 264 Fed. Appx 437 (5<sup>th</sup> Cir. 2008).

hurdle, however, Kelley failed the second. The Court held that while there was a genuine issue of fact as to whether or not the City was appropriately enforcing Texas statutes, there was no proof that their failure to do so was motivated by gender discrimination. As a result, Kelley's claim failed and her case was dismissed.<sup>179</sup>

The final category is the least common. It arises when a law, policy, or custom is neutral on its face but is driven by a discriminatory purpose. Although similar to category two, there is a nuanced difference. *Smith v. City of Elyria*<sup>180</sup> provides an example of the difference. The case resulted from a tragic incident in which Alfred Guerrant stabbed and killed his ex-wife, Karen Guerrant, as well as stabbed and injured their nine year old daughter and Karen's sister, Dorice Smith. Before the fateful incident, Karen allowed Alfred to move into the guest room of her house. Several days later, Karen told Alfred to leave the house, but he refused. Karen called the police and upon arrival, they told her that she "could not 'just put him out at her whim'"<sup>181</sup> despite the fact it was her house and Alfred had no legal claim to it. Because the police would not assist her, Karen asked her daughter to call her sister, who came to help and again called the police. The police again refused to assist the women. Shortly thereafter, Alfred attacked Karen, stabbing her twelve times and fatally wounding her, as well as stabbing both his daughter and Dorice when they tried to intervene.

The plaintiffs sued the police officers and the City for, among other things, violating their fourteenth amendment rights to equal protection under the law. Although the Court dismissed

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<sup>179</sup> For other examples of cases falling into the second category that failed on equal protection grounds see: *Burella v. City of Philadelphia*, 501 F.3d 134 (3<sup>rd</sup> Cir. 2007), *Jones v. Union County*, 296 F. 3d 417 (6<sup>th</sup> Cir. 2002), *Blankenship v. City of Cleveland*, 1998 U.S. App. LEXIS 6511 (6<sup>th</sup> Cir. 1998), *Eagleson v. Guido*, 41 F.3d 865 (2<sup>nd</sup> Cir. 1994), *Ricketts v. City of Columbia*, 36 F. 36 775 (8<sup>th</sup> Cir. 1994).

<sup>180</sup> 857 F. Supp 1203 (D. Oh. 1994).

<sup>181</sup> *Smith* at 1206.

the racial discrimination claim, it upheld the gender and domestic violence<sup>182</sup> victim claims. The Court held that while the police department's policy was neutral on its face, there was sufficient evidence to demonstrate it had a disparate impact on women and that the policy "was intended to 'accomplish the collateral goal of keeping women in a stereotypic and predefined place'."<sup>183 184</sup> The Court went on to conclude that the facts presented "demonstrate discriminatory intent because they reveal a sexually discriminatory assumption that Alfred Guerrant had a right to exercise dominion and control over his ex-wife and her home."<sup>185 186</sup>

The outline of equal protection law, as applied to domestic violence situations, is not as neat and tidy as other fourteenth amendment law, mostly because the Supreme Court has not issued a decision directly related to the matter. In summary, however, there are several steps a plaintiff/victim must undergo to successfully plead his/her case. First, the plaintiff/victim is required to demonstrate the existence of a discriminatory law, policy, or custom implemented by the defendants. A discriminatory law, policy, or custom on its own, however, is not sufficient. The plaintiff must also demonstrate that the complained about law, policy, or custom was at least partially motivated by discriminatory intent toward either the plaintiff or toward a group of which the plaintiff is a member. Finally, to defeat immunity claims from state actors, the

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<sup>182</sup> The Court held that while the police clearly treated domestic violence and non-domestic violence situations differently, they did not articulate any rational reason for doing so. It thus allowed the claim to proceed.

<sup>183</sup> *Smith* at 1212 citing *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>184</sup> The Court elaborated: "The [policy] assumes (1) the potentially violent party in a family dispute will be a man, (2) the dispute will be occurring in 'his home,' (3) the woman complainant will be upset and irrational and will probably later refuse to cooperate in the prosecution, and (4) the man will be the wage earner in the family and it would be detrimental for the family to lose his income. The policy against arrest requires the police officer to persuade the woman victim to live with violence or the threat of violence to protect the integrity of the family, a result she is expected to want more than her own physical safety" (1212).

<sup>185</sup> *Ibid.*

<sup>186</sup> For an example of a case from the third category of equal protection claims that failed, see *Lunini v. Grayeb*, 395 F.3d 761 (7<sup>th</sup> Cir. 2005).

plaintiff must demonstrate that as a result of the discriminatory law, policy, or custom, the plaintiff was deprived of a clearly established constitutional right.

As discussed above, demonstrating discriminatory impact is not sufficient. Although these three requirements are applicable to all equal protection law, not just domestic violence civil lawsuits against municipalities and police forces, there is one notable exception in sex-based equal protection law—explicit discrimination based on sex. Unfortunately for domestic violence victims attempting to assert civil claims against unresponsive municipalities and police departments, the Supreme Court’s approach to official sex categorization has not extended to situations where one gender is significantly more affected or burdened than another. As a result, it is nearly impossible for domestic violence victims to successfully assert equal protection claims against a city or police department. The burden of demonstrating intentional discrimination absent an acceptable governmental purpose is extremely difficult—especially after the first several successful lawsuits in the mid- to late-1980s inspired police departments to retool their official policy with regard to domestic violence situations. Although there have been a smattering of successful cases in lower courts over the years, the vast majority of these claims fail.<sup>187</sup>

## ***V. Conclusion***

In this chapter I outlined the current state of federal case law dealing with fourteenth amendment domestic violence civil claims. As it stands, it is nearly impossible to bring a claim

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<sup>187</sup> Chemerinsky 2003.



based on any of the fourteenth amendment clauses, although an equal protection claim currently stands the best, albeit still poor, chance.

Private violence victims first tried to assert substantive due process claims. With *DeShaney*, the Supreme Court rejected these claims except for under very circumscribed situations in which there was a special relationship between the state and the victim or the state created the danger the individual faced. Despite having alternatives, the Court framed the state's intervention in Joshua's situation as one of inaction, rather than the required state action to bring a successful claim. The Supreme Court further held that the Due Process Clause does not guarantee state intervention in the private sphere—instead the Due Process Clause acts as a restraint on the state to preserve a zone of liberty and freedom. In response to *DeShaney*, private violence victims attempted to assert procedural due process claims, arguing that state law could create a protected property interest in—and therefore an entitlement to—state protection from private violence. Although initially this approach seemed to hold promise, in *Castle Rock* the Supreme Court foreclosed that option, holding that Colorado's mandatory arrest law was not only not mandatory, but that it also did not create an individual entitlement to enforcement. With *DeShaney* and *Castle Rock*, the Supreme Court essentially eliminated the Due Process Clause as a means of holding state officials accountable for haphazard and irresponsible state (non) intervention in private and domestic violence situations, except in extremely limited circumstances.

Without the Due Process Clause option to hold the state accountable in private violence situations, the only remaining option in the fourteenth amendment is the Equal Protection Clause. The equal protection jurisprudence developed concurrently with the due process

jurisprudence. Although victims alleging equal protection violations have had some success, particularly early on, to establish a successful equal protection claim a victim must demonstrate the existence of a discriminatory law, policy, or custom—one that is motivated, in part, by discrimination against the group to which the victim belongs. This is exceedingly difficult because discriminatory impact is not sufficient to demonstrate discriminatory intent unless the policy is, on its face, discriminatory. As a result, few equal protection claims are able to survive summary judgment motions to dismiss because victims are unable to demonstrate requisite discriminatory intent following the major law and policy changes that occurred, at least on paper, during the mid- to late-1990s.

Why does the fourteenth amendment matter if most domestic violence law is state law? The fourteenth amendment jurisprudence developed as a response to states allowing their agents and municipalities to successfully assert immunity to avoid accountability when their actions, in part, resulted in serious injury or death in a private violence situation. To overcome immunity, victims had to demonstrate that a state actor in the course of official duties violated a well-established constitutional right. Because there are few federal individual constitutional rights victims can rely on, private violence victims attempted to use the fourteenth amendment guarantees to due process and equal protection, with little success.

The fourteenth amendment jurisprudence is not only relevant for federal law, however. The fourteenth amendment logic has permeated state law interpretations, thereby foreclosing not only federal remedies, but also state remedies. Indeed, as demonstrated in the Wisconsin and Colorado state chapters, state courts have used the Supreme Court's interpretations of federal rights to influence their interpretation of state rights. As a result, interpretations of federal

constitutional rights have had a significantly greater impact than is necessary or even to be expected given the strong federal system in the United States.

It is important to remember, however, that there is nothing in the constitution or previous jurisprudence requiring the current interpretations of the fourteenth amendment as it applies to domestic and private violence. Instead, judges have been influenced by constitutional structure and content which has generally led them to consider federal intervention in private violence to be unthinkable. More specifically, the strong vertical structure of rights provisions, and in particular the fourteenth amendment, as well as the absence of applicable individual rights—especially women’s rights—in the constitution has shaped judges’ understandings of what types of state intervention into the private sphere are acceptable, legitimate, and appropriate. While the constitution’s strong vertical nature would seem less relevant in fourteenth amendment claims based upon state action, the reality of a vertical structure goes beyond who a victim can sue and why. A strong vertical structure, without an accompanying indirect horizontal application of constitutional principles to law, minimizes the state’s obligation to protect individuals from private violence and structures what the legal and lay communities consider thinkable legal actions. Thus, in large part because of the strong vertical nature of the U.S. constitution, police departments, municipalities, and their officers are, from a constitutional perspective, unburdened by the reality of private violence. The vertical structure of the constitution, combined with the absence of strong rights provisions that could also require the state to protect individuals in domestic violence situations, are key impediments to domestic violence victims successfully suing state entities for failing to protect them from private violence.

Structural issues are not themselves the entire story, however, because in the U.S. context the verticality and absence of strong statements of individual rights do not require the particular outcomes discussed above. Instead, they create a permissive environment in which a judge is able to use precedent and their own understanding of the role of the constitution and government in American society to determine cases. Thus, the thinkability of a particular solution or outcome becomes crucial. With little to guide them in the actual constitution, judges rule based upon their understanding of the proper division of the public and private spheres, federalism, and individual rights. Based upon U.S. legal history and culture, these understandings overwhelmingly favor a strong declaration of limited government involvement in private violence situations, with the underlying goal of maximizing individual freedoms. As a result, there is little recognition of how individual freedoms can be curtailed by private entities with the tacit support of government through non-intervention. Instead, the judicial focus rests almost exclusively on how unfettered government intervention could lead to tyranny, not on how government interaction could, in some situations, actually increase individual liberty. The following chapter examining South Africa's approach to domestic violence will demonstrate how that is possible.

## Appendix

**Table 1: Federal Domestic Violence Civil Litigation Timeline**

|      | <b>Substantive Due Process Claims (SDP)</b>   | <b>Violence Against Women Act</b> | <b>Procedural Due Process Claims (PDP)</b>  | <b>Equal Protection Claims (EP)</b>  |
|------|---|-----------------------------------|---|--|
| 1984 |   |                                   |   | CT district court found EP violation in <i>Thurman v. Torrington</i>   |
| 1987 | 7 <sup>th</sup> Circuit holds no SDP violation in <i>DeShaney v. Winnebago</i>  |                                   |   |  |
| 1988 |   |                                   |   | September—10 <sup>th</sup> Circuit outlined requirements to bring a DV EP in <i>Watson v. City of Kansas City</i><br><br>December—3 <sup>rd</sup> Circuit outlined requirements to bring a DV EP claim in <i>Hynson v. Chester</i> |
| 1989 | February—Supreme Court holds no SDP violation in <i>DeShaney v. Winnebago</i><br><br>June—9 <sup>th</sup> Circuit found a special relationship and state created danger exception in <i>Wood v. Ostrander</i><br><br>August—11 <sup>th</sup> Circuit found a state created danger and special relationship exception in <i>Cornelius v. Highland Lake</i> |                                   |   |  |
| 1990 | PA district court found a restraining order did no SDP violation in <i>Coffman v. Wilson Police Department</i>  | VAWA first introduced             | PA district court found a restraining order created a protected property interest in <i>Coffman v. Wilson Police Department</i> | PA district court allows a DV EP claim alleging gender bias to proceed in <i>Coffman v. Wilson Police Department</i>   |
| 1991 | OH district court found no SDP violation in <i>Siddle v. City of Cambridge</i>  |                                   | OH district court found a restraining order did create a protected property interest in <i>Siddle v. City of Cambridge</i>      |  |

|      |  |  |  |  |
|------|--|--|--|--|
| 1992 | Supreme Court ruled in <i>Collins v. City of Harker Heights</i> that deprivation of a liberty interest must be arbitrary for a SDP violation |  |  |  |
| 1994 |  | VAWA enacted   |  |  |
| 1995 |  | Supreme Court decides <i>United States v. Lopez</i>  |  |  |
| 1996 |  | June—CT district court upholds federal civil rights remedy in <i>Doe v. Doe</i><br><br>July—VA district court strikes down federal civil rights remedy in <i>Brzonkala v. Virginia Polytechnic &amp; State University</i>        |  |  |
| 1997 |  | June—4th Circuit upholds federal civil rights remedy in <i>Brzonkala v. Virginia Polytechnic &amp; State University</i><br><br>July—TN district court reluctantly upholds federal civil rights remedy in <i>Seaton v. Seaton</i> |  |  |
| 1998 |  | Full panel of 4th Circuit strikes down federal civil rights remedy in <i>Brzonkala v. Virginia Polytechnic &amp; State University</i>  |  |  |
| 1999 | 11 <sup>th</sup> Circuit overruled <i>Cornelius v. Highland Lake</i> in <i>White v. Lemacks</i>  |  |  |  |
| 2000 |  | Supreme Court strikes down federal civil rights remedy in <i>Morrison v. United States</i>   |  |  |
| 2001 | CO district court found no SDP violation in <i>Gonzales v. Castle Rock</i>   |  | CO district court found no PDP violation in <i>Gonzales v. Castle Rock</i>     |  |
| 2002 | 10 <sup>th</sup> Circuit found no SDP violation in <i>Gonzales v. Castle Rock</i>  |  | 10 <sup>th</sup> Circuit found PDP violation in <i>Gonzales v. Castle Rock</i> |  |

|      |   |  |   |   |
|------|---|--|---|---|
| 2004 | Full panel of 10 <sup>th</sup> Circuit found no SDP violation in <i>Gonzales v. Castle Rock</i>                               |  | Full panel of 10 <sup>th</sup> Circuit found PDP violation in <i>Gonzales v. Castle Rock</i>                                  |   |
| 2005 | Supreme Court holds no SDP violation in <i>Castle Rock v. Gonzales</i>  |  | Supreme Court holds no PDP violation in <i>Castle Rock v. Gonzales</i>  |   |
| 2006 |   |  | 6 <sup>th</sup> Circuit found KT law did not create a protected property interest in <i>Howard v. Bayes</i>                   |   |
| 2007 | 6 <sup>th</sup> Circuit found no SDP rights violations when failing to enforce a restraining order in <i>Hudson v. Hudson</i> |  | 6 <sup>th</sup> Circuit found no PDP rights violations when failing to enforce a restraining order in <i>Hudson v. Hudson</i> |   |
| 2009 | 2 <sup>nd</sup> Circuit finds a state created danger in <i>Okin v. Village of Cornwall-on-Hudson Police Department</i>        |  |   |   |
| 2010 | 6 <sup>th</sup> Circuit finds no SDP claims in <i>Estate of Smithers v. Flint</i>   |  | 6 <sup>th</sup> Circuit finds no PDP claims in <i>Estate of Smithers v. Flint</i>   | 6 <sup>th</sup> Circuit finds no EP violation in <i>Estate of Smithers v. Flint</i> |

## Chapter 7

### South Africa

#### ***I. Introduction***

So far this dissertation has been a story of mostly unsuccessful, circular legal claims, with neither the U.S. federal nor state legal systems willing to take responsibility for protecting victims of intimate violence. The U.S. constitution, through its limited provisions and narrowly interpreted rights, fails to provide private violence victims generally, and women victims of intimate violence specifically, either meaningful protection from violence or significant remedies after violence occurs. Steeped in a tradition that reflects a public-private divide codified over two hundred years ago, and one that continues to be reinforced through the legal and social institutions established at the country's founding, the U.S. federal constitution has largely failed to address women's vulnerability in the private sphere. Similarly, U.S. state constitutions, while sometimes providing additional rights to their citizens, have also largely failed to protect women, as their interpretations by courts and legislatures have been primarily influenced by federal constitutional interpretations and contemporary U.S. legal culture.

This is not the only way to address private violence, however. In contrast to the U.S. experience, South Africa provides an excellent example of how a constitution can structure a society that takes gendered private violence seriously and views it as the human rights violation<sup>1</sup>

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<sup>1</sup> See, for example: Bunch, Charlotte, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly*, vol. 12 no. 4, pgs. 486-498 (1990); Cook, Rebecca (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994; and Peters, Julie and Andrea Wolper (eds), *Women's Rights Human Rights: International Feminist Perspectives*, Routledge, New York, 1995.



it is now widely understood to be. Before beginning an analysis of South Africa, however, it is important to note that while the constitution has dramatically altered the country's legal structure, particularly in regards to private and domestic violence, this has not translated into women's safety on the ground.<sup>2</sup> Thus, in addition to demonstrating how constitutions can reshape a country's legal framework, the South African case study also exemplifies the disconnect feminists have long identified between formal and substantive equality.

Despite these implementation issues, the South African case plays a crucial role in this analysis of how constitutions structure state responses to private violence. Although I briefly outline the history of the South African legal system and apartheid domestic violence law, my analysis begins in earnest with the post-apartheid era. Since apartheid South Africa was not a constitutional democracy, it did not have legal or political systems that provide useful leverage for this analysis, except to provide context for the monumental shift that occurred during the transition in the early-mid 1990s. The history underscores how, during the transition, the

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<sup>2</sup> Any analysis of the legal rights of South African women with regards to private violence encounters the inevitable and obvious issue of the discrepancy between law on the books, law in action, and the reality of violence on the ground. This dissertation and chapter focuses on the constitution and how the constitution structures state's legal responses to domestic violence. It does not address the widespread failure to implement these laws, except insofar as there are or are not legal remedies for those failures. For more information on general implementation issues with the Domestic Violence Act see Lillian Artz, "Magistrates and the Domestic Violence Act: Issues of Interpretation," *Institute of Criminology*, University of Cape Town: South Africa, 2003; Joy Watson's, "Lessons from a Decade of Legislation," presented at *The South African Domestic Violence Act: Lessons from a Decade of Legislation and Implementation*, November 26-8, 2008; Lillian Artz, "Victim Retraction or System Reluctance?: An Investigation into the Attrition of Domestic Violence Cases within the Criminal Justice System," presented at *The South African Domestic Violence Act: Lessons from a Decade of Legislation and Implementation*, November 26-8, 2008; "Public hearings on the implementation of the Domestic Violence Act," Parliament of the Republic of South Africa, February 17, 2010, No 131, released October 25, 2010. For information on women's experiences with domestic violence in South Africa see, Lisa Vetten's, "Addressing domestic violence in South Africa: Reflections on strategy and practice," presented at the UN Division for the Advancement of Women's Expert Group Meeting, *Violence against women: Good practices in combating and eliminating violence against women*, May 17-20, 2005; Matthews, Shanaaz, Naeemah Abrahams, Lorna Martin, Lisa Vetten, Lize van der Merwe, and Rachel Jewkes, "'Every six hours a woman is killed by her intimate partner': A National Study of Female Homicide in South Africa," *MRC Policy Brief*, No. 5, June 2004.

political leaders responded to the past governmental abuses by attempting to craft a political and legal system that protected individuals from both public and private abuse.

The crown jewel of South Africa's transition is the 1996 constitution. It includes protections for vulnerable populations, as well as many individual rights for all citizens. These individual rights include both positive and negative rights, some of which are applied horizontally as well as vertically. Crafted to transition the country from an oppressive minority system to one of democratic majority rule, the constitution enshrines important individual rights to create a state that not only respects individual human dignity and equality, but also one founded on the principles of non-racialism and non-sexism.<sup>3</sup> Thus, the structure and content of the South African constitution attempts to not only reconstruct the public-private divide in an effort to minimize exploitation in the private sphere, but it also provides the necessary impetus to change what the legal and lay communities regard as thinkable legal solutions to various social issues. Consequently, the South African constitution, in both the explicit rights guaranteed to citizens and the authority granted to the legislature and courts to develop and protect those rights, stands in stark contrast to the U.S. federal constitution. As a result, although neither country's constitution explicitly deals with domestic violence, juxtaposing the two countries enables a comparison of how constitutional structure influences state responses to private intimate violence.

From a legislative perspective, South Africa has passed two pieces of national legislation addressing domestic violence during and post transition from apartheid—the first in 1993 and the

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<sup>3</sup> Andrews, Penelope and Stephen Ellmann, "Introduction: Towards Understanding South African Constitutionalism," in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, edited by Penelope Andrews and Stephen Ellmann, pgs. 1-21. Ohio University Press, Athens, 2001.

second in 1998. The second piece of legislation, the Domestic Violence Act of 1998, greatly expanded upon the first, thereby demonstrating a growth of awareness of the scope of the problem, as well as the state obligation to confront it. Although not as comprehensive as the U.S. federal Violence Against Women Act, both pieces of legislation were upheld by the Constitutional Court when challenged.<sup>4</sup>

With regard to case law, South Africa stands alone in this project as having multiple cases in which appellate-level courts have made affirmative choices to protect women's rights despite challenges framed in abusers' rights and disregarding the general principle of sovereign and qualified immunity. This can be contrasted with the prevailing U.S. approach that generally begins with sovereign and qualified immunity and then requires some type of constitutional violation and state action to overcome that immunity. Through delicate balancing of the issues involved, the opinions provide a record of the role the country's transition to democracy as well as its constitutional structure and rights play in shaping what judges regard as thinkable when determining the state's responsibility vis-à-vis private violence.

Taken together, the analysis of the South African constitution, legislation, and case law provides an alternative to the U.S. approach addressing private gendered violence. But perhaps even more importantly, the development of post-apartheid private law, guided by the permanent constitution, provides a vivid example of how fundamental legal change becomes thinkable. Although post-apartheid South African constitutional interpretation began with a fairly typical—at least from a U.S. perspective—analysis of state obligations in the private sphere by both the legislature (with the Prevention of Family Violence Act) and the courts (with the Supreme Court

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<sup>4</sup> See *S. v. Baloyi* and *Omar v. The Government of South Africa and Others* discussed in section five of this chapter.

of Appeals' first *Carmichele* decision), both branches of government expanded their understanding of the government's role in protecting citizens from private violence over the ensuing decade. Led by a Constitutional Court that took the permanent constitution's rights provisions and state obligations seriously, South African law has evolved from an abusive system under apartheid, to a fairly typical liberal state during and immediately following transition, to a progressive, transformative legal system that officially recognizes the rights of all citizens to live their lives free from private gendered violence over the past decade.

### Chapter Outline

To put South Africa's dramatic transformation into perspective, in the following two sections I provide a brief summary of South Africa's legal history as well as an overview of how the apartheid government addressed domestic violence. In section four I analyze the interim 1993 and permanent 1996 constitutions and how they have been applied in private violence cases. In this section the stark difference between the U.S. and South African approaches becomes clear, as the South African Constitutional Court has held that, in some circumstances, the state does have an obligation to protect individuals from private violence. The following section analyses the two relevant pieces of domestic violence legislation that were promulgated during and following the transition to democracy, as well as the constitutional challenges of the legislation. Section six analyses relevant case law not covered in either the constitutional or legislative sections. Finally, in section seven I conclude with a summary of South African domestic violence law and some thoughts regarding the role that the permanent constitution has played in fundamentally altering the South African state.

## ***II. Brief Legal History of South Africa***

South Africa is a legal and cultural melting pot. Although African populations have inhabited the land we now know as South African since time immemorial, white settlers did not arrive until the mid-seventeenth century.<sup>5</sup> The Dutch established the first permanent European settlement at the Cape of Good Hope, but did not begin to expand inland in significant numbers until the early nineteenth century. The British and the Dutch struggled with each other, and with local African populations, for control over the colony until the British defeated the Dutch settlers in 1902. From the beginning, the British used race politically, and equality was never permanently established in the colony. South Africa became an independent state in 1910 but remained a member of the Commonwealth. Although at no time was independent South Africa a true racial democracy, it was not until 1948 that the Nationalist Party consolidated power and officially created apartheid shortly thereafter.

From a legal perspective, although the British held the colony until South Africa officially became independent in 1910, Great Britain did not fully replace Dutch law with British law<sup>6</sup> Instead, a hybrid system emerged with three main components: 1) customary law governing African tribes; 2) Roman-Dutch civil law brought in by the Dutch; and, 3) British common law. Religious law was also subsequently added, but the three principle components

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<sup>5</sup> For more detailed analysis of South African history, see Robert Ross, *A Concise History of South Africa*, Cambridge University Press, Cambridge (1999) and Thompson, Leonard, *A History of South Africa*, Yale University Press, New Haven (1995).

<sup>6</sup> For more information on South Africa's legal history see Heinz Klug's, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing, Oxford (2010); Klug, Heinz, "South Africa: From Constitutional Promise to Social Transformation," in *Interpreting Constitutions: A Comparative Study*, edited by Jeffrey Goldsworthy, pgs. 266-320. Oxford University Press, Oxford, 2006, Thompson, Leonard, *A History of South Africa*, Yale University Press, New Haven (1995), and H.R. Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution*, Stevens Publishing, London (1960).

remain customary, Dutch, and British law. In fact, Roman-Dutch civil law became the basis of British common law, even though civil codes were replaced with the common law.<sup>7</sup>

Upon establishing authority in the country, the British installed a governmental system based on parliamentary sovereignty and loyalty to the British monarch. Although multiple constitutions were promulgated after independence, the judiciary was functionally unable to review legislation until the 1961 Constitution. With the 1961 Constitution, the apartheid government abandoned any pretense of judicial oversight and completely eliminated judicial review.<sup>8</sup> Consequently, under parliamentary sovereignty, the South African parliament was able to pass laws without any meaningful constitutional check on their decisions.<sup>9</sup> This system had dramatic implications for the South African population. Most notably, this system did not require Parliament to pass laws that respected certain human rights. As a result, Parliament was able to pass not only racist but also sexist legislation without providing any legal recourse to the population except lobbying Parliament to pass new laws. The acting Chief Justice of the Appellate Court—the highest court of the time—perhaps said it best when he stated,

arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will.<sup>10</sup>

Thus, under apartheid a minority of the country was able to vote for members of parliament who could only be held accountable by their own electorate and no executive or legal branch of

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<sup>7</sup> As a result, some interesting legal anomalies exist despite the fact South Africa is a common law system. For example, instead of the common law of torts, South Africa has the civil law of delict governing civil wrongs. The law of delict is still developed through the common law, however, as is evidenced in the discussion of *Carmichele* in section four. See footnote 47 for additional information on the law of delict.

<sup>8</sup> Klug, 2010.

<sup>9</sup> Klug, 2006.

<sup>10</sup> *Sachs v Minister of Justice; Diamond v Minister of Justice, 1934 AD 11 37*, cited in Klug, 2006.

government could act as a mollifying influence. A simple majority was sufficient to enact new laws, regardless of the content.

In response to the power allotted to the South African Parliament—and the manner in which it was exercised throughout the twentieth century—the architects of the transition engineered a transformation from a parliamentary sovereign state to a constitutional democracy. This change was first instituted with the 1993 interim constitution<sup>11</sup> and solidified with the permanent 1996 constitution<sup>12</sup>. I will discuss both constitution below in section four, focusing on the permanent constitution, but it is important to know the basics of the apartheid parliamentary system to fully comprehend the significant human rights protections contained in the permanent constitution. Most importantly, the establishment of a constitutional democracy required that laws follow the rights and principles outlined in the constitution. In addition, the permanent constitution also established a system of courts<sup>13</sup> (see figure 1) not only to enforce the law, but also to ensure that new, customary, and common laws embodied both the letter and the spirit of the constitution. As a result of these significant legal changes, judges have been

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<sup>11</sup> Constitution of the Republic of South Africa, Act 200, 1993.

<sup>12</sup> Constitution of the Republic of South Africa, Act 198, 1996.

<sup>13</sup> South Africa has an extensive court system with multiple layers and issue-specific courts. The basic hierarchy follows. The Constitutional Court is the highest court in South Africa on constitutional matters. It was created by the interim constitution and has eleven justices. The Constitutional Court only hears cases that involve the constitution. Below the Constitutional Court is the Supreme Court of Appeal (SCA). The SCA is the highest court for non-constitutional matters and only hears cases on appeal from the High Courts. Appeals are heard by a panel of three to five judges and the majority opinion rules. The High Courts used to be called “the Supreme Courts” and deal with issues that are too serious for Magistrate’s Courts, or appeals from Magistrate’s Courts. High Court cases are heard by one judge, unless it is an appeal in which case it is heard by at least two judges. There are fourteen provincial divisions of the High Court as well as Circuit Courts, which sit at least twice a year and travel to rural areas to hear cases. Magistrate’s Courts are lower courts that deal with less serious criminal cases and civil cases. Magistrate’s Courts include both regional and district courts, each with different jurisdictions. For more information on South Africa’s court system see the Department of Justice and Constitutional Development of South Africa at [www.justice.gov.za/about/sa-courts.html](http://www.justice.gov.za/about/sa-courts.html). Accessed March 1, 2013. See figure one in the Appendix to this chapter for a flow chart.

transformed from, in many respects, the enforcers of the apartheid government to the protectors of the population.

### ***III. Domestic Violence Law under Apartheid***

Apartheid South Africa did not have specific domestic violence legislation. Women initiating claims against their husbands or partners would have to do so under common assault laws, often with mixed results. Additionally, rape laws throughout the apartheid era contained marital exceptions so women had no legal recourse for sexual assault within marriages.<sup>14</sup> Before beginning, it is important to note that this discussion focuses on domestic violence under South African laws, it does not include a discussion of how domestic violence was treated in the independent homelands. Under apartheid, most non-whites were governed under a separate legal system than whites, as they were not officially citizens of the South African state. Consequently, non-white women would have had even fewer rights, than did women under the apartheid regime.

Beginning in the 1950s and up until transition and the enactment of the Prevention of Family Violence Act in 1993, a woman seeking to stop domestic abuse would have to obtain a “peace order” from a local judge or magistrate.<sup>15</sup> A peace order was functionally the apartheid-

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<sup>14</sup> Marital rape was not outlawed until the Prevention of Family Violence Act of 1993. In 1989, however, Parliament passed the Criminal Procedure Amendment Act (Act 39 of 1989). Although Parliament rejected the South African Law Commission’s recommendation to eliminate the marital rape exception, it did transform marital rape into an aggravating circumstance at sentencing. As a result, marital rape was not technically illegal, but it was viewed as an aggravating circumstance to assault.

<sup>15</sup> See Section 384, Criminal Procedure Act 56 of 1955 and Section 344(1), Criminal Procedure Act 51 of 1977.



era restraining order, although it was essentially a warning and did not have a provision for automatic arrest or prosecution if violated. If a woman complained of abuse

the court would have to hold an enquiry to determine whether the order had been contravened. Only then could the abuser be prosecuted for contempt of court and fined. A survey conducted by the Advice Desk for Abused Women found that [this] procedure was ineffective as a remedy for battered women. Battered women could also apply to the Supreme Court (the next court up from magistrates' courts in the South African judicial hierarchy) for an interdict, but this was an expensive prospect, requiring the retention of an attorney and an advocate and high legal fees.<sup>16</sup>

Thus, the procedure to stop domestic violence was lengthy, expensive, and delayed, and highly inappropriate for the realities surrounding domestic violence.

Although the apartheid government did not directly concern itself with protecting women who were in violent relationships, it did attempt to structure power and authority within marriages. The common law rule of Marital Power existed into the 1980s.<sup>17</sup> Marital power gave the husband power over the person and property of his wife; consequently, married women were essentially in the same position as minors under the authority of their husbands, and had limited standing to bring suits, limited contractual ability, and did not have legal guardianship over their children.<sup>18</sup>

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<sup>16</sup> Human Rights Watch, "Violence Against Women in South Africa," *The Human Rights Watch Global Report on Women's Human Rights*, pgs. 375- 401, Human Rights Project, 1995: 383  
<http://www.hrw.org/reports/pdfs/g/general/general958.pdf>.

<sup>17</sup> Parliament passed the Matrimonial Property Act in 1984 (Act 88 of 1984) abolishing the common law rule of marital power in marriages of Whites, Coloreds, and Asians married after November 1984. Four years later, Parliament passed the Marriage and Matrimonial Property Law Amendment (Act 3 of 1988) and extended the abolition of marital power to marriages between Blacks in South Africa (and not the independent homelands) occurring after December 1988. Thus, while Parliament effectively ended marital power in the 1980s, the changed did not apply to marriages occurring before the designated dates in each Act.

<sup>18</sup> The scope of marital power was first successfully challenged in *Palmer v. Palmer* (1955 (3) S.A. 56 (O)) where a husband unsuccessfully tried to force his estranged wife to have a medical exam. The Court held that while husbands do have personal guardianship over their wives, their authority does not extend so far as to give husbands the right to interfere with their wives' personal freedom to the extent they can force their wives to have nonconsensual medical exams.

In a stunning example of a husband's authority and dominion over his wife, the Court in *S. v. Mdingela*<sup>19</sup> reduced the sentence of husband who was convicted of assaulting his wife. The case arose after a husband suspected his wife of cheating and went looking for her with a stick and a knife. After finding his wife, the husband assaulted her with both weapons. He was convicted of assault and received a six month prison term because the suspected infidelity was considered a mitigating circumstance to the attack. The husband subsequently appealed.

The issue on appeal was whether the suspected infidelity was a mitigating circumstance such that the accused should have received an even lighter sentence. The Court found that it was. It held that under certain circumstances, the reason behind a husband's "correction" of his wife can temper the moral blameworthiness of the conduct, even though if the correction does not necessarily have the intended outcome. Although the Court cited case law stating that a husband no longer had the right to administer corporal punishment of his wife, it still ordered a reduction of his sentence to one month in jail and a five months suspended sentence for three years. The Court justified this sentence, stating the husband

deserves actual incarceration because, instead of confining his corrective efforts to belaboring his wife with a stick, he endangered her physical well-being and such comeliness as she may have been endowed with, by knifing her. A corrected wife, even if unduly corrected, may become a source of comfort, a mutilated wife, never. Using a knife unlawfully on an erring wife can therefore be a self-defeating measure for the husband and the cause of enduring misery for both of them. Such conduct cannot be countenanced and must be sternly dealt with whenever it occurs.<sup>20</sup>

Despite declaring that such behavior was not acceptable and must be sternly dealt with, the Court tacitly accepted the premise of a husband's authority over his wife's body by reducing his

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<sup>19</sup> *S. v. Mdingela*, 1977 (3), S.A. 322 (O).

<sup>20</sup> *S. v. Mdingela* at 325.

already light sentence even further. The decision demonstrates the inability of women to adequately access state authority to increase their personal safety under apartheid.

The other apartheid-era case regarding domestic violence I will discuss is *Glass v. Glass*.<sup>21</sup> In this case, a wife petitioned the sheriff to remove weapons from, and to bar her husband from entering, the home. Ms. Glass feared for her life after Mr. Glass threatened to kill her with the weapons he kept in their home. The issue before the Court was whether or not Ms. Glass had a claim to have the weapons removed from the home. The Court found that she did not, holding that there was no basis in common law for the wife to have a legal claim to the weapons.

The Court further held that the husband, while not guaranteed free access to the home, could enter the home for any reason after giving twenty-four hours notice to his wife or her attorney, including for personal reasons or to visit the children. Additionally, the Court ordered costs be paid by the applicant—Ms. Glass. Thus, not only did Ms. Glass end up having to pay court fees for attempting to remove her husband and his weapons from the home, she was by and large unsuccessful in her attempts to secure her home.

Under apartheid, women had little recourse when faced with domestic violence. The government served to protect masculine authority in the house, not to protect women from intimate violence. As a result, women were largely at the mercy of the men in their lives. With the transition to a constitutional democracy, however, this structure was fundamentally upended.

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<sup>21</sup> *Glass v. Glass*, 1980 (3), S.A. 263 (W).

#### *IV. South African Constitution*

The 1996 South African Constitution came about after more than five years of negotiations, with discussions about the negotiations occurring even before the official dialogues began. Although not all political parties participated in the discussions, the constitution was a landmark document that represented the forging of a new, democratic South Africa.<sup>22 23</sup> Emerging from the apartheid system, the constitution enshrined democratic values and ideals, offering all citizens a breathtaking number of political as well as socio-economic and cultural rights.<sup>24</sup>

Several of those rights and principles are applicable in private violence situations. Beginning with the enumerated Founding Provisions, the constitution immediately outlines the principles on which the new South African democratic system is to be established. In addition to the values of human dignity, equality, human rights, and freedom<sup>25</sup>, the Founding Provisions also lists both non-racialism and non-sexism<sup>26</sup> as founding principles of the new South Africa.

The Bill of Rights also has multiple sections that are relevant to issues of domestic and intimate violence. Before enumerating individual rights, however, the Bill of Rights first

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<sup>22</sup> Gloppen, Siri, *South Africa: The Battle over the Constitution*, Ashgate Publishing, 1997; Klug, 2010.

<sup>23</sup> There was also an interim constitution that passed in 1993 and went into effect in 1994. The interim constitution established 34 constitutional principles that had to be incorporated into the final constitution before it could be certified by the Constitutional Court (Gloppen 1997). Included in the 34 constitutional principles was establishing a “democratic system of government committed to achieving equality between men and women...” as well as creating a constitution that “shall prohibit...gender...discrimination and shall promote...gender equality”. (Interim Constitution, Schedule 4, Constitutional Principles I and III, respectively) The interim constitution, as opposed to the final constitution, was not explicitly horizontal.

<sup>24</sup> Much has been written about the South African constitution-writing process and the two post-apartheid constitutions. For more information on the subject, see Gloppen, 1997; Ge Devenish’s *A Commentary on the South African Constitution*, Butterworth Publishers, 1998; Penelope Andrews and Stephen Ellmann’s (eds), *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law*, Witwatersrand University Press, 2001; and, Klug, 2010.

<sup>25</sup> Constitution of the Republic of South Africa, Chapter 1, section 1 (a).

<sup>26</sup> Constitution of the Republic of South Africa, Chapter 1, section 1 (b).

establishes the roll these rights will play in a new South Africa. In addition to being “a cornerstone of democracy in South Africa”<sup>27</sup> it also explicitly requires the state to “respect, protect, promote and fulfill the rights in the Bill of Rights”<sup>28</sup>. The Bill of Rights goes further, listing the extent to which these rights can be limited and providing guidance to courts for the development of legislative and common law. The rights can be “limited only...to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”<sup>29</sup> In addition, the final section of the Bill of Rights reads: “[w]hen interpreting any legislation, and when developing the common law or customary law, every court...must promote the spirit, purport and objects of the Bill of Rights.”<sup>30</sup>

The first important right relevant to an analysis of how constitutions structure state responses to private violence is set forth in section nine and outlines the right to equality in the new South Africa. In addition to explicitly protecting individuals from unfair discrimination based on sex and gender, the section prohibits discrimination by both the state and individuals.

The relevant portions read:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law...
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...gender, sex, pregnancy...
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination...is unfair unless it is established that the discrimination is fair.<sup>31</sup>

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<sup>27</sup> Constitution of the Republic of South Africa, Chapter 2, section 7 (1).

<sup>28</sup> Constitution of the Republic of South Africa, Chapter 2, section 7 (2).

<sup>29</sup> Constitution of the Republic of South Africa, Chapter 2, section 36 (1).

<sup>30</sup> Constitution of the Republic of South Africa, Chapter 2, section 39 (2).

<sup>31</sup> Constitution of the Republic of South Africa, Chapter 2, section 9 (1),(3),(4),(5).

The equality section is thus explicitly horizontal as well as gendered—unequivocally prohibiting unfair public and private discrimination based upon certain identified categories, including sex and gender.<sup>32</sup> This section has had a profound impact on the state’s obligations to protect individuals—women, in particular—from private violence, most notably in the creation and enforcement of domestic violence law, which will be discussed in greater detail in section five of this chapter.

The following two sections of the permanent constitution are relatively simple, and serve to protect human dignity<sup>33</sup> and life<sup>34</sup>. Due to the overall structure of the constitution, as well as the phrasing of the provisions, both could be used to require increased protection of victims of private violence as they do not require any state action to trigger state obligations of enforcement. Section twelve protects the freedom and security of the person. There are several portions of the section that are applicable to private violence situations:

- (1) Everyone has the right to freedom and security of the person, which includes the right—...
  - (c) to be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right—...
  - (b) to security in and control over their body...<sup>35</sup>

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<sup>32</sup>The interim constitution was not explicitly horizontal. Section eight, equality, lacked the equivalent of section nine, subsection four of the 1996 constitution. Instead, the interim constitution stated that “[n]o person shall be unfairly discriminated against, directly or indirectly...”, thereby allowing for a horizontal interpretation without explicitly creating a horizontal application.

<sup>33</sup>Constitution of the Republic of South Africa, Chapter 2, section 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.” Section ten of the interim constitution is nearly identical.

<sup>34</sup>Constitution of the Republic of South Africa, Chapter 2, section 11: “Everyone has the right to life.” Section nine of the interim constitution is nearly identical.

<sup>35</sup> Constitution of the Republic of South Africa, Chapter 2, section 12 (1),(2).

Again, the constitution explicitly creates a right to be free from private violence, as well as creating the right to bodily integrity and security. This section is instrumental in creating additional obligations on the government to protect individuals from private violence.<sup>36</sup>

The first case that directly and indirectly challenged the new constitutional order was decided by the Constitutional Court in 2001. Although the case, *Carmichele v. The Minister of Safety and Security*<sup>37</sup>, arose under the interim constitution, the permanent constitution was in effect when the Constitutional Court heard the appeal. As a result, the Court used both constitutions to decide the outcome of the case.

The facts of the case are somewhat complicated and long, but require recitation to fully understand the outcome.<sup>38</sup> On August 6, 1995, Francois Coetzee viciously assaulted and injured Alix Jean Carmichele at Julie Gosling's house. Coetzee was 22 at the time of the assault and had a history of sexual problems and assault, starting from the age of ten, which included molesting his niece when he was in his early teens. His mother sought medical assistance at the time, but doctors advised her that Coetzee was too young to be given medication.

In June of 1994, Coetzee climbed into the room of a young woman with whom he was acquainted, laid in bed with her and fondled her until she woke up. After she awoke and screamed for help, Coetzee escaped through the window, but was apprehended, charged, and pled guilty to breaking and entering as well as indecent assault. He was given a suspended

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<sup>36</sup>This section was greatly expanded upon from the comparable section in the interim constitution. In the interim constitution, section eleven did not explicitly declare that all individuals had a right to be free from private violence. Instead is stated that “[e]very person shall have the right to freedom and security of the person” and “no person shall be subject to torture of any kind...nor shall any person be subject to cruel, inhuman or degrading treatment...”.

<sup>37</sup>*Carmichele v. The Minister of Safety and Security and The Minister of Justice and Constitutional Development*, 2001 (4) SA 938 (CC).

<sup>38</sup>The facts come from the Constitutional Court opinion of *Carmichele*.

sentence for the breaking and entering charge, but was sentenced to a fine and six months imprisonment and twelve months suspended sentence for the indecent assault charge.

In March of the following year, Coetzee attempted to rape and murder a seventeen year-old classmate, Eurona Terblanche, after she resisted his advances following a school dance at a hotel. During the brutal assault, Coetzee stripped Terblanche, threatened to kill her, and beat her unconscious. Coetzee denied raping her, despite stripping her naked, and it was never established whether or not he actually did rape Terblanche before leaving her for dead. Following the assault, Coetzee returned to the dance and notified the hotel staff that he had killed a girl and needed them to contact the police. When the police arrived, Coetzee again confessed to murder, and the police arrested him for public drunkenness. In the meantime, Terblanche regained consciousness, gathered some of her clothes, and walked to a friend's house where she was able to contact her mother. Terblanche's mother contacted the police and Terblanche went to the hospital, where the medical staff recorded her extensive injuries.

After leaving the hospital, Terblanche and her mother went to the police station to report the assault. The sergeant on duty told the women that Coetzee had told them he had a previous rape conviction. The next morning, police officers interviewed Coetzee and notified him he was being charged with rape. Coetzee appeared in court the following day, where the lead detective notified the state prosecutor that there was no reason to deny Coetzee bail, and that he should be released with a warning. The prosecutor did not inform the judge of Coetzee's previous conviction or that he was on a suspended sentence for indecent assault. As a result, Coetzee was released, without any conditions, and warned to appear at his subsequent court appearance.



After his release, Coetzee returned to live with his mother in a small, isolated community. A few days later, Terblanche's mother notified Gosling about the attack and Coetzee's previous conviction for indecent assault. Gosling, who employed Coetzee, was concerned that he was free and went to discuss Coetzee's bail with the police captain, who referred her to the prosecutor. The prosecutor, with whom Gosling was friends, told her that "there was no law to protect them and that the authorities' hands were tied unless Coetzee committed another offense."<sup>39</sup> A couple days later, Coetzee went to the Terblanche home to talk; Treblanche's mother contacted the police and Coetzee fled.

Coetzee's mother, concerned that her son might either commit suicide or "get up to something" approached a relative, who also happened to be a police detective who worked at the local police station, in hopes that the police would institutionalize her son.<sup>40</sup> Upon arriving home, Mrs. Coetzee found that her son had indeed attempted suicide. He was treated at the hospital and then discharged. During an interview with the police after the suicide attempt, Coetzee told them that he did not know why he assaulted Terblanche and that he could not control himself when he saw a girl in a bathing suit. He also said he could not remember committing the assault. According to Coetzee, the inability to control himself had been an issue since he was about ten years-old. Following the interview, Coetzee was referred for psychiatric observation, to which he consented.

The following month Coetzee appeared before the court again, facing the same prosecutor. The hospital report from Coetzee's psychiatric observation determined that he was both mentally capable of understanding the criminal charges he was facing and that he was also

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<sup>39</sup> *Carmichele* 2001 at para 15.

<sup>40</sup> *Carmichele* 2001 at para 17.

mentally capable when he attacked Terblanche. Coetzee pled not guilty, arguing that he had not raped Terblanche. There is no record of bail being discussed, but Coetzee was released and told to appear again in court in early May. At the May appearance, his trial was further postponed to the end of June.

In the meantime, Coetzee began poking around Gosling's home. On at least one occasion where Gosling was not home but Carmichele—who frequently stayed with Gosling—was, Coetzee quickly left after being questioned by Carmichele. Gosling reported the incident to police, and again asked if there was anything that could be done to get Coetzee into custody. At that interaction, and on at least one more occasion, the police assured Gosling there was nothing they could do.

On August 6, 1995, Carmichele arrived at Gosling's house for a meeting. Gosling had not yet arrived, but Coetzee, who had broken into to Gosling's house, was there. Upon seeing Carmichele, Coetzee immediately attacked her, assaulting her with a pick handle and stabbing her in the chest with a knife. Carmichele was able to escape through a door, and ran until she found someone who could help her. Coetzee was arrested and charged with numerous crimes, including attempted murder as well as breaking and entering.

In September, one month after he attacked Carmichele, Coetzee was tried for assaulting Terblanche. He admitted to assaulting her but maintained he did not rape her. He was convicted of attempted rape and sentenced to seven years in prison. In December of that same year, Coetzee was tried for his assault on Carmichele. He was convicted of both attempted murder and breaking and entering, and sentenced to twelve and one-half years in prison.

Although Coetzee went to prison for the attacks on both Terblanche and Carmichele, Carmichele also wanted the police and prosecutors held accountable for allowing her assault to occur. She argued that the police officers and prosecutors had a legal duty to protect her, that they negligently breached that duty, and that as a result she was violently assaulted by Coetzee. To support her claim, Carmichele argued that the police department and “the prosecutors owed her a duty to: 'ensure that she enjoyed her constitutional rights of inter alia the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement.’”<sup>41</sup> In addition, Carmichele relied upon the role of the police outlined in the interim constitution, as well as case law that declared rape violated women's rights protected by the interim constitution.<sup>42</sup> In their defense, the respondents argued that the interim constitution required them to recommend and grant bail unless the interests of justice would be undermined by releasing the accused.<sup>43</sup>

The trial and appellate courts both held that the named police officers and prosecutors did not have a legal duty to protect Carmichele, and consequently dismissed her claim. On appeal Carmichele argued that the police and prosecutors had a constitutional duty to protect the public in general, and women in particular, from violent crime. Although she did not argue that every failure to protect an individual would or should result in a successful civil claim, Carmichele did argue that in her case, it did.

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<sup>41</sup>*Carmichele*, 2001 at para 27. As noted earlier, Carmichele brought her suit under the 1993 interim constitution. Her claims reference: section nine (life); section ten (dignity); section eleven (freedom and security); section thirteen (privacy); and, section eighteen (freedom of movement).

<sup>42</sup>See *S v. Chapman*, 1997 (3) SA 342 (A).

<sup>43</sup> Section 25(2)(d) of the interim constitution read: “Every person arrested for the alleged commission of an offence shall...have the right...to be released from detention with or without bail, unless the interests of justice require otherwise.” There is no explicit comparable right in the 1996 constitution.

Three main issues arose in the Constitutional Court's unanimous Carmichele opinion. First was whether or not the state had a positive duty to protect citizens' constitutional rights. In formulating their analysis, the Court cited the U.S. approach outlined in *DeShaney*<sup>44</sup>, and summarily rejected the notion that the South African government never had an obligation to engage in affirmative acts to protect individuals' constitutional rights. It did acknowledge, however, that by creating a requirement of action, Constitutional obligations are not necessarily straight-forward. Indeed, the Court wrote that there is tension in "striking a balance between the interests of parties and the conflicting interests of the community."<sup>45</sup> The Court continued:

This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the 'spirit, purport and objects of the Bill of Rights' and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values."<sup>46</sup>

In other words, the Court must strike a balance between the interests of the individual and those of the community, while weighing the requirements established in the Bill of Rights.

The second issue that presented itself in the case was whether or not public officials should be protected by immunity. Citing English cases granting immunity as well as multinational European court holdings permitting civil lawsuits, the Constitutional Court held that civil lawsuits for delict<sup>47</sup> must not be precluded as a matter of law. Instead, courts must implement the aforementioned "proportionality exercise" as well as ascertain the "foreseeability

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<sup>44</sup> *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

<sup>45</sup> *Carmichele*, 2001 at para 43.

<sup>46</sup> *Ibid.*

<sup>47</sup> The law of delict in South Africa is roughly comparable to tort law in pure common law systems. Delict can be crudely explained as the civil law version of tort law. As discussed in section two of this chapter, South Africa is technically a hybrid legal system, and the law of delict is one area where this hybrid system is still evident.

and proximity” of a given action, or lack thereof, of a specific outcome.<sup>48</sup> Indeed, “[l]iability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents.”<sup>49</sup> Such a result, the Court implied, would undermine justice.

Finally, also important in an analysis of Carmichele's claim is the obligation, set forth in the 1996 constitution, establishing the Bill of Rights as supreme law as well as requiring the development of common law to comport with the rights set forth in the constitution.<sup>50</sup> Although the Court cautioned against “overzealous judicial reform”, it noted that the Constitutional and lower courts can, together, develop common law in a way that is both restrained and true to the nature of the 1996 Constitution.<sup>51</sup>

Importantly, throughout the opinion, the Court repeatedly referred to women's constitutional rights as a baseline from which any analysis of the case must proceed.<sup>52</sup> Indeed, citing an amicus brief, the Court wrote that both the threat of and completed sexual assaults “goes to the core of women's subordination in society” and that “[i]t is the single greatest threat

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<sup>48</sup> *Carmichele*, 2001 at para 49.

<sup>49</sup> *Ibid.*

<sup>50</sup> Section 7(2) of the interim constitution established that the 1993 Constitution was fundamental law as long as it was in force. The Court writes, “the [interim constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms. In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights”

*Carmichele* 2001 at para 36. In addition, the 1996 Constitution clarified that all existing law that comports with the new constitution continued to be in effect (Item 2, schedule 6). Section seven of the 1996 constitution established the Bill of Rights as foundational and requires the state to “respect, promote and fulfill these rights” *Carmichele* at para 33. Finally, sections eight and 173 empower courts to develop existing law to comport with the Bill of Rights.

<sup>51</sup> *Carmichele*, 2001 at para 55.

<sup>52</sup> See, for example: “Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, protect, promote and fulfill the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected” (*Carmichele* at para 57). Or, “In addressing [the positive obligations on members of the police force] in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence” (*Carmichele* at para 62).

to the self-determination of South African women.”<sup>53</sup> In addition, the Court also highlighted the state's obligations under multiple international agreements to protect women from violence that undermines their fundamental rights.<sup>54</sup>

Having addressed the underlying legal issues, the Court returned to the facts. They quickly summarized the facts of the case and found that both the police officers and prosecutors involved violated their duties with regard to their handling of Coetzee's bail. By declining to present relevant information about Coetzee's violent past and his acknowledged impulse control issues with regard to sexual assault and women, both the lead investigator and prosecutor were negligent in carrying out their legal obligations. Furthermore, the Court held that the police and prosecutor's failure to present the bail court with relevant information that could have resulted in the court denying bail was potentially a cause of Coetzee's assault on Carmichele. Although the Court did not conclude that had the police and prosecution presented the relevant information the bail judge would have definitely denied Coetzee's bail, it did assert that there was enough evidence to put the issue into play and require a trial judge to decide the issue. Thus, the Court held that Carmichele's case “has sufficient merit to require careful consideration to be given to the complex legal issues that it raises.”<sup>55</sup> Accordingly, the Court remanded the case and directed

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<sup>53</sup> *Carmichele* at para 62.

<sup>54</sup> The Court specifically cited two agreements: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) signed by South Africa in January 1993 and ratified almost three years later, in December 1995 and The United Nations Committee on the Elimination of Discrimination Against Women. The Court also cited *S v. Baloyi* (2000 (2) SA 425 (CC)), discussed later in this chapter, which cited an additional several agreements: the Universal Declaration of Human Rights (1948), the Declaration on the Elimination of Violence Against Women (1993), and the African Charter on Human and Peoples' Rights (signed by South Africa in 1995 and ratified in 1996).

<sup>55</sup> *Carmichele* at para 81.

the lower courts to develop the common law in compliance with the constitutional and statutory mandates on the state.<sup>56</sup>

On remand, the trial court<sup>57</sup> found that the police and prosecutors did owe a legal duty to protect Carmichele from Coetzee's assault and that they negligently breached those duties by failing to argue against Coetzee's release on his own recognizance following his assault against Terblanche. Cognizant of the possibility of a falsely applying hindsight to the actions of state officials, the trial court held that police and prosecutors must exercise reasonable care and diligence in the execution of their jobs. Falling short of that standard could expose state officials and the state to liability for the wrongs that occurred. Returning to the case at hand, the lower court held there was a sufficient nexus between the police and prosecutors' wrongdoing and Carmichele's assault, and that the state was consequently liable for damages.

Not surprisingly, the defendants appealed. The Supreme Court of Appeals dismissed the defendants' appeal, however, holding that "the State is liable for the failure to perform the duties imposed upon it by the constitution unless it can be shown that there is a compelling reason to deviate from" the general norm of accountability.<sup>58</sup> The Court further held that there was no "reason in this case to depart from the general principle that the State would be liable for its failure to comply with its Constitutional duty to protect" Carmichele. "On the contrary,

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<sup>56</sup> The Constitutional Court stated that if it determined the outcome it "would be acting as a court of first instance in relation to issues of fundamental importance concerning the development of the common law of delict...that is not desirable" (*Carmichele*, 2001, para 81). The Court further emphasized that the lower courts were the most appropriate forum to establish the facts, and that those courts could then apply the law as determined by the Constitutional Court.

<sup>57</sup> Information on the High Court case was taken from the Supreme Court of Appeals case, *Minister of Safety and Security and Another v. Carmichele*, 2004 (2) BCLR 133 (SCA).

<sup>58</sup> *Carmichele*, 2004 at para 43.

[Carmichele] was pre-eminently a person who required the State's protection."<sup>59</sup> As a result, and after establishing that had the bail judge heard the details both of Coetzee's assault on Terblanche and Coetzee's previous convictions he probably would have either denied Coetzee bail or set it high enough that Coetzee would be unable to make bail, the Supreme Court of Appeals upheld the trial court's decision assigning liability to the police and prosecutors.<sup>60</sup> Because the constitutional issue was settled, the defendants were unable to appeal their case to the Constitutional Court, and the Supreme Court of Appeals decision was final.

The *Carmichele* case demonstrates the development of thinkability with regards to holding the state and its officers liable in cases of private violence. Although the trial court and Supreme Court of Appeals initially held that the state was not liable for Carmichele's assault, thereby following the general common law norm of no state accountability for private violence, the Constitutional Court disagreed. Instead, the Constitutional Court interpreted both the structure and content of the 1996 constitution in light of the purpose and spirit behind the rights provisions, in conjunction with South Africa's international obligations vis-à-vis women's rights and non-binding international precedent, and held that allowing the state to escape responsibility would undermine justice. In so holding, the Constitutional Court explicitly rejected U.S. and English approaches to state accountability in private violence situations and cited multinational European court holdings to support the shift. Thus, the case demonstrates that while constitutional content and structure can significantly impact the thinkability of a certain legal

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<sup>59</sup> *Carmichele*, 2004 at para 44.

<sup>60</sup> The Supreme Court of Appeals opined on causation and foreseeability in a way that directly contradicted the Wisconsin Supreme Court in *Barillari v. Milwaukee*. With regard for to the police officer and prosecutor named in the case, the Supreme Court of Appeals stated that "[t]hey were dealing with a young male (he was 21 years of age at the time) with a possible previous conviction for rape who had attempted to murder and rape a friend of his. It is not very likely that such a person could do the same or something similar if not detained? I would think that the answer must be in the affirmative..." (*Carmichele* 2004 at para 52).



solution it is not necessarily enough in isolation. As a result, in attempting to transform a legal system, it appears helpful to not only have a supportive constitutional structure and content, but also important to have a social and cultural movement, possibly buffered by precedent elsewhere, accompanying the shift.

In 2002, one year after the Constitutional Court decided *Carmichele*, the Supreme Court of Appeals decided a similar case arising solely under the permanent constitution. The case, *Van Eeden v. Minister of Safety and Security*<sup>61</sup>, dealt with the assault, rape and robbery of Ghia Van Eeden by an escaped inmate, Andre Gregory Mohamed. At the time of the assault, in August 1998, Van Eeden was nineteen years old. Several months before the assault, in May of that same year, Mohamed escaped from police custody through an unlocked security gate while waiting to appear in a police lineup. At the time of his escape he was being held on 22 charges, including indecent assault, rape, and armed robbery. Six days after his escape, Mohamed recommenced his attacks on young women. Van Eeden was Mohamed's third victim after he escaped in May.

Following her assault, Van Eeden filed a civil lawsuit against the State for damages resulting from the attack. She argued that the police "owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm and that they negligently failed to comply with such duty."<sup>62</sup> The only issue at trial was whether or not the police did indeed owe Van Eeden a legal duty to prevent Mohamed's escape and the resultant attack.<sup>63</sup> The State acknowledged that at the time of Mohamed's escape, the police department was aware he was

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<sup>61</sup> 2003 (1) SA 389 (SCA).

<sup>62</sup> *Van Eeden* at para 3.

<sup>63</sup> At trial, the State conceded on the issues of vicarious liability, negligence, and causation. The Supreme Court of Appeals went so far as to "[commend]" the state "for not arguing the inarguable" and allowing the trial to be about the only "true legal issue" presented in the case (*Van Eeden* at para 5).

dangerous and likely to commit additional sexual attacks against women and that his escape was preventable.

At trial, citing the Supreme Court of Appeals 2001 *Carmichele* decision (their first decision in that case), the High Court held that the police did not have a legal duty to prevent Mohamed's escape and protect Van Eeden from the subsequent assault. In the interim, however, the Constitutional Court reversed that decision and held that the State did have a positive legal duty to prevent reasonably foreseeable harm and that the courts had a constitutional obligation to develop the common law to comport with the State's new duties under the interim and permanent constitutions.

How the common law was to be developed was left to the lower courts, however. As a result, *Van Eeden* is among the first cases the Supreme Court of Appeals heard that dealt with the issue of the state duty to prevent private violence against women. To begin the analysis, the Supreme Court of Appeals applied the existing test for determining a duty, liability, and causation. Crucial to the analysis is whether or not the plaintiff had a reasonable expectation that the defendant had a legal obligation to take positive actions to prevent the harm that occurred. Thus, they determined that whether or not a legal duty existed must be decided by the court after considering all of the circumstances of the case.

Those circumstances include the constitutional rights asserted by the plaintiff, which in this case include the fundamental values and founding provisions enshrined in the constitution<sup>64</sup> as well as the right of everyone to live their life free from public or private violence<sup>65</sup>. The

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<sup>64</sup> The founding provisions include human dignity, equality, the preservation of human rights and freedom, as well as non-racialism and non-sexism. (1996 Republic of South Africa Constitution, Chapter 1, section 1(a) and (b)).

<sup>65</sup> Republic of South Africa Constitution, Chapter 2, section 12 (c).

constitutional right to be free from public and private violence creates a positive obligation on the State to prevent a violation of the right by private individuals. Again contrasting and rejecting the American approach in *DeShaney*, the Court asserted that the South African constitution does impose affirmative duties upon the State.<sup>66</sup> This obligation does not merely originate from the South African constitution, however, as it also stems from international law requiring states to protect women both from violent crime and “the gender discrimination inherent in violence against women.”<sup>67</sup>

The Court rejected the defendant’s notion that imposing a legal duty upon the police to protect Van Eeden would open the “floodgates’ of litigation and result in limitless liability on public authorities and functionaries.”<sup>68</sup> Instead of blanket immunity, the Court held that the legal requirements to establish both negligence and causation would serve to limit liability.<sup>69</sup> Moreover, the Court held that without the ability to hold state agencies and officials responsible, crime victims are frequently left without any remedy for their damages.

As a result, the Court held that the police were liable in the assault against Van Eeden. The justices held that the circumstances surrounding Mohamed’s assault on Van Eeden did impose a legal duty on the police to adequately restrain a known violent person who was likely

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<sup>66</sup> The Court reiterated that although the constitution imposes positive obligations on the state to protect the constitutional rights of individuals, even from a private violation of those rights, the constitution does not impose a similar obligation on private citizens to intervene to prevent a violation of another individual’s constitutional rights. See *Minister of Safety and Security Van Duivenboden* ((2002) 3 All SA 741 (SCA)), discussed in more detail below, where police were held liable for failing to initiate proceedings against an individual to prevent him from possessing a firearm. That same individual, after multiple violent incidences, killed his wife and eleven year-old daughter with his legal firearm, as well as shooting and injuring neighbors who came to the family’s aid.

<sup>67</sup> *Van Eeden* at para 15.

<sup>68</sup> *Van Eeden* at para 22.

<sup>69</sup> The Court further held that “[t]he requirement of a special relationship between a plaintiff and defendant as an absolute pre-requisite for imposing a legal duty can, in the light of the constitutional imperatives...set out above, no longer be supported. To do so would mean that the common law does not adequately reflect the spirit, purport and objects of the Bill of Rights” (*Van Eeden* at para 23).

to continue to attack women if he was not incarcerated. Furthermore, Mohamed's escape was the result of police negligence, as it was reasonable and practical for the police to lock security doors in a prison housing dangerous inmates. Thus, the police were liable for the damages arising from Mohamed's assault against Van Eeden.

These two cases are notable for two important reasons. First, they demonstrate how public officials can be held responsible for negligent acts leading to private violence—even if those negligent acts are omissions to act rather than problematic affirmative acts. Grounded in the constitutional rights of the victims, and consequently the constitutional obligations of the State, the Constitutional Court held that state officials cannot act with impunity in the execution of their job tasks. While immunity might be appropriate in some situations, the Court held that a blanket ban on civil lawsuits undermines the interests of justice. Thus, whether or not the official had a legal duty to the victim is an issue of law to be settled at trial after considering all of the circumstances—there is no baseline assumption that the legal official did not owe the victim a duty. In addition, the cases also demonstrate that courts can balance the rights of assailants and victims, without a wholesale denial of the rights of one group in the interests of the other. Although in the United States courts are preoccupied with the idea that any expansion of rights will open the floodgates for litigation, that does not appear to have happened in South Africa.<sup>70</sup>

Second, these cases demonstrate the potential power of constitutional rights. Constitutional rights can require the state to undertake both positive and negative actions to enable individuals to enjoy those rights. Whereas in the United States the assumption is largely

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<sup>70</sup> While I cannot definitely say what has occurred at the Magistrate's and High Court level, there were not an overwhelming number of private violence cases being heard on appeal.

that the State is not required to undertake affirmative steps to protect individuals' constitutional rights, that is an interpretive choice that becomes clearer when compared to the South African approach. In South Africa, the permanent constitution's structure and content, interpreted in light of the constitution's spirit and purpose, international treaties, and non-binding international precedent, enabled the Constitutional Court to institute a fundamental legal shift. Although initially such a shift was unthinkable to the lower courts, after direction from the Constitutional Court the lower courts developed the legal analysis required to hold the state accountable, or not, in private violence cases. Thus, once the shift in thinkability occurs, it appears to gain momentum when supported by so many factors—i.e. constitutional, cultural, and legal.

#### ***V. South African Legislation***

There are two pieces of post-apartheid South African legislation explicitly dealing with domestic violence, both of which are primarily restraining order laws. South Africa, as opposed to the United States, does not have criminal statutes addressing domestic violence specifically, either as a separate crime or as a sentence enhancer under the criminal code. Instead, there are criminal statutes covering assault, homicide, property damage, etc. that the state can use to punish the underlying criminal act in a domestic violence situation. I will discuss each piece of national legislation in turn. See table one in the appendix to this chapter for a brief comparison of the two pieces of legislation.

*The Prevention of Family Violence Act of 1993*

The first important piece of legislation, the Prevention of Family Violence Act of 1993, was passed during the transition from minority to democratic rule,<sup>71</sup> before either the interim or permanent constitutions were enacted in 1994<sup>72</sup> and 1996 respectively. The legislation accomplished three main things: it created domestic violence restraining orders; it required specified individuals to report suspected cases of child abuse; and it clarified that a husband can be convicted for raping his wife. The majority of the Act, however, dealt with restraining orders.

The legislation had a very narrow application. It defined “parties to a marriage” as “a man and a woman who are or were married to each other according to any law or custom” as well as any man and woman who “live or lived together as husband and wife.”<sup>73</sup> The phrasing ensured that individuals in religious or customary marriages not registered with the state would still be covered by the Act. However, only heterosexual, marriage and marriage-like relationships were eligible for the protections provided in the law—dating and family relationships were excluded. The restraining order was similarly narrow in application. Under the law, a party to a marriage or someone with “material interest in the matter” could petition for a restraining order “on behalf of the applicant.”<sup>74</sup> The order could prohibit the respondent from:

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<sup>71</sup> The Nationalist Party passed three important laws during the transition in an attempt to secure additional support from women during the 1994 presidential elections. The three laws were the Prevention of Family Violence Act of 1993, discussed in detail above; the General Law Fourth Amendment (Act 132 of 1993) which sought to promote greater equality of the sexes in part by repealing sections of the Matrimonial Property Act that retained the husband as the head of the family and home; and, The Guardianship Act (Act 192 of 1993) which provided men and women with equal guardianship over minor children (previously fathers had guardianship of minor children) and repealed marital power entirely in designated areas. O’Sullivan, Michelle and Christina Murray, “Brooms sweeping oceans? Women’s rights in South Africa’s first decade of democracy,” *Advancing Women’s Rights: the first decade of democracy*, edited by Christina Murray and Michelle O’Sullivan, pgs. 1-41. Juta Publishers, Cape Town, 2005.

<sup>72</sup>The interim constitution, passed as Act 200 of 1993, is also referred to as the 1993 Constitution, although it did not actually pass parliament until January 1994 and did not go into effect until April of that same year.

<sup>73</sup>Act 133 of 1993, Section 1(2).

<sup>74</sup>Act 133 of 1993, Section 2(1).

assaulting or threatening the petitioner and any children also living with the couple; entering the family home, part of the family home, the area the petitioner lives, or some other location the petitioner is residing; preventing the petitioner or a child from entering his/her house; and violating any other act outlined in the restraining order. Although the order could be obtained ex-parte, it had to be served on the respondent to be effective and the respondent could request the order be set aside 24 hours after receiving service.

To give the order some teeth, the legislation required the judge to draft an arrest warrant for the respondent, and then suspend it, provided s/he complied with the order. Upon arrest, the respondent could not be released until appearing before a judge or magistrate, which had to occur within 24 hours of the arrest. The judge could then either convict the respondent of violating the restraining order or s/he could order the release of the respondent. These features were important innovations over the contempt proceedings women could initiate following violations of a peace order obtained under apartheid law.

The next two portions of the Prevention of Family Violence Act required select individuals to report suspected child abuse and explicitly permitted a husband to be convicted of the rape of his wife. These portions of the legislation were not repealed by the subsequent piece of legislation, the Domestic Violence Act of 1998 and are therefore still valid law.

The restraining order portion of the Prevention of Family Violence Act was challenged in *State v. Baloyi*.<sup>75</sup> That case emanated from a domestic assault, in violation of a restraining order. The wife of the couple reported a domestic assault to the police, who recommended she obtain a restraining order under the Prevention of Family Violence Act. The wife's restraining order

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<sup>75</sup> *S v. Baloyi and Others*, 2000 (2) SA 425 (CC).

prohibited the husband from committing domestic violence against his wife or child, as well as prohibited him from preventing them from entering or leaving the family home. As was provided in the Act, a warrant was issued with the provision of the restraining order, although it was suspended provided the husband did not violate the order.

After the wife obtained the restraining order, the husband allegedly assaulted and threatened to kill her. The wife reported the incident to the police, who subsequently arrested the husband and brought him before a judge. After listening to the husband, wife, and wife's brother's testimony, the judge convicted the husband of violating the restraining order and sentenced him to twelve months in prison, six of which were suspended.

The husband appealed his conviction to the Transvaal High Court, arguing that the section of the Prevention of Family Violence Act under which he was convicted placed an unconstitutional<sup>76</sup> burden on him to prove his innocence, rather than requiring the state to prove his guilt beyond a reasonable doubt. The High Court agreed. The Court held that the state could not limit the husband's right to be presumed innocent, and "further indicated, with little elaboration, that it was essentially a case of the [husband's] word against that of the [wife] and her brother."<sup>77</sup> Because the case dealt with the constitutionality of a piece of legislation, the High Court referred their decision to the Constitutional Court for review.

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<sup>76</sup>The husband argued that under the 1996 constitution he had a right to be presumed innocent. He cited Section 35(3)(h) which guarantees "[e]very accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings."

<sup>77</sup> *Baloyi* at para 8.



The Constitutional Court disagreed with the High Court.<sup>78</sup> In their analysis of the issue, the Constitutional Court outlined several important issues raised by the case: the constitutional requirement to deal effectively with domestic violence, the presumption of innocence, the private/public and civil/criminal character of the Act; whether or not the husband was ‘an accused person’ under the meaning of the constitution; and, whether or not the Act imposed a reverse onus on the husband to prove his innocence. I will briefly discuss the Court’s analysis of these issues.

For our purposes, perhaps the most important issue raised by the Court is their declaration that the permanent constitution requires the state to effectively address domestic violence. The Court cites section 12(1) which reads, “[e]veryone has the right to freedom and security of the person, which includes the right...to be free from all forms of violence from either public or private sources...” The Court continued,

[r]ead with section 7(2)<sup>79</sup>, section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman, or degrading way.<sup>80 81</sup>

In addition to the above, the Court also highlighted the gendered nature of domestic violence, thereby asserting that permitting domestic violence violates the promise of a non-sexist society

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<sup>78</sup>The Minister of Justice and the Commission for Gender Equality both made written and oral submissions on the constitutionality of the Prevention of Family Violence Act.

<sup>79</sup>Section 7(2) requires the state to “respect, protect, promote and fulfill the rights in the Bill of Rights.”

<sup>80</sup> *Baloyi* at para 11.

<sup>81</sup>The rights outlined are from the 1996 Constitution: freedom and security (section 12(1)); bodily and psychological integrity (section 12(2)); dignity (section 10); freedom from torture (section 12(1)(d)); prohibition on cruel, inhuman, degrading treatment (section 12(1)(e)).

and prohibitions on discrimination.<sup>82</sup> In addition to the responsibilities set forth under the South African constitution, however, the Court also identified the State's obligations under international law. It cited the Universal Declaration of Human Rights, the Declaration on the Elimination of Violence Against Women, and the African Charter on Human and Peoples' Rights as all requiring South Africa to undertake effective action to address domestic violence.

The Court also recognized the need to protect the respondent's rights, as well as domestic violence victims' rights. The Court balanced these constitutional requirements by reaffirming the fact that respondents are accused persons for the purposes of the constitution and must be afforded the presumption of innocence.

As part of their analysis of the contours of domestic violence in South Africa, the Court discussed the public/private nature of domestic violence. Highlighting the role that privacy can play in domestic violence, and the value that most citizens place on privacy, the Court recognized that "all too often the privacy and intimacy [of the home] end up providing both the opportunity for violence and the justification for non-interference."<sup>83</sup> It asserted, however, that domestic violence is not just a private crime, but one that also implicates society, both as a barometer of what crimes society will tolerate against an individual, and as a means of upholding respect for the law.

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<sup>82</sup>The Court writes: "[t]o the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form" (footnotes omitted, *S v. Baloyi* para 12). It later states "[t]he ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorization of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behavior are normalized rather than combatted. *Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.*" (emphasis added, *ibid*).

<sup>83</sup> *Baloyi* at para 16.

After a lengthy discussion of domestic violence and the role the constitution and legislature play in protecting both victims of domestic violence as well as the abusers, the Court unanimously held that the Prevention of Family Violence Act was constitutional and that it struck the proper balance between the respondent's and petitioner's rights. Consequently, the case was remanded to the High Court, where presumably Baloyi's sentence was reinstated.

*Baloyi* is an important case in the development of South Africa's official response to domestic violence for several reasons. First, it upheld the Prevention of Family Violence Act, particularly the different procedural mechanisms for granting and enforcing restraining orders. Without procedural mechanisms that are at least partially victim-driven, restraining orders are unable to be widely employed as a victim-protection tool. Upholding these procedures was the first step in creating a potentially useful self-help tool for victims of domestic violence. Second, it is the first time the Constitutional Court addressed the issue of domestic violence in South Africa. It issued a strong opinion that categorized domestic violence as gender discrimination that violates women's constitutional rights, thereby increasing the onus on both the legislature and the courts take domestic and gendered private violence seriously. As a result, legislators and judges received a powerful message regarding the role of the state in intimate violence situations, thereby increasing the thinkability of state intervention in domestic violence. Finally, the Constitutional Court cited not only the South African constitution, but also international treaties to bolster its decision. Thus, it demonstrated the role of that persuasive authority can play to bolster a court's decision to enact a fundamental shift on a serious legal issue.

*The Domestic Violence Act of 1998*

Shortly after the Prevention of Family Violence Act was enacted, Human Rights Watch<sup>84</sup> identified four major shortfalls, from a domestic violence victim's perspective, with the legislation. First, the law only applied to married and cohabitating heterosexual couples, thereby leaving many individuals in long-term committed relationships vulnerable to abuse; second, the law did not specify the type of abuse that qualified a petitioner for protection, it only "referr[ed] to the words 'assault or threaten' as well as 'any other act'"<sup>85</sup>; third, a petitioner had to apply for a restraining order to a court with jurisdiction over the respondent, regardless of where the petitioner lived; and, fourth, although a court could waive the fee for obtaining a restraining order, requesting a waiver could cause a lengthy delay in obtaining the order.<sup>86</sup> In response to these problems, Parliament passed the Domestic Violence Act (DVA),<sup>87</sup> which served to fundamentally overhaul restraining order law in South Africa.

In an attempt to remedy the aforementioned flaws, the DVA was significantly more comprehensive than the Prevention of Family Violence Act. The new Act's preamble, which acknowledged that existing remedies had been ineffective, that South Africans have a constitutional right to equality and to live their lives free from violence, as well as the state's international obligations to protect women and children, is worth quoting at length:

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<sup>84</sup> Human Rights Watch, *Violence Against Women in South Africa: State Response to Domestic Violence and Rape*, Human Rights Watch, New York, 1995.

<sup>85</sup> Human Rights Watch, *Violence Against Women in South Africa: State Response to Domestic Violence and Rape*, Human Rights Watch, New York, 1995: 70.

<sup>86</sup> The Human Rights Watch Report also discussed two additional problems with the Prevention of Family Violence Act. One was that victim advocates could not obtain protection, thereby leaving them vulnerable to retaliatory violence from angry abusers. The other was concern that ex-parte restraining orders would not adequately protect respondent's rights.

<sup>87</sup> Act no 116 of 1998.

Recognizing that domestic violence is a serious social evil... that victims of domestic violence are among the most vulnerable members of society... and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

And having regard to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children...

It is the purpose of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of the state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.<sup>88</sup>

The Act also redefined the qualifying domestic relationships, greatly expanding the previous definition to include: current or former spouses and cohabitants; coparents; family members related by blood, affinity, or adoption; engaged, dating or customary relationships—including actual or perceived relationships; and, current or recent roommates. Importantly, the Act was not limited to heterosexual relationships—homosexual relationships are explicitly included in the definition of domestic relationships.<sup>89</sup> In addition, domestic violence was broadly defined, and includes: physical, sexual, emotional, verbal, psychological, and economic abuse; intimidation; harassment; stalking; property damage; entry into a non-shared residence; as well as “any other controlling or abusive behavior towards the complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.”<sup>90</sup>

In addition to providing much broader definitions of both domestic relationships and domestic violence, the 1998 Act also created additional obligations on police officers. Under the DVA, police officers had a duty to offer reasonable medical and relocation assistance to a domestic violence victim, as well as to explain the victim’s legal options under both criminal and civil law. Importantly, the Act also permitted, but did not require, police officers to arrest any

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<sup>88</sup> DVA, preamble.

<sup>89</sup> DVA, Section 1 (vii)(a-f)

<sup>90</sup> DVA, Section 1 (viii)(j).

respondent at the scene the officer “reasonably suspects of having committed” domestic violence without a warrant.<sup>91</sup>

The DVA also outlined the procedures for obtaining a restraining order. The new procedure included details on the means by which a victim could obtain a restraining order outside of normal court hours, the standards by which a judge should determine whether or not to grant an order, and the rights of a respondent to receive notice and contest an order. The legislation also included detailed instructions on how a restraining order hearing should proceed, including providing protections for victims to not be cross-examined by their abusers.<sup>92</sup>

In granting permanent restraining orders, the legislation also allowed courts to prohibit respondents from: committing—or eliciting another to commit—any act of domestic violence; entering a shared residence, the complainant’s residence, or the complainant’s workplace; and, committing any other prohibited act. In addition, the court may include any other conditions that “it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant,” including seizing a weapon and ordering police officers accompany the complainant to help him/her collect personal property.<sup>93</sup> Furthermore, the court can order the respondent to continue any financial obligations, rent or mortgage payments, and to pay emergency monetary relief to the complainant.<sup>94</sup> Additionally, courts “must” order a police officer “to seize any arm or dangerous weapon” if the respondent has threatened to kill or injure

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<sup>91</sup>DVA, Section 3. The Act also amended section 40 of the Criminal Procedures Act of 1977 to permit the warrantless arrest of individuals who are “reasonably suspected” of committing domestic violence, as defined in the DVA (Criminal Procedures Act of 1997, Section 40(1)(q)).

<sup>92</sup> To ensure a respondent’s rights, the legislation allowed either the respondent’s counsel to directly cross-examine the petitioner, or to permit the respondent to pose his/her questions to the judge, who would then relay them to the petitioner.

<sup>93</sup> DVA, Section 7(2).

<sup>94</sup> DVA, Section 7(3)(4).

the complainant or if maintaining possession of the weapon is not in the respondent's best interests.<sup>95</sup> The DVA did not include time restrictions on restraining orders—orders are valid until they are set aside by a court following a request by either the petitioner or the respondent.

Importantly, to increase the likelihood of implementation, the Act outlined police, prosecutorial, and court procedures for carrying out the new law. Most notably, to enforce an order, the Act requires the court to issue a suspended arrest warrant for the respondent.<sup>96</sup> The warrant remains valid as long as the restraining order is in effect and police officers are required to arrest the respondent if the officer has “reasonable grounds to suspect that the complainant may suffer imminent harm<sup>97</sup> as a result of the alleged breach of the protection order by the respondent.”<sup>98</sup> Anyone convicted of violating a restraining order is eligible for a fine and imprisonment of up to five years. However, falsely accusing someone of violating a restraining order is punishable by a fine and imprisonment of up to two years.

Finally, although the DVA repealed most of the previous law, the Prevention of Family Violence Act, it did leave sections four and five in effect. As discussed above, section four created an obligation for certain professionals to report ill-treatment of children; section five created the crime of spousal rape.

The initial Domestic Violence Bill was largely similar to the version passed.<sup>99</sup> Perhaps most significantly, the preamble was dramatically changed. The initial version of the bill had a much more graphic and emotional description of domestic violence, before acknowledging the

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<sup>95</sup> DVA, Section 9 (1)(a)(b).

<sup>96</sup> DVA, Section 8 (1)(a)(b).

<sup>97</sup> Imminent harm is to be determined by considering: a) “risk to the safety, health or wellbeing of the complainant;” b) “seriousness of the conduct”; and, c) “length of time since the alleged breach occurred” (DVA, Section 8 (5)(a-c)).

<sup>98</sup> DVA, Section 8 (4)(b).

<sup>99</sup> See the Domestic Violence Bill, B 75-98, July 27, 1998.

requirements of the government to act to protect primarily the women and children who are victims under the constitution and international treaties.<sup>100</sup> The definitions from the initial and final bill are mostly identical, although Parliament added to the definition of domestic violence any controlling or abusive behavior that harms or potentially harms the well-being or security of the petitioner.<sup>101</sup> In addition, parliament deleted the threat of physical and sexual abuse from the original bill.<sup>102</sup> Although there were other minor changes, none of them were significant

There was some legislative debate regarding the Domestic Violence Bill, in particular some of the potential constitutional issues that the bill raised. Similar to the issues raised in the United States, most contentious were granting an interim order ex-parte and issuing a suspended arrest warrant upon granting an order. Interestingly, the parliamentary committee researchers and the legislators framed the issue as one of competing rights. Indeed, one researcher for the committee debating the bill, Ms. De Villiers, argued that the ex-parte granting of a restraining order was “a core difficulty of the Bill.” De Villiers further argued that “[i]t conflicts with the general rule in our law that notice must be given to the respondent as well as the right of a person to freedom and security.” Thus, “[t]he committee need[ed] to weigh up the rights of the respondent and a woman’s right to be free from violence.”<sup>103</sup> As opposed to most of the official discussions identified in U.S. legislative debate, where the victim’s constitutional rights were

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<sup>100</sup>The preamble begins by saying that “domestic violence is a serious crime against society; that many persons are regularly beaten, tortured, and in some cases even killed by their partners or cohabitants; that many victims are unable to leave abusive situations due to social and financial factors...that children suffer deep and emotional effects from exposure to domestic violence” before stating that “the majority of victims of domestic violence are women...that the home is often the most violent place for women...that domestic violence is an obstacle to achieving gender equality.” (Domestic Violence Bill, B 75-98).

<sup>101</sup> DVA, Section 1(viii)(j).

<sup>102</sup> Domestic Violence Bill, Section 1(vii)(a-b).

<sup>103</sup>Ms. De Villiers speaking at the Domestic Violence Bill and Maintenance Bill Briefing before the Joint Committee on Improvement of Quality of Life & Status of Women, August 24, 1998. Discussing B 75-98.



rarely, if ever, identified, in South Africa both the victim's and assailants' rights were considered during the legislative process. Indeed, without the counterbalance of the victim's rights as even a potential foil in the discussion, the respondent's rights take center stage in the United States. In South Africa, however, this did not occur, in part because of the strong statement of women's rights in the constitution.

Also highlighted during the debate was role economic dependence could play in trapping a woman in a violent situation. The identified remedy was the need to empower women. After discussions on the role economic dependency, customary practice, and rural isolation could play in complicating addressing domestic violence in South Africa, the following was offered in response to the concerns regarding the balancing act of respondent and complainant's rights: "It has been argued that women are so vulnerable and domestic violence is so prevalent, desperate measures are necessary for protection. Domestic violence is different to anything else in our law therefore it is justified to have different procedures."<sup>104</sup> In the end, it is clear that Parliament agreed with this assessment, as they passed the bill without making major procedural changes to the version debated.

Not surprisingly, the "different procedures" sanctioned by the Domestic Violence Act were challenged before the Constitutional Court. The case, *Omar v. The Government of South Africa and Others*<sup>105</sup>, originated after Ahmed Omar's wife, Halima Joosab, obtained a restraining order against her estranged husband prohibiting him from abusing her and their children. Over the course of their relationship, Ms. Joosab had filed for and obtained several protection orders

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<sup>104</sup> Speaker not identified, the Domestic Violence Bill and Maintenance Bill Briefing before the Joint Committee on Improvement of Quality of Life & Status of Women, August 24, 1998. Discussing B 75-98.

<sup>105</sup> 2006 (2) SA 289 (CC).

against her husband, Mr. Omar; this was not her first. As dictated by the Act, a suspended warrant was simultaneously issued with the restraining order. At some point following the issuance of the order, Omar allegedly violated the order, and the warrant was executed before being suspended. He sued, arguing that section eight (warrant of arrest upon issuing of protection order) of the Domestic Violence Act violated several of his fundamental rights guaranteed by the South African constitution—namely the rights to freedom and security of the person, a fair trial, and access to the courts. The High Court in Pietermaritzburg upheld the Act and assessed Omar costs associated with the case.

The Constitutional Court granted Omar’s appeal of the High Court’s decision. In outlining their unanimous decision, the Constitutional Court asserted the following regarding domestic violence:

The high incidence of domestic violence in our society is utterly unacceptable. It causes severe psychological and social damage. There is clearly a need for an adequate legal response to it. Whereas women, men and children can be victims of domestic violence, the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicit therein, are obvious. As disempowered and vulnerable members of our society, women and children are most often the victims of domestic violence.<sup>106</sup>

The Court goes on to discuss the ineffectiveness of the criminal justice system to adequately address domestic violence, thereby necessitating a civil component—first with the Prevention of Family Violence Act of 1993, and subsequently the Domestic Violence Act of 1998. Citing its own decision in *Baloyi*, the Court further expounded upon the nature of domestic violence, and the problems associated with combatting it. In addition, the Court cited multiple sections of the permanent constitution, including the Founding Provisions and the Bill of Rights, as well as the *Carmichele* decision in which the Constitutional Court recognized its international obligations to

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<sup>106</sup> *Omar* at para 13.

prohibit gender-based discrimination, to conclude that the “complex private as well as public character of domestic violence” necessitates “combin[ing] civil and criminal remedies to address it.”<sup>107</sup>

Omar asserted five main arguments. Four of the arguments were constitutionally based and one proffered that section eight of the DVA was ripe for “misuse, exploitation or manipulation and the Act does not contain sufficient safeguards.”<sup>108</sup> In response, the Court held that none of the issues raised justified invalidating the Act. On the contrary, the Court held that there were sufficient procedural safeguards protecting a respondent’s access to the courts, his/her right to fair trial, and right to be free from arbitrary arrest.<sup>109</sup>

In response to Omar’s argument that section eight could be used to maliciously and unjustifiably arrest an individual, the Court posited that both the restraining order and the violation of the order must be supported by affidavits alleging domestic violence. If a police officer is satisfied that there is reasonable suspicion to believe the respondent has violated the order and arrests him/her, several levels of procedure have been satisfied before the arrest occurs. In addition, the Court emphasized that if the complainant is lying, s/he is “criminally liable for intentionally [making] false allegations.”<sup>110</sup> The Court concluded the discussion on this issue with an admonishment to lawyers that they must not “exploit or manipulate the Act to gain a tactical advantage in divorce litigation and custody battles, because this could well be at the cost

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<sup>107</sup> *Omar* at para 18.

<sup>108</sup> *Omar* at para 34.

<sup>109</sup> The fourth argument that implicated the constitution was the requirement that the parliament use less restrictive possibilities for addressing the problem of domestic violence. The Court was underwhelmed by this argument and dismissed it without much discussion.

<sup>110</sup> *Omar* at para 47.

of the effectiveness of the Act.”<sup>111</sup> Indeed, “[t]he possibility of the Act being maliciously manipulated is by far outweighed by its potential to afford protection by the police to the victims of domestic violence, against the background of a history in which this protection was sadly withheld.”<sup>112</sup> Although the Court was clearly aware that such abuse could occur, it is not clear whether it has, in fact, occurred, or whether the concern was mostly hypothetical.

Following this analysis, the Court held that the Domestic Violence Act was not unconstitutional. Thus, after evaluating the rights of respondents to a fair trial and access to the courts and the rights of petitioners to freedom and security of their person, the Constitutional Court held that the legislation struck an appropriate balance between the two and could be upheld. While it is not particularly novel to allow arrest following a violation of a protection order, this case is particularly notable for the bold restatement of not only the gendered nature of domestic violence, but also the constitutional and international obligations the South African government has to protect women against this type of private violence. Thus, it is clear that the South African constitution’s strong horizontal rights provisions to equality and a violence-free life, as well as the country’s international treaty obligations have supported a shift in how the government views its obligations with regards to gendered private violence. They have permitted a fundamental overhaul not only in how the state addresses private gendered violence, but also in the state’s accountability for preventing or addressing such violence. In upholding both the Prevention of Family Violence Act and the Domestic Violence Act the Court has placed the South African state in a central role, declaring that it is the obligation of the state to address private violence.

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<sup>111</sup> *Omar* at para 61.

<sup>112</sup> *Omar* at para 60.

## *VI. South African Case Law*

The final line of cases relevant for a discussion of how constitutions structure state responses to domestic violence explores state responsibility for private violence—but not specifically violence against women. I will briefly discuss three different cases implicating different issues that arise when a state assumes responsibility for certain types of private violence. The cases variously discuss the role of the state in preventing foreseeable private harm, police negligence, official inaction and liability, and the state’s duty to protect individuals from private violence. I discuss these cases in a separate case law section, instead of section four, as they are grounded in statutory and common law and use the constitution as a backdrop for deciding important legal and policy issues involving private violence, rather than explicitly dealing with constitutional interpretation. The first case, and one cited in the second Supreme Court of Appeals *Carmichele* opinion, is *Minister of Safety and Security v. Van Duivenboden*<sup>113</sup>. Although the case involves domestic violence as its instigating factor, it is not, at its essence, a domestic violence case.

The facts of the case are tragic. Neil Brooks, his wife Dawn, and their two children, Nicole and Aaron lived together on the Cape peninsula. Neil had two legal guns and was fond of alcohol; Dawn had one legal gun that she had previously used to defend herself against Neil. When combining guns and alcohol, Neil was combustible. In October 1995 Neil and Dawn argued. Neil loaded both his weapons, strapped additional ammunition around his waist, and went to confront Dawn by pointing a cocked pistol at her face. Dawn, who was with both the children in the garage, pushed the gun away. Neil eventually shot Dawn, who despite the

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<sup>113</sup> (2002) 3 All SA 741 (SCA).

gunshot wound was able to escape with Aaron. Nicole, however, was trapped in the garage with her father, who shot and killed her after Dawn and Aaron escaped.

After killing his daughter, Neil set out to find Dawn and Aaron. In the meantime, Aaron had gone to Van Duivenboden's house to ask for help and gave him Dawn's revolver while Dawn hid. Van Duivenboden and his father went into the street to investigate, along with other neighbors, where they encountered Neil, who began firing at them with both of his guns. Neil hit Van Duivenboden in the ankle as he attempted to flee, forcing him to collapse in the street. Neil found Dawn hiding in Van Duivenboden's garage and shot her until she died. He then went back to Van Duivenboden and shot him again in the shoulder before Van Duivenboden was able to pull Dawn's gun and scare Neil away. The police eventually arrived and arrested Neil, who was ultimately convicted for the two homicides and other crimes he committed.

Van Duivenboden subsequently brought a civil suit against the state, arguing that the police department was negligent in permitting Neil to legally possess his firearms despite the multiple encounters they had with him that demonstrated a lack of emotional and mental fitness to own weapons. The first incident occurred several years prior to the deadly assault in 1995. During a fight, Neil, who was drunk, pulled a gun on Dawn and approached her. She pulled her own gun out of her purse and he relented. Dawn then called the police, who confiscated both of their weapons until the following day.

In September 1994, a domestic argument resulted in an armed standoff between Neil and the local police department. Although the situation was resolved without incident, Dawn later phoned the department and spoke with the officer in charge of firearms to discuss her husband's drinking problem. The officer told her that there was nothing the police department could do

about it, but since Neil had guns the officer told Dawn that she could make a sworn statement and there would be an inquiry regarding Neil's ability to legally possess firearms. Dawn responded that she would deal with the issue herself. She subsequently sought the dismissal of charges stemming from the armed standoff incident because she stated was trying to save her marriage. At some other time, Dawn approached the police to report that she was scared of her husband because he kept threatening to kill her and the kids, and to see whether or not there was any way for the police to confiscate his weapons. She was told she had to press charges against her husband for the police to be able to do anything.

Van Duivenboden argued that despite the police department's previous interactions with Neil that provided them with grounds to remove his weapons, they had failed to do so. Indeed, even though the police had the authority to confiscate the weapons, they placed the onus on Dawn to officially seek the removal of Neil's firearms. The High Court dismissed Van Duienboden's case, holding that the state was not liable for his injuries. Van Duienboden appealed that decision to the Full Court, who reversed the earlier decision. The Supreme Court of Appeals accepted review.

The issue before the Supreme Court of Appeals was whether or not the police were liable for their negligent omission (failing to remove Neil's weapons) in the course of their duties. There was no dispute regarding the ability of the police officers to remove Neil's weapons—there is clear statutory support for the fact that they could and should have initiated proceedings. In this case liability hinged on two issues: first, whether or not the police had "a legal duty to

avoid negligently causing harm”; and second, whether or not “a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.”<sup>114</sup>

After discussing several other common law countries’ approaches to this issue—including distinguishing the South African approach from *DeShaney*, the Court stated that deciding the issue was a matter of legal policy that must respond to the norms of the community.

The Court wrote:

the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied. The application of those broad principles to particular cases in other jurisdictions will provide insight into the weight that is attached by that society to various values and norms when they are balanced against one another but that can assist only partially in this country. The fact that there have been different outcomes in similar cases when those principles have been applied in various common law countries merely underscores that point. *What is ultimately required is an assessment, in accordance with the prevailing norms in this country, of the circumstances in which it should be unlawful to culpably cause loss.*<sup>115</sup> (emphasis added)

The Court’s discussion of this matter highlights how the thinkability of a particular outcome influences the final decision in a case. To ascertain the values of the community, the Court referenced both the 1996 Constitution and the Constitutional Court’s holding in *Carmichele*. Thus, while the Court importantly noted that there is no obligation of an individual to intervene when another individual’s constitutional rights were being threatened<sup>116</sup>, it did not extend that

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<sup>114</sup> *Van Duienboden* at para 12.

<sup>115</sup> *Van Duienboden* at para 16.

<sup>116</sup> The Court stated that “[w]hile private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat,—and while there might be no similar constitutional imperatives in other jurisdictions, in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights” (*Van Duienboden* at para 20, footnotes omitted).



immunity to public officials, despite concerns of a chilling effect and limitless liability on the functioning of the State.<sup>117</sup>

Following *Carmichele*, the Court held that to determine whether or not a duty exists, a court must take the entirety of the circumstances into consideration and balance various legal norms. Having done that, the Court held that there were no public policy arguments that overcame the right of the respondent to have the State safeguard his constitutionally protected rights to human dignity, life, and security. Having established the existence of a duty, the Court then had to then address whether or not the police acted negligently, and as a result caused Van Duienboden's injuries. To that effect, the Court held that the harm Neil caused was eminently foreseeable and a reasonable police officer would have sought to remove his firearms. With regards to causation, the Court held that it was unlikely that without his permit to legally carry his weapons openly, Neil would have killed his wife and daughter before shooting Van Duienboden on that fateful day. Thus, the Court dismissed the appeal and upheld the Full Court's decision that the police were liable for Van Duienboden's injuries.

In a similar case before the Supreme Court of Appeals the following year<sup>118</sup> the Court again held that police authorities did have a legal duty to adequately assess an individual's fitness before issuing a gun permit. A breach of that duty rendered the authorities liable for a civil lawsuit for the damages resulting from the inappropriate use of the legal weapon. In this case, Ian Hamilton, a 22 year-old student, was rendered a tetraplegic after he was shot by Erna McArdell, a 45 year-old woman with a history of significant psychiatric problems, including

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<sup>117</sup> With regard to limitless liability, the Court stated that it should not be "unduly exaggerated" because "the requirements for establishing negligence—and a legally causative link,—provide considerable practical scope for harnessing liability within acceptable bounds" (para 19, footnotes omitted).

<sup>118</sup> *The Minister of Safety and Security v. Hamilton*, (2003) 4 All SA 117 (SCA).

hospitalization, as well as drug and alcohol abuse. Hamilton sued the police officials who issued McArdell's permit, alleging that they neglected to adequately investigate her character and emotional fitness to possess a firearm. Hamilton argued and the Court agreed that police officers had a legal duty to investigate McArdell's fitness to possess a weapon, that they negligently breached that duty, and that their negligence was the cause of the shooting and Hamilton's resultant injuries.

Two interesting issues arose during the case that warrant a brief discussion. First, it is important to note that although Hamilton argued that the police undertook a positive act, the Court adopted the appellant's argument that the police officers failed to act.<sup>119</sup> Thus, the Court again entered the same analytic territory as the U.S. Supreme Court did in *DeShaney*. As opposed to the U.S. analysis, however, the Supreme Court of Appeals did not dismiss the case because it arose based upon an omission, or a failure to act. Citing *Van Eeden*, the rape and assault case discussed in section four, the Court stated that the issue is not whether the defendant undertook a positive or negative act, but rather whether or not the defendant had a duty to prevent the harm experienced by the plaintiff. Thus, the issue of whether or not state action was involved does not even enter the legal analysis because the crux of the analysis centers upon the existence, or not, of a duty to protect.

Second, the Court cites a line of cases that acknowledges the somewhat subjective nature of legal analyses. Highlighting the role of thinkability in judicial decision-making, albeit in different language, the Court cites case law that in turn references a well-respected Australian tort law textbook, writing that the

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<sup>119</sup> *Hamilton* at para 15.

recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.<sup>120</sup>

Referencing the interim and permanent constitutions, the Court held that the plaintiff's "invaded interest" was "worthy of legal protection."<sup>121</sup> Acknowledging that there are some situations where the public interest will be better protected and furthered by denying a private cause of action, the Court held that this was not one of those situations, and that the only way to hold the state accountable for its omission is to allow for civil lawsuit to proceed.

The final case that warrants discussion in this section is *Rail Commuters Action Group v. Transnet LTD t/a Metrorail et al.*<sup>122</sup> Although in many respects it is similar to the two above cases, *Rail Commuters* was eventually heard by the Constitutional Court and therefore is a more definitive statement on the legal status of private violence cases in South Africa. The plaintiffs in the case were the Rail Commuters Action Group—a voluntary association that represented the interests of rail commuters on the Western Cape—and eight individuals who were themselves assaulted, or who are the next of kin to individuals who were killed, on commuter Metrorail trains in the Western Cape. The defendants in the case were Transnet, the sole owner of Metrorail, the South African Rail Commuter Corporation, the Minister of Transport, and the Minister of Safety and Security. The plaintiffs grounded their claims in statutory law and the law of delict, with multiple causes of actions presented to the court. For our purposes, the relevant

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<sup>120</sup> *Hamilton* at para 17 citing *Administrateur, Natal v. Trust Bank van Afrika Bpk*, 1979 (3) SA 824 at 833.

<sup>121</sup> *Hamilton* at para 36. Although the Court references the interim and permanent constitutions, it is explicit that they did not rely directly on the Bill of Rights in either document in making its decision.

<sup>122</sup> 2005 (2) SA 359 (CC).

issue is whether or not the defendants had a legal duty to protect the plaintiffs from the private violence they experienced on the Metrorail trains.

After detailing the history of South African commuter transport, including a discussion of the racial, gender, and class implications of that history on contemporary transportation, the Court summarized the lower courts' rulings. The High Court held that Transnet and the South African Rail Commuter Corporation did have a legal duty to minimize violent crime on the Metrorail trains and to protect commuters' lives and property. The Minister of Safety and Security—the police force—did not have a duty, the Court held, because there is a tremendous need for police officers throughout the country and it would be inappropriate for the Court, without compelling supporting information, to challenge these policy decisions. Thus, in the balancing of public and private interest discussed above, the High Court held that in this case, the case against the police force failed because the police have limited resources and must distribute them to the best of their ability. As a result, without the plaintiffs providing information that challenged that distribution scheme, the case against the police force failed.

The plaintiffs appealed, among other parts of the case, the High Court's holding that neither the Minister of Transport nor the Minister of Safety and Security had a legal duty to protect the Metrorail commuters. The Supreme Court of Appeals held that the High Court erred in its granting of relief against Transnet and the South African Rail Commuter Corporation<sup>123</sup> and it upheld the High Court's decision that neither the Minister of Transport nor the Minister of Safety and Security had a legal duty to protect commuters from private violence on Metrorail

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<sup>123</sup> The High Court also granted some relief against the Minister of Transport which the Supreme Court of Appeals overruled. This discussion focuses on the assignment of a legal duty to public entities to protect individuals from private violence, however, so these issues are not relevant for our purposes.

trains. Although in a concurrence and a dissent the possibility of holding the various defendants responsible was accepted, the concurring judges argued that the plaintiffs had not presented a compelling case to require that outcome. The dissent disagreed, and thought that the Minister of Safety and Security should be held accountable in this case.

The case eventually went before the Constitutional Court where the appellants sought, among other things, to have the Court declare that the respondents had a “legal duty to protect the lives and property of rail commuters in the Western Cape, whilst they are making use of rail transport services.”<sup>124</sup> The appellants argued that the Supreme Court of Appeals improperly interpreted statutory law *without* regard for the obligations set forth in the Bill of Rights,<sup>125</sup> specifically sections ten (dignity), eleven (right to life), and twelve (freedom and security of the person).

After deciding that all of the respondents were organs of the state and therefore “bearers of obligations in respect” to the Bill of Rights, the Court had to decide if they each (or all) had a duty to protect commuters.<sup>126</sup> Citing case law relating to violence against women, including both *Baloyi* and *Carmichele*, the Constitutional Court held that the issue was not whether there was a private law remedy for the appellants’ harm suffered, but instead whether there was a public law remedy.<sup>127</sup> The Court thus removed the case from the bounds of the law of delict, as the

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<sup>124</sup> *Rail Commuters Action Group* at para 31.

<sup>125</sup> The appellants acknowledged that Justice Streicher in his concurring opinion with the Supreme Court of Appeals decision used the constitution as reference point to interpret the respondents’ statutory obligations, but argued that he improperly applied them.

<sup>126</sup> *Rail Commuters Action Group* at para 67.

<sup>127</sup> On the issue of public vs. private law, the Court stated: “private law damages claims are not always the most appropriate method to enforce constitutional rights. Private law remedies tend to be retrospective in effect, seeking to remedy loss caused rather than to prevent loss in the future. Moreover, the use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the state.” (*Rail Commuters Action Group* at para 80).

appellants had grounded their claims in the unconstitutional implementation of public law, although they had sought both public and private law remedies.<sup>128</sup>

Having established the parameters for the decision, the Court held that Transnet and the South African Rail Commuter Corporation did have a positive obligation under statutory law, read in conjunction with the obligations flowing from the South African constitution, “to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services.”<sup>129</sup> The Court further held that it did not matter who provided the “reasonable measures” as long as they were provided by someone.<sup>130</sup> Cautious of replacing the decision-maker’s assessment with that of the Court’s, the Court clarified that reasonableness had “to be assessed in the light of the ‘social, historical and economic context’” of the issue being evaluated.<sup>131</sup> The Court also held that the Minister of Transport did not have an independent obligation to protect Metrorail commuters, and that the appellants did not establish a case against the Minister of Safety and Security.<sup>132</sup>

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<sup>128</sup> With regard to the law of delict claim, the Court held: “it is not ordinarily desirable for the Court on motion proceedings to decide the elements of delictual liability... Whether or not Metrorail and the Commuter Corporation bear a legal duty in respect of the injuries caused to any of the individual applicants or their family members is not something that this Court could or should determine on the papers in this case. Extensive disputes of fact exist. It is not desirable to determine elements of a legal duty in delict in the abstract on the basis of facts that may or may not be proved. To the extent... relief sought in this case is seeking this Court to determine the existence of a legal duty for the purposes of the law of delict, it cannot succeed.” (*Rail Commuters Action Group* at para 95).

<sup>129</sup> *Rail Commuters Action Group* at para 84.

<sup>130</sup> In an interesting discourse on public power and the obligations emanating from the exercise of such authority, the Court wrote: “our Constitution constructs and restrains the exercise of public power in our democracy. Determining the scope of public power, therefore, and any duties attached to it requires an analysis not only of the statutory provisions conferring the power, but also of the social, political and economic context within which the power is to be exercised and a consideration of the relevant provisions of the Constitution. If this approach is followed, the ambit of public duties of organs of the state will be drawn in an incremental and context-driven manner.” (*Rail Commuters Action Group* at para 85).

<sup>131</sup> *Rail Commuters Action Group* at para 86, citing *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) SA46.

<sup>132</sup> In dismissing the case against the Minister of Safety and Security, the Court held that the applicants did not establish that their policy choices for providing security both throughout South Africa and on commuter trains “was not rational, lawful or directed to proper purposes” (para 101).

This case is important for several reasons. First, it clearly established that although the Constitution protects diverse personal rights, those rights have to be balanced against the provision of state services generally, and in the public interest. In refusing to grant relief against the Minister of Safety and Security, the Court held that their policing decisions, constrained by both financial resources and personnel limitations, cannot be expected to, or held accountable for the failure to, protect every individual citizen. Thus, the Court established that the state cannot be held liable for every individual act of violence—the standards of duty and reasonableness do limit successful claims. Second, the Court clearly stated that legal duty not only should not be decided by the Constitutional Court, but that it has to be established in each case based on the facts of the situation. Thus, there are no bright lines, but instead a standard of reasonableness in a given set of circumstances. Finally, it established public remedies that do not necessarily result in financial payouts (e.g. declaratory or injunctive relief<sup>133</sup>) as a possible way to help state entities conform to constitutional obligations in the future, even if they have failed in the past.

## ***V. Conclusion***

South Africa has undergone an impressive political, social, economic, and most importantly for our analysis, legal transformation in the last two decades. While this transformation has reached nearly all corners of society in some way or another, it is readily apparent in an analysis of how the state formally deals with private violence against women. Although unfortunately this fundamental change has not translated into increased security for

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<sup>133</sup> Declaratory relief is when a court establishes the rights of the parties without ordering any specific remedies. Injunctive relief is when a court orders one or more parties to do, or not do, specific actions.

women in their daily lives, it is still important to recognize the transformation as it holds great potential if implemented. For its part, the permanent constitution did two crucial things to perpetuate this change. First, it provided South Africans with several important rights, including but not limited to specifically ensuring the public and private equality rights of women, protecting the right of all South Africans to have their lives and dignity respected, as well as guaranteeing the right of all South Africans to live their lives free of public and private violence. Read together, the rights work in conjunction to gender many of the rights that are implicated in different situations, including, but not limited to, private violence against women. Second, the constitution established itself as the supreme law of the land and requires that all other law conform to the values set forth in the document. This requires not only state entities and officials abide by the rights set forth in the constitution, but it also obliges the courts to interpret law in a manner that respects and fulfills the constitutional rights of citizens.

As a result of these changes, fundamental legal change became thinkable to members of parliament and judges. Buttressed by a supportive cultural and social shift, the Constitutional Court interpreted the structure and content of the constitution in light of its spirit and purpose. Further strengthened by South Africa's international obligations, the Court fundamentally reconceived of the state's duties to its citizens. Consequently, the Constitutional Court set the tone not only for lower courts, but also for other branches of government.

Thus, although rights in a constitution do not necessarily translate into rights in other legal areas, South African courts seem to have genuinely embraced their mandate to develop legal structures to conform to constitutional values. Once the shift was implemented at the top—with the Constitutional Court—lower courts incorporated these new ideals into their legal



interpretations. This is perhaps best demonstrated by two important decisions about how to interpret the constitution, both of which have resulted in the current legal situation with regard to violence against women in South Africa. First, the Constitutional Court has interpreted several key horizontally-structured constitutional rights to create a burden on the state to protect an individuals' ability to enjoy those rights, free from public and private violation. As a corollary, that decision also led the Court to oversee the development of private and public law to comport with the values outlined in the constitution. Second, and related to the first, the Constitutional Court has not instituted sovereign immunity as a general policy protecting the State and its officials from lawsuits. Instead, the Court has ruled that immunity frequently leads to unjust results, and that the rights of individuals must be balanced against the best interests of the community.

In practice, these interpretive choices are seen not only in the rulings upholding the Prevention of Family Violence and Domestic Violence Acts, but are perhaps most obviously seen in the development of the private law of delict. Although neither the High Court nor the Supreme Court of Appeals initially undertook a radical transformation of the law of delict, the Constitutional Court marked a significant departure with their holding in *Carmichele*. Citing the constitutional structure and content, as well as the purpose and spirit guiding the new constitution, as well as international obligations, the Constitutional Court embraced a previously unthinkable legal shift—one permitting state accountability, in some circumstances, for private violence incidents. *Carmichele*, more than any other case, marks a noteworthy departure from a strictly vertical to a horizontal conception of citizens' rights, which consequently increased the state's obligation to ensure those rights. Following the Constitutional Court's *Carmichele* ruling,

the failure of a state official or entity to protect an individual from the private violation of his/her constitutional rights became thinkable and *could* result in a successful civil lawsuit by the victim against the state. Over the past decade, this principle has been developed in multiple areas, including private gendered violence as well as the failure of the state to take proper precautions in permitting individuals to possess firearms. Thus, after *Carmichele*, courts are obligated to ascertain whether or not the state had a duty to protect the victimized individual from the violence s/he experienced. This analysis requires an important balancing act that limits liability to the state through a reasonableness test, thereby preventing the nightmare scenario of excessive and frivolous lawsuits often predicted in civil lawsuits against the state in the United States, and cited as a rationale for granting state immunity in these types of situations.

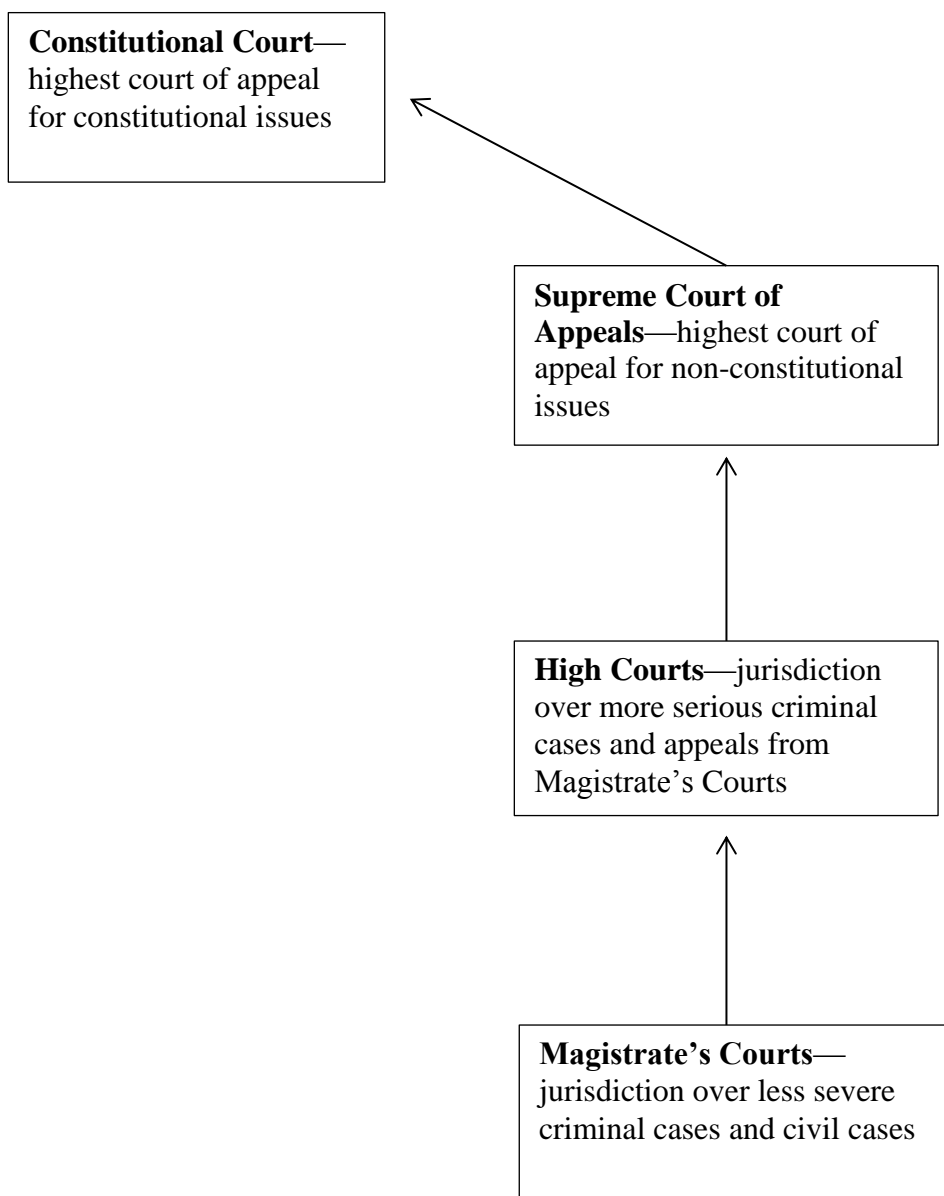
South Africa thus stands as another model of how a state can legally address private gendered violence. By providing strong horizontal constitutional guarantees to individuals generally, and women specifically, the state committed itself to protecting women's fundamental human rights in the private sphere. Although this commitment has not yet been effectively implemented<sup>134</sup>, the state has still undertaken a strong formal commitment to protecting women and has allowed itself to be held accountable when that protection fails.

In addition, South Africa serves to demonstrate how a constitution can influence the thinkability of different legal options. While the constitution in isolation was not sufficient to implement a dramatic shift in South African law, the structure and content, when read with the

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<sup>134</sup> According to a 2012 World Health Organization report, 60,000 women and children are the victims of domestic violence each month, which is the highest reported rate in the world. See "South Africa: Racing Against Domestic Violence," *All Africa*, March 26, 2012 <http://allafrica.com/stories/201203271076.html> (Accessed April 14, 2013) and Charlayne Hunter-Gault's, "Will the Pistorius Case Change South Africa?," *The New Yorker*, February 16, 2013 <http://www.newyorker.com/online/blogs/newsdesk/2013/02/will-the-pistorius-case-change-south-africa.html> (Accessed April 14, 2013).

spirit and purpose underlying the new constitution, enabled the Constitutional Court and Parliament to put previously unthinkable legal responses to domestic and intimate violence into action. Consequently, the case study demonstrates the role of constitutional structure and content, reinforced by a supportive cultural movement, in crafting fundamental legal change. As a result of such changes, South Africa has embarked upon a new approach to addressing private violence, requiring its officers to take such violence seriously, and enabling accountability for victims when intervention fails.

*Appendix***Figure 1: Basic South African Court Hierarchy**

**Table 1: South African Domestic Violence Legislation**

|                           | <b>Prevention of Family Violence Act of 1993</b>   | <b>Domestic Violence Act of 1998</b>  |
|---------------------------|--|---|
| Scope                     | Parties to a marriage—heterosexual marriage and marriage-like relationship   | Current and former spouses and cohabitants; co-parents; family members; engaged, dating, customary relationships; current or recent roommates. Includes hetero and homosexual relationships.  |
| Application               | None specifically listed—abuse and threat mentioned  | Physical, sexual, emotional, verbal, psychological, and economic abuse; intimidation; harassment; stalking; property damage; entry into a non-shared residence; and, “any other controlling or abusive behavior towards the complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.”  |
| Possible orders available | Prohibit the respondent from assaulting or threatening the petitioner and any children also living with the couple; entering the family home, part of the family home, the area the petitioner lives, or some other location the petitioner is residing; preventing the petitioner or a child from entering his/her house; and violating any other relief deemed necessary | Prohibit the respondent from committing, or eliciting another to commit, any act of domestic violence; entering a shared residence, the petitioner’s residence, or the petitioner’s workplace; committing any other prohibited act; any other remedy as necessary, including seizing weapons or directing law enforcement to accompany the petitioner to collect personal effects; financial orders |

## Chapter 8

### Conclusion

This dissertation examined how constitutions structure state responses to domestic violence. To answer that question, I analyzed the United States—the federal system as well as Wisconsin, Colorado, and Montana—and South African constitutions, domestic violence law, and appellate level case law addressing private violence. I found that although in the United States domestic violence is not generally considered to be a constitutional issue, per se, constitutions have a profound impact on how a government legally addresses domestic violence. Thus, while in the United States domestic violence victims have few, if any, constitutional remedies, the same is not true in South Africa. In contrast to the U.S. approach, South Africa has harnessed the power of their new constitution to require the state to protect individuals from some types of private violence and to provide accountability mechanisms when state intervention fails. The five case studies demonstrate that in addition to outlining what a state can, cannot, and must do, constitutions also shape what legal and lay communities consider thinkable legal approaches to addressing domestic violence. As a result, constitutions have both a direct and indirect impact on how governments intervene in domestic violence situations.

In the United States, domestic violence is generally considered to be a state issue. Most domestic violence law is promulgated, implemented, and enforced at the state level and most governmental interventions are carried out by local officials. Despite the fact that most governmental intervention occurs at the state level, victims of domestic and other types of intimate violence are generally unable to hold state officials or municipalities accountable when

their injuries result, in part, from official inaction or negligence. There are two related reasons why victims of intimate violence are unable to hold state officials accountable. First, state courts generally allow localities and government officials to assert sovereign and qualified immunity, respectively. To overcome assertions of immunity, a victim must either demonstrate that an official's affirmative act violated one of the victim's well-established constitutional rights or that the actions fell under one of the recognized exceptions to immunity, most notably the special relationship or state created danger exceptions.

Asserting a violation of a well-established constitutional right is exceedingly difficult for victims and their families because of how courts have interpreted state and federal constitutions. State constitutions frequently have rights whose content and structure could allow courts to find rights applicable to victims of domestic violence, such as the Wisconsin's "equality, inherent rights" section<sup>1</sup> or Colorado's "inalienable rights" section<sup>2</sup>. Despite these possibilities, however, state courts have generally interpreted state constitutions in the same manner as the U.S. Supreme Court has interpreted the federal constitution. That is, constitutional rights are vertically structured and govern only the relationship between the state and the individual, not relationships between individuals. As a result of these interpretive decisions, state constitutions do not create any horizontal obligations between citizens. If state courts interpreted state constitutional rights provisions to create horizontal obligations between individuals, it would

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<sup>1</sup> "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed" (Wisconsin Constitution, Article I, Section 1).

<sup>2</sup> "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness" (Colorado Constitution, Article II, Section 3).

increase the burden on the state to protect individuals from the private violation of those rights because individuals could violate other citizen's constitutional rights.

The second reason domestic violence victims are generally unable to hold municipalities and state officials liable for private violence is that state courts have also interpreted state constitutions to primarily apply to state action. Consequently, under this interpretation state inaction or the failure of a state to act, even when state law would seem to require action, does not result in a constitutional violation. States are only liable for inaction under certain limited circumstances, such as those listed above where there is a special relationship between the victim and the state or the government somehow created the danger that resulted in the injury. As a result, state courts' interpretations of state constitutions to dramatically limit liability through immunity and state action doctrines is the first place we see the role that thinkability plays in structuring state responses to domestic violence.

Because victims were unable to hold state officials responsible for ineffective or negligent intervention, victims then tried to assert federal constitutional claims. The same problems discussed at the state level are played out at the federal level, as the federal claims also generally failed for the same two reasons discussed above. First, federal courts have accepted states' assertions of immunity, which victims have been unable to overcome by identifying a constitutional right that has been violated. The federal constitution has significantly fewer rights provisions that could be useful in domestic violence situations than do most state constitutions, making overcoming immunity more difficult at the federal level. As a result, victims primarily assert fourteenth amendment rights, including substantive and procedural due process claims as well as equal protection claims, all of which have been largely rejected by the federal courts.



Although there has been limited success with equal protection claims, particularly in the 1980s, substantive and procedural due process claims have largely failed.

Second and more problematic at the federal level, courts have also been generally unable to find any state action—as opposed to state inaction or the failure to act—that is responsible for domestic violence victims’ injuries. The state action doctrine is more problematic than the availability of rights provisions at the federal level because even when a victim is able to assert a federal constitutional right that has been violated, if s/he is unable to identify an affirmative state act that caused the violation or an exception to the state action requirement, federal courts are unwilling to hold the state accountable for the private violence. The characterization of state action versus inaction and the narrow conception of constitutional rights are interpretive decisions made by courts, not constitutional requirements. This is the second place we see the role of thinkability in structuring government responses to domestic violence.

Furthermore, federal courts have generally held that domestic or intimate violence is a state issue and must be addressed at the state level, not at the federal level. This is evident both in legislative debates and case law challenging the Violence Against Women Act (VAWA) as well as in case law addressing fourteenth amendment claims against municipalities and officials for the failure to adequately protect victims of private violence. During the VAWA legislative debates the primary issue raised was whether or not Congress should legislate on domestic violence, and in particular if they should create a federal civil rights remedy for victims of gender-based violence. The issue was framed primarily as federalism versus civil rights. Opponents of the legislation argued that violence against women was a state and not a federal issue. Proponents of the legislation, however, argued that violence against women was a civil

rights issue and must be addressed by the federal government because the states had demonstrated that they were either unable or unwilling to adequately intervene. This framing dichotomy was also played out during the legislation's court challenges. Courts that upheld the federal civil rights remedy argued violence against women was a civil rights issue that had not been adequately addressed at the state level. Courts that overturned the remedy, including the Supreme Court, framed the issue as a state issue, not a federal one. In fact, the Supreme Court went further and held that Congress did not have the authority to create a federal civil rights remedy for victims of private gender-based violence because there was no evidence of a nationwide problem. As a result of the Supreme Court decision, private violence, particularly gendered intimate violence, is legally viewed through a federalism lens—thereby absolving the federal government of any responsibility to act—and not as a civil rights issue, which would increase the impetus on the government to intervene.

Federal courts have also ruled in fourteenth amendment cases that private and domestic violence is predominantly a state issue. Although victims have brought substantive and procedural due process claims as well as equal protection claims, these claims have largely failed in part because the courts have generally viewed private violence as a state issue. While the federal courts have not precluded state remedies in private violence cases, they have also not permitted federal remedies when state remedies have been lacking. This characterization of violence against women as a state and not a federal issue at the federal level is the third place we see thinkability affecting how states address violence against women in the United States.

The Wisconsin and Colorado case studies demonstrate this fruitless, circular legal pattern. In both case studies victims of domestic violence challenged ineffective state

intervention—primarily occurring in the form of state inaction—and were denied any remedy from the state. In response to the courts foreclosing state remedies available to private violence victims, as exemplified by *Barillari*<sup>3</sup> and *Duong*<sup>4</sup>, domestic violence victims in both states pursued federal remedies. These attempts are best exemplified by *DeShaney*<sup>5</sup> and *Castle Rock*<sup>6</sup>, in which the victims were denied remedies at the federal level as well. Montana stands in stark contrast to these two case studies for one important reason: it does not allow blanket immunity for state wrongdoing. While Montana also has impressive and expansive constitutional rights that could be used to increase domestic violence victims' rights<sup>7</sup>, those rights are not responsible for the different legal treatment in state courts. Instead of being barred from having a trial because the state and its officials assert immunity, victims in Montana are able to file a civil lawsuit against the state as they would against any individual. As a result, the trial proceeds under state tort law without any special consideration, one way of the other. Interestingly, when used, Montana's expansive rights provisions have not been utilized to their full potential, thus demonstrating that constitutional content and structure are not, by themselves, sufficient to permit a fundamental legal shift.

At the federal level, the U.S. Supreme Court has repeatedly interpreted case law and the federal constitution to constrain private violence victims' rights and remedies. Although there is nothing in the federal constitution requiring this outcome, it appears to be driven by a confluence

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<sup>3</sup> 194 Wis. 2d 247 (1995).

<sup>4</sup> 837 P.2d 226 (1992).

<sup>5</sup> 489 U.S. 189 (1989).

<sup>6</sup> 545 U.S. 748 (2005).

<sup>7</sup> See, for example Article III, section four: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas" (Montana Constitution, Article III, Section 4).

of factors: constitutional rights structure, the division of authority within the constitution, and constitutional content.

First, constitutional structure helps to create, reinforce, and entrench a public-private divide that views the government, and not the private sphere, as the primary and most problematic source of domination and oppression. This is particularly challenging for women because they are most vulnerable to violent discrimination in the private sphere. As a result, the absence of effective government intervention can actually heighten women's oppression instead of preserving a zone of liberty, as the divide was intended to accomplish. The strong vertical structure and interpretation of rights provisions also limits the thinkability of certain actions as rights are configured so as to create obligations between the government and its citizens, not between citizens. Horizontal rights configurations, in addition to creating rights between citizens, also increase the onus on the government to intervene in certain private sphere situations to prevent constitutional rights violations by individuals. Although in the United States there are few explicit horizontal rights provisions<sup>8</sup>, many state constitutional rights provisions could be interpreted to create horizontal obligations between citizens. As discussed above, even provisions that could be interpreted horizontally have generally not been interpreted in this manner, however, and instead courts have applied these provisions vertically. In addition, the Supreme Court could decide to apply the values and the spirit of the constitution to private law, as occurs in jurisdictions with indirect horizontal constitutional interpretations, although it has also declined to take this approach.

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<sup>8</sup> Only Montana and New York have explicit horizontal equality provisions in their state constitutions. The only implicit horizontal right in the federal constitution is the thirteenth amendment's prohibition of slavery.

Second, the U.S. federal constitution limits Congress' ability to legislate to certain areas, thereby reinforcing a division of authority that relegates certain issues to the states, regardless of states' ability to effectively address them. While the fourteenth amendment has significantly broadened Congress' legislative authority, the Supreme Court has generally not interpreted the amendment to extend to situations involving private action—at least not when gender is concerned. As a result, the Violence Against Women Act was enacted under Congress' Commerce Clause authority based on the aggregate impact of violence against women on the economy and the ability of Congress to legislate the channels and instrumentalities of interstate commerce. In *Morrison v. United States*<sup>9</sup>, the challenge to VAWA's federal civil rights remedy, the Supreme Court further foreclosed Congress' ability to legislate under the Commerce Clause by holding that Congress could only regulate intrastate economic activities that had an aggregate impact on interstate commerce. Congress could no longer aggregate non-economic activities, regardless of their effect on interstate commerce. In addition, the Court rejected Congress' fourteenth amendment authority to create a federal civil rights remedy, holding that a state's mishandling of violence against women may be a separate equal protection violation, but not one that could enable Congress to create a self-help remedy for victims of private gender-based violence—there was no state action justifying federal intervention in private violence situations. The decisions to limit the scope of both the Commerce Clause and Congress' authority under the fourteenth amendment are interpretive choices made by Supreme Court justices. They are not required by the constitution.

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<sup>9</sup> 529 U.S. 598 (2000).

Finally, federal constitutional content also does not require, but similarly does not prevent, the federal government from holding localities and government officials responsible for negligent state (in)action. The U.S. Supreme Court has chosen to interpret the fourteenth amendment as not providing any meaningful protection to victims of private violence. Instead, the Supreme Court has chosen to interpret the fourteenth amendment as requiring state action, rather than demonstrating negligent inaction, to hold municipalities and officials responsible for a victim's injury. In addition, although private violence victims have variously tried asserting substantive and procedural due process claims as well as equal protection claims, federal courts have largely rejected these claims, holding that governments and state officials are not responsible for private violence. Furthermore, due in part to the absence of a federal equal rights amendment, the Supreme Court has also determined that women as a class only receive intermediate protection under the fourteenth amendment, and mostly only when laws or policies explicitly discriminate against women. Discriminatory impact of a law or policy is generally not sufficient to trigger an equal protection violation under the fourteenth amendment. These narrow interpretive choices are particularly problematic at the federal level because the federal constitution is extremely limited with regards to rights provisions that could be asserted in private violence situations. As a result, these interpretive decisions again led to an unnecessary narrowing of governmental accountability for official discrimination and negligent (in)action by ignoring discriminatory impact of laws and policies on women as a class.

By comparison, South Africa stands in stark contrast to the United States in how it legally addresses domestic and intimate violence. Although initially lower courts did not interpret the constitution to require the government to protect individuals from private violence, the

Constitutional Court did with their decision in *Carmichele*<sup>10</sup>. The Court used the permanent constitution's structure and content, in conjunction with the spirit and purpose behind the fundamental shift represented by the 1996 constitution, as well as the country's international treaty obligations to make its decision. The permanent constitution has multiple horizontal rights provisions, including the rights to sex and gender equality as well as to live a life free from violence. In addition, the constitution was drafted to transform South Africa from an oppressive, non-democratic state to a non-racial and non-sexist democracy. After taking the country's constitutional and international obligations into account, the Court held that providing immunity for official misdeeds would undermine the interests of justice and that under certain circumstances the government did have an obligation to protect individuals from private violence. Thus, although the permanent constitution set the stage for a fundamental shift, the specific words were not sufficient to permit the lower courts to implement it. Instead, the text had to be interpreted in light of the purpose and spirit of the country's democratic transition to make such a change thinkable. As a result, with this one case, the Court instituted a massive shift in the state's role in everyday life as well as in citizens' rights vis-à-vis the state.<sup>11</sup>

The Constitutional Court has held that the state has a duty to protect individuals from private violence in some situations, as well as that gendered violence undermines women's equality and must be addressed by the state. This was evident not only in sexual assault cases, but also in cases upholding the two pieces of post-apartheid domestic violence law. By reading various constitutional rights together, the Court held that women were at particular risk for

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<sup>10</sup> 2001 (4) SA 938 (CC).

<sup>11</sup> Although technically horizontal constitutional rights provisions create obligations between citizens, the Constitutional Court has held that individuals do not have a positive obligation to protect other individuals' constitutional rights. See *Minister of Safety and Security Van Duivenboden* ((2002) 3 All SA 741 (SCA)).

private violence and that the state has an obligation to intervene to increase women's safety in the private sphere. As a result, remedies that were previously unthinkable under the apartheid government became not only thinkable, but required under the democratic government to help promote women's safety in the private sphere. While this change has unfortunately not yet dramatically increased women's safety in their everyday lives, it does demonstrate an alternative legal approach to dealing with private violence.

Finally, although I have mostly discussed how the constitution has affected the thinkability of certain legal options by courts, constitutions also impact what legislators consider acceptable legal options. While this finding is weaker than the court findings, if only because there is significantly less evidence as I did not have verbatim legislative debates for all of my case studies, there is sufficient evidence to suggest that constitutions do influence what legislators view as thinkable responses to domestic violence. In the U.S. context, both state and federal systems, the predominant concern during legislative debates was the appropriateness of certain remedies and defendants' rights. Victims' constitutional rights, however, were never mentioned by legislators, and only raised in the Montana debates by women's advocates. While what a legislator considers an appropriate remedy is influenced by the constitution, defendants' rights are outlined in state and federal constitutions and have been developed by the courts. Although a focus on defendants' rights is not inherently problematic—indeed, defendants' rights are a crucial concern when crafting domestic violence law—there was no discussion of victims' rights against which to balance the concerns. As a result, legislators seemed overly preoccupied with the likelihood that women would falsely accuse men of violence as a strategic ploy in various legal proceedings. In South Africa, in contrast, the summarized committee debates on



the Domestic Violence Act indicate a concern for both defendants' and victims' constitutional rights. Thus, the constitution appeared to influence Parliament's understanding of the role of the state with regard to domestic violence victims, in part through the creation of multiple rights, including gender equality and bodily integrity rights, applicable to the private sphere. As a result the constitution, by redrawing the public-private divide to broaden the reach of the public sphere, served to alter what were considered thinkable strategies to address the previously exclusively private problem of domestic violence.

These findings have both policy and theoretical implications. From a policy perspective, my findings indicate that altering constitutional content will not necessarily be sufficient to fundamentally alter women's legal or substantive rights with regards to private violence.

Although advocates have largely focused on how to alter constitutional content to better protect women's rights, my findings indicate that constitutional structure cannot be ignored. Structure matters in constitutional interpretation, so advocates engaging in constitutional writing and reform should pay special attention to not only the constitutional content, but also how those rights are structured if they hope to increase women's rights in the private sphere. Therefore, in addition to attempting to secure specific rights—such as sex equality rights and the right to bodily integrity—feminists must also pay attention to how those rights are configured.

Importantly, my findings also indicate that fundamental constitutional reform, while helpful, is not necessary or even necessarily sufficient for major change to occur. Instead, what is absolutely necessary is to make previously unthinkable legal solutions to domestic violence thinkable. The O.J. Simpson murder trial of Nicole Brown Simpson and Ron Goldman instigated a brief period of significant legal reform in the United States in 1994. During this

window of opportunity, many states reformulated their domestic violence laws, implemented mandatory arrest laws, and Congress finally passed the Violence Against Women Act after four years of delay and debate. Although advocates were unable to sustain the movement and extend it to court interpretations of the federal and state constitutions, it still demonstrates the power of a social movement to alter different solutions' thinkability. Similarly, South Africa embarked on a fundamental social and legal transformation in the early to mid-1990s, thereby enabling the Constitutional Court to reformulate state responsibilities in private violence situations. While no doubt challenging, altering a social understanding of a particular problem is invariably more doable—particularly in the United States—than is fundamental constitutional reform.

My findings also indicate that a backdoor approach to increasing government accountability in private violence situations in the United States would be to eliminate, or at least curtail, the use of sovereign and qualified immunity doctrines by localities and government officials. This would be the easiest approach to increasing government accountability in private violence situations, particularly domestic violence, because immunity doctrines are largely based on statutory and case law. As a result, small changes at the state level that do not appear to fundamentally alter the current legal status quo could have a dramatic impact on victims' ability to hold localities and officials liable for negligent (in)action in response to domestic violence situations.

From a theoretical perspective, my dissertation has demonstrated gaps in two relevant bodies of literature: analyses of constitutional structure and feminist constitutional analyses. Analyses of constitutional structure do not generally include studies of how structure intersects with gender or first generation rights (i.e. civil and political rights). Instead, these analyses

mostly focus on how constitutional structure influences socio-economic rights claims. Thus, scholars of constitutional structure should expand their research questions to explore how structure shapes a variety of rights claims, including civil and political rights, as well as how structure intersects with identity politics, such as race and gender. My findings indicate that not only will this be a fruitful area of scholarship, but that in addition to rights claims, structure influences background conditions to lawmaking, such as shaping what legal and lay communities consider thinkable legal solutions to social problems.

Similarly, feminist constitutional analyses emphasize constitutional content but have not adequately investigated the role of rights structure on women's legal and substantive equality. Although there have been recent efforts at reformulating feminist constitutionalism, feminist scholars must seriously investigate how constitutional structure affects gendered rights claims. While scholars have identified the gendered nature of the state and its constituent concepts, as well as explored the role of specific rights provisions in increasing women's rights generally, they must now expand their analysis to include how rights structure affects gendered public and private rights to better understand how constitutions shape women's lives. This expanded focus will accomplish two primary tasks. First, it will help feminist scholars tease out the role that constitutions play in shaping the public and private spheres through the configuration of rights provisions. While feminists have long identified the problematic nature of the public-private divide in addressing women's rights, identifying a source of its continuous configuration will enable feminists to better reshape those spheres. Second, it will also highlight the role that constitutions play in influencing what the legal and lay communities consider thinkable

approaches to issues predominantly affecting women—issues previously relegated to the private sphere.

Like all research, this dissertation unearthed more questions than answers. While I was able to begin to theorize how constitutions shape government's responses to domestic violence through an analysis of constitutional structure's influence on what lawmakers consider thinkable approaches to domestic violence, additional research is required to flesh out the mechanisms of thinkability. In addition, this research has also begged many questions regarding the generalizability of these findings to other jurisdictions and legal systems. Additional case studies, particularly in civil law countries, could provide invaluable information to help develop the theory and concepts I have outlined above.

Finally, this research looked primarily at the legal interpretation and structure, omitting an analysis of substantive realities of women's lives on the ground. Although that division of labor was necessary for the purposes of this dissertation, future research should investigate how some of these seminal cases discussed above have influenced, or not influenced, police treatment of domestic violence in practice. In this way, a more comprehensive understanding of how constitutions structure state responses to domestic violence can be created and refined.

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