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RETHINKING CIVIL RIGHTS AND GENDER VIOLENCE

JULIE GOLDSCHIED*

ABSTRACT

Advocacy seeking justice for survivors of domestic and sexual violence historically has invoked civil rights law and rhetoric to advance legal remedies and public policy reform. Although many have come to think of a civil rights remedy as a private right of action against an individual, when we think about civil rights and gender violence, we should be thinking more broadly. Neither the Supreme Court decision in United States v. Morrison, nor its decision in Castle Rock v. Gonzales, both of which rejected civil rights-based claims, precludes new civil rights reform. Indeed, a civil rights frame has enduring potential to support needed change by challenging structural inequalities that continue to inform and drive gender violence.

This article considers potential civil rights remedies that would address structural and systemic inequalities related to gender violence. It focuses on one area of potential reform: law enforcement accountability. The article urges a shift that views law enforcement accountability for gender violence on the same continuum as other forms of law enforcement misconduct. Popular understandings of police misconduct typically involve over-enforcement, while cases involving gender violence typically involve under-enforcement. However, both categories involve misuse of authority and should be thought of in tandem. This shift can reinvigorate existing strategies and can generate new approaches to both law and policy. The article makes recommendations that would contribute to a new generation of progressive reform that advances the principles of equality and liberty for which civil rights long has stood.

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INTRODUCTION

"Civil rights" has been a powerful frame for spurring transformative reform on a range of issues, including gender violence.¹ Civil rights litigation beginning in the 1970's provoked significant policy reforms by challenging law enforcement's failed responses to domestic violence calls.² More recently, the civil rights remedy enacted as part of the 1994 Violence Against Women Act (VAWA)³ captured the imagination of advocates and the general public alike.⁴ The civil rights frame helped spur public conversations about the relationship between

1. This article uses the term "gender violence" to encompass acts such as domestic violence and sexual assault, which are committed predominantly by men against women. *See, e.g.,* CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf> (concluding that eighty-five percent of all victimizations by intimate partners in 2001 were against women); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, STATISTICAL TABLES INDEX, at tbl. 2 (reporting that ninety-two percent of all sexual assaults in 2005 were committed against women).

2. *See infra* Part I.B.

3. 42 U.S.C. § 13981 (1994), *struck down as unconstitutional in* United States v. Morrison, 529 U.S. 598 (2000).

4. *See infra* Part I.C.

gender violence and gender equality and held the potential to generate transformative change.⁵

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

A civil rights frame has enduring potential to support much needed reform by challenging structural inequalities that continue to inform and drive gender violence. Multiple issues might be addressed. For example, legislation might provide a private right of action modeled on the 1994 VAWA civil rights remedy in a way that addresses the *Morrison* Court's concerns.⁸ Alternatively, law reform might advance institutional accountability for gender violence-related discrimination,⁹ or might promote economic reforms that address structural roots of abuse.¹⁰ For reasons described in Part II, this Article focuses on institutional accountability.

5. See *infra* notes 73, and accompanying text.

6. 529 U.S. 598-74 (2000). For commentary critiquing the decision, see, e.g., Sally F. Goldfarb, "No Civilized System of Justice:" *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499 (2000); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000).

7. 545 U.S. 748 (2005) (rejecting 42 U.S.C. § 1983 claim alleging that law enforcement's failure to take steps to investigate or respond to allegations of protective order violation violates procedural due process). For commentary critiquing the decision, see, e.g., Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 HUM. RTS. L. REV. 19 (2008); Zanita Fenton, *State-Enabled Violence: The Story of Town of Castle Rock v. Gonzales*, in *WOMEN AND THE LAW: STORIES 379*, 388 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011); G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and its Progeny*, 17 WM. & MARY J. WOMEN & L. 277 (2011). The decision addressed Jessica Lenahan's procedural due process claims only, and did not address law enforcement liability under other theories, such as those based on state-created danger, special relationship, or equal protection. See *infra* Part I.B.

8. See *infra* notes 84-87 and accompanying text.

9. See *infra* Part II.

10. See, e.g., Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL'Y (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037606; Deborah Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (2007).

The idea that gender-based violence constitutes a civil rights violation may be more compelling today than it has been in the past, given international human rights law's growing recognition that gender-based violence violates human rights.¹¹ Structural inequalities, discrimination, and infringement of liberty interests continue to animate the problems faced by domestic and sexual violence survivors.¹² Nevertheless, in the decade since the *Morrison* decision, advocates in the United States have not coalesced to demand new or revived civil rights-based enforcement for law enforcement responses to gender-based violence, either to seek a refashioned remedy against private perpetrators or to ensure state accountability.¹³

This article considers potential civil rights remedies that would address structural and systemic inequalities related to gender violence, and focuses on one area of potential reform: law enforcement accountability. It urges a shift to a perspective that views law enforcement accountability for gender violence on the same continuum as other challenges to law enforcement misconduct. Popular understandings of police misconduct typically involve over-enforcement,¹⁴ while cases involving gender violence typically involve under-enforcement.¹⁵ However, both categories of cases involve misuse of authority and should be thought of in tandem.¹⁶ This shift can reinvigorate existing strategies and can generate new approaches to both law and policy.

Part I starts with an overview of civil rights-based reform to redress gender violence. It recaps the dual focus of U.S.-based civil rights-based reforms: law enforcement accountability and a remedy against private individuals. It traces the

11. See *infra* notes 34-37 and accompanying text.

12. See, e.g., Caroline Bettinger-Lopez et al., *VAWA Is Not Enough: Academics Speak Out About VAWA*, FEMINIST L. PROFESSORS (Feb. 27, 2012) <http://www.feministlawprofessors.com/2012/02/academics-speak-about-vaswa-reauthorization/>, (applauding proposals to reauthorize VAWA while urging Congress to do more to address economic and racial inequalities that make poor women, particularly women of color, undocumented women, and Native American women, more vulnerable to intimate violence).

13. Although both the *Morrison* and *Castle Rock* decisions provoked sharp critiques and galvanized organized efforts, there has been no advocacy call for civil rights-based reform. See, e.g., Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence and Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 191-92 (2008) (discussing domestic violence advocacy community's response to *Castle Rock* decision). Although not a complete reflection of advocacy efforts, it is notable that none of the reauthorizations of the Violence Against Women Act subsequent to the *Morrison* decision have included renewed civil rights remedies. See, e.g., Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (Jan. 5, 2006); Violence Against Women Reauthorization Act of 2012, H.R. 4970, 112th Cong. (2012).

14. See, e.g., Kami C. Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 360 (2011) (recognizing that police misconduct often conjures images of use of excessive force, but should be conceived more broadly to include, for example, racial profiling and corruption).

15. See *infra* Part II.B.

16. See generally Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006) (arguing that under-enforcement should be considered along with over-enforcement as symptoms of the weakness of the United States' criminal justice system).

overall trajectory of reform on both issues, including their culmination in constrained Supreme Court decisions. The section contrasts the lack of advocacy for corrective legislation in this context with legislative responses to other restrictive Supreme Court decisions and posits reasons for the absence of a robust advocacy-based reaction.

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

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

I. CIVIL RIGHTS, HUMAN RIGHTS AND GENDER VIOLENCE

A. OVERVIEW

Civil rights law and rhetoric has been, and is, a powerful frame for meaningful reform.¹⁷ The term "civil rights" has its roots in the post-slavery movement to ensure equality for African Americans.¹⁸ It typically is invoked to refer to

17. See, e.g., DENISE C. MORGAN ET AL., *AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE* (2005) (critiquing U.S. Supreme Court decisions limiting reach of civil rights laws); see also Testimony of Rea Carey, Exec. Dir., National Gay and Lesbian Task Force Action Fund, to U.S. Senate Comm. on Health, Educ., Labor, and Pensions (Nov. 5, 2009), available at http://www.thetaskforce.org/downloads/release_materials/enda_1109_testimony.pdf (urging passage of ENDA); *About Us*, NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS, www.rollbackcampaign.org/aboutus/ (campaign to ensure that courts protect and preserve equal justice, fairness and opportunity); see generally *Civil Rights*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Oct. 1, 2012) (citing multiple civil rights advances of the administration).

18. For discussion of the trajectory of the civil rights movement, including attendant debates, for example, over whether law reform should seek equality of opportunity or of result, and of strategic lawyering choices, for example, over whether to prioritize ending segregation or advancing economic equality, see, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before Brown*, 115 *YALE L.J.* 256 (2005).

principles of equality and liberty protected by the constitution.¹⁹ The civil rights framework is rooted in the concept that those who discriminate based on impermissible biases and stereotypes violate legal and social norms, and that the person discriminated against should be eligible for redress.²⁰ The notion of “rights” has held expressive and symbolic value as part of social movements’ efforts to advance transformative change.²¹ It continues to be a potent frame for change notwithstanding arguments that the United States’ current approach to civil rights laws has outlived its usefulness,²² and recent United States Supreme Court decisions narrowing the availability of remedies under a variety of civil rights protections.²³ I invoke the term in the context of gender violence law reform to reference legal and other strategies that ground substantive and rhetorical approaches in terms of equality and liberty.²⁴

Historically, civil rights strategies to address gender violence in the United States have taken two primary forms: suits seeking to hold institutions, primarily law enforcement, accountable for their responses to gender violence, and those seeking redress from individuals who committed gender violence.²⁵ Unlike other civil rights initiatives, such as those seeking racial equality, civil rights reform addressing gender violence did not proceed as part of a deliberate legal strategy.²⁶ The cases can be thought of as progressing in two waves. The first series of cases began in the 1970’s and challenged law enforcement’s under-responsiveness to calls from domestic violence survivors.²⁷ These cases spurred litigation seeking law enforcement accountability, often under the traditional civil rights law, 42

19. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 32, 34-47 (2007) (discussing “civil rights” approaches as focusing on discrimination and unequal treatment); Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363 (1953) (defining civil rights as “those rights commonly denied because of race, color, religion, national origin, or ancestry,” and as distinct from civil liberties, which reference other rights protected by the Bill of Rights and the Constitution).

20. Diller, *supra* note 19, at 35-36.

21. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 164 (1991) (“[t]he concept of rights, both positive and negative, is the marker of our citizenship, our relation to others”). The notion of “rights” also has been critiqued as being insufficient alone to produce transformative change. See, e.g. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (2004) (tracing the myth, politics, and strategists of rights in movements for social change).

22. See generally RICHARD FORD, *RIGHTS GONE WRONG* 10-11 (2011) (arguing that civil rights “do too much and not enough at the same time”).

23. See, e.g., *Connick v. Thompson*, 131 U.S. 1350 (2011) (limiting scope of liability for prosecutorial misconduct); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (precluding procedural due process claim against law enforcement for failed response to domestic violence calls); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down civil rights remedy of 1994 Violence Against Women Act as unconstitutional).

24. Doctrinally, those civil rights strategies may be seen as distinct from other substantive categories such as family law or criminal justice, even though both invoke liberty and equality-based concerns.

25. See *infra* Parts I.B. & I.C.

26. Cf. TAYLOR BRANCH, *PARTING THE WATERS* (1988) (describing, civil rights litigation strategy, amongst other things); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2005) (same).

27. See *infra* Parts I.B & I.C.

U.S.C. § 1983.²⁸ A second strand of advocacy began in the 1990's, and sought to frame private acts of gender violence as civil rights violations; efforts focused on the federal civil rights statute enacted as part of the 1994 federal Violence Against Women Act.²⁹ Although the legal doctrines underlying both law enforcement accountability claims and the constitutionally permissible scope of civil remedies for gender violence have suffered setbacks in court, the need for accountability has not diminished. Both institutional and individual accountability measures remain promising and needed areas for future reform.

The changing nature of discrimination and other civil rights violations requires a rethinking of traditional approaches; new frameworks for advancing equality are needed to address the complex and nuanced ways civil rights violations manifest in the twenty-first century.³⁰ Against that backdrop, in recent years, advocacy on issues that historically have been addressed under the rubric of civil rights, such as equality and due process, have invoked human rights frameworks.³¹ Contemporary United States-based civil rights lawyers increasingly invoke the human rights frame and human rights strategies to advance the social and economic, as well as civil and political, rights claims that animate social change arguments.³² To a large extent, both human rights and civil rights campaigns seek consistent and overlapping goals.³³

International human rights law's robust interpretations of anti-discrimination and liberty-based protections can spur reform by exemplifying alternatives to those adopted under United States law.³⁴ For example, international human rights law and other countries' national authorities increasingly recognize that gender

28. See *infra* notes 38-42 and accompanying text.

29. 42 U.S.C. § 13981 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000). See *infra* Part I.C.

30. For examples of such approaches, see, e.g., RESTORATIVE JUSTICE AND FAMILY VIOLENCE (Heather Strang & John Braithwaite eds., 2002); Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

31. For a history and discussion of the use of human rights principles in the United States, see, e.g., CYNTHIA SOOHOO ET AL., BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS (2008).

32. Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer*, in SOOHOO, *supra* note 31, vol. 2 ch. 4.

33. See, e.g., Alma Lu Beltran y Puga et al., *Gender Justice in the Americas: A Transnational Dialogue on Sexuality, Violence, Reproduction, and Human Rights*, 65 U. Miami L. Rev. 751 (2011) (discussing connections between human rights and women's rights in the context of sexuality, violence, and reproduction); CTR. FOR REPROD. RIGHTS, BRIEFING PAPER, REPRODUCTIVE RIGHTS VIOLATIONS AS TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT: A CRITICAL HUMAN RIGHTS ANALYSIS (2011), available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/TCIDT.pdf>. For discussion of the use of human rights principles in civil rights issues including workers rights, immigration, rights of indigenous peoples, capital punishment, prisoners' rights; housing, healthcare, reproductive rights, welfare, environmental justice and disaster relief, see generally, e.g., SOOHOO, *supra* note 31, vol. 3.

34. See, e.g., Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, [hereinafter Inter-Am. Comm'n], (2011) (finding U.S. to have violated international obligations to take reasonable action in response to domestic violence calls). For further discussion of that case see *infra* notes 57-66 and accompanying text.

violence violates human rights,³⁵ and require states to provide protection to victims, and to exercise due diligence to prevent, investigate, prosecute and punish perpetrators.³⁶ A developing body of international human rights decisions holds states accountable based on findings that they knew or should have known of real and immediate risks to an individual by another person, and failed to take reasonable steps to prevent the harm.³⁷ This shift in global understandings should prod U.S. policy makers to rethink how U.S. law and policy might better ensure institutional and individual accountability for gender violence.

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

35. See, e.g., G.A. Res. 63/155, ¶ 2, U.N. Doc. A/RES/63/155 (Jan. 30, 2009) (resolution adopted by the General Assembly, *Intensification of efforts to eliminate all forms of violence against women*) [hereinafter G.A. Res. 63/155], available at http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_RES_63_155_EN.pdf; Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Preamble, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), available at <http://www.un.org/womenwatch/daw/cedaw/>; Comm. on the Elimination of Discrimination Against Women, Gen. Rec. 19, 11th Sess., U.N. Doc. A/47/38 (1992) (addressing Violence Against Women), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Preamble, U.N. Doc. 1/49/104 (Dec. 20, 1993) [hereinafter 1993 UN Decl. on Elim. of VAW]. See also *supra* notes 27-28 and accompanying text.

36. See, e.g., Elimination of Domestic Violence Against Women, Res. 58/147, U.N. G.A.O.R., 58th Sess., ¶ 5, U.N. Doc. A/RES/58/147 (Feb. 19, 2004); 1993 UN Decl. on Elim. of VAW, *supra* note 35 at Art. 4.c.; G.A. Conf., Vienna Declaration and Programme of Action, ¶¶ 18, 28, U.N. Doc. A/CONF.157/23 (July 12, 1993). For a history and further discussion of the due diligence standard as a tool for eliminating gender violence, see Special Rapporteur on Violence Against Women, its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Yakin Erturk, U.N. Economic and Social Council, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

37. See, e.g., *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R., at ¶ 130 (2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *Campo Algodonero v. Mexico*, Inter-Am. Ct. H.R., Nos. 12.496, 12.497, and 12.498, ¶¶ 141-143 (Nov. 4, 2007), available at <http://www.cidh.org/demandas/12.496-7-8%20Campo%20Algodonero%20Mexico%204%20noviembre%202007%20ENG.pdf>; Views of the Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary* U.N. Doc. A/60/38 (Jan. 26, 2005), available at http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/cedaw/opt/0/node/4/filename/hungary_t5_cedaw_2_2003, (finding Hungary liable for failing to offer resources and help to domestic violence survivors); Views of the Committee on the Elimination of Discrimination against Women, *Goekce v. Austria*, U.N. Doc. C/39/D/5/2005 (Aug. 6, 2007), available at http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/cedaw/opt/0/node/4/filename/austria_cedaw_t5_5_2005, (finding Austria liable for failing to aid domestic violence victim who was killed by her husband). A few countries' national courts also have recognized states' accountability for private acts of gender violence. See, e.g., Melanie Randall, *Private Law, the State and the Duty to Protect: Tort Actions for Police Failures in Gendered Violence Cases*, 44 SUP. CT. L.R. (2d) (2009) (discussing Canadian cases); *Carmichele v. Minister of Safety & Sec.*, 2001 (3) SA 305 (SA) para. 61 (S.Afr.) (imposing "general norm of accountability" on South African state actors, such as the police, for responding to gender violence). For discussion, see, e.g., Carolyn Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19 (2008).

B. LAW ENFORCEMENT ACCOUNTABILITY

The connection between civil rights and gender violence has long roots in anti-gender violence law reform. Civil rights claims seeking state accountability for law enforcement responsiveness to domestic or sexual violence calls have played an important role in improving law enforcement policies.³⁸ Beginning in the 1970's, survivors of domestic and sexual violence and their families brought suits to hold law enforcement accountable for failed responses to calls for assistance.³⁹ Many of those claims were brought under federal civil rights statutes, and advanced arguments that law enforcement policies violated survivors' equal protection and due process rights.⁴⁰ Those cases were brought in an era when law enforcement officers commonly refused altogether to take action when called to respond to a "domestic" dispute, or reacted in ways that did not hold the perpetrator to account.⁴¹ The suits widely are recognized as having prompted changes in law enforcement policy and practice.⁴² For example, laws and policies developed to require or encourage law enforcement responsiveness to domestic violence calls, often by removing police discretion through mandatory arrest policies.⁴³ Other reforms improved documentation of domestic

38. Although this discussion is framed in terms of law enforcement accountability generally, most litigation challenging systematic responses to gender violence has focused on police responsiveness. Nevertheless, for example, the record of gender bias Congress considered in enacting the 1994 VAWA addressed both civil and criminal justice systems, and prosecutorial as well as policing functions. *See, e.g., United States v. Morrison*, 529 U.S. 598, 620 (2000) (recognizing VAWA's legislative record demonstrating insufficient investigation and prosecution of gender-motivated crime, state justice system participants' perpetuation of discriminatory stereotypes, and unacceptably lenient sentences for perpetrators). Of course, civil rights cases brought under section 1983 and other statutes address related claims, such as those involving gender violence that occurs in the workplace or at school, or claims involving sexual assault committed by law enforcement or other officials. *See, e.g., Julie Goldscheid, Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 745-56 (2007) (discussing applicability of Title VII, 42 U.S.C. § 1983, and 42 U.S.C. § 1985(3) to perpetrators of gender-based violence). *See also infra* note 126 and accompanying text.

39. *See, e.g., Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1988); *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1985); *Bruno v. Codd*, 47 N.Y.2d 582 (1979).

40. *See, e.g., Thurman*, 595 F. Supp. at 1525. For further discussion of these cases, *see infra* Part III.A. & B.

41. LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 9 (2011); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 44 (2000); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667-69.

42. *See, e.g., SCHNEIDER, supra* note 41 at 44; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 276-77 (2005); Sack, *supra* note 41; *see also, e.g., MEG TOWNSEND ET AL., LAW ENFORCEMENT RESPONSE TO EMERGENCY DOMESTIC VIOLENCE CALLS FOR SERVICE 8-9* (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf> (summarizing history of cases that establish law enforcement's potential financial liability if they failed to adequately protect victims).

43. *See, e.g., Sack, supra* note 41, at 1670-71. These mandatory and pro-arrest policies themselves are controversial, but they represent a move to require responses where police previously had walked away from calls.

violence incidents and enhanced law enforcement training on domestic violence issues.⁴⁴

The Supreme Court decision in *Castle Rock v. Gonzales*⁴⁵ follows in this line of cases. The case involved a tragic set of facts, which have been widely reported.⁴⁶ Jessica Lenahan⁴⁷ sued the local police under 42 U.S.C. § 1983 ("Section 1983"), alleging substantive and procedural due process violations, after local law enforcement repeatedly failed to respond to her requests that they take steps to enforce the domestic violence protective order she had against her estranged husband.⁴⁸ The police responded to her multiple calls for assistance by, among other things, telling her they could not help her because the children were with their father, and chastising her for "making us freak out and thinking the kids are gone."⁴⁹ Ms. Lenahan's fears that her estranged husband had abducted her children turned out to be founded; he eventually showed up at the police department, a shooting ensued, and her children were found dead in the trunk of his car.⁵⁰

Jessica Lenahan sued the town of Castle Rock, seeking accountability and redress for the immeasurable loss she had suffered.⁵¹ She alleged that the town of Castle Rock had violated her due process rights by failing properly to respond to complaints of restraining order violations, and by tolerating non-enforcement of restraining orders.⁵² She appealed the trial court's initial rejection of her claim, after which a panel of the Tenth Circuit Court of Appeals affirmed the rejection of her substantive due process claim, but found that she had alleged a cognizable procedural due process claim.⁵³ A divided *en banc* court agreed, finding that she had a "protected property interest in the enforcement of her restraining order," and that the town had violated her procedural due process rights because the police never seriously responded to her request for enforcement.⁵⁴ The Supreme Court decision addressed only the procedural due process claims.⁵⁵ The Court

44. *Id.* at 1671.

45. 545 U.S. 748 (2005).

46. See *supra* note 7. For further discussion of the case, see, e.g., Bettinger-Lopez, *supra* note 13.

47. The case initially was brought under the name Jessica Gonzales; the plaintiff subsequently changed her surname to Lenahan, and I will use that name to reference her here.

48. Inter-Am. Comm'n, *supra* note 34, at ¶¶ 2, 18-31.

49. *Id.* at ¶¶ 26-32.

50. *Id.* at ¶ 32.

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

52. *Id.* at 754-55.

53. *Id.* at 754.

54. *Id.* at 754-55.

55. *Id.* (distinguishing substantive due process claims from the procedural due process claim before the Court). The lower courts had concluded that Ms. Lenahan's claim did not fall within the narrow

rejected the procedural due process claim, and concluded that Ms. Lenahan had no protected property interest that would give rise to a procedural due process claim.⁵⁶

Having exhausted her recourse in U.S. courts, Jessica Lenahan appealed the Supreme Court's decision to the Inter-American Commission on Human Rights (IACHR).⁵⁷ The IACHR found the United States to be in violation of international human rights obligations to take reasonable steps to protect women from domestic violence.⁵⁸ The Commission's ruling was its first in a women's rights case against the United States.⁵⁹ It concluded that the United States failed to act with due diligence to protect Jessica Lenahan and her daughters from domestic violence, and that the United States' failure violated its obligation not to discriminate and to provide for equal protection before the law.⁶⁰ The Commission made numerous recommendations, including that the United States adopt or reform legislation to ensure mandatory enforcement of protection orders.⁶¹ It also recommended the continued adoption of public policies and programs aimed at restructuring the stereotypes of domestic violence victims, and at promoting the eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence.⁶² Although the United States has taken the position that it is not bound to the American Declaration,⁶³ the Commission's decision at a minimum constitutes persuasive authority for reconsidering the adequacy of the United States' legal and policy-based approach.⁶⁴

The IACHR decision and corresponding international developments elaborating state obligations to exercise due diligence with respect to gender violence should inspire us to reconsider how existing and potential remedies can best ensure law enforcement accountability. For example, the fact that the U.S.

"state-created danger" exception to the *DeShaney* decision's rule that the state has no duty to protect its citizens from harm committed by a private third party, since there was no indication that the police created or enhanced the danger posed by Simon Gonzales. See *Gonzales v. Castle Rock*, 366 F.3d 1093, 1099 (10th Cir. 2004) (en banc); *Gonzales v. Castle Rock*, 307 F.3d 1258, 1262-63 (10th Cir. 2002). The Tenth Circuit Court of Appeals clarified the distinction between the respective theories, see 366 F.3d at 1099-1100, and the Supreme Court did not disturb that distinction. See, e.g., *Castle Rock*, 545 U.S. at 755-56 (distinguishing substantive from procedural due process theories). For discussion of the significance of this limited holding, see *infra* notes 65-66 and accompanying text.

56. *Castle Rock*, 545 U.S. at 766.

57. Inter-Am. Comm'n, *supra* note 34, at ¶¶ 1, 40-44.

58. See, e.g., *id.* at ¶¶ 115-35 (summarizing States' legal obligation to protect women from domestic violence under international human rights law). For further discussion of the case, see *infra* notes 60-63 and accompanying text.

59. See Elizabeth M. Schneider et al., *Implementing the Inter-American Commission on Human Rights' Domestic Violence Ruling in Lenahan v. United States: Advocates Take Up the Challenge*, 46 CLEARINGHOUSE REV. 113 (2012).

60. Inter-Am. Comm'n, *supra* note 34, at ¶ 199.

61. *Id.* at ¶ 201.4.

62. *Id.* at ¶ 201.6.

63. *Id.* at ¶ 55.

64. See Schneider et al., *supra* note 59.

Supreme Court decision addressed only Ms. Lenahan's procedural due process claim is notable, particularly given that previous cases largely had been based either on equal protection or substantive due process theories.⁶⁵ Accordingly, the Supreme Court decision leaves undisturbed those other, more frequently used, theories under which survivors of gender violence have held and continue to hold law enforcement accountable for failed responses to domestic and sexual violence calls.⁶⁶ The IACHR decision serves as a reminder to think broadly about how U.S. law and policy most effectively can advance the shared interests in equality and due process that underlie both U.S. and international law and policy.

C. INDIVIDUAL ACCOUNTABILITY THROUGH PRIVATE RIGHT OF ACTION

A second strand of anti-gender violence advocacy explicitly invoked a civil rights frame. Legislative efforts in the United States in the 1990's focused on remedies holding individual perpetrators accountable. The civil rights remedy enacted as part of the Violence Against Women Act (VAWA) in 1994 is the most prominent of those remedies.⁶⁷ That law afforded a private right of action by a victim against the perpetrator of gender-motivated violence.⁶⁸ It sought to frame gender-based violence in the same category as other civil rights violations,⁶⁹ and to add a remedy to then-existing federal civil rights laws which afforded redress against private institutions,⁷⁰ groups of individuals,⁷¹ or state actors, both individual and institutional.⁷² It was designed to fill a gap in accountability measures: no then-existing federal civil rights law provided redress against the private individuals who committed most of those violations.⁷³ The private right of action against an individual perpetrator held the potential for practical and transformative redress: it both could afford compensation for the economic losses

65. See, e.g., Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1287 (1990) (discussing theories).

66. For discussion of cases, see *supra* Part III. Nevertheless, as Laura Oren has observed, the Court does not appear favorably disposed to the state-created danger exception. See Laura Oren, *Some Thoughts on The State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 17 TEMP. POL. & CIV. RTS. L. REV. 47, 59 (2006) (recognizing *Castle Rock* majority's reasoning grouped its rejection of Jessica Lenahan's procedural due process claim with previous *DeShaney* ruling rejecting substantive due process claim).

67. 42 U.S.C. § 13981 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000). For commentary on the decision, see *supra* note 3. For a discussion of state laws providing similar relief, see, e.g., Julie Goldscheid, *The VAWA Civil Rights Provision: Shaping It, Saving It, Litigating It, Losing It*, 11 GEO. J. GENDER & L. 543, 548-51 (2010) [hereinafter *Shaping It*]; Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but not Ruled Out*, 39 A.B.A. FAM. L.Q. 157 (2005) [hereinafter *Struck Down*].

68. 42 U.S.C. § 13981 (1994).

69. See, e.g., Sally F. Goldfarb, *Persistence of Privacy*, 61 OHIO ST. L.J. 1, 16-18 (2000), at 7; see generally *Struck Down*, *supra* note 67, at 160-64 (summarizing legislative history).

70. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2012) [hereinafter Title VII].

71. See, e.g., 42 U.S.C. § 1985(3) (2012).

72. See 42 U.S.C. § 1983 (2012).

73. See, e.g., Goldfarb, *Persistence of Privacy*, *supra* note 69 at 16-18.

occasioned by the abuse and could shift conceptions of abuse from a private matter shrouded in secrecy to a matter of public concern.⁷⁴ Both goals advanced important concerns. Compensatory relief could correct the economic disadvantage produced by abuse; the remedy's transformative goals built on the civil rights frame's symbolic power to challenge enduring biases and discriminatory beliefs.⁷⁵

During the years the civil rights remedy was in effect, approximately 50 to 60 cases were decided in favor of both sexual assault and domestic violence survivors.⁷⁶ However, the history of those cases was marked by controversy; as soon as litigants began to invoke the law, defendants began to challenge its constitutionality.⁷⁷ Virtually all the courts that addressed the question found it to be constitutional.⁷⁸ Nevertheless, the Supreme Court ultimately struck down the law as an unconstitutional exercise of Congress' powers under the Commerce Clause and under section five of the Fourteenth Amendment.⁷⁹ The Court rejected arguments that Congress was authorized to enact the law under its Commerce Clause power, despite the detailed Congressional record of the myriad ways gender violence impacts women's economic equality.⁸⁰ The Court also rejected arguments that the law was justified under Congress' power to enact laws to remedy equal protection violations, reasoning that Congress' powers to remedy equal protection violations did not extend to private actors, and that the Congressional record of discriminatory practices did not include findings from each of the 50 states.⁸¹ The decision was widely critiqued as reflecting both an unduly narrow view of Congressional authority, and a regressive view of women's rights.⁸²

Given that the issue before the Court in *Morrison* was the scope of Congress' legislative powers, its doctrinal legacy bears more on issues of federalism than on other existing remedies for gender violence. The decision did nothing to disturb the other provisions of the 1994 Violence Against Women Act or its reauthorizations, which, among other things, created funding streams, supported program-

74. See, e.g., Goldfarb, *supra* note 6, at 506; Goldscheid, *supra* note 38.

75. Goldscheid, *supra* note 38, at 768-77.

76. See, e.g., *Shaping It*, *supra* note 67, at 548; *Struck Down*, *supra* note 67, at 164-65 (summarizing cases); Julie Goldscheid & Risa Kaufman, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 271-83 (2001) (discussing decisions).

77. See *Struck Down*, *supra* note 67, at 164. Defendants challenged Congress' authority to enact the law under both the Commerce Clause and under Section 5 of the Fourteenth Amendment. See, e.g., Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000) (reviewing arguments).

78. See, e.g., *Shaping It*, *supra* note 67, at 548; *Struck Down*, *supra* note 67, at 164-65.

79. *United States v. Morrison*, 529 U.S. 598 (2000).

80. *Id.* at 617-18.

81. *Id.* at 626-27.

82. *Struck Down*, *supra* note 67, at 159.

ming innovations, and carved out avenues of redress for immigrant survivors of gender violence.⁸³

Consequently, alternative civil rights remedies holding individuals accountable for committing acts of gender violence could survive review as long as they avoided the constitutional issues found problematic by the *Morrison* majority. As legislation proposed in 2001 and 2003 reflect, federal statutory responses could afford a modified remedy against a perpetrator and still advance the original statute's goals, while nevertheless responding to the *Morrison* Court's constitutional concerns.⁸⁴ However, this legislative proposal has not galvanized Congressional attention.⁸⁵ Some states and localities picked up on the Supreme Court majority's call for states to respond⁸⁶ by enacting similar legislation, while other states retained remedies authorizing private rights of actions against perpetrators of gender-based violence that had been on the books before the VAWA civil rights remedy was enacted.⁸⁷

D. UNTAPPED POTENTIAL FOR FEDERAL RESPONSE

One would imagine that decisions such as *Castle Rock* and *Morrison* would spur calls for meaningful reform, much like other criticized Supreme Court decisions have led to corrective legislative responses.⁸⁸ There are numerous political reasons for the absence of a call for a federal legislative response; the difficulty of galvanizing Congressional support cannot be underestimated.⁸⁹ But additional factors associated with gender violence claims may be at play as well.

83. *Id.*, at 159-60.

84. See Violence Against Women Civil Rights Restoration Act of 2003, H.R. 394, 108th Cong. (2003); Violence Against Women Civil Rights Restoration Act of 2001, H.R. 429, 107th Cong. (2001). Both proposals provided a private right of action against a perpetrator of gender-motivated violence and required the plaintiff to satisfy a jurisdictional element that ensured a connection in each case with interstate commerce. For further discussion of potential legislative responses to *Morrison*, see, e.g., *Struck Down*, *supra* note 67, at 167-79; Judith Resnik, *Drafting, Lobbying, and Litigating VAWA: National, Local, and Transnational Interventions on Behalf of Women's Equality*, 11 GEO. J. GENDER & L. 557, 567-69 (2010).

85. Neither the legislation reauthorizing VAWA in 2005, nor the legislation proposed to reauthorize VAWA in 2011, contained similar provisions authorizing a private right of action against a perpetrator. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 11 Stat. 2960 (2006); Violence Against Women Reauthorization Act of 2012, H.R. 4970, 112th Cong. (2012); Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (2011).

86. *United States v. Morrison*, 529 U.S. at 627.

87. See *Struck Down*, *supra* note 67, at 167-71.

88. See, e.g., Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5 (2012) (enacted in response to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (2006) (codified at 42 U.S.C. § 1981 et. seq.) (enacted in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Martin v. Wilks*/*Martin v. Wilks*, 490 U.S. 755 (1989)).

89. See, e.g., Dana Milbank, *Our do-almost-nothing Congress*, WASH. POST, May 2, 2012, available at http://www.washingtonpost.com/opinions/the-big-talk-no-action-congress/2012/05/02/gIQAu7uT_story.html; David Firestone, *The Cycle of Standoffs*, N.Y. TIMES Aug. 1, 2012, available at <http://takingnote.blogs.nytimes.com/2012/08/01/the-cycle-of-standoffs/>; Marc Sandalow, *Congress Sinks into*

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

1. Domestic Violence Movement's Partnership With the State

A growing literature critiques the mainstreaming of the United States' anti-domestic violence movement,⁹⁰ and its diminished focus on structural reform and social change. Although the anti-domestic and sexual violence movements have made tremendous strides in expanding the availability of services and focusing public attention on the problem, those advances have depended in large part on a partnership with the state.⁹¹ Many argue that this partnership has resulted in a de-politicization, professionalization, and standardization of the anti-domestic violence movement, with an overwhelming and problematic emphasis on criminal justice responses.⁹²

In some ways, this critique can be seen as a product of the movement's success. Increased government funding has expanded the availability of both social services and legal advocates.⁹³ Those services are critically important, and continue to be under-resourced.⁹⁴ But the expansion in social services and government funding has shifted the movement's focus from grassroots activism and calls for structural reform to service delivery, mental health, and criminal justice responses.⁹⁵ Less attention now is directed to structural reform, such as ending subordination based on race, class, ethnicity, and sexual orientation, as well as gender, and increasing social and economic empowerment.⁹⁶ Increased funding has grown the ranks of legal and non-legal advocates engaged in service delivery, leaving relatively few organizations positioned (or funded) to undertake

Partisan Quagmire, S.F. CHRON Apr. 28, 2005, available at <http://www.sfgate.com/politics/article/Congress-sinks-into-partisan-quagmire-2638647.php>.

90. Although problems with law enforcement responsiveness plague responses to both domestic and sexual violence calls, this section focuses on the anti-domestic violence movement, which has produced a more visible and coordinated advocacy response.

91. See, e.g., KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 1-15 (2008).

92. See, e.g., LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 47 (2008); GOODMARK, *supra* note 41, at 1-6, 25-28; BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE AND AMERICA'S PRISON NATION 66-97 (2012); Beth Richie, *Reflection on the Antiviolence Movement*, 25 SIGNS 1133 (2000); ANDREA SMITH ET AL., *The Color of Violence: Introduction*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (2006).

93. See, e.g., GOODMAN & EPSTEIN, *supra* note 92, at 38; Richie, *supra* note 92, at 93.

94. See, e.g., NAT'L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, THE VIOLENCE AGAINST WOMEN ACT (VAWA): A TOOLKIT FOR EDUCATING POLICY MAKERS ABOUT REAUTHORIZATION 16 (2011), <http://www.ncadv.org/files/VAWA%20Reauth%20ToolKit%20Final%2011%2028%2011.pdf> (detailing remaining gaps between available funding and demand for services for domestic and sexual violence survivors).

95. See, e.g., GOODMAN & EPSTEIN, *supra* note 92, at 31-47 (tracing separation from anti-poverty activists, increased professionalization of services, narrowing range of services available to survivors); RICHIE, *supra* note 92, at 65-98 (tracing shifts in the anti-violence movement).

96. See, e.g., GOODMAN & EPSTEIN, *supra* note 92, at 47; RICHIE, *supra* note 92, at 75-76.

the systems advocacy work traditionally advanced by the grass-roots advocacy community.⁹⁷ Although those engaged in individual representation also engage in systems-based advocacy, limited resources for systems reform reduces awareness of the ongoing need for systematic change and the ability to effectively mount advocacy campaigns.

It follows that the emphasis on services and state collaboration, while valuable, reduces the likelihood that advocates will take positions in opposition to established programs. This renders litigation against law enforcement and other state actors less likely. For example, policy-makers and funders often support community coordination between stakeholders, including community based organizations and criminal justice personnel, because they promote coordination and may improve the quality of services.⁹⁸ However, they also may privilege increased prosecution rates as a priority of intervention and as the measure of success.⁹⁹ Those partnerships may have the unintended consequence of reducing advocates' inclination or ability to challenge law enforcement's practices, since it may become difficult to take a position adverse to an institutional and programmatic partner. Advocates will be less likely to publicly critique prosecutors for failing to do their jobs when their paychecks are being paid by the state.¹⁰⁰

Even if advocates identify problems with law enforcement responses, lawyers representing survivors may not be trained to commence civil rights litigation. Government funding has increased the availability of lawyers trained to represent survivors in family law cases.¹⁰¹ Those lawyers make critical differences in survivors' lives, and the need far outpaces the availability of legal services.¹⁰² But family law attorneys typically are not trained in federal civil rights litigation and the private bar may not have the capacity, either in expertise or staffing, available to represent survivors.¹⁰³ Only a few not-for-profit organizations frame a lack of law enforcement responsiveness to gender violence claims as a matter that civil rights laws could address.¹⁰⁴ As Caroline Bettinger-Lopez has noted, the gap

97. GOODMAN & EPSTEIN, *supra* note 92, at 47; RICHIE, *supra* note 92, at 75-76.

98. BUMILLER, *supra* note 92, at 164-65.

99. *Id.* at 165.

100. GOODMARK, *supra* note 41, at 27.

101. *See, e.g.*, Legal Assistance for Victims Grant Program, www.ovx.usdoj.gov/fy2011-grant-program.htm #12 (enumerating grantees for 67 grants totaling \$31,930,180 awarded in 2011).

102. *See, e.g.*, Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158 (2003) (finding increased access to legal representation helps explain decline in domestic violence during the 1990's).

103. *See, e.g.*, SCHNEIDER, *supra* note 41, at 95 (describing limited availability of lawyers trained in domestic violence issues); *see also, e.g.*, National Domestic Violence Volunteer Attorney Network Act, S. 1515, 110th Cong. (2007) (proposing pilot program coordinating a system of volunteer attorneys to ensure safe, culturally and linguistically appropriate legal representation for domestic violence victims).

104. For example, the Women's Justice Center explicitly calls for challenges to gender-biased law enforcement responses that deny women access to justice. *See* WOMEN'S JUST. CTR., *Highlighting the Gendered Blind Spot, Engaging Social Justice and Civil Rights Groups in Securing Women's Justice Rights*, http://justicewomen.com/cj_genderedblindspot.html (last visited Oct. 2, 2012). The ACLU

between the work of domestic violence service providers and civil and human rights organizations “is pronounced.”¹⁰⁵

The net result of the shift from activism to service delivery with the accompanying increase in state funding for programs and services has reduced the likelihood that problems with law enforcement responsiveness will be framed as matters of civil rights. The absence of a vibrant civil rights frame for gender violence claims shapes public discourse accordingly. It masks problems that might surface through an equality or due process lens and in turn limits the potential for policy-based reform.

2. Limits of Identity Politics

The absence of a call for reform reflects another movement trend as well. Considered on their face, claims against law enforcement for failed responses to gender violence readily should be categorized as cases of police misconduct. Like cases involving overuse of police power, gender violence-based claims of under-responsiveness also often involve violations of due process, whether they result from violent infringement of liberty, or from law enforcement interventions, or lack of interventions, that increase the risk of harm to private individuals.¹⁰⁶ Accordingly, both often lead to litigation under the civil rights statute, 42 U.S.C. § 1983.¹⁰⁷

But claims of law enforcement under-responsiveness to gender violence calls generally are not treated as cases of police misconduct.¹⁰⁸ The distinct treatment

Women's Rights Project was co-counsel in the *Lenahan* case at the U.S. Supreme Court and litigates cases seeking law enforcement accountability for responding reasonably to domestic violence cases. See, e.g., *Valdez v. City of New York – Brief of Amici Curiae New York City Bar Association, American Civil Liberties Union et al.* (July 18, 2011), available at <http://www.aclu.org/womens-rights/valdez-v-city-new-york-brief-amici-curiae-new-york-city-bar-association-american-civil-liberties-union-et-al>. The Women's Law Project has had a longstanding project to address the United States' chronic failure to report and investigate rape and sexual assault. See WOMEN'S L. PROJECT, *Rape and Sexual Assault*, www.womenslawproject.org/NewPages/wkVAW_SexualAssault.html (last visited Oct. 2, 2012). Other organizations dedicated to gender equality and civil rights also have litigated cases seeking law enforcement accountability for gender violence. See, e.g., CENTER FOR CONST. RTS., <http://ccrjustice.org/> (last visited Oct. 2, 2012); LEGAL MOMENTUM, <http://www.legalmomentum.org/> (last visited Oct. 2, 2012); NAT'L WOMEN'S L. CENTER, <http://www.nwlc.org/> (last visited Oct. 2, 2012). By and large, these organizations engage in impact-oriented advocacy, and are not the organizations representing survivors in domestic violence cases in family and criminal courts; their capacity for assuming cases is necessarily limited. The National Center for Women and Policing advocates increased representation of women on police forces as a way to improve law enforcement's response to violence against women, but does not engage in individual representation or litigation. See KIM LONSWAY ET AL., NAT'L CTR. FOR WOMEN & POLICING, *HIRING & RETAINING MORE WOMEN: THE ADVANTAGES TO LAW ENFORCEMENT AGENCIES* 7-8 (2003), <http://www.womenandpolicing.org/pdf/NewAdvantagesReport.pdf>.

105. *Bettinger-Lopez*, *supra* note 13, at 189.

106. See, e.g., MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 2 (2011) (describing conduct giving rise to police misconduct claims).

107. See generally *id.* (detailing use of §1983 to address police misconduct).

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

of cases of over and under enforcement reflects the limitations of traditional identity politics and single-identity group advocacy.¹⁰⁹ Police misconduct cases involving over-enforcement historically are associated with race-based misconduct while cases involving under-enforcement—typically, domestic and sexual violence—are seen in terms of gender-based misconduct.¹¹⁰ Legal doctrines framing discrimination claims as either race or sex based discrimination fuel this single-identity approach.¹¹¹

The traditional single-identity-based approach to police misconduct obscures the connection between over- and under-enforcement.¹¹² The cases may be seen as posing distinct issues even though both may reflect issues of both race and gender bias.¹¹³ To the extent the issues are publicized by advocacy groups, the distinct framing of the respective categories of cases may reflect the limitations of identity politics and the challenges of translating intersectionality theory into practice.¹¹⁴

Recent initiatives are beginning to surface the limitations of these identity-based distinctions as organizations and grass-roots campaigns increasingly address the overlap between multiple forms of subordination.¹¹⁵ With respect to

109. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberle Crenshaw, *Demarginalizing the Intersection between Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139.

110. See, e.g., WOMEN'S JUST. CTR., *supra* note 104 (critiquing traditional social justice and civil rights groups' failure to challenge under-enforcement of crimes against women as well as over-aggressive policing practices, which primarily affect males); see also AVERY, *supra* note 106, §§ 2:4-2:7 (discussing racially motivated misconduct).

111. Cf., e.g., Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009) (discussing difficulty of prevailing in claims alleging multiple forms of discrimination).

112. Cf., e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29-75 (1997) (detailing law enforcement failure to protect African Americans from crime); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (critiquing decision striking down anti-loitering statute as not serving community's best interests).

113. See, e.g., RIGHTS WORKING GROUP, (June 29, 2012), <http://rightsworkinggroup.org/content/racial-profiling-gender-lgbtq-awareness-week> (collecting materials and blog postings). For example, Jessica Lenahan is part Native American and part Latina. See, ACLU videos, *Domestic Violence & Human Rights: Lenahan v. USA*, YOUTUBE (Oct. 24, 2011), www.youtube.com/watch?v=UvPtMCrI4J4. Studies indicate that poor women and women of color may be at greatest risk of law enforcement under-responsiveness to their calls for assistance. Victoria Frye et al., *Dual Arrest and Other Unintended Consequences of Mandatory Arrest in New York City: A Brief Report*, 22 J. FAM. VIOLENCE 397, 401-02, 404 (2007).

114. See generally Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, in INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 124 (Grabham et al. eds., 2009) (discussing the challenges of applying intersectionality theory).

115. See, e.g., *Women of Color and the Courts*, LEGAL MOMENTUM, <http://www.legalmomentum.org/our-work/vaw/njep-issues-pages/women-of-color-and-the-courts.html> (last visited Oct. 2, 2012) (recognizing combined effect of race and gender-based discrimination); *Hispanic Victims of Domestic Violence Might Need a Different Approach*, NAT'L COUNCIL OF LA RAZA (Oct. 18, 2010), http://www.nclr.org/index.php/about_us/news/blog/hispanic_victims_of_domestic_violence_might_need_a_different_approach/ (discussing culturally competent violence prevention education); *The Truth Commission on*

policing practices, for example, the proposed End Racial Profiling Act of 2011 would add gender to the list of prohibited grounds for profiling, recognizing that gender, as well as race and often religion, frequently combine as the bases of biased police practices.¹¹⁶ African American women may be profiled as users, couriers or purveyors of drugs.¹¹⁷ Women of color, including transgender women of color and immigrant women, are often profiled as being engaged in prostitution.¹¹⁸ Muslim, Arab, and South-Asian women who wear hijab may be profiled as part of the “war on terror.”¹¹⁹ But this intersecting approach still constitutes the exception, rather than the general trend.

A call for law enforcement involvement may be met with skepticism by communities of color and other marginalized communities, such as the LGBT community, given problems of over-policing and its attendant harms.¹²⁰ But those concerns should not excuse a failure to respond to calls involving gender-based violence when survivors seek law enforcement intervention. Under-enforcement is especially worrisome if, as studies suggest, survivors in communities of color face greater difficulty obtaining assistance from law enforcement for domestic or sexual violence,¹²¹ at the same time that they suffer the consequences of over-policing.¹²² Policies and practices that endorse law enforcement discretion to disregard survivors’ calls for assistance undermine survivors’ autonomy, much the same as mandatory arrest policies.¹²³ The same critique should apply to both. That some of the cases challenging law enforcement’s under-responsiveness to gender violence have been brought by

Black Women and Sexual Violence, BLACK WOMEN’S BLUEPRINT, <http://www.blackwomensblueprint.org/sexual-violence/> (last visited Oct. 2, 2012) (advocating intersectional advocacy).

116. See End Racial Profiling Act of 2011, S. 1670, 112th Cong. § 2(7) (2011) (defining “racial profiling” to include practices based on gender). For a discussion of the intersections of race, gender, and sexual orientation as they relate to racial and religious profiling, see, e.g., *Racial Profiling: Gender & LGBTQ Awareness Week*, RIGHTS WORKING GROUP, *supra* note 113. See also, e.g., JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011) (arguing that policing of sex and gender reinforces racial and gender inequalities).

117. See, e.g., U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 10 (2000), available at <http://www.gao.gov/assets/230/228979.pdf> (finding that black women who were U.S. citizens were nine times as likely as white women to be x-rayed after being frisked or patted down, but were less than half as likely to be found carrying contraband as white women who were U.S. citizens).

118. Andrea Ritchie, *What’s Gender Got to do with Racial Profiling?*, RIGHTS WORKING GROUP (Sept. 14, 2012), <http://www.rightsworkinggroup.org/content/whats-gender-got-do-with-racial-profiling>.

119. *Id.*

120. See *infra* Part V.A.

121. *Id.*

122. See, e.g., Special Rapporteur, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Ms. Rashida Manjoo, paras. 14, 50-66, U.N. Doc. A/HRC/17/26/Add.5 (June 1, 2011) [hereinafter Special Rapporteur] (detailing compound challenges of women who face multiple forms of discrimination).

123. For critiques of mandatory arrest laws, see, e.g., GOODMARK, *supra* note 41, at 118-24; Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004).

women of color underscores the importance of these cases as part of a robust civil rights response.¹²⁴

II. REVIVING CIVIL RIGHTS: LAW ENFORCEMENT ACCOUNTABILITY AS POLICE MISCONDUCT

A new federal civil rights-based approach to gender violence might take several forms. This section focuses on institutional accountability and argues that new strategies could productively address ongoing problems with law enforcement responses to gender violence calls. It sets the stage for later sections, which in turn review the availability of relief under current federal civil rights laws, and propose administrative and community-based strategies to complement litigation-based remedies.

A. INDIVIDUAL AND INSTITUTIONAL ACTORS

Historically, civil rights claims to redress gender violence have encompassed claims against both individual and institutional actors.¹²⁵ While both are important, I focus here on new approaches to institutional accountability. This approach builds on civil rights laws' historic role in holding institutions accountable for discrimination and other rights violations.¹²⁶ The civil rights frame foregrounds the notion that gender violence, and institutional responses to it, are a matter of public concern for which we share collective responsibility.¹²⁷ Specifically, reform could focus on law enforcement, given ongoing problems in obtaining evenhanded responses.¹²⁸ Even the Supreme Court majority in *Morrison* acknowledged that there is a problem with state justice systems'

124. See *supra* note 113 (noting that, for example, Jessica Lenahan is part Native American and part Latina).

125. See *supra* Parts I.B. & C.

126. Institutional accountability can be advanced through the law enforcement accountability measures advocated here, or through other strategies, for example, holding employers liable for discriminatory and other failed responses to employees coping with abuse. See, e.g., Maria Amelia Calaf, Comment, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 186-91 (2003); Julie Goldscheid, *Disparate Impact's Impact: The Gender Violence Lens*, 90 ORE. L. REV. 33 (2011); Julie Goldscheid, *Gendered Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61 (2008); John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309, 336 (2004); Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 294-95 (2006); Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 393-94 (2007); Wendy R. Weiser & Deborah A. Widiss, *Employment Protection for Domestic Violence Victims*, 38 CLEARINGHOUSE REV. 3, 6-7 (2004); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669 (2008).

127. See *supra* note 74 (discussing VAWA civil rights remedy's transformational goals).

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

responses to gender violence.¹²⁹ Remedies directed against the institutional biases that continue to present barriers to justice for survivors of gender violence hold potential to produce meaningful change in the day-to-day responses survivors receive from law enforcement.¹³⁰

A focus on institutional accountability would be consistent with the approach of other federal civil rights laws, which, correctly or incorrectly, generally privilege institutional over individual liability.¹³¹ For example, Title VII claims primarily hold liable the institutional employer, rather than an individual discriminator. Virtually all jurisdictions preclude claims against an individual under Title VII.¹³² Claims under section 1983 may be directed at individuals, although individuals often are shielded from liability through qualified immunity.¹³³ Litigation seeking policy-based reform often is directed at institutions, for example, through claims holding municipalities liable for failing to train, or for maintaining a policy or practice that violates constitutional or statutory rights.¹³⁴ Institutional accountability can advance structural reform by spurring policy and procedural change.¹³⁵ Individual accountability no doubt is important, but is inherently limited in cases of gender violence, given, among other things, the difficulties of recovery and survivors' understandable resistance to re-engaging with abusers through elective litigation.¹³⁶

129. The *Morrison* majority acknowledged that the 1994 civil rights remedy was enacted in response to a "voluminous" record of gender bias in state justice systems. *United States v. Morrison*, 529 U.S. 598, 620 (2000).

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

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

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

133. *See* Martin A. Schwartz & Kathryn R. Urbonya, *Chapter 15*, in *SECTION 1983 LITIGATION* (2d ed. 2008).

134. *See id.* at Chapter 10.

135. *See, e.g.*, *supra* note 41 (discussing policy responses to lawsuits brought against municipalities for failed responses to domestic and sexual violence).

136. *See, e.g.*, Goldscheid, *supra* note 38, at 768-77. Similar critiques of reliance on private litigation as a remedy against individuals have been raised in in other civil rights contexts. *Cf., e.g.*, Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1201-07 (2011) (proposing administrative accountability as an additional tool to address racial discrimination in housing, in light of the limits of individual litigation).

The use of civil rights laws to prod law enforcement responsiveness to marginalized groups is not new. As Zanita Fenton has argued, police refusal to protect battered women is analogous to law enforcement's historic refusal to enforce the law to protect African-Americans, which led to the enactment of the Reconstruction-era civil rights statutes, including section 1983.¹³⁷ One of the core purposes of that law was to provide a federal remedy for non-enforcement of state remedies to prevent violence against individuals.¹³⁸ Indeed, Section 1983 is the statute often used to redress cases of police misconduct involving over-enforcement.¹³⁹

Implicit in the VAWA civil rights remedy's focus on individual liability was the assumption that the bedrock civil rights statute, 42 U.S.C. § 1983 ("section 1983"), would afford redress in cases alleging institutional failures involving state actors.¹⁴⁰ Ongoing problems with law enforcement accountability demonstrate the continued need for both robust enforcement of existing legal theories, and for new and complementary strategies that would advance greater accountability. As Part III details, section 1983 affords increasingly narrow, but nevertheless viable, avenues for redress.

B. LAW ENFORCEMENT ACCOUNTABILITY AND CIVIL RIGHTS

Ongoing problems with law enforcement policies and practices with respect to gender violence counsel renewed efforts to promote accountability. The United Nations Special Rapporteur has documented the historic and ongoing problems with enforcement of anti-domestic violence laws in the United States.¹⁴¹ Recent Department of Justice (DOJ) investigations confirm the enduring nature of these practices with respect to police response to both domestic and sexual violence. For example, the DOJ's investigation of the New Orleans Police Department (NOPD) revealed gender biased policing, based, among other things, on misclassifications of many possible sexual assault cases that resulted in failure to

137. Fenton, *supra* note 7 at 388; *accord*, Natapoff, *supra* note 16 (recognizing law enforcement's historic responses to domestic violence as a problem of underenforcement).

138. Fenton, *supra* note 7 at 388.

139. *See, e.g.*, MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION (2012).

140. Goldfarb, *supra* note 6, at 508. Other remedies, such as Title VII of the 1964 Civil Rights Act, provide redress in cases of private institutions' failed responses to gender violence. *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

141. *See, e.g.*, Special Rapporteur, *supra* note 122 at paras. 13-17, 54, 61, 83; *accord* Inter-Am. Comm'n, *supra* note 34, at paras. 96, 97 (referencing reports). Recent studies confirm ongoing problems with law enforcement, including persistent under-reporting of domestic and sexual violence. *See, e.g.*, LYNN LANGTON & MARCUS BERZOFKY ET AL., U.S. DEP'T OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 4, 6 (2012), *available at* http://www.ncdsv.org/images/BJS_VictimizationsNotReportedToThePolice2006-2010_8-2012.pdf (reporting that 65 percent of sexual assault victimizations and 46 percent of intimate partner violence victimizations were not reported to police in time period studied).

investigate a significant number of potential sex crimes,¹⁴² missing or inadequate investigation and documentation, and indications that staff relied on stereotypical assumptions and judgments about sex crimes and victims of sex crimes.¹⁴³ The DOJ found “systemic deficiencies” in NOPD’s handling of domestic violence cases as well.¹⁴⁴ It detailed NOPD’s lack of specific guidance regarding important functions, such as protocols for 911 operators taking domestic violence calls, and procedures for investigation and follow up.¹⁴⁵ It also detailed grossly inadequate training of law enforcement in how to investigate domestic violence claims, leading to failures of follow up, and minimal efforts to find and interview witnesses.¹⁴⁶ The DOJ investigation resulted in a consent decree in which NOPD agreed, among other things, to develop and implement a set of policies and procedures reflecting improved responses to sexual assault¹⁴⁷ and domestic violence.¹⁴⁸

In its investigation of the Puerto Rico Police Department (PRPD), the DOJ similarly found “troubling evidence” that PRPD failed adequately to respond to police sexual assault and domestic violence cases.¹⁴⁹ The investigation detailed that PRPD reported dramatically lower numbers of reported forcible rapes as compared to murders than virtually all other jurisdictions (which reported more forcible rapes than murders).¹⁵⁰ This finding suggested to the DOJ that PRPD was under-classifying the numbers of rapes reported. The DOJ investigative report also cited low levels of orders of protection among women who had been murdered by their partners, as well as high numbers of women who had been

142. Outdated definitions of rape have contributed to policies and practices in which allegations of sex crimes are coded as “non-crimes” and consequently not investigated, and interrogations often include victim-blaming questioning requiring victims to “prove an allegation false.” Recent changes to the Uniform Crime Report’s (UCR) definition of rape should help ameliorate the problem. *See, e.g.*, Press Release, Women’s Law Project, Women’s Law Project Applauds Attorney General Holder on Changes to UCR Definition of Rape (Jan. 6, 2012), available at http://www.womenslawproject.org/NewPages/wkVAW_SexualAssault_AG2012.html.

143. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEP’T 43-51 (2011) (“NOPD Investigation”), available at http://www.justice.gov/crt/about/spl/nopd_report.pdf.

144. *Id.* at 43.

145. *Id.* at 49.

146. *Id.* at 50.

147. *United States v. City of New Orleans*, No. 12-1924, Case 2:12-cv-01924-SM-JCW, paras. 195-211 (E.D. La., filed July 24, 2012), available at http://www.laed.uscourts.gov/Consent/12cv01924_Doc2-1.pdf. For example, the consent decree requires the NOPD to incorporate materials on the realistic dynamics of sexual assault, including issues related to trauma response, into regular training, and prohibits police officers from coding sexual assaults in a “miscellaneous” or “non-criminal” category without the express written approval of a higher officer. *Id.* at paras. 205-07.

148. *Id.* at paras. 212-22. Under the consent decree, the NOPD agreed to discourage dual arrests of offenders and victims, *id.* at para. 214, to incorporate into its ongoing training materials on the dynamics of domestic violence, *id.* at paras. 219-21, and to track dispositions of domestic violence investigations, *id.* at para. 222.

149. *See, e.g.*, DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEP’T 54, 57-58 (2011) (“PRPD Investigation”), available at http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf.

150. *Id.* at 57.

murdered by their domestic partners, which suggested that police were not doing enough to inform victims of legal resources available to them.¹⁵¹ The investigation further reported that PRPD has repeatedly failed to appropriately discipline officers accused of domestic violence.¹⁵² Together, these concerns led the DOJ to conclude that PRPD's institutional oversight may rise to the level of a constitutional violation.¹⁵³

In another investigation, the DOJ similarly raised serious concerns that the Maricopa County Sheriff's Office failed to investigate a large number of sex crimes in a manner that may constitute gender and/or national origin discrimination.¹⁵⁴ The Department has also announced a series of investigations into allegations that the University of Montana Office of Public Safety, Missoula Police Department, and the Missoula County Attorney's Office failed to adequately investigate and prosecute alleged sexual assaults against women in Missoula.¹⁵⁵

Ongoing problems with law enforcement responses to domestic and sexual violence that are inconsistent with constitutional and international human rights principles call for renewed attention as a matter of civil rights concern.¹⁵⁶ Studies suggesting that poor women and women of color may be at greatest risk of law enforcement under-responsiveness to their calls for assistance highlights the importance of renewed attention.¹⁵⁷

Although current problems may not be of the stark magnitude that led to reform in the 1980's, they highlight the need for more nuanced, but no less rigorous, responses. The trajectory of U.S. Supreme Court precedent, ongoing problems with law enforcement's response to gender violence, and developing international human rights norms support shifting attention to civil rights remedies for gender violence that advance institutional accountability for law enforcement's meaningful response.

III. FEDERAL CIVIL RIGHTS CASELAW

Ongoing enforcement problems raise the question of the effectiveness of Section 1983 in ensuring law enforcement accountability for gender-biased policing. That inquiry reveals a nuanced landscape. Popular accounts would suggest that the Supreme Court's *Castle Rock* decision eliminated all avenues of

151. *Id.* at 58.

152. *Id.*

153. *Id.*

154. See Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty, at 15, 16 (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

155. See Press Release, U.S. Dep't of Justice, Justice Department Announces Investigations (May 1, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-crt-561.html>.

156. This would not preclude new civil rights remedies holding individuals accountable.

157. See, e.g., Special Rapporteur, *supra* note 122, at paras. 50-61; Inter-Am. Comm'n, *supra* note 34 at para. 161; see also, e.g., Frye et al., *supra* note 113.

redress when law enforcement fails to enforce a protective order.¹⁵⁸ The decision in fact was more limited. The Court rejected procedural due process claims as a basis for enforcing protective orders.¹⁵⁹ However, procedural due process had not been the theory most commonly used for holding law enforcement accountable for reasonably responding to domestic and sexual violence calls. Other theories, notably those grounded in procedural due process, had been invoked more frequently than procedural due process as a basis for holding law enforcement accountable to domestic and sexual violence survivors.¹⁶⁰ That said, even though those theories of recovery formally remain available, the scope of relief has narrowed in recent years.¹⁶¹ This section outlines the scope of still-available relief.

A. SUBSTANTIVE DUE PROCESS AND “STATE-CREATED DANGER”

Modern Supreme Court caselaw has been marked by decisions limiting civil rights redress for violence within the family. One early such decision was the landmark case, *DeShaney v. Winnebago County Board of Social Services*.¹⁶² The case involved allegations that a county department of social services had violated a boy’s substantive due process rights by not removing him from his father’s custody, despite allegations that the department had reason to believe that the father was abusive to him.¹⁶³ The Court rejected the claim and concluded that a State’s failure to protect an individual against private violence does not constitute a due process violation.¹⁶⁴ In its reasoning, however, the Court identified exceptions under which a state may be liable for failing to carry out its duties. Those include claims based on a showing of a “special relationship” with law enforcement, for example, through a relationship created by taking someone into custody,¹⁶⁵ or, more pertinent to domestic violence-related claims, by putting

158. See, e.g., Linda Greenhouse, *Justices Rule Police Do Not Have a Constitutional Duty to Protect Someone*, N.Y. TIMES, June 28, 2005, at A17, available at <http://www.nytimes.com/2005/06/28/politics/28scotus.html>; Fred Barbash, *Court Backs Town in Lawsuit Over Domestic Violence; Justices Allow Police Wide Discretion*, WASH. POST, June 28, 2005, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062700580.html>; *Court: Police Can’t be Sued for Not Enforcing Restraining Order*, THE DENVER CHANNEL, June 27, 2005, available at <http://www.thedenverchannel.com/news/4655165/detail.html>.

159. *Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005).

160. See *supra* notes 65-66, and accompanying text.

161. See *infra* Part III. See also, e.g., Oren, *supra* note 66 (noting that the Supreme Court may not be favorably disposed to the state-created danger exception).

162. 489 U.S. 189, 200-01 (1989).

163. *Id.* at 191-92.

164. *Id.* at 196-97.

165. *Id.* at 200-01. Claims based on this “exception” may be thought of as “special relationship” claims. See, e.g., Borgmann, *supra* note 65, at 1304-07 (1990) (highlighting *DeShaney* Court’s requirements for satisfying the “special relationship” theory in battered women’s cases). Most courts hold that a “special relationship” would only be established when the state takes a person into custody and holds her through affirmative exercise of its power, a standard that is not often satisfied in claims by gender violence victims and their families. See, e.g., *Hudson v. Hudson*, 475 F.3d 741, 745 (6th Cir. 2007)

someone in a more dangerous position than that which she otherwise would have experienced.¹⁶⁶

As a result, notwithstanding the *DeShaney* holding, survivors may hold law enforcement accountable under the state-created danger theory if they can establish that the officers' affirmative conduct created or increased their risk of private violence.¹⁶⁷ For example, in *Okin v. Village of Cornwall*, the Second Circuit Court of Appeals upheld the substantive due process and municipal liability claims of Michele Okin based on allegations that, despite her repeated calls for police assistance, the police neither arrested her former partner Roy Charles Sears, nor interviewed him at any length about her allegations.¹⁶⁸ The officers' actions, such as discussing football with Sears in response to Okin's complaint that Sears had beaten and tried to choke her, transmitted a message that Sears would not suffer any consequences for his acts of violence.¹⁶⁹ Similarly, officers' failure to intervene or to arrest in response to Sears' comments that he could not "help it sometimes when he smacks Michele Okin around," and officers' failure to file a domestic incident report, to interview Sears, or to make an arrest in response to Okin's numerous allegations of abuse, further supported the Court's conclusion that the officers' actions constituted affirmative conduct that created or increased the risk of violence to her.¹⁷⁰

(granting of protection order does not create a special relationship between police officers and individual who petitioned for the order); *Jones v. Union Cnty.*, 296 F.3d 417 (6th Cir. 2002) (law enforcement failure to serve protective order on ex-husband didn't create special relationship); *Betran v. El Paso*, 367 F.3d 299, 306 (5th Cir. 2004) (911 dispatcher advice suggesting that plaintiff stay in the bathroom and telling her that police were on their way did not create special relationship because the dispatcher did not affirmatively place her in custody); *Gardner v. Luzerne Cnty.*, 645 F. Supp. 2d 325, 334-35 (M.D. Pa. 2009) (bail bond agreement signed by domestic violence victim didn't establish custodial relationship); *Dudosh v. Allentown*, 722 F. Supp. 1233, 1234-35 (E.D. Pa. 1989) (law enforcement escorting domestic violence victim to confront her assailant despite knowledge of protective order and his prior dangerous conduct didn't establish custodial relationship).

166. *DeShaney*, 489 U.S. at 200-01. For discussion of the state-created danger exception, see, e.g., Laura Oren, *Safari Into the Snakepit: the State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165 (2005). See also, e.g., Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280 (1990) (enumerating theories); Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788 (1986).

167. See, e.g., Oren, *supra* note 56 (collecting cases); see also Atinuke O. Awoyomi, *The State-Created Danger Doctrine in Domestic Violence Cases: Do We Have a Solution in Okin v. Village of Cornwall-on-Hudson Police Department?*, 20 COLUM. J. GENDER & L. 1 (2011); Milena Shtelmakher, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations*, 43 LOY. L.A. L. REV. 1533 (2010); Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177 (2002); see also, e.g., Peter Bachrach & Marton S. Baratz, *Decisions and Nondecisions: An Analytic Framework*, 57 AM. POL. SCI. REV. 632, 641-42 (1963) (identifying non-decision-making as action that is discernable and subject to analysis).

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

169. *Id.* at 430.

170. *Id.* at 431. The court additionally upheld Okin's claims that the officers' affirmative creation or enhancement of the risk of violence to her shocked the conscience, given that the "serious and unique

Other courts similarly have upheld substantive due process and municipal liability claims when a survivor identified a pattern of conduct, such as a failure to interview, to investigate, or to take any meaningful steps to determine whether arrest or further law enforcement action was warranted.¹⁷¹ Courts seem particularly responsive to these claims when the alleged abuser either was a law enforcement officer, or was friends or otherwise associated with local law enforcement.¹⁷²

But other claims have not been as successful,¹⁷³ and the contours of the doctrine are hard to draw.¹⁷⁴ For example, it is difficult to reconcile the *Okin*

risks and concerns of a domestic violence situation are well known and well documented.” *Id.* at 431-32. The court further upheld her claims of municipal liability based on allegations that the police department maintained a custom of acquiescing in the officers’ misconduct and that the “patterns of misconduct” suggested training “so inadequate” as to give rise to an inference of deliberate indifference.” *Id.* at 440.

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

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

173. *See, e.g., Smithers v. Flint*, 602 F.3d 758 (6th Cir. 2010) (no liability when law enforcement officers arrested girlfriend for trespass, not domestic violence, and released her from custody; no suggestion that she would be held for period of time and actions may have been seen as reasonable); *Culp v. Rutledge*, 343 F. App’x 128 (6th Cir. 2009) (no liability notwithstanding law enforcement assurance that abusive partner would be arrested, he was not arrested, and subsequently shot the mother of ex-girlfriend); *Burella v. Philadelphia*, 501 F.3d 134 (3d Cir. 2007) (no liability notwithstanding long history of physical and emotional abuse, numerous reported incidents and purported violation of protective order; officer’s failure to act not an affirmative misuse of authority); *Hudson v. Hudson*, 475 F.3d 741 (6th Cir. 2007) (no liability when law enforcement made no attempt to find husband after wife called police department alleging violations of protective order and he subsequently killed her and two friends; inaction not an “affirmative act”); *Pinder v. Johnson*, 54 F.3d 1169, 1175-76 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995) (no affirmative act when boyfriend set house on fire and killed plaintiff’s children after police responded to her call for help, assured her that he would be locked up overnight, but released him). *See also, e.g., Estate of Vordermann v. City of Edgerton*, No. 09-cv-443-wmc, 2010 WL 3788669 (W.D. Wis. Sept. 23, 2010) (plaintiffs arguably may have offered “just enough” facts to conclude that officers increased the danger to decedent by persuading her to return home, but rejecting claim because officers’ reasons for doing so failed to “shock the conscience”); *Mayrides v. Del. Cnty.*, 666 F. Supp. 2d 861, 868 (S.D. Ohio 2009) (“hesitant[ly]” dismissing claim that police response to 911 call enhanced the danger to domestic violence caller, noting that “facts of a particular case” are key to determining the existence of a violation).

174. *Accord, Oren, supra* note 56, at 51 (arguing that it is difficult to find a “principled difference” between cases upholding and rejecting state-created danger arguments).

court's conclusion that law enforcement's comments and actions in response to repeated calls for assistance constituted affirmative conduct that increased the survivor's risk of violence with the Sixth Circuit Court of Appeals' reasoning in *Brooks v. Knapp*.¹⁷⁵ There, Brenda Hernandez repeatedly called the police after incidents of threats and protective order violations by her husband, Gilbert Hernandez, and made complaints that he had a gun and that he threatened to kill her.¹⁷⁶ In what was to be the final incident, the police were called after Mr. Hernandez physically assaulted her and ripped the phone out of the wall when she tried to call for help.¹⁷⁷ The police arrived and put him in the back of a squad car, but did not handcuff him; the police allowed him to make phone calls, and, instead of arresting him, released him.¹⁷⁸ A few hours later, he broke into the house, shot and killed Mrs. Hernandez, and killed himself.¹⁷⁹ In the subsequent section 1983 action by surviving family members, the court did not even analyze whether the officers' acts of releasing Mr. Hernandez and of providing assurances to Mrs. Hernandez that additional patrols would be provided constituted affirmative acts that exposed her to increased risk of danger; instead the court rejected her substantive due process claim on the basis that the officers took no affirmative act.¹⁸⁰

B. EQUAL PROTECTION

Other cases have invoked equal protection theories to challenge law enforcement approaches to domestic violence claims.¹⁸¹ Courts have upheld arguments that law enforcement policies that treat domestic violence calls less seriously than non-domestic violence calls could deny equal protection based on sex.¹⁸² Evidence such as statistical data showing that non-domestic violence complaints were more likely to lead to arrest than comparable domestic violence complaints,¹⁸³ or that police officers were trained to "defuse" domestic violence

175. 221 F. App'x 402 (6th Cir. 2007).

176. *Id.* at 404-05.

177. *Id.* at 405.

178. *Id.*

179. *Id.*

180. *Id.* at 407.

181. For discussion of equal protection arguments, see, e.g., Erica Franklin, *When Domestic Violence and Sex-Based Discrimination Collide: Civil Rights Approaches to Combating Domestic Violence and its Aftermath*, 4 DEPAUL J. FOR SOC. JUST. 335 (2011); Niji Jain, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability through the Equal Protection Clause*, 60 EMORY L.J. 1011 (2011); Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295 (1995).

182. See, e.g., *Macias v. Ihde*, 219 F.3d 1018, 1027-28 (9th Cir. 2000); *Navarro v. Block*, 72 F.3d 712, 716-17 (9th Cir. 1995); *Hynson v. City of Chester*, 864 F.2d 1026, 1030-31 (3d Cir. 1988), *on remand*, 731 F. Supp. 1236 (E.D. Pa. 1990); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1988); *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528-29 (D. Conn. 1984).

183. See, e.g., *Hynson*, 864 F.2d at 1030; *Watson*, 857 F.2d at 696.

situations and to arrest only as a last resort,¹⁸⁴ might allow a jury to infer discriminatory intent. The Ninth Circuit Court of Appeals has gone so far as to conclude that policies distinguishing domestic violence from non-domestic violence calls could fail even the rational basis test under the Equal Protection Clause.¹⁸⁵

The Department of Justice has recognized that inaction in the form of practices that underserve certain communities also can violate equal protection.¹⁸⁶ Practices such as failing to investigate sexual assault and domestic violence may constitute such discriminatory practice.¹⁸⁷ Evidence that police downgrade sexual assault complaints or deem them “unfounded” may reflect gender bias.¹⁸⁸ Data-driven evidence, for example, that a jurisdiction has responded to fewer forcible rapes than murders, also suggests policing policies and practices that do not take gender-based crimes such as domestic and sexual violence seriously.¹⁸⁹ Evidence that a jurisdiction fails to discipline officers who have been accused of domestic violence also may indicate equal protection violations.¹⁹⁰

Officers’ use of stereotyped comments also could support equal protection claims.¹⁹¹ For example, stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about victims’ perceived credibility, sexual history, or delay in contacting law enforcement, may skew law enforcement responses.¹⁹² Law enforcement may downgrade sexual assault complaints without conducting a fact-based investigation.¹⁹³ Investigations may focus on proving an allegation to be false, or on the victim’s trustworthiness, or may otherwise rely on stereotypes, for example, by asking victims why they did not resist, why they put themselves in certain

184. *Id.*

185. *See Navarro*, 72 F.3d at 717.

186. NOPD Investigation, *supra* note 143, at 32.

187. *Id.* at 43-51. The Department detailed a range of problems in New Orleans, including inadequate policies, training and supervision, improper classification of complaints, and inadequate investigations. *Id.*

188. *Id.* at 45. *See, e.g.,* Testimony of Carol E. Tracy, Exec. Dir., *Women’s Law Project, before the Senate Committee on the Judiciary Subcommittee on Crime and Drugs, Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases* (Sept. 14, 2010), available at <http://www.judiciary.senate.gov/pdf/09-14-10%20Tracy%20Testimony.pdf>; CASSIA SPOHN & KATHARINE TELLIS, *POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE* (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf>.

189. *See, e.g.,* PRPD Investigation, *supra* note 149, at 57-58.

190. *Id.* at 58.

191. *See, e.g.,* *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 700 (9th Cir. 1988); (recognizing that comments such as an officer’s response to plaintiff’s domestic violence complaint by stating that he “did not blame plaintiff’s husband for hitting her, because of the way she was ‘carrying on,’” “strongly suggest” an intention to treat domestic violence claims less seriously than other assaults as well as an “animus against abused women”).

192. NOPD Investigation, *supra* note 143, at 43.

193. *Id.* at 45-46.

situations, and why they did not immediately disclose the assault to police, family, or friends.¹⁹⁴ Investigators may perpetuate stereotypes, for example, by asking blaming or leading questions.¹⁹⁵ They may rely on characterizations rather than the victims' own first-hand account, and may rarely question suspects.¹⁹⁶ Notwithstanding the prevalence of these practices, equal protection claims generally have proven to be difficult to sustain, primarily due to the challenges of establishing discriminatory intent or motive.¹⁹⁷

C. (IN)ADEQUACY OF RELIEF

The resulting doctrine under section 1983 charts a patchwork of potential arguments that set a high threshold for relief. Unless a survivor can prove that an officer took affirmative acts that increased the risk of private violence or that a policy intentionally was implemented to discriminate on the basis of gender or another prohibited ground, section 1983 will not afford relief. The preceding summary of federal civil rights doctrine highlights both the formal availability of theories for redress and those theories' practical limitations as remedies for survivors.¹⁹⁸ For example, the current section 1983 framework would hold law enforcement accountable for cases in which officers took action that might be

194. *Id.* at 46.

195. *Id.* at 47-48. For example, in an interview of a teenager who reported being assaulted by her mother's boyfriend, a detective recounted that in the victim's explanation of whether she resisted, she "didn't yell or scream, nor did she try to use her cell phone to call her mom or the police." *Id.* The detective noted that "the accused never threatened or implied to have a weapon or cause her physical harm." *Id.* at 48. He described the victim and her mother's demeanor as "very nonchalant." *Id.* In other cases, investigators may preclude investigations based on erroneous conclusions that forensic evidence would not be available if not immediately reported. *Id.* at 49.

196. *Id.*

197. *See, e.g.,* *Soto v. Flores*, 103 F.3d 1056, 1063-64 (1st Cir. 1997); *Eagleston v. Guido*, 41 F.3d 865, 876-78 (2d Cir. 1994); *Ricketts v. City of Columbia*, 36 F.3d 775, 779-82 (8th Cir. 1994); *Brown v. Grabowski*, 922 F.2d 1097, 1114, 1119 (3d Cir. 1990); *McKee v. City of Rockwall*, 877 F.2d 409, 414-15 (5th Cir. 1989); *Hynson v. City of Chester*, 731 F. Supp. 1236, 1241. The viability of a particular claim rests on case-specific fact-intensive inquiries. *See, e.g.,* *Beltran v. City of El Paso*, 367 F.3d 299, 306-07 (5th Cir. 2004) (rejecting equal protection argument due to lack of evidence of discriminatory intent and causation, notwithstanding Fifth Circuit Court of Appeals recognition of the equal protection theory in domestic violence cases in *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000), *overruled on other grounds* by *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc)).

198. State remedies also may be available, but may take similarly restrictive approaches. *See, e.g.,* *Valdez v. City of New York*, 18 N.Y.3d 69 (N.Y. 2011) (rejecting domestic violence survivor's negligence claim against police after her estranged boyfriend shot her after her call to police in which a law enforcement officer assured her that he would be arrested immediately). Other courts, however, have recognized that victims may have a remedy for law enforcement officers' willful and wanton violation of a statutory duty created under a state Domestic Violence Act. *See, e.g.,* *Calloway v. Kinkelaar*, 659 N.E.2d 1322 (Ill. 1995); *see also, e.g.,* *Matthews v. Pickett Cnty.*, 996 S.W. 2d 162 (Tenn. 1999) (rejecting "public duty" defense to negligence action because restraining order created "specific duty" to protect plaintiff); *Campbell v. Campbell*, 682 A.2d 272, 274 (N.J. Super. Ct. 1996) (finding non-discretionary duty to enforce restraining order); *Donaldson v. Seattle*, 831 P.2d 1098, 1103 (Wash. Ct. App. 1992) (law enforcement officer has mandatory duty to arrest in domestic violence cases); *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983) (en banc) (statute's mandatory restraining order directive created "specific duty" for the "benefit of individuals previously identified by judicial order).

deemed to encourage private violence, but not in cases of flat inaction; for cases in which policies could be proved to be intentionally discriminatory, but not for those that inadvertently discriminate.

We should ask whether this framework encourages meaningful and effective responses. Some worry that limitations of the current framework will encourage law enforcement to ignore domestic violence calls, which would produce a return to the widely critiqued circumstances that led to the adoption of mandatory arrest policies in the first place.¹⁹⁹ Others have raised concerns that the framework encourages survivors and community members to take the law into their own hands when trained law enforcement officers could respond more effectively.²⁰⁰ Still others argue that, as a form of under-enforcement, law enforcement's failure appropriately to respond to domestic violence claims casts doubt on the legitimacy of the criminal justice system.²⁰¹

The inconsistencies and limitations of the current framework should be challenged. As Natapoff has argued, a response to the problem of under-enforcement calls for a different approach to police responsiveness, not simply for more policing.²⁰² Advocacy urging a more responsive role for the state could bring the United States into greater compliance with international human rights directives.²⁰³ Arguments advocating a reimagined state role in addressing the needs of those who are most vulnerable reflect a similar vision.²⁰⁴ One might consider challenges to the negative rights philosophy reflected in *DeShaney v. Winnebago* and *Castle Rock v. Gonzales* as a way to lay a foundation for a more nuanced and effective floor for state intervention.²⁰⁵ Congress could chart an approach to state accountability more in line with international human rights standards and could recognize states' positive obligations to hold law enforcement accountable for exposing survivors to danger.²⁰⁶ It could propose a

199. G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405, 424 (2009) (arguing that recent decisions have eviscerated mandatory law enforcement intervention).

200. Fenton, *supra* note 7, at 406.

201. Natapoff, *supra* note 16, at 1775.

202. *Id.* at 1773.

203. See *supra* notes 35-37, and accompanying text.

204. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 273-75 (2010); Laura Spitz, *Theorizing the More Responsive State: Transcending the National Boundaries of Law*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* (Martha A. Fineman ed., 2011).

205. Future scholarship could address how arguments challenging the *DeShaney* doctrine might be fashioned.

206. See, e.g., G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133 (2000) (critiquing the *DeShaney* Court's approach to the role of the state in establishing accountability for responding to domestic violence); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005) (urging frameworks of state accountability for law enforcement responses to domestic violence); Oren, *supra* note 56 (arguing that both *DeShaney* and

statutory response to *Castle Rock* confirming that law enforcement officers' actions, or inaction, may constitute affirmative conduct that increases victims' vulnerability to violence and is actionable under section 1983.²⁰⁷ Short of that transformative vision, litigation could challenge, or at least aim to clarify, the distinction reflected in the state-created danger exception between action and inaction.²⁰⁸ At a minimum, increased public attention to, and discussion of, the shortcomings and successes of law enforcement intervention, framed in the language of human or civil rights, would generate dialog that could inform productive new initiatives.²⁰⁹

IV. ACCOUNTABILITY REIMAGINED

A reimagined civil rights approach would take a fresh look at how civil rights frameworks could support law enforcement accountability. Current approaches to police over-enforcement include litigation-based remedies (for example, through claims under Section 1983), administrative accountability, and community-based campaigns. New approaches to under-enforcement similarly could tap formal mechanisms authorizing administrative accountability as well as community-organizing efforts. This section elaborates on forms those approaches might take. Although these solutions may not eliminate the problem, they can expand the range of options available to those affected by under-enforcement.

A. ADMINISTRATIVE REMEDIES

A reimagined civil rights response might include remedies other than traditional civil litigation. If law enforcement's under-responsiveness to domestic and sexual violence claims were to be viewed on the continuum of police misconduct, a range of remedies would come into view. For example, two federal statutes authorize Department of Justice investigations of claims that law enforcement officers and criminal justice agencies discriminate on enumerated protected grounds,²¹⁰ or engage in a pattern or practice of violating the

Castle Rock are wrong and should be challenged). For additional suggestions for doctrinal reform, see, e.g., Awoyomi, *supra* note 167; Barrett, *supra* note 167; Shtelmakher, *supra* note 167.

207. In other words, a federal statutory response could codify the approach of the *Okin* court.

208. See, e.g., Oren, *supra* note 66. Alternatively, state statutes or constitutions could provide the substantive foundation for establishing states' obligations to provide a minimum level of security, in gender violence and other similar claims. See, e.g., Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims under State Constitutions via Analogous 'Bivens' Actions*, 110 COLUM. L. REV. 1294 (2010) (urging state constitutional remedies); Kathryn E. Litchman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOY. U. CHI. L.J. 765 (2007) (urging state legislative remedies).

209. See generally, e.g., Schneider et al., *supra* note 59, at 115-18 (discussing advocacy strategies).

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

constitution of federal law.²¹¹ These laws identify somewhat different prohibitions and procedural requirements,²¹² and both contemplate injunctive relief rather than compensation.²¹³ Nevertheless, they both afford vehicles for investigation and review of law enforcement practices that offer an alternative to private litigation.²¹⁴

Although both federal statutes most often address cases of racial misconduct,²¹⁵ their statutory scope encompasses cases involving gender-based discrimination and abuse.²¹⁶ Recent investigations have found gender-biased police practices, such as the failure to investigate sexual and domestic violence, and inadequate policies, procedures, and training with respect to sexual and domestic violence cases, among identified patterns and practices of police misconduct.²¹⁷

211. See 42 U.S.C. § 14141 (2010) (authorizing civil action by Attorney General upon reasonable cause to believe that a program or activity receiving Office of Justice Programs funding violates the federal constitution or statutory law). This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994).

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

213. 42 U.S.C. § 14141 authorizes a civil action by the Attorney General for “equitable and declaratory relief to eliminate the pattern or practice.” 42 U.S.C. § 14141(b) (Westlaw). 42 U.S.C. § 3789d contemplates injunctive or other relief “as necessary or appropriate to insure the full enjoyment of the rights proscribed in this section, including . . . repayment” of the OJP funds, 42 U.S.C. § 3789d(c)(3), and authorizes recovery of attorney fees by a prevailing plaintiff in the event a private person brings a civil action to enforce compliance after exhaustion of her administrative complaint with DOJ. 42 U.S.C. § 3789d(c)(4)(B) (Westlaw). For a discussion of the Department of Justice’s enforcement practices with respect to these statutes, see, e.g., Civil Rights Div., *Conduct of Law Enforcement Agencies*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/about/spl/police.php> (last visited Oct. 2, 2012).

214. For general discussion of these statutes, and of administrative oversight of law enforcement accountability, see, e.g., Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93 (2012); Simmons, *supra* note 14; Kami C. Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Accountability*, 59 CATH. U. L. REV. 373 (2010); Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3 (2003); Walker & McDonald, *supra* note 130, at 502-16.

215. See, e.g., Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 161-64 (1998) (noting that § 14141 was enacted in response to the police brutality committed against Rodney King and others); Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 732-36 (2004) (discussing use of 42 U.S.C. §§ 3789d and 14141 to redress racial profiling).

216. 42 U.S.C. § 3789d explicitly prohibits sex discrimination among the enumerated types of prohibited activities; 42 U.S.C. § 14141 prohibits sex discriminatory practices by prohibiting conduct protected by the “Constitution or laws of the United States,” which would include those guaranteeing equal protection, and those prohibiting sex discrimination.

217. For discussion of these investigations, see *supra* notes 141-155 and accompanying text.

At least one investigation led to oversight of domestic violence committed by law enforcement officers.²¹⁸ These reports demonstrate the potential of viewing responses to gender-based violence on the police misconduct continuum.

Administrative responses through Department of Justice investigation can offer a useful alternative to private litigation as a mechanism for complaint, investigation and oversight.²¹⁹ The administrative approaches created under 42 U.S.C. §§ 14141 and 3789d have several advantages to traditional private litigation. Individuals can seek investigations regardless of whether they have a lawyer or can afford court fees. Administrative enforcement therefore addresses some inherent limits of the private enforcement scheme favored under most federal civil rights laws.²²⁰ The approach squarely frames problems of law enforcement accountability as a civil rights problem, and creates the potential for a uniform federal floor for accountability. Even though limited investigatory resources and the relatively high “pattern or practice” threshold for intervention likely render this a remedy that would be invoked in select cases only, it can be a valuable tool for institutional reform.²²¹

On the other hand, the departmental capacity for undertaking investigations will be constrained by the availability of administrative resources, which may vary depending on the administration in office.²²² Since the statutes do not authorize a direct, private right of action, and since they set a threshold of liability for patterns or practices of wrongdoing, they may not afford redress in individual cases of misconduct.²²³ In addition, they do not authorize financial compensation, which may render them unappealing and inadequate for complainants seeking compensation for financial losses in addition to changes in policies and practices.

218. An investigation resulted in a consent decree in *United States v. City of Pittsburgh*, which, *inter alia*, required documentation of all claims or suits in which a police officer is named in a domestic violence matter. *See Consent Decree, United States v. City of Pittsburgh*, U.S. DEP’T OF JUSTICE, Apr. 16, 1997, at para. 12a, <http://www.justice.gov/crt/about/spl/documents/pittssa.php>.

219. For discussion of the efficacy of 42 U.S.C. § 14141, *see, e.g.*, U.S. DEP’T OF JUSTICE, TAKING STOCK: REPORT FROM THE 2010 ROUNDTABLE ON THE STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM (42 U.S.C. § 14141) (2011); *see also, e.g.*, Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 20-21 (2009) (discussing scholarly response to 42 U.S.C. § 14141).

220. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); *cf.* Johnson, *supra* note 136 (urging expanded concept of Fair Housing Act’s administrative enforcement scheme).

221. *See, e.g.*, Harmon, *supra* note 219 (discussing promises and limitations of Section 14141, and proposing strategies for more impactful implementation).

222. For a discussion of this and other critiques, *see, e.g., id.* at 20-21.

223. Under 42 U.S.C. § 3789d, an individual can bring a private suit, but only after exhausting the administrative complaint procedure after filing a complaint with the offending program. 42 U.S.C. § 3789d(c)(4)(A) (West, Westlaw through P.L. 112-140 & 112-141).

Nevertheless, steps can be taken to build on these existing enforcement mechanisms. For example, federal legislation might confirm that the Department of Justice's existing civil rights investigatory authority applies to all state agencies involved in the investigation and prosecution of domestic and sexual violence.²²⁴ An administrative guidance might confirm the Department of Justice's investigatory authority to investigate claims of gender-biased law enforcement practices.²²⁵ Expanding the range of available remedies and publicizing their availability can go a long way toward shifting our popular understandings and promoting needed redress.

B. COMMUNITY RESPONSE

To some extent, the absence of a widespread call for reform reflects the fact that public discourse and rhetoric do not frame under-policing of gender violence as a matter of civil or human rights. It follows that increased public education and community organizing could support reinvigorated reform. For example, community organizer Ejim Dike argues that community members may not know that United States law currently does not impose a duty on the government to provide protection from violence perpetrated by private actors.²²⁶ Campaigns to increase awareness of the limitations of current accountability schemes could generate engaged discussion and activism. They could foster new collaborations between grassroots groups and human rights projects that frame gender violence as a human rights violation.²²⁷ As an issue that spans racial and gender justice concerns, under-policing of gender violence could support new coalitions and partnerships.²²⁸ For example, the *Lenahan* decision has prompted organizing and activism by battered mothers who lost custody of their children, and has spurred

224. By authorizing Department of Justice investigations into discriminatory or otherwise unconstitutional law enforcement practices, that approach would be similar to the proposals enumerated in the Civil Rights Restoration Acts of 2001 and 2003, which, *inter alia*, would authorize civil action by the Attorney General for equitable relief upon "[r]easonable cause to believe that any State or political subdivision of a State . . . or other person acting on behalf of a State or political subdivision of a State has discriminated on the basis of gender in the investigation or prosecution of gender-based crimes and that discrimination is pursuant to a pattern or practice of resistance to investigating or prosecuting gender-based crimes." Violence Against Women Civil Rights Restoration Act of 2003, H.R. 394, 108th Cong. (2003); Violence Against Women Civil Rights Restoration Act of 2001, H.R. 429, 107th Cong. (2001).

225. For example, a guidance analogous to the Department of Justice' guidance of the use of race in law enforcement could elaborate impermissible gender-biased practices. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

226. See Ejim Dike, *Community Organizing*, in Schneider, et al., *supra* note 59 at 117-18.

227. *Id.* at n.27 (referencing examples including the Center for Women's Global Leadership "16 Days of Activism" campaign; International Human Rights Day, Dec. 10; International Women's Day, March 8; periodic reports due to international human rights treaty bodies).

228. See, e.g., WOMEN'S JUST. CTR., <http://justicewomen.com/index.html> (last visited Oct. 3, 2012) (calling for greater law enforcement accountability as a matter of gender equality); *NY Bill of Rights*, NAT. DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/ny-bill-of-rights> (last visited Oct. 3, 2012) (describing successful campaign to promote legislative reform for domestic workers' working conditions).

U.S.-based domestic violence advocacy efforts to incorporate human rights premises into their advocacy in family court matters.²²⁹ This type of activism could generate fresh approaches to law reform as well as policy-based change at the local level.

New remedies, even if limited in scope, could spur community organizing and activism demanding accountability from local law enforcement agencies. The recent DOJ investigations confirming the Department's statutory authority to investigate instances of systemic under-enforcement of crimes that disproportionately impact women could form the basis for public education or organizing campaigns urging local speak-outs, public conversations, and advocacy to hold local officers accountable. The specter of potential federal investigation could offer a new tool for local activists frustrated by the limited avenues of redress through traditional litigation. The "civil rights" or "human rights" frame affords a different lens through which community groups can address longstanding problems of inequality and discrimination.²³⁰

Local human rights resolutions affirming that freedom from domestic violence is a basic human right constitute one such approach. Law school clinics in Cincinnati, Baltimore and Miami drafted human rights ordinances, each of which subsequently were adopted by their respective local city councils.²³¹ Those resolutions now can be used to advance public awareness and constitute an additional tool to support legal and policy-driven advocacy on behalf of survivors and their families.

V. LIMITATIONS AND CONCERNS

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

229. Bettinger-Lopez, *supra* note 13, at 191-92.

230. See, e.g., N.Y. CITY HUM. RTS. INITIATIVE, <http://www.nychri.org> (last visited Oct. 2, 2012) (describing local initiatives to enact human rights laws).

231. See, e.g., Resolution Expressing the Board's Intent to Declare that the Freedom from Domestic Violence is a Fundamental Human Right, Miami-Dade County, Fla., Res. R-644-12 (July 17, 2012), available at <http://www.miamidade.gov/govaction/matter.asp?matter=121380&file=true&yearFolder=Y2012>; Declaring that freedom from domestic violence is a fundamental human right, Cincinnati, Ohio, Resolution 47-2011 (Oct. 5, 2011), available at http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/33497.pdf;jsessionid=29F32575A142D399B4BDDAA85FCSFBB7?rpp=-10&m=2&w=doc_no%3D'201101139'; Freedom from Domestic Violence is a Fundamental Human Right, Baltimore, Md., Resolution 12-0034 (Mar. 19, 2012), available at http://www.baltimorecitycouncil.com/Council_Journal/12-03-198th.pdf. See also Schneider, et al., *supra* note 59, at 119; Memorandum from Jennifer Cunningham-Minnick et al., Law Students at the Univ. of Cincinnati Coll. of Law, To be Free from Domestic Violence is a Fundamental Human Right (Oct. 5, 2011), available at <http://bit.ly/KaBF1W> (memorandum supporting Cincinnati Resolution 47-2011).

A. OVER-CRIMINALIZATION

One issue raised by proposals to promote law enforcement accountability is the concern that responses would exacerbate the current emphasis on law enforcement interventions for domestic and sexual violence. As others have detailed, the extent to which criminal justice interventions have dominated the United States' legal and policy-based response to domestic and sexual violence has proved problematic, particularly for undocumented survivors, for those in communities of color, and for the LGBT community.²³² Over-incarceration of people of color and criminal justice policies that disproportionately target communities of color have led to widespread distrust of law enforcement.²³³ Many will not turn to the criminal justice system for help because of widespread violence against women of color perpetrated by the state.²³⁴ Battered immigrant women face the additional possibility that seeking help from the criminal justice system will expose them, or their partners, to the risk of deportation.²³⁵ LGBT survivors similarly may resist criminal justice interventions because of fears that law enforcement either will not respond, will arrest and criminalize both parties, or will respond with homophobic comments that further subject them to abuse.²³⁶

However, the question of the wisdom of supporting law enforcement initiatives as a preferred policy response to gender violence is analytically distinct from the question of whether law enforcement should be accountable when survivors affirmatively seek intervention.²³⁷ Critiques of over-criminaliza-

232. See, e.g., BUMILLER, *supra* note 91; MOGUL ET AL., *supra* note 116; JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009); RICHIE, *supra* note 92; SMITH ET AL., *supra* note 92; Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 J. LAW & POL'Y 13, 33-35 (2011); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, in *DOMESTIC VIOLENCE AT THE MARGINS* 50 (Natalie J. Sokoloff & Christina Pratt eds., 2005); Leigh Goodmark, *Autonomy Feminism: An Anti-essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009).

233. See, e.g., RICHIE, *supra* note 92, at 99-124 (tracing connections between black women, male violence and increasing criminalization and imprisonment); SMITH ET AL., *supra* note 92, at 11 (describing, *inter alia*, the criminal justice system's disproportionate punishment of people of color, and violence by law enforcement against women of color); see generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012) (detailing effects of criminalization of African Americans).

234. Smith et al., *supra* note 92; see also, e.g., Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* (2006).

235. See, e.g., Leigh Goodmark, *Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 36-37 (2004). For example, the increase in dual arrests leads battered immigrant women who have been arrested to plead guilty to avoid jail time and reduce the risk that their children will be removed by child protective services, but exposes them to the possibility of deportation. *Id.* at 37. Battered immigrant women may not want to call the police because they may not want their abuser to be subject to deportation, or because of fear that exposing an abusive partner to the risk of deportation may trigger further violence. *Id.*

236. See MOGUL ET AL., *supra* note 116, at 132-40.

237. Cf., e.g., Fenton, *supra* note 7, at 392-93 (arguing that police discretion leads to both over and under enforcement in poor communities and in communities of color); Miccio, *supra* note 199, 414-15 (describing battered women's movement's dual concerns with under-enforcement in domestic violence cases and with an aversion to partnering with the state).

tion should not mitigate the importance of consistent and non-discriminatory responses when survivors choose to reach out to law enforcement for assistance.²³⁸ Advancing law enforcement accountability when survivors seek intervention would further, not thwart, efforts to support survivors' agency and empowerment.²³⁹ Advocating for responsive and non-discriminatory policing is not a wholesale endorsement of criminal justice based responses. Instead, a call challenging over- as well as under-policing as misconduct reflects a practical, if incremental, approach to civil rights reform.

B. ENGAGING WITH THE STATE

An additional concern may rest with the challenges associated with state intervention. The history of feminists' calls for increased state responsiveness has been mixed at best. For example, within the context of domestic violence, state involvement has meant an increase of funding and resources for a wide range of services. Yet some argue that engagement with the state comes at a high price. For example, Leigh Goodmark argues that anti-domestic violence advocates have invested power in the state at the expense of grounding policy in the voices of survivors.²⁴⁰ Kristin Bumiller elaborates the complications of relying on the state for assistance, and argues that well-meaning reforms may even worsen dependencies.²⁴¹ On the other hand, feminists also propose reforms that would allocate resources to support a more responsive state.²⁴²

These concerns raise significant issues that must be parsed in the context of particular proposed reforms. Here, the proposal to bolster avenues for checking misuse of state power would give voice to survivors' experiences, and should not exacerbate the concerns about state supervision or state-supported dependency that have been the core of objections to a more robust state response. That said, charting an appropriate role for state intervention requires a delicate balance, one that is subject to checks and balances by government and community groups alike.

CONCLUSION

Framing law enforcement under-responsiveness to gender violence through the lens of under-enforcement allows a re-imagining of how law and policy might meaningfully advance the federal interest in law enforcement accountability. At a minimum, the combined impact of the IACHR's decision in *Lenahan v. United States* and the increasing global recognition of the ways gender violence violates

238. See, e.g., Natapoff, *supra* note 16, at 1773 (arguing that the problem of underenforcement should be countered by more or different policing that increases police responsiveness and democratic sensitivity to all stakeholders in the policing process).

239. Cf. GOODMARK, *supra* note 41, at 118-25.

240. See GOODMARK, *supra* note 41, at 6.

241. BUMILLER, *supra* note 91, at 96-98.

242. See, e.g., *supra* note 204, and accompanying text.

civil and human rights, suggests that we broadly consider new approaches that will most meaningfully and effectively deter and end all forms of gender violence.

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