Chapter Four

From *Bruno* to *Gonzales*: Patriarchal Privacy and the Failure to Protect

Introduction

While *People* v. *Liberta*[1] represented a considerable success for battered women bringing criminal cases, the movement's more common judicial victories during the 1980s took place in a different arena: civil litigation. The deluge of civil cases at this time represented a concerted strategy on the part of battered women's legal advocates. The growth of national organizations dedicated to addressing domestic violence throughout the 1970s had facilitated increased communication among victims and activists, who began to realize that the problem of police noninterference in "domestic disputes" was widespread and pervasive. Just as the movement was considering how best to address this problem, the US Supreme Court ruled, in 1978, that municipalities could be held liable in civil court for their actions.[2] This increased awareness of police negligence in cases of domestic abuse, along with the availability of a new remedy, contributed to a wave of civil suits targeted at the problem of police negligence. These kinds of suits also provided another legal option for battered women and their advocates to pursue when the criminal law proved inadequate. 1

Unlike criminal cases, in which the state served as prosecutor and plaintiff against batterers, these civil cases usually placed the state (or its agents) in the role of respondent. Battered women themselves were the plaintiffs in these cases, and police departments, most often, were the defendants.[3] In these lawsuits, often referred to as "Section 1983 cases," victims of domestic violence sought financial awards from police and other government entities based on Section 1983 of the Civil Rights Act of 1871, which provides a federal cause of action for individuals whose constitutional rights are violated by state actors.[4] Specifically, the constitutional bases of these suits lay primarily in the substantive due process and equal protection clauses of the Fourteenth Amendment and the notion that the state had a duty to protect battered women from violence. When police systematically refused to arrest abusive partners, they failed to protect battered women to the same extent that they protected men or victims of nondomestic (i.e., "stranger") violence. 2

At the root of this failure to protect battered women was the patriarchal notion of privacy: respect for the nuclear, familial home and the man's dominance therein. By challenging in court existing law-enforcement policies and procedures of noninterference in violent homes, battered women and their lawyers tested judicial notions of privacy, asking whether courts would refute or uphold the antiquated ideal of "a man's home as his castle." Thus, while these cases were primarily argued on equal protection or substantive due process grounds, they simultaneously 3

attempted to chip away at patriarchal ideas about privacy and gender roles. In so doing, they articulated rights for women that superseded the presumed right of men to behave with impunity in their homes regardless of the welfare of others.

4 Two issues that would prove critical to many of these cases were the doctrines of "special relationship" and "qualified immunity." Unlike equal protection and due process, which are constitutional grounds on which to bring a wide range of cases, these are two doctrines developed through case law that help to define the responsibility of state actors to individuals. The first of these, special relationship, delineated the particular circumstances, such as the existence of a restraining order, in which police might owe battered women a special duty of protection. The second, qualified immunity, outlined those situations in which individual officers might be exempt from just such a responsibility. The courts' wide-ranging interpretations of these issues, discussed in further detail in this chapter, helped to shape the outcome of battered women's civil cases.

5 This chapter will explore the influence of these two issues while tracing the major developments of this period of civil litigation. I will begin with a brief examination of the precursors to this judicial trend, followed by a more detailed explanation of the first two landmark class-action civil lawsuits battered women brought against police: *Bruno* v. *Codd*[5] and *Scott* v. *Hart*.[6] After discussing the effects of *Bruno* and *Scott*, I will then turn to the individual lawsuits of the early- to mid-1980s (a fairly fruitful period for battered women plaintiffs), when the issues of special relationship and qualified immunity first became salient. The next section of the chapter will explore the ways in which these individual civil suits against police faced increasing difficulty in the courts during the latter half of the decade.

6 In 1989, the judicial landscape changed dramatically. In a landmark child abuse case entitled *DeShaney* v. *Winnebago County Department of Social Services*,[7] the United States Supreme Court declared that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause,"[8] except in cases in which the individual was either physically in state custody at the time of the assault, directly exposed to increased danger by a state actor, or injured due to inadequate police training.[9] These new, strict requirements for seeking civil redress rendered future "failure to protect" litigation on behalf of battered women exceedingly difficult. In the next section of the chapter, I will examine the *DeShaney* case and its aftermath, paying particular attention to the judicial reasoning of the majority opinion and the dissents, as well as the implications of this case for battered women's civil litigation against police and other state entities.

7 In the decade that followed *DeShaney*, civil suits against police departments for their failure to protect battered women seemed all but impossible. In fact, it was not until 2002 that the movement had any indication that such suits might see real success again. In the Tenth Circuit's 2002 opinion in the case of *Gonzales* v. *Castle Rock*, the court accepted the plaintiff's argument that *DeShaney* had closed off only substantive, but not procedural, due process

claims.[10] As such, the court found, battered women did have another option available to them, even after *DeShaney*. Unfortunately, the circuit court's opinion was not the final word in *Gonzales*, and the ultimate outcome of this case at the US Supreme Court level has come to signify a strengthening of the *DeShaney* ruling, and a bleak future indeed for battered women's civil litigation. The final section of this chapter therefore explores the *Gonzales* case and reflects on the future of battered women's civil suits against police and other state actors in light of its outcome.

The history of these civil cases provides a valuable vantage point on the utility of privacy for battered women's activists. The "failure to protect" cases were predicated in many ways on a paternalistic model of the state as protector. While this strategy was undeniably successful on several levels—bringing justice to individual victims or their surviving family members, sending a powerful message about domestic violence, and raising public awareness of the issue—it had some serious limitations, as well. Lawyers advocating for battered women in the post-*DeShaney*, post-*Gonzales* era have continued to find themselves in the difficult position of having to prove their clients worthy of state protection and state intervention in their homes. The significantly decreased chance of success with such suits today suggests that this model may have run its course. Instead, the greatest use of privacy for battered women may be its role in the assertion, *Liberta*-style, of an affirmative right to bodily integrity and self-determination. **8**

Significance of the "Failure to Protect" Era

The proliferation of the "failure to protect" cases during the 1980s indicated a critical moment in the battered women's movement. Primarily, this abundance of cases signaled that battered women's advocates of this era were specifically and deliberately pursuing a judicial strategy to combat domestic violence. A memo entitled "Action Programs in Domestic Violence" from the 1978 National Conference of the National Organization for Women, for example, suggested that one way to take action was the following: **9**

> LITIGATION: Where there are laws, there is often a grave lack of enforcement. This is particularly true on an issue involving the privacy of the family. Perhaps you have a county prosecutor who refuses to take domestic violence cases—perhaps you should take HIM/HER to court.[11]

Using the courts to effect social change in the arena of domestic violence made good sense at this time, given the support that had recently become available with the formation of the National Battered Women's Law Project (NBWLP) in the mid-1970s. Unlike criminal cases (such as *Liberta*) that were initiated by an obvious violation of criminal law against a particular individual, each element of these civil cases had to be carefully formulated, from the selection

of plaintiffs to the selection of judicial grounds on which to proceed. As a result, battered women's advocates bringing civil lawsuits could more easily shape their cases for the benefit of not only the named plaintiffs, but the movement itself.

10 In addition to combating domestic violence, some of the lawyer-activists who brought these cases were purposefully battling broader societal attitudes as well. Meeting minutes from an early litigation strategy session for *Bruno* v. *Codd*, one of the first two class-action suits against police, note that the "purpose and effect of the lawsuit was discussed. It was agreed that the underlying problem being confronted is sexism. . . . [W]e should not lose sight of the fact that the problem is larger than framed by our lawsuit."[12] The filing of class-action and other civil suits as a means of confronting sexism as well as domestic violence indicates that the battered women's movement was very deliberately choosing judicial paths to effect social change.

11 Having chosen this judicial strategy, battered women's activists pursued it vigorously. Shortly after the initiation of the *Bruno* and *Scott* lawsuits, scores of similar cases were brought on behalf of battered women around the country. The surge in activity between 1979 and 1989 was so vast that the NBWLP produced several publications tracking this new arena of battered women's litigation.[13] These reports detailed an array of civil suits against police and prosecutors in numerous states, including Alaska, Oregon, Connecticut, Texas, South Carolina, Tennessee, Michigan, Washington, Arizona, Kansas, Illinois, Pennsylvania, New York, and California. The multitude of similar cases brought within the same time period, combined with the communication afforded by the NBWLP, gave activists the opportunity to learn from and build on each other's strategies and successes. This series of cases, therefore, signaled a concerted, nationwide effort to use the judicial system to uphold the rights of battered women.

12 In addition, the nature of the rights being asserted at this time diverged significantly from those usually at issue in the more common criminal cases. Whereas criminal cases were brought by the state on charges of assault and battery or other violations of the state's criminal code, these civil cases were brought by and on behalf of battered women themselves. This formulation was particularly empowering for battered women, as it afforded them an active role in the pursuit of justice. As plaintiffs, women were able to move beyond the role of victim and participate as agents in the judicial process. These suits were brought on state or federal constitutional grounds, or both, enabling plaintiffs the opportunity to succeed and to effect change on several levels.

13 Most cases were brought on the basis of equal protection and/or due process clauses, via Section 1983. The specific nature of the claims varied, but most asserted that the plaintiffs were being denied the equal protection of the laws in some way. Some claims were based solely on gender, arguing that women did not enjoy the full protection of the laws relative to men. Others included a racial analysis, noting that battered women of color were not protected equally relative to white women and men. Others claimed that battered women received less protection than non-battered women, or than all victims of non-domestic crimes. By asserting

the battered woman's right to equal protection of the laws, particularly with regard to her gender and her race, these suits emphasized an affirmative right that extended beyond basic criminal remedies. Likewise, by seeking financial damages as well as policy changes from state entities, these cases implicitly urged courts to recognize the economic component of domestic abuse as well as the intrinsic value of its victims. The resulting financial awards provided a crucial affirmation of women's agency, serving as a formal, tangible recognition of women's suffering.

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Many of the civil cases brought on behalf of battered women during this era achieved success in the courtroom. In some cases, courts flatly rejected police officers' defenses that they should be immune from such litigation by virtue of the discretionary judgment necessary to fulfilling their official roles.[14] At other times, courts affirmed battered women's equal protection and due process claims, finding, for a variety of reasons, that police officers did have a specific affirmative duty to protect battered women, and that they could therefore be held liable under §1983 when they failed to provide this protection.[15] The most highly publicized of these cases was *Thurman* v. *City of Torrington*,[16] in which a Connecticut District Court found that city officials and police officers "are under an affirmative duty to take reasonable measures to protect the personal safety of . . . women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship," and that "failure to perform this duty would constitute a denial of equal protection of the laws."[17] This case also resulted in an unusual degree of financial remuneration for the plaintiff, with a federal jury eventually awarding Thurman significant compensatory damages.

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While several of these suits succeeded in court and resulted in financial awards to plaintiffs, the success of this strategy could also be gauged by the degree to which they raised awareness about the problem. Local media, for example, often provided supportive coverage even to those cases whose outcomes did not strictly favor the battered women plaintiffs, thereby generating a great deal of publicity for the issue of domestic violence and engendering public pressure on police departments and other state entities.[18] At the same time, such cases served as models for other lawyer-activists around the country. As the National Center on Women and Family Law (NCOWFL) began tracking the strategies and judicial successes and failures of each case, battered women's advocates were able to more effectively tailor and refine their approaches to subsequent cases.

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Neither of the two major class-action suits that ushered in this era—*Bruno* v. *Codd* and *Scott* v. *Hart*—achieved unequivocal success in the courtroom. The damages plaintiffs sought were not awarded, and the courts, for the most part, did not accept the arguments of the plaintiffs. Yet the settlements in which both cases ended ultimately provided the critical first steps toward improving police departments' policies and procedures regarding domestic violence. After the filing of these and similar cases prompted modifications to official procedures, battered women's advocates succeeded in effecting similar policy changes without litigation in several cities, including Atlanta, Chicago, New Haven, and San Francisco.[19]

17 At the same time, lawyers and activists were aware that such developments, while undeniably important, would never solve the problem entirely. They noted that "legal advocacy [was not] sufficient by itself either to combat woman battering or completely aid one woman."[20] Success within the courtroom would need to be accompanied by attitudinal change. Laurie Woods, Executive Director of the NCOWFL, observed that "the attitudes which originally gave rise to the practice of arrest-avoidance in wife-assault cases are independently and deeply ingrained in members of the police force. They are not likely to be eliminated by a mere change in regulations."[21] Nonetheless, such policy changes were a significant first step in altering police attitudes and practice, and the lawsuits which gave rise to them also allowed for compliance measures, including monitoring by battered women's advocates. Thus, cases that appeared unsuccessful by purely judicial measures often served the larger goals of the movement to some extent.

Battered Women's Civil Litigation in the Pre-*DeShaney* Era

Precursors to Bruno *and* Scott

18 While this civil litigation on behalf of battered women proliferated during the 1980s, it did not originate then. In fact, several similar cases had achieved various degrees of success in prior decades. As early as 1956, for example, the Supreme Court of New York held the city of Watertown liable for the injuries of a battered woman and the death of her husband as a result of the negligent actions of the city's police force.[22] In this case, the Watertown police had prior knowledge that the husband had threatened to kill his wife and others with his unlicensed gun, for which he did not have a permit. The police nevertheless returned the gun to the husband, thus enabling him to use it to shoot his wife and himself shortly thereafter. Eight years later, a California court held that a municipality could be liable when its police department failed to inform a battered woman, as promised, when her abusive husband had been released from jail.[23] In several other early cases, courts found potential liabilities for those municipalities whose police had failed to provide adequate protection to battered women who had previously reported domestic threats and assaults,[24] including municipalities that had withdrawn existing police protection[25] or that had released batterers from police custody despite the batterers' threats of murder.[26] These early cases, still too isolated and few in number to signify a cohesive strategy for battered women's legal advocacy, nevertheless paved the way for the surge of civil litigation that was to come. Having succeeded in various courtrooms, these cases precipitated the next major judicial strategy of the battered women's movement.

The Class-Action Lawsuits: Bruno *and* Scott

19 The first indication that the movement's lawyer-activists were using civil litigation as a coordinated judicial strategy came in the form of two class-action lawsuits filed almost simultaneously on opposite coasts: *Scott* v. *Hart* in California, and *Bruno* v. *Codd* in New York. Both cases were filed in late 1976, as the battered women's attorneys for both cases were in

contact with each other.[27] While they differed from each other in several significant ways, both cases proved instructive to battered women's advocates and opened the door for the series of civil litigation that would soon follow.

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Scott v. *Hart* was filed in Oakland, California in October, 1976. The class-action suit named five battered women plaintiffs, four African-American and one white, on behalf of all women in Oakland who had received inadequate police response to domestic violence. The original complaint details a slew of offenses committed against these five women by the Oakland police, including failure to respond to a domestic assault for which one woman was hospitalized; forcing a female victim to leave her own home after an assault (out of refusal to believe that she lived and paid rent there); encouraging assailants to press charges against victims; falsely informing battered women that they had no legal recourse; threatening to arrest victims; refusing to arrest batterers; failing, despite their promises to do so, to follow up on a victim's attempt to make a citizen's arrest;[28] and providing a batterer with keys to his victim's home and vehicle.[29] In this last case, officers were called to a hospital where the plaintiff was taken after her husband severely beat and threatened to kill her. After locating the assailant, police refused to arrest him, instead providing him the keys to the plaintiff's home and car. Thus deprived of transportation, the plaintiff was forced to walk home from the hospital at 4:00 a.m. Police refused her request for a ride home by noting that they "were not a taxi service" and suggested that in the event the husband did in fact wait at her home to carry out his threats to kill her, she should call them again. The defendants named in the *Scott* suit were George Hart, chief of the Oakland Police Department (OPD), and the Oakland City Council, the governing body responsible for establishing city policy and overseeing the OPD.[30]

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The *Scott* case was brought on both state and federal grounds, thus allowing the plaintiffs the flexibility of attempting to prove their case in several different ways simultaneously. On the federal level, plaintiffs first charged that their equal protection rights under the Fourteenth Amendment were being violated, given that assaulted black women were not protected equally relative to assaulted white women and white men, and that women assaulted at home were not protected equally relative to victims of nondomestic assaults. They alleged that the inaction of Hart, the OPD, and the city council amounted to an unconstitutional policy actionable under Section 1983.[31] They also charged that the OPD, a federally funded program, unlawfully perpetuated a policy of race and sex discrimination.[32] On the state level, plaintiffs charged the OPD with breaching their duty to arrest as established in the California Penal Code.[33]

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Two months later, in December 1976, battered women and their advocates in New York City filed a similar suit against the New York City Police Department (NYPD), the New York City Department of Probation, and the clerks of the New York Family Court. *Bruno* v. *Codd* contained twelve named plaintiffs, all battered women, suing on behalf of all women in New York City who were similarly situated with regard to domestic violence.[34] The plaintiffs claimed that the NYPD consistently denied protection to victims of domestic abuse on the basis of their marital status, a practice readily admitted by individual officers and disclosed in the New York

Police Patrol Guide.[35] Like the *Scott* plaintiffs, they charged police with refusing to arrest assailants and providing battered women with misinformation about their options for legal recourse.[36] The *Bruno* plaintiffs also accused police of overtly favoring batterers at the scene of domestic crimes by verbally supporting abusive husbands with such statements as, "Maybe if I beat my wife, she'd act right too."[37]

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In addition to their complaints against the NYPD, the *Bruno* plaintiffs charged both the department of probation and the family court clerks with effectively preventing battered women from obtaining legal recourse through pro se orders of protection.[38] As Laurie Woods, an attorney for the plaintiffs and the future Executive Director of NCOWFL, explained, it was crucial to confront all three entities (the NYPD, the department of probation and the family court clerks) in one suit. Plaintiffs' affidavits revealed that each agency tended to shift responsibility for the protection of battered women onto the other two agencies, resulting in a circle of blame and no real protection for victims. As Woods explained, the attorneys observed

> a pervasive pattern of police sending women to family court, and of probation and clerk officials at the family court sending women to the police. Employees in each agency tended to blame those in the other for the battered woman's inability to get protection. It became apparent that we would have to join all defendants in one suit in order to prevent any one agency from attempting to escape responsibility for its own practices by pointing the finger of guilt at non-party agencies.[39]

For this reason, the *Bruno* plaintiffs named the city and state directors of probation and the chief clerk of family court as well as the police commissioners as defendants in their suit.

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Unlike *Scott*, which was brought in federal district court on both state and federal grounds, *Bruno* was brought in state court and made no federal claims.[40] Instead, the *Bruno* plaintiffs charged that police patterns of failure to respond to domestic violence calls, failure to arrest abusive husbands, and failure to notify battered wives of their right to make citizens' arrests were violations of both state and city law. These laws, including the New York City Charter and Code and the New York State Criminal Law, require police officers to enforce the law and to arrest where "reasonable cause" exists, but do not authorize them to use marital status as a basis for denying that protection to one group of victims.[41] Additionally, the *Bruno* plaintiffs charged the department of probation and family court defendants with denying their right of access to court as outlined in the State Family Court Act and the city rules governing the department of probation and the family court.[42]

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In addition to the differing legal grounds on which the cases were brought, the selection of plaintiffs also differed radically between the two cases. Because New York Family Court did not have jurisdiction over unmarried battered women, all of the *Bruno* plaintiffs were, by necessity, married women. The *Scott* lawyers, unrestricted by such jurisdictional issues, ensured that their plaintiffs covered a range of marital situations, including married, unmarried and living with boyfriends, and married but in the midst of divorce. In addition, while the *Bruno* case did not

mention race or ethnicity,[43] the *Scott* lawyers ensured that their named plaintiffs included African-American as well as white women, a decision that only seemed natural to plaintiffs' lawyers Pauline Gee and Eva Jefferson Paterson, given the racial diversity of the population they were serving.[44] In *Scott*, the African-American plaintiffs initially sued on behalf of all black women in Oakland who had received inadequate police protection relative to their white counterparts.[45]

26 Interestingly, this race-based claim was quickly dropped. As Gee explains, she and Paterson decided to abandon the racial claim in their amended complaint in response to feedback they had received from women in the community. Some of this feedback came from white women in higher-income neighborhoods, who thanked them for bringing the suit and asked them to broaden the class, given that domestic violence affected them as well, and they too were in need of police protection. As a result, the amended complaint continued to call attention to the race of the named plaintiffs, but did not explicitly bring any racial discrimination claims.[46]

27 Gee later explained that having a diverse range of plaintiffs was not only meant to represent accurately the population of women, but served another important function as well. She urged attorneys bringing similar suits to "choose named plaintiffs who represent a cross-section of society in terms of ethnicity and socio-economic background to dispel the myth that domestic violence only occurs in the low income and minority population."[47]

28 While Gee's observation about the importance of racial and class diversity among plaintiffs had not been specifically articulated by the *Bruno* lawyers, the underlying premise of her statement—that such suits could be used as educational tools—certainly was. In fact, lawyers for both cases approached the suits not merely as a means of achieving justice for their plaintiffs, but also as a means of raising awareness about domestic violence. As Gee observed, *Scott* was filed "with two primary goals in mind: (1) to obtain effective police protection for battered women and (2) to educate not only the criminal justice system, but also the public as to the problem of domestic violence."[48] The *Bruno* attorneys concurred. Marjory Fields, currently a justice on the civil branch of the New York State Supreme Court, was one of the six attorneys who represented the *Bruno* plaintiffs. Fields recalled that *Bruno* was "part of our initial attempt to get judges and legislatures to look at [domestic violence] as a valid legal issue, [and] to listen to women the same as other crime victims."[49] Minutes from a litigation strategy session held five months before the filing of the *Bruno* suit observe that "the lawsuit has potential for improving the [problems of domestic violence and sexism]. It would publicize the problem, educate persons as to the extent and the nature of the problem."[50] Likewise, discussing the role of affidavits in the attorneys' preparation of the *Bruno* suit, Laurie Woods recalled, "We felt that these statements were important for two reasons. First, as a technical matter, [and] [m]ore broadly . . . to address the myths and misconceptions about battered women. . . . This was designed to educate the court from the outset by indirectly dispelling certain notions about battered women."[51] From the beginning, then, the lawyers advocating for battered women in both cases clearly understood and intended that the influence of these suits would extend far

beyond the courtroom. Rather than pursuing strictly judicial victories, they explicitly planned that these cases would serve as vehicles to change the thinking of police, judges, and the general public about the problem of domestic violence.

29 To that end, both sets of attorneys garnered plenty of public attention for these suits. Working closely with shelter workers and other battered women's activists, they continually challenged the notion of domestic violence as a private issue. The *Bruno* attorneys, for example, held several press conferences related to the filing of the suit and maintained close contact with various representatives from print, radio, and television media. Both prior to and following the filing of the initial complaint, the *Bruno* attorneys shared media contacts with each other, solicited publicity help from the National Organization for Women (NOW), and continually invited reporters to cover the issue.[52] Indeed, Marjory Fields initiated such publicity a full two years before *Bruno* was filed, when she was quoted in a *New York Times* article addressing the need for a stronger police response to domestic violence—one of the first stories in any major media outlet addressing the problem of domestic abuse at all.[53] Similarly, the NCOWFL issued a triumphant press release entitled, "Batterers Beware! Oakland Police Department to Afford Better Police Protection to Battered Women" after the settlement of the *Scott* suit, outlining in detail the terms of the settlement and the ways in which police would be held accountable.[54] By continually and deliberately bringing domestic violence into the public realm, these lawyer-activists were able to challenge the cultural notion of domestic violence as a strictly private matter, while simultaneously educating the public about the issue and informing battered women about the new level of protection they could and should expect from state entities.

30 Both the *Bruno* and *Scott* cases were terminated by agreement between the plaintiffs and the defendants:[55] *Scott* resulted in a settlement decree, and *Bruno* concluded with a consent judgment.[56] While the technical nature of these documents differed, their content was remarkably similar. Both settlements barred police from engaging in arrest-avoidance policies with regard to crimes of domestic violence.[57] Specifically, they required the police to treat domestic violence as a criminal act, by responding quickly to calls for assistance and proceeding with making arrests in domestic situations just as they would in crimes of stranger violence.[58] They also obligated officers to inform battered women of their right to make citizens' arrests and to help them to pursue those arrests when requested to do so.[59] Furthermore, both agreements required explicit changes in the written police policy that, in both New York and Oakland, had encouraged officers to engage in mediation between victim and perpetrator as a means of avoiding arrest.[60] Instead of mediation, the change in policy mandated by these settlements required police to presume that arrest was indeed an appropriate response to domestic violence, and that it was required if the facts at the scene established probable cause.[61] This aspect of the agreements was immeasurably significant, for it went to the very heart of the police attitudes (and the resulting lack of protection) that had inspired the lawsuits. As Woods observed, "mediation is an invitation to the police officer to discourage the victim from pursuing her legal remedies and often to encourage future violence."[62] By mandating

arrest instead of mediation in cases of domestic abuse, these provisions directly challenged existing notions that abusive men were immune from state sanction within the private sphere of the home.

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In addition to requiring police to respond quickly and arrest as necessary, both settlements also forbade officers from using their most common excuses for refusing to arrest batterers. First, the relationship of the perpetrator to the victim had long been used as a justification for inaction. In the *Scott* lawsuit, for example, plaintiffs reported having to misrepresent their abuse as stranger violence in order to get police to respond at all.[63] Both agreements specifically prohibited the practice of distinguishing between domestic and stranger assaults when determining probable cause for arrest.[64] Second, the victim's previous history of seeking or not seeking police assistance for domestic violence often prejudiced officers' decisions to arrest or not.[65] According to the settlements, a woman's previous calls to police for assistance or decisions whether or not to secure orders of protection could not determine police response to a new incidence of violence.[66] The agreements also prevented police from considering either the victim's stated or perceived preference to pursue the matter in a particular court (*Bruno* only),[67] or the perpetrator's promises to cease the violence (*Scott* only),[68] when assessing probable cause.

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By eliminating each of these justifications, the settlements placed the responsibility for punishing batterers, and condemning domestic violence, in the hands of the state. This shift in responsibility represented both a symbolic and a practical departure from the pre-*Bruno* and -*Scott* days, in which battered women were left to defend themselves from assault, often with little or no assistance from local law enforcement. At the same time, by insisting that batterers receive no further protections or consideration than other assailants, these provisions helped to support the characterization of domestic violence as a crime deserving of punishment, not merely a private, family matter unworthy of state intervention.

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Finally, both settlements included provisions regarding compliance with their terms. The *Scott* agreement, for example, outlined numerous measures required of the city of Oakland and the OPD. Because the OPD was required to change its police training to reflect the terms of the settlement decree, police agreed to develop, with plaintiffs, a domestic violence training protocol with which to educate current and future officers.[69] Additionally, the OPD worked together with a coalition of plaintiffs and other battered women's advocates to educate judges and district attorneys about the proper handling of domestic violence cases.[70] The *Scott* settlement also required the city of Oakland to apply for federal funding to obtain support services for victims of domestic abuse.[71] The *Bruno* consent judgment, perhaps because of its higher level of judicial enforceability, provided fewer specific instructions regarding compliance. It did, however, require the NYPD to amend all of its official documents, including regulations, memoranda, and training materials, to reflect the terms of the agreement.[72] The agreement further obligated the police commissioner and his successors to inform all NYPD employees of

its terms.[73] Additionally, the document mandated that any complaint lodged by a battered woman against an officer for violating the terms of the consent judgment must be investigated and addressed by a supervising officer as soon as possible.[74]

34 Ultimately, while neither *Bruno* nor *Scott* achieved unqualified success in the courtroom—the plaintiffs were not awarded the damages they sought, and both cases were settled by agreement—their significance to the battered women's movement should not be underestimated. Not only did these cases yield considerable short- and long-term results, but they also established a significant model for subsequent litigation, thereby initiating an era of litigation activism within the movement. Together, *Bruno* and *Scott* signaled the first truly coordinated litigation strategy within the movement, as the lawyers on both coasts shared information and resources with each other and with the NCOWFL.[75] Both were designed to be "impact cases," intended not just to achieve greater legal protection for battered women, but also to raise awareness among police, judges, and the general public about domestic violence and gender inequality.[76]

35 The long-term effects of the cases have been substantial. At the most practical, local level, the settlements that the *Bruno* and *Scott* plaintiffs reached with police departments dramatically improved the legal protection available to the battered women of Oakland and New York City. In particular, the accountability provisions included in the agreements and the monitoring efforts undertaken by battered women's advocates helped to ensure that the litigation produced genuine and lasting procedural changes. These efforts then resulted in the development of model police protocols that were eventually replicated across the nation, whether as a result of similar litigation or in response to pressure from battered women's advocates.[77]

36 In addition to securing increased physical protection for battered women, this litigation also effected change of a less tangible, though no less important, nature. The publicity generated by these lawsuits—including some of the very first major newspaper coverage about the scope of the problem of domestic violence[78]—did much to raise awareness among the general public. In addition, anecdotal evidence in the months following the settlements suggested that the suits had begun to affect the attitudes and behaviors of batterers as well as police. Woods observed that, following the *Bruno* settlement,

> [local activists] received telephone calls from women informing them that their husbands had stopped beating them; conversations with clients indicate that a few certain precincts are making arrests and that some officers are informing women that while they could not help them last month, they can now in response to the consent judgment. Conversations also indicate that some husbands have ceased their beating as a consequence of reading about the consent judgment in the newspapers . . . ; others because they have been arrested pursuant to the terms of the agreement.[79]

Thus, while the lawyer-activists involved in these suits were certainly aware of their inability to mandate attitudinal changes via litigation—a natural limitation of the judicial system—it seems clear that the combination of the lawsuits and the ensuing publicity yielded results that extended beyond mere policy changes.

Overall, the *Bruno* and *Scott* suits suggested—on both formal, procedural levels and informal, attitudinal levels—that domestic violence was not simply a private, family matter. By demanding police intervention in violent homes, this litigation directly challenged existing notions that abusive men were immune from state sanction within the private sphere of the home. In fact, the rejection of domestic privacy as a refuge from criminal punishment and the refusal to privilege the marital home as the domain of masculine rule at all costs were at the core of these suits. The impact of this litigation strategy would be felt for years to come, as battered women's advocates proceeded to pursue *Bruno*- and *Scott*-inspired suits for the next ten years. **37**

Civil Litigation in the Aftermath of Bruno *and* Scott

The decade following the highly publicized *Bruno* and *Scott* settlements was initially marked by several additional class-action suits in other parts of the country that resulted in settlements similar to those in New York and Oakland.[80] However, class-action lawsuits also contained several inherent disadvantages, including the difficulty involved in securing class-action status, the extra time and resources demanded by such large-scale suits,[81] and the potential of such suits to establish negative judicial precedent for other plaintiffs if they failed.[82] Perhaps because of these potential pitfalls, battered women and their advocates turned increasingly toward individual lawsuits during the 1980s. This development within the movement also reflected a larger national trend of decreasing reliance on class-action lawsuits at this time.[83] **38**

While the level of success attained by the plaintiffs varied greatly in these cases, the outcomes did exhibit a chronological pattern (see Table 4.1: Success of Battered Women's Civil Suits Against Police). In general, those cases that were tried earlier in the decade were decided more favorably, with the most notable and well-publicized financial successes for battered women peaking in the middle of the decade. The latter part of the 1980s was less kind to battered women, as plaintiffs began losing most of their cases in the two years leading up to the *DeShaney* case. *DeShaney*, then, represented the culmination of these losses and was a major judicial defeat for battered women. **39**

While all of these civil cases of the 1980s were brought against local police departments and/or prosecutors, the specific grounds for the proposed remedies varied: while many were brought as federal Section 1983 claims, several were brought on state grounds. Almost all of the cases charged that police failure to protect the plaintiffs from domestic violence (or, in some cases, prosecutors' failure to pursue their cases) violated their rights to equal protection and/or **40**

substantive due process. Finally, the outcomes of most of these lawsuits ultimately hinged on at least one of two critical issues: "special relationship" and "qualified immunity," the former of which would factor prominently in the *DeShaney* case at the decade's end.

41 The basic elements of a Section 1983 claim include consideration of two questions. First, was the person responsible for the offending conduct acting under color of state law? In other words, was the responsible party acting in an official capacity as a representative of the state? Second, did the conduct in question deprive the plaintiff of rights, privileges, or immunities guaranteed by the constitution or laws of the US? While these questions pertain specifically to federal Section 1983 claims, very similar issues govern battered women's state claims against police, as well. Claims based on state law generally referred to state statutes such as Oregon's 1977 Abuse Prevention Act, which included provisions for warrantless arrest based on probable cause for the violation of a protective order.[84] A state case might consider, for example, whether police officers who knowingly failed to enforce such a statute could be held liable for the harm that befell the plaintiff as a result.[85] The civil cases brought by battered women during this era, therefore, whether on federal or state grounds, generally revolved around the issues of who should be held responsible for the offending actions, and to what extent those actions violated statutory or constitutional rights.

42 For judges deciding these cases, answering these two questions involved consideration of several factors. One of the most significant of these factors was the "special relationship" test. The special relationship concept originated in a series of cases that questioned whether the due process clause of the Constitution implied an affirmative duty on behalf of police officers to protect the public. These cases explored the contours of this duty by examining levels of police responsibility in a variety of situations not related to domestic violence. In one case, for example, a black man had been beaten to death by a gang of white youths. Plaintiffs claimed that police were responsible for generally failing to protect black people on the public streets, an argument that the court rejected.[86] In another case, however, officers who witnessed but did not intervene in a brutal beating were found liable under Section 1983 for failing to perform the duties of their office.[87] As this line of cases developed, courts agreed that police could not be held liable for all citizens' injuries under Section 1983 unless police actions (or failure to act) constituted a specific breach of their stated duties that could be shown to have directly caused the injury.

43 Eventually, this line of judicial reasoning was narrowed even further, as judges began to suggest that state actors could only be held liable for injury to those who were directly in state custody, such as prisoners and patients in state mental institutions—in essence, only when the state had a "custodial relationship" with particular individuals.[88] Shortly thereafter, courts were asked to consider whether child and family services agencies could be held liable for the deaths of children whose families they were ostensibly supervising. Because these deaths

occurred in private homes, but under the supervision of an agency meant to prevent such incidents, courts jettisoned the overly restrictive custodial relationship model. They replaced it with the special relationship model, on the grounds that

> the due process clause of the Constitution provides no basis for imposing liability . . . on state officers who either negligently or even recklessly facilitate the criminal actions of a third party, absent some special relationship between the victim and . . . the state officer.[89]

This special relationship approach allowed for broader interpretation of the due process clause than the custodial model had. Courts considered a variety of factors to determine the presence of a special relationship, including

> 1) whether the state created or assumed a custodial relationship toward the plaintiff; 2) whether the state was aware of a specific risk of harm to the plaintiff; 3) whether the state affirmatively placed the plaintiff in a position of danger; or 4) whether the state affirmatively committed itself to the protection of the plaintiff.[90]

This model, which allowed for the liability of child and family services agencies in child abuse cases, could also apply to police officers in domestic violence cases.

44 The second potentially mitigating factor in the determination of Section 1983 claims was the concept of "qualified immunity." The qualified immunity doctrine takes into consideration that state agents such as police officers must perform certain discretionary functions as part of their official duties (for example, they must exercise discretion when determining probable cause for arrest, deciding how to proceed in a volatile situation, etc.).[91] Given the inherently discretionary nature of some aspects of the job, this doctrine provides that state actors are immune from liability for damages incurred while performing those discretionary functions.[92] This immunity from liability applies only to those specific actions undertaken as discretionary functions, and only when those actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[93]

45 Although this potential for immunity was subject to significant restrictions, it nonetheless represented a considerable obstacle for battered women bringing civil suits against police. Throughout the 1980s, courts considered questions of immunity and police liability in a variety of arenas, including, but certainly not limited to, issues of domestic violence.[94] In addition to the domestic violence cases discussed here, these cases also considered subject matter ranging from duties of police at the scene of traffic accidents[95] to police obligation to protect a rape victim from future assaults from the same assailant[96] to police role in preventing a shootout at a bar,[97] and more.[98]

46 In the course of these deliberations, judges developed several standards to determine which duties could be considered discretionary and therefore deserving of immunity. At one point, courts noted that officials could be granted qualified immunity "if reasonable officials in the

defendants' position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal principles."[99] In other words, this standard granted immunity based on what the average or "reasonable" officer would have done in a given situation based on his or her understanding of currently existing law. Ultimately, courts developed an even broader application of this doctrine, leaving only a few instances in which an officer might *not* be granted qualified immunity.[100] In a reflection of the increasingly conservative judicial tenor of the Reagan years, the discretion and immunity afforded to police officers increased as the 1980s progressed.[101] As a result, by requiring plaintiffs to meet such difficult standards, the qualified immunity doctrine provided a potent defense for police officers toward the end of the decade, making Section 1983 cases all the more challenging for battered women.

47 Despite the potential difficulties posed by the special relationship and qualified immunity doctrines, several courts issued rulings favorable to battered women, most often in the earlier years of the decade. In 1983, the Supreme Court of Oregon found that police officers who violated that state's Abuse Prevention Act by failing to enforce an order of protection could be held liable for the harm that befell battered women and their children as a result.[102] The court flatly rejected the officers' defense of discretionary immunity, noting that the language of the statute mandated a course of action so clearly that it left no room for discretion. As such, the *Nearing* v. *Weaver* court found that the officers undoubtedly had "a duty specifically towards these plaintiffs,"[103] and reversed the lower court's summary judgment as a result.

48 Two years later, a district court in Pennsylvania ruled in favor of the administrator of the estate of a woman who had been killed by her batterer.[104] The plaintiff in *Dudosh* v. *Allentown* brought a federal Section 1983 claim based primarily on the denial of Kathleen Dudosh's equal protection and due process rights. The court weighed Dudosh's repeated requests for police assistance heavily when determining the existence of a special relationship. In addition, the opinion noted that the protective order secured by Dudosh and served by the police gave the defendants notice of the batterer's violent conduct and "placed an affirmative duty upon the police department to protect the deceased."[105] Given these facts, the court asserted that

> [T]he deceased was not just a member of the public at large who through fate and misfortune becomes a victim of crime in a situation over which the police had no control or notice. She was a specific individual who had been subjected to particularized assaults and threats of murder. For these reasons, . . . we conclude that a special relationship did exist between the deceased and the defendants such that would vest in Ms. Dudosh a right to adequate police protection.[106]

This special relationship, the court concluded, rendered the plaintiffs' equal protection and due process claims viable and subject to relief under Section 1983. Both the *Nearing* and the *Dudosh* courts, therefore, found that protective orders secured by the plaintiffs established an

affirmative duty on the part of police to protect them from domestic violence. These opinions plainly signaled that battered women, having deliberately sought legal protection, deserved the full benefit of that protection.[107]

49 Even in cases that did not primarily turn on issues of special relationship or immunity, courts accepted evidence of police inaction as validation of battered women's equal protection arguments. Police defendants in the 1986 case of *Bartalone* v. *Berrien*[108] had promised plaintiff Sandra Bartalone that they would arrest her assailant husband, but never even attempted to do so.[109] Several days later, the husband threatened Sandra with a shotgun at her workplace; in the ensuing struggle, Sandra was shot in the leg and abdomen.[110] A Michigan district court accepted her argument that the police denied her equal protection "based on her sex, or marital status, or both,"[111] noting that "if a police officer is under a duty to protect persons within the area of his authority, he must do so on a fair and equal basis. The equal protection clause requires him to perform his duties without intentionally discriminating on an irrational basis."[112]

50 Likewise, in the Tenth Circuit case of *Watson* v. *Kansas City*,[113] plaintiff Nancy Watson detailed a lengthy history of police failure to arrest her abusive husband—himself a police officer—despite her repeated requests for his arrest and the copious physical evidence of his violence toward her. These refusals to arrest were often accompanied by police comments such as, "If you ever call the police again, I will see to it that you are arrested and you'll never see those … kids again,"[114] and (after an incident in which her husband beat, stabbed, and raped her) remarks to the effect that "the whole situation was her fault because she had married [him]."[115] Citing the *Bartalone* opinion, the circuit court found Watson's evidence sufficient to support her claim that Kansas City unconstitutionally provided less protection to victims of domestic violence than to victims of stranger violence.[116] By affirming these equal protection claims, opinions such as *Bartalone* and *Watson* gave credence to the concept that the battered women's movement had been promoting for years: namely, that the privacy of the home should not protect violent crimes from punishment.[117]

51 Two cases that made this point more definitively and successfully than any of their predecessors were *Thurman* v. *Torrington*[118] and *Sorichetti* v. *New York*.[119] The substantial financial awards and the resulting publicity associated with these cases, both decided in the mid-1980s, distinguished them as landmark victories for the battered women's movement as well as for the plaintiffs themselves. In the first case, plaintiff Tracey Thurman brought a federal Section 1983 equal protection case against the city of Torrington, Connecticut for their failure to provide equal police protection to victims of domestic violence (relative to victims of non-domestic violence). She demonstrated an eight-month-long record of failure on the part of the Torrington city police to respond to her requests for protection from her violent husband, Charles Thurman. This detailed history revealed repeated police refusals to help her obtain a criminal warrant against her husband, numerous refusals to arrest (or even attempt to locate) her husband even after he had violated a restraining order, and failure to apprehend the

husband even after watching him physically injure her.[120] The incident for which Charles Thurman was finally arrested took place in June 1983. After repeatedly stabbing Tracey in the chest, neck, and throat, Charles was holding a bloody knife when police arrived at the scene. In their presence, he kicked Tracey in the head twice, dropped their infant son onto her bloody body, and continued to verbally threaten her, while police refused to intervene. As she lay on a stretcher being lifted into an ambulance, Charles approached her again. Only at that point was he finally arrested and taken into custody.[121]

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While Charles received a twenty-year prison term for attempted murder, Tracey remains partially paralyzed and permanently disfigured as a result of his assaults. Her lawsuit succeeded in two important ways: first, a jury awarded her $2.3 million from the city in compensatory damages, the largest settlement yet received by a battered woman plaintiff in this type of suit. In addition, Thurman's case produced some of the most strident judicial support for battered women in all of the civil cases. Ruling on a 1984 motion by the City of Torrington to dismiss the case, Senior District Judge Blumenfeld noted,

> City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. . . . This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship as well as to all other persons whose personal safety is threatened, including women not involved in domestic relationships. . . . Failure to perform this duty would constitute a denial of equal protection of the laws.[122]

By affirming the equal protection claim, Judge Blumenfeld also provided significant judicial support for the notion that women deserve protection from violence regardless of whether it is committed in public or in private.

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Furthermore, Blumenfeld stated that the relationship of a crime victim to her assailant should have no bearing on the conduct of responding police officers. Citing *Bruno* v. *Codd*, he reiterated that police inaction on the basis of marital status was entirely unacceptable. In addition, he emphatically rejected the persistent argument that failure to act might promote "domestic harmony" (aided, perhaps, by the sheer incongruity of discussing domestic harmony in light of multiple stab wounds):

> A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not "automatically decline to make an arrest simply because the assaulter and his victim are married to each other" (*Bruno* 1976, at 1049). . . . Such inaction on the part of the officer is a denial of the equal protection of the laws.
>
> In addition, any notion that defendants' practice can be justified as a means of promoting domestic harmony by refraining from interference in marital disputes, has no place in the case at hand.[123]

This forceful opinion regarding the rights of battered women and the obligations of police officers was a substantial victory for battered women seeking redress via the equal protection doctrine.

54 Unlike the *Thurman* case, *Sorichetti* v. *City of New York* was not a federal action; the case was brought in state court in response to the city's violation of a state family court act.[124] In addition, the violent acts around which this case centered were committed against an infant rather than an adult woman. (The case was brought by Josephine Sorichetti on behalf of her infant daughter Dina and herself.) Nonetheless, much of the *Sorichetti* case also depended greatly on the assailant's history of violence against his wife, and its outcome, like that of *Thurman*, held considerable promise for future battered women's litigation. The facts of the case detail Frank Sorichetti's history of violence toward his wife Josephine, as well as her repeated attempts to seek help. In November 1975, an order of protection that Josephine had secured was extended for one year, granting Frank weekly visitation rights with Dina.[125] The first such visit resulted in the violence that formed the basis of the lawsuit.

55 Immediately after picking Dina up, Frank directly threatened Josephine's life, stating, "You, I'm going to kill you."[126] Josephine reported this threat in person at the police station, showing the officer a copy of the order, recounting Frank's violent history, and urging the officer to arrest him. The officer responded that there was nothing he could do and sent her home.[127] The next day, Josephine returned to the station, where, fearing for Dina's safety, she repeatedly begged and demanded that Frank be arrested. Officers repeatedly told her to "just wait" but took no action, even after the time had passed when Frank was obligated by the order of protection to return Dina to her mother.[128] An hour after this deadline had passed, Frank's sister found him passed out on her apartment floor, having just attacked Dina brutally enough to send her into a coma. The injuries Dina sustained as a result of this attack resulted in a forty-day period of hospitalization and permanent disability. Specifically, Frank attacked the infant repeatedly with a fork, knife, and screwdriver and attempted to saw off her leg.[129]

56 Josephine Sorichetti initiated her civil suit against the city and the police after this last assault. Ultimately, like Tracey Thurman, the *Sorichetti* plaintiffs won significant financial awards: Dina was awarded two million dollars,[130] and Josephine was awarded forty thousand dollars, from the city defendants.[131] Ruling on appeal to uphold these awards, the Supreme Court of New York concluded that the City of New York (via the NYPD) had an affirmative duty to protect Josephine and Dina owing to the special relationship that existed between the City and the plaintiffs.[132] While the court acknowledged that the existence of such special relationships is rare, it held that just such a relationship did exist in this case, based on four factors. The first of these was the order of protection itself, which, as in *Dudosh*, played a critical role in establishing this special relationship.[133] The second factor was the police department's previous knowledge of Frank's history of violence (gained through its dealings with Frank and the information provided by Josephine).[134] Third, the court cited the police department's response to Josephine's requests for help on the day of the incident; and fourth, simply "Mrs.

Sorichetti's reasonable expectation of police protection."[135] These elements of the court's decision are significant, for they indicate that, given knowledge of a violent or potentially violent domestic situation—particularly, but not exclusively, via a protective order—police are required to act to protect the victim. Likewise, victims of domestic violence, having sought police assistance, can "reasonably expect" police protection from further violence. Police departments that choose to ignore these requests after the *Sorichetti* ruling do so with full awareness of their own potential for liability.

57 While the financial awards of the *Thurman* and *Sorichetti* cases were undeniably meaningful for the individual plaintiffs, they also held great significance for the battered women's movement overall. Unprecedented in their magnitude, these awards sent a powerful message that battered women were being recognized and compensated in the courtroom, and that police departments were being held accountable for their willful refusal to assist in cases of domestic abuse. The financial component of the cases, coupled with the court's logic and language on behalf of battered women, also generated a great deal of publicity for the movement and the issue itself. Newspapers and law reviews alike reacted strongly to the *Thurman* and *Sorichetti* cases,[136] and Tracey Thurman's story was even made into a Lifetime Original Movie.[137] The heightened awareness generated by these cases, in addition to their more tangible financial and judicial implications, established *Thurman* and *Sorichetti* as critical judicial successes for the battered women's movement.

58 Regrettably, the civil litigation of the 1980s did not always bring relief to battered women plaintiffs. As the decade progressed, the doctrines of qualified immunity and special relationship became increasingly greater obstacles for battered women plaintiffs, and several cases resulted in rulings that supported police inaction in violent domestic situations. In a 1987 case heard by the Court of Appeals of Washington, the mother and children of Eleanor Collins sued the local police, the county, and the Victim Assistance Unit of the county prosecutor's office.[138] After an incident in which her husband Dennis assaulted her with a gun and threatened to kill her, officials from these agencies had promised Eleanor that he would be arrested. Although Eleanor relied on this promise, defendants willfully did not arrest Dennis, and several days later he shot and killed her, and shot and assaulted their children. The court ruled for the defendants, dismissing the case altogether by affirming "[t]he absolute immunity [from civil suit] enjoyed by prosecuting attorneys."[139] The institution of prosecutorial immunity, which allows prosecutors to perform their public duties objectively, could not be undermined by the facts of this case, the court concluded. Assessing the competing priorities of defending this immunity and compensating the victims in this case, the court chose the former. In short, the court declared that "the public's need for an independent prosecutor must outweigh the concern over individual wrongs." The other defendants also enjoyed this immunity, although briefly. [140]

59 In some cases, courts relied on both the special relationship and qualified immunity doctrines in order to find for the defendants. In the 1987 case of *Turner* v. *North Charleston*,[141] a South Carolina district court granted qualified immunity to defendants on the basis that no "special relationship between the plaintiffs and the city existed that created an affirmative duty of protection."[142] Absent an affirmative obligation, the court reasoned, defendants could not be held liable for failing to provide protection. The facts of the case were undisputed: plaintiffs Janice Turner and her son had contacted police repeatedly during the day to notify them of batterer Vernon Fair's violation of a permanent restraining order and to ask for his arrest. Police ignored the calls, however, until after Fair had entered Turner's home, shot Janice numerous times in the head, and attempted to shoot her son.[143] Nonetheless, the court found that none of the police defendants could be held liable for these injuries, not even the officer who "was apparently aware of the relationship between Turner and Fair, and of Fair's criminal record, but . . . did not return Turner's telephone calls for assistance," because "it is not clear that a reasonable official would understand that he is violating someone's constitutional right by failing to return phone calls."[144] In this case, as in *Collins*, the court found that protection of state actors' discretionary freedom superseded the physical protection of battered women.

60 One of the broadest interpretations of qualified immunity—and therefore one of the most problematic, for battered women's litigation—came from the Third Circuit (which includes Delaware, New Jersey, Pennsylvania, and the Virgin Islands). The 1988 case of *Hynson* v. *City of Chester*,[145] like the *Collins* case, was brought by the mother and children of a woman killed by her batterer. Alesia Hynson's family brought this Section 1983 case on equal protection grounds, claiming that the Chester police department treated victims of domestic violence differently than victims of non-domestic violence. The *Hynson* court seized this opportunity to respond to what it perceived as "a growing trend of plaintiffs relying upon the due process and equal protection clauses . . . to force police departments to provide women with the protection from domestic violence that police agencies are allegedly reluctant to give."[146]

61 Here, the court established a very specific standard of qualified immunity, thereby rejecting Hynson's claims:

> [W]e conclude that a police officer loses a qualified immunity to a claim that a facially neutral policy is executed in a discriminatory manner only if a reasonable police officer would know that the policy has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and that there is no important public interest served by the adoption of the policy.[147]

Several factors were enunciated in this standard. First, the court implicitly favored police officers by starting with the presumption that officers *do* have immunity and delineating only those unique circumstances in which such immunity would be lost. In addition, the court stated that, in order for an officer to "lose" this immunity, all three of its stated conditions must be met. First, the "reasonable" officer must be aware of the policy's discriminatory effect on women.

Second, the plaintiff must prove that the policy was adopted at least in part with an intentional bias against women. Finally, the plaintiff must prove that the policy serves "no important public interest." Only if a battered woman plaintiff could prove that each of these three conditions were true in her case would the officers in question then lose the immunity that otherwise would shield them from liability.

62 This multifaceted standard, including the particularly difficult to prove "bias-as-motivator" component, rendered battered women's suits against police officers exceedingly difficult. Ultimately, despite the successes achieved by battered women plaintiffs in the earlier part of the 1980s, their efforts in the latter half of the decade were increasingly stymied by the doctrines of special relationship and qualified immunity. In general, courts had been more receptive to battered women's equal protection and due process claims at the beginning of the decade. Just as these successes seemed to signal a "growing trend," however, courts began to expand the basis for immunity for police officers in a wide variety of circumstances,[148] while continually narrowing the parameters for a special relationship between police and battered women. At the same time, the composition of the nation's highest court became increasingly conservative (and therefore less amenable to the notion of civil litigation as a path to justice) during the 1980s, as President Reagan appointed several new members to the Court and Justice Rehnquist assumed the role of chief justice. The combination of these factors resulted in an increasingly hostile climate for battered women's civil litigation in the years leading up to the *DeShaney* case.

DeShaney v. *Winnebago County Department of Social Services*

63 The case that would ultimately have the greatest impact on battered women's civil litigation was not primarily a battered woman's case. While *DeShaney* v. *Winnebago County Department of Social Services* did pertain to domestic violence, broadly construed—that is, violence committed in the home—it centered on a horrific case of child abuse. The issues of private violence and police liability that were salient in the *DeShaney* case, however, closely echoed those that had been addressed by the battered women's movement in their civil litigation of the past ten years. As such, battered women's advocates immediately understood the US Supreme Court's holding in *DeShaney* to be a tremendous setback to their efforts. In an article for the NCOWFL entitled "Suing the Police After *DeShaney*," Joan Zorza wrote, "[B]efore the *DeShaney* decision, battered women had a much easier time suing the police and municipalities in federal court for failing to protect them . . . Because of the *DeShaney* decision, a battered woman can no longer expect to win a substantive due process civil rights case for failure to act to protect her . . ."[149]

64 The facts of the *DeShaney* case detail a brutal history of child abuse. Born in 1979, Joshua DeShaney was still an infant when his parents divorced the following year. Joshua's father, Randy DeShaney, was granted custody of him, and the two of them moved to Winnebago

County, Wisconsin. In January 1982, Randy's second wife notified the police that Randy had "hit the boy causing marks and [was] a prime case for child abuse."[150] When interviewed by the Winnebago County Department of Social Services (DSS), Randy denied these accusations, and DSS dropped the matter. In January of the following year, Joshua was admitted to the hospital with bruises and abrasions consistent with child abuse. After notifying DSS, the hospital assembled a "Child Protection Team" consisting of several physicians, DSS staffers, a lawyer, and others to examine Joshua's case. Although DSS obtained an order from a Wisconsin juvenile court placing Joshua in temporary custody of the hospital, the "team" subsequently determined that there was insufficient evidence to keep Joshua in state custody. Instead, they recommended several informal measures for his protection, such as enrolling him in a preschool program.

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The following month, Joshua returned to the emergency room with more injuries. DSS found no basis for immediate action, but made monthly visits to the DeShaney residence for the next six months. The DSS caseworker responsible for these visits recorded numerous head injuries to Joshua during the course of the six months, but took no further action. In November of that year, Joshua returned to the emergency room, again with "suspicious injuries."[151] DSS continued to take no action, even when, during the caseworker's next two visits to the DeShaney residence, she was told that Joshua was "too ill to see her."[152] Several months later, in March 1984, when Joshua was four years old, his father beat him so brutally that he fell into a coma. His life-threatening condition necessitated emergency brain surgery, which revealed "a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time."[153] Joshua did not die, but suffered brain damage so extensive that he will spend the rest of his life in an institution for the severely mentally disabled.[154]

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While Randy DeShaney was tried and convicted of child abuse, Joshua and his mother, Melody DeShaney, brought a federal Section 1983 lawsuit against the DSS and Winnebago County. They based their lawsuit on substantive due process grounds, claiming that the defendants deprived Joshua of his Fourteenth Amendment liberty rights by failing to protect him from his father's violence, despite their knowledge of that violence. The *DeShaney* case eventually made its way to the US Supreme Court in 1989. Explaining its rationale for reviewing the case, the high court cited "the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights."[155] By construing the issue broadly enough to pertain not only to child abuse cases, but to all cases of state protective services, the Court guaranteed that its resolution would have a significant impact on battered women's civil litigation, as well.[156]

67

Case Resources
DeShaney v. *Winnebago County Department of Social Services*
Findlaw (http://laws.findlaw.com/us/489/189.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1980-1989/1988/1988_87_154) (oral arguments)
Harris v. *McRae*
Findlaw (http://laws.findlaw.com/us/448/297.html) (full text)
Oyez (http://www.oyez.org/cases/case?case=1970-1979/1979/1979_79_1268) (oral arguments)

The majority opinion in *DeShaney* was authored by Chief Justice Rehnquist and joined by five other justices, representing the Court's more conservative side: White, Stevens, O'Connor, Scalia, and Kennedy. The Court flatly rejected the DeShaneys' due process claim by describing the due process clause as "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security;"[157] in other words, an expression of negative rather than positive rights. Evoking the rhetoric of the right to privacy, Rehnquist's opinion characterized the due process clause as a means of protecting individual citizens from excessive state intervention: "Its purpose was to protect people from the State, not to ensure that the State protected them from each other."[158] The opinion also cited the controversial 1980 abortion case of *Harris* v. *McRae*[159]—which held that the government had no obligation to fund abortion services for indigent patients—to assert that the due process clause confers only negative rights, not "entitlements."[160] Having painted the due process clause with this brush, the Court readily concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[161]

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The majority opinion conceded that an affirmative obligation to protect individual citizens arises when a special relationship exists between state agents and those citizens. Nonetheless, the Court construed the nature of such special relationships even more narrowly in *DeShaney* than it had previously interpreted the much more restrictive "custodial relationships."[162] Specifically, the Court rejected the DeShaneys' argument that the state's knowledge of the violent situation, coupled with its stated intention to protect Joshua, was sufficient to establish a special relationship and an affirmative duty of care. Instead, the opinion acknowledged only that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[163] According to this analysis, the due process clause is a viable source of protection only when the state detains a person involuntarily and then deprives him or her of "basic human needs."[164] As Rehnquist explained, "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[165]

69 Unfortunately for the DeShaneys, the Court's analysis rested largely on the presumption of individual citizens who are capable of acting on their own behalf. The majority opinion thereby failed to address the issue at the heart of the *DeShaney* case: that as a four-year-old, Joshua's "freedom to act on his own behalf" was essentially nonexistent.[166] By focusing solely on the negative rights aspect of the due process clause, however—the freedom of the individual from excessive government intervention—the opinion rendered this fact irrelevant to its analysis. Yet Joshua's need for assistance from government agencies was not irrelevant here, and he was harmed as a result of the state's failure to intervene—in the same way that battered women suffer when the privacy right is construed solely as a negative right of freedom from state interference. In both cases, the overemphasis on protection *from* the state, rather than protection *by* the state, removes accountability for state actors who fail to fulfill their duty of protecting individuals in danger.

70 Justices Brennan, Marshall, and Blackmun dissented from the majority opinion in *DeShaney*. In keeping with their voting on other cases the Court was hearing at this time, this core group represented a more liberal political orientation than that exhibited by Rehnquist and Scalia (and, to varying degrees, several of the other justices).[167] In contrast to their colleagues' more conservative rhetoric, the opinions authored by Brennan, Marshall, and Blackmun seemed to be informed by social justice approaches that often benefited traditionally disadvantaged groups. In *DeShaney*, the dissenters offered a more nuanced analysis of the balance between state action and inaction, and between positive and negative rights, than did their colleagues in the majority. In so doing, they developed an opinion that confirmed many of the arguments advanced by battered women's civil litigation over the previous decade. Acknowledging the validity of a negative rights reading of the due process clause, Brennan's dissent complicated that reading by noting that, in many cases, once a state chooses a particular course of action, it subjects itself to various obligations as a result. Given that "a State's actions . . . may impose upon the State certain positive duties," he concluded that "a State may be found complicit in an injury even if it did not create the situation that caused the harm."[168]

71 In particular, Brennan's dissent called attention to the fact that the state of Wisconsin had granted the DSS primary responsibility for addressing child abuse cases with an authority that superseded that of other state or private actors. In so doing, the state "relieved ordinary citizens and governmental bodies other than the [DSS] of any sense of obligation to do anything more than report their suspicions of child abuse to DSS."[169] The nature of this system dictated that ultimate responsibility for child abuse cases rested with DSS, and, should DSS fail to fulfill its duty toward a child, "no one will step in to fill the gap."[170] By creating a structure whereby other forms of recourse are displaced by the involvement of DSS, the state had created a system in which the failure of DSS places children in an ostensibly worse position than they would have occupied without the existence of the program.[171] For this reason, Brennan's dissent concluded that "inaction can be every bit as abusive of power as action" and that "oppression can result when a State undertakes a vital duty and then ignores it."[172] Criticizing the majority opinion for "construe[ing] the Due Process Clause to permit a State to displace private sources

of protection and then, at the critical moment, to shrug its shoulders and turn away," Brennan concluded, "I cannot agree that our Constitution is indifferent to such indifference."[173] In this way, Brennan condemned the *DeShaney* majority for validating attitudes of noninterference in private violence at both the state and the community level.

The Impact of DeShaney *on Battered Women's Litigation*

72 Had Brennan's analysis been accepted by a majority of the justices, *DeShaney* would have been a powerful tool for battered women and their advocates in future litigation. By calling attention to the danger that results from reading ostensibly negative rights too simplistically, the dissenting opinion bolstered battered women's claims that in some cases, police or other state agents did owe them a duty of protection. Likewise, the dissent's willingness to accept state liability for inaction as well as action would reinforce battered women's damage claims against police who engaged in policies of non-arrest. Finally, Brennan's conclusion that state actors who bear the responsibility of protecting citizens from harm can and should be held liable for failing to execute that duty could have solidified the judicial foundation for battered women's future litigation against police. Ultimately, the *DeShaney* dissents had all the elements of a potentially landmark ruling for the future of battered women's civil litigation.

73 In reality, however, Justice Brennan was in the minority, and the majority opinion in *DeShaney* proved to be a significant blow to the battered women's movement in the civil courts. Lawyer-activists within the movement recognized the importance of *DeShaney* at once. Three months after the Court issued its opinion, the NCOWFL devoted the front-page article in its newsletter, *The Women's Advocate*, to explaining the opinion and assessing its impact on future litigation by battered women.[174] Subsequently, the NCOWFL issued an information packet on "The Implications of *DeShaney*" that included articles on the *DeShaney* opinion from a wide variety of sources, related cases, and memoranda.[175] Ultimately, lawyer-activist Joan Zorza wrote a lengthy article assessing the damage caused by the opinion and detailing several practical approaches to battered women's litigation in its aftermath. In particular, Zorza observed, battered women would do well in the future to avoid bringing cases on substantive due process grounds. Instead, she suggested (as other legal scholars have subsequently done) that cases based on equal protection grounds—that is, cases that asserted that battered women were not protected equally relative to men or to non-battered women—would have a much greater chance of success.[176]

74 Legal scholars responded to the opinion with equal gravity. To date, almost two hundred law review articles have addressed the case in some detail. Many of these have drawn explicit links between the *DeShaney* opinion and the future of battered women's litigation, with titles such as "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services*"[177] and "Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect *DeShaney*?" [178] These articles offered a variety of theories and suggestions on how battered women should proceed with civil

litigation against police, from the most obvious courses of action (equal protection suits can still survive *DeShaney* and should be pursued)[179] to the most unusual approaches (the Thirteenth Amendment prohibition against slavery may provide new avenues of legal recourse for victims of domestic violence in the post-*DeShaney* context).[180] Despite the anxiety these articles generally expressed about the future of battered women's civil claims, the majority of them also suggested alternative avenues that, while potentially difficult, had not been entirely thwarted by the Court's holding in *DeShaney*.

75

Creative legal approaches notwithstanding, the results of battered women's lawsuits in the decade following the *DeShaney* ruling were fairly dismal. For those law enforcement agencies clearly uninterested in responding to domestic violence calls—a disdain perhaps rooted in misogyny as well as notions of privacy—*DeShaney* seemed to further justify their failure to respond. The most immediate and conspicuous example of *DeShaney*'s impact was in the 1990 case of *Balistreri* v. *Pacifica Police Department*.[181] The plaintiff, Jena Balistreri, was severely beaten by her husband in February 1982. While police did remove him from the home temporarily, they refused to arrest him; furthermore, one of the officers told Jena that she deserved the assault, and one pressured her into not pressing charges.[182] Subsequently, after repeated incidents of vandalism and harassment, Jena obtained a restraining order against her by-then ex-husband, who responded by crashing his car into her garage. Police responded to the scene but refused to arrest or even investigate.[183] Balistreri's subsequent reports to the police of harassment and vandalism were routinely ignored, as police officers denied the existence of the restraining order and even hung up on her.[184] After Balistreri's ex-husband firebombed her house in March 1983, police took 45 minutes to arrive at the scene, where they briefly questioned the ex-husband and promptly determined he was not responsible.[185] For the next two years, Balistreri was subjected to continuing telephone harassment and vandalism to which the police did not respond.[186]

76

Jena Balistreri brought a Section 1983 claim against the Pacifica Police Department based primarily on due process and equal protection grounds. When her case reached the Ninth Circuit, that court affirmed her due process claim based on its recognition of the special relationship that existed between the plaintiff and the Pacifica police. The court based its finding of a special relationship on the existence of the restraining order combined with the police's ongoing awareness of the violence (via the plaintiff's repeated requests for help).[187] The Ninth Circuit issued this opinion in March of 1988. In light of the 1989 *DeShaney* decision, however, the circuit court amended its opinion in 1990. Noting that, in *DeShaney*, "the Supreme Court limited the circumstances giving rise to a 'special relationship,'" the Ninth Circuit concluded that Jena had not in fact established such a relationship, and therefore dismissed her due process claim altogether.[188] This amended opinion provided the first and clearest indication of the kind of impact the *DeShaney* decision might have on future domestic violence civil litigation.

77 Unfortunately, *Balistreri* indeed proved to be the rule rather than the exception throughout the 1990s: courts in many subsequent cases declined to rule in favor of battered women plaintiffs as a result of *DeShaney*. Because the *DeShaney* opinion dealt most specifically with due process and special relationship issues, the cases that suffered, most predictably, in its aftermath were those brought on due process grounds. Courts assessing battered women's due process claims interpreted *DeShaney* broadly, using it as the basis for pronouncements such as "the state and its officials cannot be liable for simply failing, negligently or otherwise, to take affirmative measures to protect an individual,"[189] or, stated more simply, "there is no substantive due process clause right to protection from violence perpetrated by private actors."[190] One such case was brought by the surviving family of a woman killed by her husband directly outside the courtroom where they were about to undergo divorce proceedings. Despite the existence of a restraining order at the time of the murder and the sheriff's agreement (and subsequent failure) to provide police protection to the plaintiff on the date of the hearing, the court in *Duong* v. *County of Arapahoe*[191] found the family's claims to be without merit. Relying almost exclusively on *DeShaney*, the court denied the existence of a special or custodial relationship, in spite of the fact that the state had required the plaintiff to be in the courthouse at the time of her murder.[192] Cases like these effectively signaled that in the wake of *DeShaney*, battered women's due process claims would be all but impossible to prove.

78 *DeShaney*'s reach also extended beyond the realm of due process claims. Even cases brought on equal protection grounds—and therefore not necessarily subject to *DeShaney*'s authority—were often stymied by judges' interpretation of that case. In the 1989 case of *McKee* v. *City of Rockwall*,[193] for example, the Fifth Circuit observed that while *DeShaney* did not "directly bar" plaintiff McKee's equal protection claim, it was "nonetheless relevant"[194]—and the court proceeded to rely on it heavily. The court's opinion noted that because of *DeShaney*, police officers still enjoyed "some discretionary authority;"[195] this authority, in turn, helped to bolster the defendants' assertion that their arrest policies were not biased against women. Granting police wide discretion to implement policies and procedures, the court intoned, "This is the lesson of *DeShaney*: that law enforcement officers have authority to act does not imply that they have any constitutional duty to act."[196]

79 Likewise, a 1994 equal protection case in the Eighth Circuit cited *DeShaney* as it voided a jury's award of $1.2 million to a battered woman and her family.[197] Courts' willingness to apply the spirit of *DeShaney*, even to those cases with very different doctrinal bases, indicated the extent of the setbacks that battered women's litigation had faced as a result of that ruling.

80 Of course, not all courts dismissed battered women's claims after *DeShaney*. In fact, the ruling in the 1990 case of *Freeman* v. *Ferguson*[198] (in which a woman and her daughter were killed by the woman's estranged husband while she had a restraining order against him) even referenced *DeShaney* specifically when finding for the plaintiff. A due process case that could have easily been thwarted by *DeShaney*, *Freeman* instead offered a reading of *DeShaney* that was much less hostile to battered women. Specifically, the *Freeman* court found in *DeShaney*

"the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been absent state action."[199] While this approach was not adopted by the majority of courts, it suggested, at the very least, that *DeShaney* need not be the final word on battered women's civil suits. Likewise, battered women's post-*DeShaney* suits that *did* succeed provided hopeful indications that, while *DeShaney* may have effectively closed at least the substantive due process avenue, plaintiffs could still obtain civil relief on other grounds, primarily equal protection claims.[200]

Castle Rock v. *Gonzales*

81 Ten years after the *DeShaney* decision came down, an escalating domestic violence situation in Colorado ended in tragedy. This incident and the events that preceded it—also resulting from a father's horrific violence against his own children—would eventually provide the basis for the Supreme Court's decision to re-examine *DeShaney*. On May 21, 1999, Jessica Gonzales obtained a temporary restraining order against her husband, Simon Gonzales, directing him to "not molest or disturb the peace of [Jessica Gonzales] or . . . any child."[201] The order stated that "the court . . . finds that physical or emotional harm would result if you [Simon Gonzales] are not excluded from the family home," and ordered him to stay at least one hundred yards away from the property at all times.[202] On June 4, 1999, the order was served and made permanent, and modified to outline specific "parenting time" that Simon Gonzales would be allowed to spend with the couple's three daughters: alternate weekends, two weeks during the summer, and, "upon reasonable notice . . . a mid-week dinner visit with the minor children [that] shall be arranged by the parties."[203]

82 Less than three weeks later, evening of Tuesday, June 22, 1999, Simon violated the order. Without any prior arrangement with Jessica to see the children, he came to the home and abducted all three girls, aged 10, 9, and 7, while they were playing outside. Upon learning of the girls' disappearance, Jessica contacted the Castle Rock Police Department, telling them she suspected the girls had been abducted by their father and asking them to enforce the restraining order against her husband. Two officers were dispatched to her home, where Jessica showed them a copy of the order and urged them to enforce it. The officers told Jessica that "there was nothing they could do" and suggested that she call the police department back if the children were not returned home by 10:00 that night.[204]

83 Approximately an hour later, Jessica reached Simon on his cell phone. He confirmed that the girls were with him at an amusement park in Denver. Jessica immediately called the Castle Rock Police Department again to relate this new information and to again urge the police to find and arrest Simon. The officer she spoke with refused, but suggested that she call back after 10 if the children were not returned home. At 10:10 p.m., she did just that, only to be told to wait for

another two hours. At midnight, she called the police again, and then went to Simon's apartment complex. Finding no one home at Simon's apartment, she called the Castle Rock Police again. The dispatcher told her to wait there for a police officer to arrive. At 12:50 a.m., no officers had arrived, and she went to the police station. There, an officer took an incident report but took no further action. He then went to dinner.[205]

84 At 3:20 a.m., Simon arrived at the police station. Emerging from his truck, he began shooting at the police station with a semiautomatic handgun. He was quickly shot dead by the police. Searching the truck, police found the bodies of the three girls, Rebecca, Katheryn, and Leslie, whom Simon had murdered earlier that night.[206]

85 Jessica Gonzales brought a Section 1983 suit in federal court against the City of Castle Rock and the three individual officers for their failure to respond to her repeated requests for enforcement of her restraining order.[207] Her case alleged that she was denied both substantive and procedural due process rights by the Castle Rock Police Department in their failure to enforce the order. [208] She further claimed that the City of Castle Rock had a pattern and practice of failing to respond properly to violations of domestic violence restraining orders.[209]

86 The district court relied heavily on *DeShaney* in its analysis of Gonzales's substantive due process claims. Writing for the court, Judge Wiley Daniel claimed that "the starting point for analyzing the validity of Plaintiff [sic] substantive due process claim is *DeShaney* v. *Winnebago,*" which he said, reveals that "[e]ven if the State knows of an individual's predicament or expresses intent to help an individual, its failure to protect does not violate substantive due process."[210] Judge Daniel conceded that, while "[t]he Tenth Circuit has recognized two exceptions to the general *DeShaney* rule: (1) the special-relationship doctrine, and (2) the danger-creation theory," Gonzales's case did not meet either of these criteria, because, "[c]onsistent with *DeShaney*, both exceptions apply *only where the State creates the danger*." [211] Specifically, Daniel concluded that the danger was a direct result of Simon Gonzales's action, not of police inaction, and that therefore, Jessica Gonzales had failed to state a claim of denial of her substantive due process rights.

87 Jessica's procedural due process claim, on the other hand, rested on a different foundation. To determine whether or not her procedural due process rights had been denied, the court had to consider whether or not she had been deprived of life, liberty, or property without "appropriate procedural safeguards."[212] In this case, Gonzales alleged that "the State, by failing to enforce the TRO [temporary restraining order] as required by [Colorado law], deprived her of the property interest created by the TRO without proper procedure such as notice and/or a hearing to vacate the TRO."[213] In other words, Gonzales argued that the state had deprived her of a property right without due process of law.

88 For the purposes of due process analysis, "property" has been described by the US Supreme Court as "a broad and majestic term."[214] The Court has noted that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," and "may take many forms."[215] Specifically, "a property interest is created when a person has secured an interest in a specific benefit to which the individual has 'a legitimate claim of entitlement.'"[216] In the *Gonzales* case, the property interest at issue was Jessica Gonzales's expectation that her TRO would be enforced. For such a claim of entitlement to be legitimate, the statute or other objective measure creating the claim must contain "language [that] is so mandatory that it creates a right to rely on that language."[217] In short, the property interest cannot be based on an unfounded expectation; there must be explicit, *mandatory* language granting that benefit or service.

89 The district court's analysis of Jessica Gonzales's procedural due process claim, therefore, depended upon its opinion about whether or not she had been deprived of a property interest without appropriate procedural safeguards. Before answering that question, the court first wondered whether or not Jessica's expectation of the enforcement of her TRO constituted a property interest at all—and concluded that it did not. Judge Daniel observed that Colorado's mandatory arrest statute governing the enforcement of restraining orders required responding officers to make a determination of probable cause before making an arrest. Since police were required to use discretion in making that determination, he reasoned, they therefore were not obligated by any mandatory duty. He asserted, "No Colorado law . . . holds that a valid protective order creates a property interest that can only be removed through due process of law."[218] As such, he concluded, Gonzales had no "protectable property interest," and therefore no basis on which to claim that the state of Colorado had deprived her of that property interest without due process of law.[219] As a result, her procedural due process claim, in addition to her substantive due process claim, was dismissed.

90 Upon appeal in 2002, the Tenth Circuit agreed with the district court's analysis of Jessica's substantive due process claim. They disagreed, however, with regard to the procedural due process claim. The Tenth Circuit found that the restraining order, and the statute on which it was based—both of which explicitly command police to enforce the order—did create a property interest worthy of constitutional protection.[220] Subsequently, in a hearing en banc,[221] the circuit court went even further. The majority found not only that Gonzales had a property interest, but also that a particular process was indeed owed to her before she was deprived of that property.[222]

91 While the district court had claimed that police's ability to use discretion in determining probable cause meant that the statute did not mandate any particular police action, the circuit court strongly disagreed. Writing for the circuit court majority, Judge Stephanie Seymour stated that:

> [A]n officer's determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms. . . . Moreover, once probable cause exists, any

> discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished. . . . [The responding officers] were not given carte blanche discretion to take no action whatsoever. The restraining order and its enforcement statute took away the officers' discretion to do nothing and instead mandated that they use every reasonable means, up to and including arrest, to enforce the order's terms.[223]

Judge Seymour's straightforward analysis of the police's duty to protect affirmed in many ways the claims made by anti-domestic-violence activists for years. Just because police had discretion in determining probable cause, she concluded, that discretion did not include the option of ignoring victims' requests for help, or of choosing not to make any probable cause determination at all.

92

When the city of Castle Rock appealed to the United States Supreme Court in 2005, the amicus briefs filed on behalf of Jessica Gonzales echoed similar sentiments. One such brief, submitted by the National Black Police Association, Women in Federal Law Enforcement, and others, flatly stated, "domestic violence can no longer hide behind soft language. It is not a 'quarrel,' 'spat,' or 'dispute.' It involves crimes that demand a law enforcement response, including arrest where probable cause and legal authority exist."[224] Another amicus brief, coauthored by the National Coalition Against Domestic Violence and the National Center for Victims of Crime, observed that "[u]ntil recently, law enforcement's under-enforcement of laws involving domestic violence was widespread," and noted the "archaic misconceptions and stereotypes" that have "contributed to law enforcement's failure to arrest men who were abusing their partners or violating protective orders."[225] Once again, anti-domestic-violence activists and their allies found themselves in the position of attempting to convince the court that the state—and specifically, law enforcement—had a duty to protect battered women from the violence in their homes.

93

Case Resources
Castle Rock v. *Gonzales*
Findlaw (http://laws.findlaw.com/us/000/04-278.html) (full text)
Oyez (http://www.oyez.org/cases/case?case=2000-2009/2004/2004_04_278) (oral arguments)

The United States Supreme Court, however, ultimately disagreed. In a 7-2 decision, the Court found that Jessica Gonzales's due process claim failed. Gonzales was not deprived of her due process rights, the Court concluded, because she did not have a property interest in police enforcement of her restraining order. Like the district court, the Supreme Court viewed the matter of police discretion as a barrier to this property interest. Writing for the majority, Justice Scalia was unconvinced that the language of Colorado's mandatory arrest statute truly required that such orders be enforced: "We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." [226] Their stance on

this issue—whether a statute could truly be considered mandatory given that it granted police the power of discretion in probable cause determinations—was central to the majority's reasoning in the *Gonzales* decision.[227]

94 The dissent, authored by Justices Stevens and Ginsburg, found this reasoning to be flawed. Like the amicus briefs filed for Gonzales, the dissent pointed out that domestic violence mandatory arrest statutes were a "unique case" to be considered, in light of the fact that "[s]tates passed a wave of these statutes in the 1980's and 1990's with the unmistakable goal of eliminating police discretion in this area."[228] This context and the well-documented history of police refusal to respond appropriately to domestic violence calls, the dissent claimed, were crucial to an understanding of the intent of mandatory arrest statutes, such as Colorado's, that targeted domestic violence.

95 Arguing for the importance of understanding this context, Justice Stevens made explicit reference to the problem of privacy, noting, "The crisis of under-enforcement had various causes, not least of which was the perception by police departments and police officers that domestic violence was a private, 'family' matter and that arrest was to be used as a last resort."[229] This clear understanding and articulation of the links between the societal concept of privacy, the historical failure on the part of law enforcement to respond to domestic violence, and the resulting increased danger for victims of domestic violence was unprecedented on the United States Supreme Court. While Justices Stevens and Ginsburg were in the minority, their expression of this argument—advanced by anti-domestic-violence activists for decades—was a clear signal that at last this message had gotten through to at least some members of the Court.

96 Building on this concept and echoing Circuit Judge Seymour's earlier analysis, Justice Stevens took exception to the notion that police discretion could excuse a failure to act at all:

> the crucial point is that, under the statute, the police were *required* to provide enforcement; they *lacked the discretion to do nothing*. . . . Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day.[230]

For these reasons, the dissent concluded, Jessica Gonzales had a property interest based on her legitimate expectation that her court-issued restraining order would be enforced. That property interest was worthy of constitutional due process protection, and that protection had been denied.

The Implications of Gonzales *for Future Battered Women's Litigation*

97 Not surprisingly, anti-domestic-violence activists responded to the *Gonzales* decision with outrage and a profound sense of disappointment. Numerous publications of the battered women's movement featured articles explaining the decision and expressing their frustration with the Court's ruling. The lead article of the Family Violence Prevention Fund (FVPF) publication *Speaking Up*, for example, was devoted to the decision, which it denounced in harsh terms. Quoting FVPF's President, Esta Soler, the article stated,

> This damaging ruling may cause more family violence victims to live in terror, and more domestic violence injuries and deaths.
>
> Restraining orders aren't worth the paper they are written on when police do not enforce them. . . . This is a sad day and a giant step backward for a nation that had been making progress in stopping domestic violence and helping victims.[231]

Other movement publications expressed similar sentiments, while simultaneously seeking to answer the question: what legal remedies are still available to victims of domestic violence whom police fail to protect? Often, these articles sought to convey that despite the ruling, restraining orders could still be an important means of protection for battered women, in an attempt to counteract the media perception that *Gonzales* had rendered such orders essentially meaningless.[232] These authors also acknowledged, however, that when police failed to enforce the orders, legal recourse for victims had been severely limited by the *Gonzales* decision.

98 In *Gonzales*, the Supreme Court sent a clear message that the due process clause of the constitution was now effectively closed as an avenue through which battered women could pursue these "failure to protect" suits. While the *Gonzales* decision was limited to the procedural aspects of due process, it reinforced *DeShaney* in further limiting the possibility of succeeding with such a suit on due process grounds. In fact, the *Gonzales* majority made this point rather explicitly, by linking the two decisions together to draw a general conclusion about the due process clause: "In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."[233]

99 Given this reality, activist writings on still-existing remedies have focused primarily on state-level remedies for police failure to protect victims of domestic violence. These authors note that traditional avenues for enforcing orders still exist: civil and criminal contempt actions, for example, and state tort law. In some states, they note, state constitutional remedies may be available. They even note that federal equal protection arguments such as that used successfully in *Thurman* v. *Torrington* are still available. Likewise, substantive due process claims may still be available to a plaintiff who can prove that the state affirmatively created the

danger she encountered. Both of these federal constitutional remedies, however, are noted with caution as to their limited likelihood of success, given the Court's tone in *DeShaney* and *Gonzales*.[234]

Last, activists writing in the wake of *Gonzales* urged others in the movement to work toward administrative and legislative ends: improving internal police accountability systems, and improving state tort laws. By continuing to educate law enforcement agencies and create standards of accountability at the local level, they suggest, advocates could help to create systems of "individualized oversight" that discipline officers who fail to comply with policies and laws.[235] Likewise, by improving state tort laws, advocates could create stronger mechanisms by which to motivate officers to comply, and hold them accountable for failure to do so.[236] In short, despite their disappointment with *Gonzales*, anti-domestic-violence advocates have continued to explore and promote a variety of legal and activist strategies for justice for battered women. **100**

Conclusion

The decade of the 1980s was a crucial one for litigation by the battered women's movement. First, two early class-action lawsuits, *Bruno* v. *Codd* and *Scott* v. *Hart*, resulted in significant policy changes, both locally and in many other areas across the nation. Subsequently, battered women's civil litigation proliferated, as victims of domestic violence and their advocates brought cases on due process and equal protection grounds. Often challenged by the doctrines of special relationship and qualified immunity, many of these suits succeeded nonetheless, whether via judicial rulings, jury awards, or out-of-court settlements. **101**

In 1989, the United States Supreme Court opinion in the child abuse case of *DeShaney* v. *Winnebago County* marked a significant turning point for battered women's civil litigation. Definitively proclaiming that the state has no obligation to protect individuals from private violence, the *DeShaney* opinion practically eliminated one of the most effective means of civil redress previously available to battered women—Section 1983 suits based on substantive due process claims. While most courts embraced *DeShaney* wholeheartedly, battered women plaintiffs continued to find some success in the civil arena with equal protection claims, suggesting that while *DeShaney* undeniably made such litigation more difficult, it did not render it impossible. In 2005, however, when the Court revisited this issue in the case of *Castle Rock* v. *Gonzales*, its decision closed off yet another avenue for battered women's claims, procedural due process suits. Perhaps just as important as its substantive holding, however, is the message the Court sent with the *Gonzales* decision. As the Court's second rejection of the Due Process clause as a basis for such suits, *Gonzales* strongly reinforces the overall tone of *DeShaney*, denying the state's obligation to protect citizens from private violence. Taken together, these two opinions seem to send this message so strongly that lower courts may even read the *Gonzales* opinion broadly to prohibit other constitutional arguments (such as equal **102**

protection claims), as happened in the wake of *DeShaney*. Whether that happens or not, it is clear that battered women can no longer rely on such suits for civil redress. Indeed, as options for a due-process-based remedy have all but vanished, the need for an affirmative right to privacy becomes even more urgent.

Overall, the civil lawsuits brought during this era were premised on the fact that battered women were not protected by police departments equally to victims of other crimes. Furthermore, this protection was being denied to them as a result of stereotypical ideas about gender roles and privacy, namely, the state's refusal to invade the sanctity of the private—often marital—home, no matter the injury to the woman inside. These suits deliberately attacked those conceptions of privacy, urging police and judges to make women's safety a higher priority than domestic privacy. **103**

By insisting upon police protection for crimes of private as well as public violence, however, battered women and their advocates simultaneously implied that state intervention in the home was a desirable goal. Likewise, while this phase of the movement often succeeded in blurring the boundary between public and private spheres, plaintiffs in these suits were generally required to prove themselves worthy of this level of state protection, most often via the establishment of a "special relationship" with the local police. As such, these suits, which often achieved significant gains both for individual plaintiffs and for the movement as a whole, also reinforced a model of the state as protector. This model, while not necessarily negative, is nonetheless imbued with elements of paternalism that are problematic for the issue of domestic violence. Women's need for, desire for, and right to protection by the state thus creates an uneasy tension. On one hand, the civil suits of the 1980s represent battered women and their advocates demanding equal access to the protective power of the state to which they are constitutionally entitled. At the same time, they resist the ideological constraints imposed by that power, having little need for a paternalistic state response that demands that women prove that they, or their relationships, deserve such protection. The paradox highlighted by battered women's demands for state protection echoes larger feminist debates about women's relationship to the state. These debates are at the core of the privacy issue for feminists who, while recognizing the need for police protection from abusive partners, question the extent to which state intervention should be pursued. **104**

The history of battered women's civil litigation demonstrates the positive potential of state intervention in the home; namely, equal police protection for battered women. In the next chapter, however, I will explore the flip side of this issue; in particular, the dangers that exist for women (and men) in abusive same-sex relationships when the state enters the home. The historical development of the legal right to privacy outlined in chapter two reveals a clear privileging of heterosexual, married relationships. The next chapter will examine the lasting implications of that legacy of privilege, further complicating the meaning of the "right to privacy" **105**

for battered women. Ultimately, given the inherent limitations of the state-as-protector model that chapter five will help to demonstrate, I will return to the assertion of an affirmative, *Liberta*-esque right to privacy as a potential alternative to the privacy paradox.

Notes

Note 1: 64 N.Y.2d 152 (1984).

Note 2: In *Monell* v. *Department of Social Services*, http://laws.findlaw.com/us/436/658.html (full text), the Court reversed its previous ruling that municipalities could not be held liable under Section 1983, noting instead that municipalities should be considered "persons" for such purposes and thus could now be held liable for damages under Section 1983. 436 U.S. 658, 1978: 700–701.

Note 3: In addition to police departments, battered women's civil suits often named individual police officers; prosecutors and/or other court personnel; and local governing bodies with authority over these entities, such as city councils, as defendants.

Note 4: 42 U.S.C. §1983, which will hereafter be referred to as "Section 1983," provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Note 5: 419 N.Y.S.2d 901 (1979).

Note 6: No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).

Note 7: 489 U.S. 189 (1989).

Note 8: Ibid., 194.

Note 9: Joan Zorza, "Suing the Police After *DeShaney*," n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36.

Note 10: *Jessica Gonzales* v. *City of Castle Rock*, 307 F.3d 1258 (2002).

Note 11: "Action Programs in Domestic Violence," 1978. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Organization for Women records, MC 496, Box 50, Folder 72.

Note 12: Litigation Strategy Session Minutes, July 14, 1976. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 4.

Note 13: See, for example, "Battered Women's Litigation Against Third Parties," n.d. NCOWFL Information Packet Item No. 24 (hereafter "Battered Women's Litigation"). Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36; "Recent Court Cases Concerning Battered Women," July 9, 1982, NCOWFL Information Packet (hereafter "Recent Court Cases"). Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36; and Laurie Woods, "Civil Litigation by Battered Women Against the Assailant and Against Government Officials," 1984 (hereafter "Civil Litigation"). Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 24.

Note 14: See, for example, *Nearing* v. *Weaver*, 295 Ore. 702 (1983).

Note 15: See, for example, *Dudosh* v. *Allentown*, 629 F. Supp. 849 (1985), and *Bartalone* v. *County of Berrien*, 643 F. Supp. 574 (1986).

Note 16: 595 F. Supp. 1521 (1984).

Note 17: Ibid., 1527.

Note 18: See, for example, *Doe* v. *Belleville*, No. 81-5256 (S.D. Ill. Sept. 9, 1983), and Earl Rinehart, "Judge Signs Decree on Handling of Domestic Cases," *Belleville [Illinois] News-Democrat* (September 11, 1983: 3A); and Earl Rinehart, "Police to End 'Cooling-Off Period' in Domestic Cases," *Belleville [Illinois] News-Democrat* (September 13, 1983: n. pg.).

Note 19: "Recent Court Cases." Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36.

Note 20: "Legal Advocacy for Battered Women," n.d., p. 1. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 22.

Note 21: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 31.

Note 22: *Benway* v. *Watertown*, 1 A.D.2d 465 (1956).

Note 23: *Morgan* v. *County of Yuba*, 230 Cal.App.2d 938 (1964).

Note 24: *Jones* v. *Herkimer*, 51 Misc.2d 130 (1966).

Note 25: *Zibbon* v. *Town of Cheektowaga*, 387 N.Y.S.2d 428 (1976).

Note 26: *Canosa* v. *City of Mt. Vernon*, 327 N.Y.S.2d 843 (1971).

Note 27: Pauline Gee, interview by author, May 24, 2002.

Note 28: *Scott* Complaint, 3–7.

Note 29: *Scott* Complaint, 6–7.

Note 30: Ibid., 2.

Note 31: Ibid., 7–8.

Note 32: The OPD received funding from LEAA, the federal Law Enforcement Assistance Administration.

Note 33: *Scott* Complaint, 8.

Note 34: Unlike *Scott*, the *Bruno* complaint did not call attention to the race of its named plaintiffs, nor did it make any race-based discrimination claims (*Bruno* Complaint, 1–3).

Note 35: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 17.

Note 36: *Bruno* Complaint, 77–81.

Note 37: *Bruno* v. *Codd*, 1050.

Note 38: Many victims of domestic violence obtain protective orders pro se or pro per, that is, "for themselves," or without the assistance of formal legal representation.

Note 39: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 17.

Note 40: While plaintiffs recognized the federal claims available to them, such as the federal constitutional equal protection claim, they reserved those claims on the chance that, should they be granted class-action status yet lose on the merits, the resulting precedent would damage future federal actions on behalf of battered women. Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 21.

Note 41: Ibid., 21.

Note 42: Ibid., 24.

Note 43: None of the official *Bruno* documents, nor the minutes from any of the litigation strategy sessions, mentions the issue of race, so neither the racial backgrounds of the named plaintiffs nor the reasons for the *Bruno* team's initial omission of a discussion about race from their suit is clear. During the appeals process, however, a coalition of groups representing the interests of women of color,

including the Asian American Legal Defense and Education Fund and the National Conference of Black Lawyers, submitted an amicus brief on behalf of the *Bruno* plaintiffs. This brief acknowledged that "the social and political issues affecting battered women cut across all class and racial lines" and that "[t]he denial of protection for battered women is part of the fabric of institutional malfeasance . . . which seriously affects the health or vitality of the poor and national racial communities" (*Bruno* Brief of Plaintiffs-Appellants, 13).

Note 44: Gee, interview, 2002. Of course, New York City is no less racially diverse than Oakland, but the *Bruno* case did not directly address issues of race in its complaint (see previous footnote for further discussion).

Note 45: *Scott* Complaint, 1–2, 7.

Note 46: Gee, interview, 2002; *Scott* Complaint; *Scott* Amended Complaint.

Note 47: Pauline Gee, "Class Action Challenges to the Criminal Justice System's Policy of Non-Intervention and Non-Arrest in Domestic Violence Cases," n.d., p. 4. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 24.

Note 48: Ibid., 2.

Note 49: Marjory Fields, interview by author, January 22, 2002.

Note 50: Litigation Strategy Session Minutes, July 14, 1976. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 4.

Note 51: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 15–16.

Note 52: Litigation Strategy Session Minutes, July 14, 1976; August 12, 1976; December 14, 1976; April 14, 1976. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 4.

Note 53: J. C. Barden, "Wife Beaters: Few of them Even Appear Before a Court of Law," *New York Times,* October 21, 1974, n. pg.

Note 54: "Batterers Beware! Oakland Police Department to Afford Better Police Protection to Battered Women." Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 21.

Note 55: In *Bruno*, the case against the probation and family court personnel was ultimately rejected by the court of appeals, which determined that those defendants either had already changed or were in the process of changing the challenged practices. For more information, see Laurie Woods, "Litigation on Behalf of Battered Women" (update), *Women's Rights Law Reporter* 7 (1981): fn 4.

Note 56: The primary difference between these two types of agreements is that, unlike a consent judgment, a stipulation of settlement is not enforceable by judicial contempt proceedings (Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 [1978]: 27). Nevertheless, both agreements provided significant measures of accountability and enforceability through a variety of mechanisms. Furthermore, while the differences between these two agreements are not insignificant, in the interest of simplicity, I use the terms "settlement" and "agreement" here generically and interchangeably to refer to both the settlement decree in *Scott* and the consent judgment in *Bruno*.

Note 57: *Bruno* Consent Judgment, 32; *Scott* Settlement Decree, 2, 4.

Note 58: *Bruno* Consent Judgment, 32–33; *Scott* Settlement Decree, 3–4.

Note 59: *Bruno* Consent Judgment, 33; *Scott* Settlement Decree, 7.

Note 60: *Bruno* Consent Judgment, 32; *Scott* Settlement Decree, 8; Pauline Gee, "Ensuring Police Protection for Battered Women: The *Scott* v. *Hart* Suit," *Signs: Journal of Women in Culture and Society* 8 (1983): 559.

Note 61: While the language used in California is the more common "probable cause," the equivalent term in New York State is "reasonable cause."

Note 62: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): 29.

Note 63: *Scott* Complaint, 4; Gee, interview, 2002. Specifically, the *Scott* Complaint details a named plaintiff using this strategy in an attempt to obtain relief in a domestic assault, and notes, "Ms. Aubrey's past experience led her to conclude that the way to get the Oakland Police Department's assistance was not to identify the problem as involving a family dispute" (*Scott* Complaint, 4).

Note 64: *Bruno* Consent Judgment, 32; *Scott* Settlement Decree, 5.

Note 65: Of course, this problem represented a particularly insidious double-edged sword for battered women, who could certainly not get their partners arrested if they failed to call; yet, when they called frequently, were often designated pejoratively as "chronic callers," whose calls were subsequently ignored or not taken seriously (*Scott* Settlement Decree, 5).

Note 66: *Bruno* Consent Judgment, 32; *Scott* Settlement Decree, 5.

Note 67: *Bruno* Consent Judgment, 32.

Note 68: *Scott* Settlement Decree, 5.

Note 69: Gee, interview, 2002; *Scott* Settlement Decree, 10.

Note 70: Gee, interview, 2002; *Scott* Settlement Decree, 10.

Note 71: Gee, interview, 2002; *Scott* Settlement Decree, 10.

Note 72: *Bruno* Consent Judgment, 33.

Note 73: Ibid., 33.

Note 74: Ibid., 33.

Note 75: Gee, interview, 2002.

Note 76: Fields, interview 2002; Gee, interview, 2002.

Note 77: Gee, interview, 2002.

Note 78: See, for example, "N.Y. Police Will Begin Arresting Wife Beaters," *Washington Post*, June 28, 1978, Wednesday, Final Edition, p. A10.

Note 79: Laurie Woods, "Litigation on Behalf of Battered Women," *Women's Rights Law Reporter* 5 (1978): fn 154.

Note 80: See *Thomas* v. *City of Los Angeles*, CA 00572/79 (Cal. Sup. Ct., filed Aug. 16, 1979, settled Nov. 4, 1985) and *Doe* v. *Belleville*, No. 81-5256 (S.D. Ill., filed Sept. 15, 1981; settled Sept. 9, 1983).

Note 81: Pauline Gee, "Class Action Challenges to the Criminal Justice System's Policy of Non-Intervention and Non-Arrest in Domestic Violence Cases," n.d., p. 4. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 24.

Note 82: See footnote 40, above.

Note 83: For further information on this trend, see Douglas Martin, "The Rise and Fall of the Class Action Lawsuit," *New York Times*, January 8, 1988, p. B7; and Joel Seligman and Lindsey Hunter, "Rule 23: Class Actions at the Crossroads," *Arizona Law Review* 39 (1997): 407.

Note 84: *Nearing* v. *Weaver*, 295 Ore. 702 (1983).

Note 85: Ibid., 704.

Note 86: *Huey* v. *Barloga*, 277 F. Supp. 864 (1967).

Note 87: *Byrd* v. *Brishke*, 466 F.2d. 6 (1972).

Note 88: James T. R. Jones, "Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After *DeShaney*," *West Virginia Law Review* 93 (1991): 264.

Note 89: *Wright* v. *Ozark,* 715 F.2d 1513 (1983): 1516.

Note 90: *Balistreri* v. *Pacifica,* 855 F.2d 1421 (1988): 1425.

Note 91: Laura S. Harper, "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services*," *Cornell Law Review* 75 (1990): 1400–1402.

Note 92: Ibid., 1400–1402.

Note 93: *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), 818, http://laws.findlaw.com/us/457/800.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1981/1981_80_945 (audio).

Note 94: See, for instance, *White* v. *Rochford*, 592 F.2d 381 (1979), *Jackson* v. *City of Joliet*, 715 F.2d 1200 (1983), *Lowers* v. *City of Streator*, 627 F.Supp. 244 (1985), *Escamilla* v. *City of Santa Ana*, 796 F.2d 266 (1986), *Sherrell* v. *City of Longview*, 683 F. Supp. 1108 (1987), and *Anderson* v. *Creighton*, 483 U.S. 635 (1987), http://laws.findlaw.com/us/483/635.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1986/1986_85_1520 (audio).

Note 95: *White* v. *Rochford; Jackson* v. *City of Joliet.*

Note 96: *Lowers* v. *City of Streator.*

Note 97: *Escamilla* v. *City of Santa Ana.*

Note 98: Given the wide range of cases through which courts developed standards of immunity and liability at this time—including both domestic violence and nondomestic-violence cases—it appears that the standards did not discriminate, at least on the surface, between officers' responses to "public" violence (for instance, a bar fight) and "private" violence (such as domestic abuse). Nonetheless, as this book argues, state responses to these two kinds of violence have often differed dramatically.

Note 99: *Anderson*, 641.

Note 100: *Hynson* v. *City of Chester Legal Department*, 864 F.2d 1026 (1988).

Note 101: See, for example, *Anderson*, *supra*, *Hynson*, *supra*, *Tarantino v. Baker*, 825 F.2d 772, 774 (1987), and *Turner v. Dammon*, 848 F.2d 440, 443 (1988).

Note 102: *Nearing* v. *Weaver*, 295 Ore. 702 (1983).

Note 103: Ibid., 741.

Note 104: *Dudosh* v. *Allentown*, 629 F. Supp. 849 (1985).

Note 105: Ibid., 855.

Note 106: Ibid., 855.

Note 107: It is important to note, however, that *Dudosh* was subsequently reconsidered by the district court, twice before and once after the *DeShaney* ruling. In each of these subsequent cases, the court accepted the Dudosh family's equal protection argument, but denied its substantive due process claim. *Dudosh* v. *Allentown*, 665 F. Supp. 381 (1987), *Dudosh* v. *Warg*, 668 F. Supp. 944 (1987), *Dudosh* v. *Allentown*, 722 F. Supp. 1233 (1989).

Note 108: 643 F. Supp. 574.

Note 109: Ibid., 575.

Note 110: Ibid., 575.

Note 111: Ibid., 577.

Note 112: Ibid., 577.

Note 113: 857 F.2d. 690 (1988).

Note 114: Ibid., 691.

Note 115: Ibid., 692. In this case, of course, the police's unwillingness to arrest one of their own undoubtedly contributed to their failure to intervene appropriately.

Note 116: Ibid., 695.

Note 117: Subsequently, on remand, the district court did grant qualified immunity in this case, but only to the individual officers. *Watson* v. *Kansas City*, Civil Action No. 84-2335-S (1989).

Note 118: 595 F.Supp. 1521 (1984).

Note 119: 65 N.Y.2d 461 (1985).

Note 120: *Thurman*, 1525–26.

Note 121: Ibid., 1526.

Note 122: Ibid., 1528.

Note 123: Ibid., 1528, 1529.

Note 124: New York Family Court Act §168 states, in part, that "[t]he presentation of a copy of an order of protection or temporary order of protection or a warrant or a certificate of warrant to any peace officer, acting pursuant to his special duties, or police officer shall constitute authority for him to arrest a person charged with violating the terms of such order of protection or temporary order of protection and bring such person before the court and, otherwise, so far as lies within his power, to aid in securing the protection such order was intended to afford" (*Sorichetti*, 468).

Note 125: Ibid., 465.

Note 126: Ibid., 465.

Note 127: Ibid., 465–66.

Note 128: Ibid., 466–67.

Note 129: Ibid., 467.

Note 130: The jury originally awarded Dina three million dollars. The City, however, contested this amount, so, to avoid a new trial, plaintiffs agreed to a reduction of this verdict to two million dollars. Josephine's financial award was not affected by this development (*Sorichetti*, 461).

Note 131: Ibid., 461.

Note 132: Ibid., 471.

Note 133: Ibid., 469.

Note 134: Ibid., 469.

Note 135: Ibid., 469.

Note 136: See, for example, Greg Anderson, "*Sorichetti* v. *City of New York* Tells the Police that Liability Looms for Failure to Respond to Domestic Violence Situations," *University of Miami Law Review* 40 (1985): 333; Caitlin E. Borgmann, "Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect *DeShaney*?" *New York University Law Review* 65 (1990): 1280; Susanne M. Browne, "Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations," *Southern California Law Review* 68 (1995): 1295; Laura S. Harper, "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services*," *Cornell Law Review* 75 (1990): 1393–1425; Carolyne R. Hathaway, "Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints. *Thurman* v. *City of Torrington*," *Georgetown Law Journal* 75 (1986): 667; Dirk Johnson, "Abused Women Get Leverage in Connecticut," *New York Times*, June 15, 1986: Section 4; Page 8; Lauren L. McFarlane, "Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?" *Case Western Reserve Law Review* 41 (1991): 929; Crystal Nix, "For Police, Domestic Violence is no Longer a Low Priority." *New York Times,* December 31, 1986:

Section B; Page 1; Special to *New York Times*, "Court of Appeals Tells City to Pay $2 Million to Girl Father Stabbed," *New York Times.* July 10, 1985: Section B; p. 4; and Staff report, "Millions Awarded Beaten Wife Who Sued Connecticut Police," *Washington Post,* June 26, 1985: First Section; p. A7.

Note 137: *A Cry for Help: The Tracey Thurman Story*. Dir. Robert Markowitz. Perf. Nancy McKeon, Bruce Weitz. Lifetime Original Movies, 1989.

Note 138: *Collins* v. *Kings County*, 742 P.2d 185 (1987).

Note 139: Ibid., 189.

Note 140: Ibid., 189. As the *Collins* court noted, "the public policy that requires immunity for individual prosecutors also requires immunity for the county and the state. If it were otherwise, the objectives for granting immunity would be destroyed because the prosecutor would need to be concerned with potential tort litigation involving the county and state each time he made a prosecutorial decision. . . . This same public policy rationale applies to employees" (ibid., 270–71). This specific aspect of the *Collins* ruling, however, (extending this immunity to the county and the state) was overturned five years later in *Lutheran Day Care* v. *Snohomish County*, 829 P.2d 746 (1992).

Note 141: 675 F. Supp. 314.

Note 142: Ibid., 319.

Note 143: Ibid., 317–18.

Note 144: Ibid., 319.

Note 145: 864 F.2d 1026.

Note 146: Ibid., 1029.

Note 147: Ibid., 1032.

Note 148: See, for example, Justice Scalia's majority opinion in *Anderson* v. *Creighton*, noting that officers are protected by immunity *except* in those cases in which "a reasonable official would understand that what he is doing violates that right" (*Anderson*, 640).

Note 149: Joan Zorza, "Suing the Police After *DeShaney*," n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36.

Note 150: *DeShaney*, 192.

Note 151: Ibid., 192.

Note 152: Ibid., 193.

Note 153: Ibid., 193.

Note 154: Ibid., 193.

Note 155: Ibid., 194.

Note 156: The Court clearly acknowledged that the *DeShaney* case "invok[ed] the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him appropriate procedural safeguards" (ibid., 195). Nonetheless, much of the majority opinion speaks generally about the due process clause without continuing to specify that it refers only to substantive, and not procedural, due process. This lack of specificity has invited some expansive interpretations of *DeShaney* in subsequent decisions by lower courts and the Supreme Court itself, as noted later in this chapter.

Note 157: Ibid., 195.

Note 158: Ibid., 196.

Note 159: 448 U.S. 297.

Note 160: *Harris* 1980, qtd. in *DeShaney*, 196.

Note 161: *DeShaney*, 197.

Note 162: See *Anderson* v. *Creighton* (1987).

Note 163: *DeShaney*, 199–200.

Note 164: Ibid., 200.

Note 165: Ibid., 200.

Note 166: I do not intend, here, to compare battered women's ability or inability to act on their own behalf to that of Joshua DeShaney. Much has been written debating the extent to which Battered Women's Syndrome does or does not render victims of domestic abuse helpless and unable to act for themselves, a conversation which is far outside the scope of this book. Instead, I am only calling attention here to the fact that the Court's insistence on a negative rights analysis obscured one of the most significant aspects of the case, thereby denying justice to the plaintiffs. The dangers inherent in this kind of analysis resonate strongly with those faced by battered women who are confronted with negative-rights interpretations of the right to privacy.

Note 167: See, for example, *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), http://laws.findlaw.com/us/487/589.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1987/1987_87_253 (audio); *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), http://laws.findlaw.com/us/492/361.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1988/1988_87_5765 (audio); *Allegheny* v. *ACLU*, 492 U.S. 573 (1989), http://laws.findlaw.com/us/492/573.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1988/1988_87_2050 (audio); and *Webster* v. *Reproductive Health Services*, 492 U.S. 490 (1989), http://laws.findlaw.com/us/492/490.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1988/1988_88_605 (audio).

Note 168: *DeShaney*, 207.

Note 169: Ibid., 210.

Note 170: Ibid., 210.

Note 171: Ibid., 210.

Note 172: Ibid., 212.

Note 173: Ibid., 212.

Note 174: "U.S. Supreme Court Ruling in DeShaney," *The Women's Advocate: Newsletter of the National Center on Women and Family Law* 10:2 (May, 1989): 1. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 24.

Note 175: "The Implications of *DeShaney*," NCOWFL Information Packet. Item No. 40. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 24.

Note 176: Joan Zorza, "Suing the Police After *DeShaney*," n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 36. See also Laura Harper, "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services,*" *Cornell Law Review* 75 (1990): 1393–1425.

Note 177: Laura Harper, "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services,*" *Cornell Law Review* 75 (1990): 1393–1425.

Note 178: Caitlin E. Borgmann, "Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect *DeShaney*?" *New York University Law Review* 65 (1990): 1280.

Note 179: Laura S. Harper, "Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After *DeShaney* v. *Winnebago County Department of Social Services*," *Cornell Law Review* 75 (1990): 1400–1402.

Note 180: Akhil Reed Amar and Daniel Widawsky, "Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*," *Harvard Law Review* 105 (1992): 1359.

Note 181: 901 F.2d 696 (1990).

Note 182: Ibid., 698.

Note 183: Ibid., 698.

Note 184: Ibid., 698.

Note 185: Ibid., 698.

Note 186: Ibid., 698.

Note 187: 855 F.2d 1421 (1988): 1426–27.

Note 188: *Balistreri* 1990, 700.

Note 189: *Brown* v. *City of Elba,* 754 F. Supp. 1551 (1990): 1555.

Note 190: *Siddle* v. *City of Cambridge,* 761 F. Supp. 503 (1991): 508.

Note 191: 837 P.2d. 226 (1992).

Note 192: Ibid., 229–30.

Note 193: 877 F.2d. 409 (1989).

Note 194: Ibid., 413.

Note 195: Ibid., 414.

Note 196: Ibid., 414.

Note 197: *Ricketts* v. *City of Columbia,* 36 F.3d. 775 (1994), 778.

Note 198: 911 F.2d. 52 (1990).

Note 199: Ibid., 55.

Note 200: See, for example, *Coffman* v. *Wilson,* 739 F. Supp. 257 (1990), *Raucci* v. *Rotterdam,* 902 F.2d 1050 (1990), *Hurlman* v. *Rice,* 927 F.2d 74 (1991), and *Roy* v. *City of Everett,* 738 P.2d 1090 (1992).

Note 201: *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1096.

Note 202: Ibid., 1096.

Note 203: Ibid., 1097.

Note 204: Ibid., 1097.

Note 205: Ibid., 1098.

Note 206: Ibid., 1098.

Note 207: *Jessica Gonzales* v. *City of Castle Rock*, Civil Action No. 00-D-1285 (2001).

Note 208: Gonzales's suit against the individual officers was later defeated at the Circuit Court level, where Judge Stephanie Seymour found that the individual officers—but not the city of Castle Rock—were entitled to the affirmative defense of qualified immunity. *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1118.

Note 209: Ibid., 4.

Note 210: Ibid., 8.

Note 211: Ibid., 9; emphasis added.

Note 212: Ibid., 12.

Note 213: Ibid., 12.

Note 214: *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), 571, http://laws.findlaw.com/us/408/564.html (full text), cited in *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1101.

Note 215: *Roth*, 571–72, 576, cited in *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1101.

Note 216: *Roth*, 577, cited in *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1101.

Note 217: *Cosco* v. *Uphoff*, 195 F. 3d. 1221 (1999), cited in *Jessica Gonzales* v. *City of Castle Rock*, 307 F.3d 1258 (2002), 1264.

Note 218: *Jessica Gonzales* v. *City of Castle Rock*, Civil Action No. 00-D-1285 (2001), 13 (note 3).

Note 219: Ibid., 14.

Note 220: *Jessica Gonzales* v. *City of Castle Rock*, 307 F.3d 1258 (2002).

Note 221: By the full court, as opposed to the smaller panel of judges that typically hears cases at this level.

Note 222: *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004).

Note 223: *Jessica Gonzales* v. *City of Castle Rock*, 366 F.3d 1093 (2004), 1106.

Note 224: Brief of National Black Police Association, National Association of Black Law Enforcement Officers, Women in Federal Law Enforcement, The National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc., as Amici Curiae Supporting Respondent, p. 68 (February 10, 2005).

Note 225: Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae in Support of Respondent, p. 14 (February 10, 2005).

Note 226: *Castle Rock* v. *Gonzales*, 125 S. Ct 2796 (2005), 2805; original emphasis.

Note 227: Justice Scalia's disdain for the notion that enforcement of a restraining order could constitute a property interest was quite evident even at oral argument. He repeatedly referred to such a notion as "zany," as in the following: "[I]f Colorado chooses to nominate some utterly zany thing of property interest, it doesn't necessarily mean that it's a property interest for purposes of the Federal Constitution," and, "Do we have any cases involving a zany property interest having been found by a state? I don't think we have any." Oral Argument of *Castle Rock* v. *Gonzales*, Alderson Reporting Company, available at U.S. Supreme Court Online: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-278.pdf, p. 14.

Note 228: *Castle Rock* v. *Gonzales*, 125 S. Ct 2796 (2005), 2816.

Note 229: Ibid., 2817.

Note 230: Ibid., 2819–20; original.

Note 231: "Gonzales Ruling a 'Serious Blow' to Victims of Violence Who Need Police Protection," *Speaking Up* [online publication of the Family Violence Prevention Fund]. June 27, 2005, vol. 11, issue 9, top story.

Note 232: In an article entitled, "Law Enforcement Liability in the Wake of *Castle Rock* v. *Gonzales*," (*The Source*, *Newsletter of the Stalking Resource Center* 6 [Winter 2006]), Jim Ferguson notes,

> In the wake of the [*Gonzales* decision], it was widely reported that the Court had given law enforcement blanket immunity for failing to enforce protective orders. See, for example, *Cold Law at Castle Rock*, CLEV. PLAIN DEALER, July 5, 2005, at B8 ("The 7-2 court majority made clear, as the court had ruled before, that police have no responsibility to protect any individual citizen."); Sarah M. Buel, Commentary, *Battered Women Betrayed*, L.A. TIMES, July 4, 2005, at B13 ("Last week, the Supreme Court ruled that police are not required to enforce restraining orders, even if state law mandates that they do so."); *High Court Deals Out a Low Blow*, KAN. CITY STAR, June 29, 2005, at B1 ("The Supreme Court ruled in Castle Rock v. Gonzales that the cops are under no real obligation to protect you and yours-even when it's a matter of a court order."); *High Court Shields Police Who Fail to Enforce Restraining Orders*, L.A. TIMES, June 28, 2005, at A19 ("The

> Supreme Court ruled Monday that police departments can't be sued for failing to enforce restraining orders . . . .")

Note 233: *Castle Rock* v. *Gonzales*, 125 S. Ct 2796 (2005), 2810.

Note 234: See, for example, Emily J. Martin and Caroline Bettinger-Lopez, "*Castle Rock* v. *Gonzales* and the Future of Police Protection for Victims of Domestic Violence," *Domestic Violence Report*, October/November 2005, vol. 11, no. 1; Julie Hilden, "Must the Government Protect Its Citizens If It Learns They Are in Danger? The Supreme Court Considers How Far Responsibility Reaches" (Findlaw.com, Mar. 29, 2005): http://writ.news.findlaw.com/hilden/20050329.html, and Joan Zorza, "Things We Still Can Do After the *Castle Rock* v. *Gonzales* Decision, *Domestic Violence Report*, October/November 2005, vol. 11, no. 1.

Note 235: Martin and Bettinger-Lopez, 15.

Note 236: Emily J. Martin and Caroline Bettinger-Lopez, "*Castle Rock* v. *Gonzales* and the Future of Police Protection for Victims of Domestic Violence," *Domestic Violence Report*, October/November 2005, vol. 11, no. 1, and Joan Zorza, "Things We Still Can Do After the *Castle Rock* v. *Gonzales* Decision, *Domestic Violence Report*, October/November 2005, vol. 11, no. 1.

