CONFRONTING THE GENDERED STATE: A FEMINIST APPROACH TO GENDER INEQUALITY AND GENDER VIOLENCE IN THE UNITED STATES AND THE IRISH REPUBLIC

*Kris McDaniel-Miccio**

* Kris McDaniel-Miccio received her law degrees from Columbia University School of Law (LL.M and J.S.D.). She is a professor of law at the Sturm College of Law and Visiting Professor and Scholar at Trinity College Dublin Law School. Professor McDaniel-Miccio has been named Honorary Life-time Member of the Law Society, Republic of Ireland for her advocacy and scholarship on human rights, specifically gender equality and LGBT rights. Other recipients include President William Clinton, President Mary Robinson (Republic of Ireland), President Michael Higgins (Republic of Ireland), Justice Antonin Scalia, Nobel Laureate Poet Seamus Heaney, and Philosopher Noam Chomsky. She has lectured throughout the United States and Ireland on human rights, and is considered an international expert on the law, male intimate violence and state accountability. As a result of two Fulbright awards, Professor McDaniel-Miccio has spent the last few years gathering the history of the Irish Battered Women's Movement, consulting with key Republic NGOs to tell the story of their movement and feminist politic.

I. INTRODUCTION

One cannot ignore the similarities in the battered women's movements (BWM) of the United States and the Republic of Ireland (ROI). Both grew out of a feminist politic that confronted a legal, political and cultural system steeped in a misogynistic culture. Gender asymmetry in law and gender violence in culture framed women's positions in both Irish and American society. The law, whether common, statutory or constitutional, reduced women to spectators in the public sphere and sexual others in the private sphere. Thus, Blackstone's rebuke that women's identity was suspended, invisible, and subsumed upon marriage framed discourse and policy.[1] Most women would spend life in the domestic sphere dominated by the familial patriarch whose power was derived and ordained by G-d and by the State.

Eudine Barriteau describes this system as a "network of power relations;" that is, based on a "complex system of personal and social relations through which men and women are socially constructed."[2] Power derives from the acquisition of resources, whether economic, political, material, or social. Access to such properties is restricted to the public sphere, a province denied to women. The State supports and maintains such gender disparity through its power to regulate not only public but also private relationships.[3] Consequently, gender not only determines whether one may access the labor market, join the body politic, exercise self-determination, and/or enjoy bodily integrity, but whether the State sanctions such behavior.

In the twentieth century, feminists addressed the exclusion of women from the public sphere.[4] Too often, women were confined to a province often marked by brutality. With the advent of the first and second wave of feminism in the U.S. and the Republic of Ireland, a grassroots movement grew that challenged the State's power to control women's lives.[5] This article shall examine the evolution of the battered women's movement and of law and culture in the United States and the Republic of Ireland.

II. THE UNITED STATES

A. The role of religion

In the United States, pundit and politician alike believe that separation of Church and State is axiomatic. Indeed, members of the Tea Party (and Fox

1. *See* WILLIAM BLACKSTONE, COMMENTARIES.

2. Eudine Barriteau, *Theorizing Gender Systems and the Project of Modernity in the Twentieth-Century Caribbean*, 59 FEMINIST REV. 186, 189-90 (1998).

3. *Id*.

4. ELLEN CAROL DUBOIS & LYNN DUMENIL, THROUGH WOMEN'S EYES: AN AMERICAN HISTORY WITH DOCUMENTS (Bedford/St. Martins 2011).

5. Linda Connolly, *The Women's Movement in Ireland, 1975-1995: A Social Movements Analysis*, 1 IRISH J. FEMINIST STUD., 43 (1996).

News) hold fast to the notion that an insuperable and perilous chasm exists between Church and State,[6] and that peril lies in the land that spurns G-d. Yet, much like our cousins across the pond, American Jurisprudence is rife with references to the "Creator," "Divine Ordinance," and other euphemisms for G-d or a god.[7] While we claim that there has been neither the establishment of a state nor governmental religion, our jurisprudential history not only contests such a claim but directly contravenes it. Tea Party protestations to the contrary, the U.S. has operated as a *Christian* country in both law and cultural practice.[8]

Such adherence to a religious politic has had a devastating affect on women, children and the family.[9] It has limited access to occupations,[10] permitted appropriation of women's bodies,[11] denied a voice and presence in the body politic,[12] and eliminated women's personhood and agency. For example, it was not a crime to beat one's wife nor to rape her-such violence

6. See, Prachi Gupta, *9 Reasons Fox News Believes There is a War on Christmas*, SALON (Dec. 24, 2013 10:30 AM), *http://www.salon.com/2013/12/24/9_reasons_fox_news_thinks_theres_a_war_on_christmas/* ; *see also*, Stephanie Mencimer, *The Coming Tea Party Civil War*, MOTHER JONES, (Nov. 16, 2010 7:00 AM) *http://www.motherjones.com/politics/2010/11/tea-party-civil-war* "A few weeks earlier, Mark Meckler, TPP's national coordinator, appeared at a DC conference sponsored by Ralph Reed's Faith and Freedom Coalition. There, Meckler told the religious right's assembled foot soldiers that he believed the real animating force behind the tea party movement was opposition to the separation of church and state and the 'removal of God from the public square.' One of the group's newest board members is the former Oklahoma Republican congressman Ernest Istook, a stalwart of the Christian right." *Id*.

7. Muller v. Oregon, 208 U.S. 412, 421-22 (1908); Bradwell v. Illinois, 83 U.S. 130, 141 (1872); State v. Black, 60 N.C. (Win.) 266 (1864).

8. We will often read that our country was founded on Judeo-Christian principles. I beg to differ. The parsing of Torah or Tanakh by Christians, specifically fundamentalist Christians, ignores and obfuscates the rich interpretive writings, wrestling and struggle of the צַדִּיק (tsaddiq) – (just, righteous), regardless of whether written in Talmud, Mishnah or current theological tracts.

9. *See generally* JULIET MITCHELL, WOMEN'S ESTATE (Penguin 1972); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 35 (Oxford Univ. Press, 1987)

10. Muller, 208 U.S. at 412; Bradwell, 83 U.S. at 130..

11. Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824). The Mississippi Supreme Court held that husbands would not be prosecuted if they beat their wives with a stick no thicker than the diameter of their thumb. *Id*. In effect, husbands had the right to use physical force as a means to control their wives' behavior. The question that triggered state action and judicial inquiry was the amount of force used—hence it was *excessive* force that was actionable, not the use or threatened use of force. *Id*. State v. Black, 60 N.C. 266 (1864), *overruled by* Harris v. Miss., 71 *Miss*. 462 (1894); Commonwealth v. Chretien, 383 Mass. 123 (1981); Marital Rape Exemption-People v. Liberta, 64 N.Y.2d 152 (1984); Merton v. State, 500 So. 2d 1301(1986).

12. U.S. CONST. art. 19 (ratified August 18, 1920). *Cf* Minor v Happersett, 88 U.S. 162,173 (1875) (holding that while Virginia Minor was a US citizen the Privileges and Immunities Clause did not confer a right to vote and state restrictions that limited voting to a specific gender, age, or class was not a violation of either the P & I clause or the relatively new Fourteenth Amendment).

was within the ambit of patriarchal power-until the last two decades of the twentieth century.[13]

Religious belief is welcome in the market place of ideas, but constructing legal discourse and enactment is not only dangerous it is anti-democratic." It is dangerous because it presumes moral certitude when such certitude is improper and it is anti-democratic because it marginalizes spiritual, religious or humanistic iterations of morality that are either disfavored or outside the bounds of what is perceived to be "acceptable." HLA Hart was correct when he denounced the moral inevitability of Lord Devlin's prohibition against prostitution and homosexuality.[14] Devlin's position, not unlike Burger's concurrence in *Bowers*, Brewer's opinion in *Muller*, or the State of Virginia's brief in *Loving*, was grounded in the "inerrant word of G-d," situated within *Christian* theocratic notions of Divine will. For Hart, the problem was not that Devlin et.al. held religious beliefs but that such beliefs structured law and formed the *sole* basis for morality. To Hart the danger was not in the details it was the detail.

In American jurisprudence there are footprints to the same source as the one critiqued by Hart in 1950s England. Politically, the Bible as authority for law and policy is very much alive in the fifty states framing condemnation of same-sex marriage, abortion and continued mulishness in the face of religious diversity and moral beliefs. Moral certainty in scriptural imperatives supplants justice and, as Hart reminds, laws from this source require no justification or rational other than it "is morally right," which, translated means, scripturally consonant.[15]

B. The Family, Familial Governance and the Gendered State

The family is not the idealized haven referenced by fundamentalists of any religious stripe. Indeed, it is not a haven in a heartless world,[16] first explicated

---

13. Marital rape exemption stricken as unconstitutional based on respective state constitutions. *Merto*n, 500 So.2d at 1301; *Liberta*, 64 N.Y.2d at 152 ; *Chretien* , 383 Mass. at 123. Indeed in New York, if a case of male intimate violence found its way into criminal court and the parties were married, the case was non-suited and transferred to family court.

14. H.L.A.. HART, LAW, LIBERTY AND MORALITY (1963).

15. MARCI A. HAMILTON & EDWARD R. BECKER, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW (2007); MARCI A. HAMILTON & EDWARD R. BECKER, GOD V. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY (2014). In Hamilton and Becker's writings they critique religious basis for law finding it to be deleterious to conceptions of democracy. In their newest publication, they sound an alarm in relation the *Hobby Lobby* case argued before the U.S. Supreme Court in April 2014. While Hamilton and Becker are on the correct course regarding RFRA and *Hobby Lobby*, they seem to ignore or discount the plethora of Christian scriptural interpretation as grounding for Supreme Court decisions and state family and penal codes. *See also* Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985). RFRA has provided the Church with a legal weapon that no atheist or agnostic can obtain. "This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Wallace*, 472 U.S. 38.

16. *See generally,* L. RUBIN, WORLD OF PAIN: LIFE IN THE WORKING-CLASS FAMILY (1976). Along with Mirra Komarovsky's BLUE COLLAR MARRIAGE (1975), Rubin examines the nexus between capitalism and patriarchy in the oppression of women regardless of class.

by Holly Hartstone, nor a panacea of well being for women or children. For example, as documented in the Senate hearings on Violence Against Women Act (VAWA), domestic violence is a greater threat to women than stranger assaults, stranger rape, occupational hazards or car accidents. For women, domestic terrorism perpetrated by those who claim to love and honor them is the greatest threat to life and limb. The VAWA hearings gave support to what feminists had been saying for half a century: while individual expressions of patriarchal muscle caused death, it was state rule and neglect that assisted in the continuation of gender violence.[17] The data was horrific. The litany read like consequences from a war or battle zone, three to four million women battered and beaten every year, whilst three to four thousand women murdered by male intimate partners per annum. As the Surgeons General reported, it was an epidemic or orgy of violence.[18]

The feminist response to the violence? The birth of a political movement.

III. CONFRONTING VIOLENCE AND THE GENDERED STATE: THE AMERICAN BATTERED WOMEN'S MOVMENT

The battered women's movement of the 1970-80s was the product of social movements of the 1960s that challenged conceptions of power based on race, sex, and sexual orientation.[19] Feminist liberation contested the appropriation of women's bodies, challenged conceptions of male supremacy in the family, and analyzed how the individual power of the patriarch was supported and legitimized by the state.[20] In the beginning, feminists sought

---

Since most studies up to this point analyzed white collar homes and families, Rubin and Komarovsky's books were at once illuminating and necessary.

17. SENATE COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, at 42 (1993) [hereinafter VAWA SENATE REPORT]. In the dissent to U.S. v. Morrison, 529 U.S. 598 (2000), Justice Souter notes Congress estimated annual cost of domestic violence and sexual assault to be $3 billion.

18. VAWA SENATE REPORT.

19. GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES (1981); Dale Carpenter, *The Limits of Gaylaw*: *Challenging the Apartheid of the Closet by William N. Eskridge, Jr.*, 17 CONST.L COMMENT. 603 (2000); Deb Friedman, *Rape, Racism & Reality*, 1 QUEST, FEMINIST Q. 40 (1979); Selma James, *Sex, Race and Working Class Power*, *in* SEX, RACE & CLASS 9 (1975) (on file with the author); E. Francis White, *Listening to the Voices of Black Feminism*, 18 RADICAL AM. 27 (1984); *Third World Women: The Politics of Being Other*, 2 HERESIES: FEMINIST PUB. ON ART & POL. 1 (1979) (on file with the author).

20. Diversity of thought within the feminist movement in general and the battered women's movement in particular is striking. Differences of thought were distributed along a political spectrum that included liberal, socialist, Marxist, radical and lesbian feminism. Each ideological category constructed a political paradigm that located the source of women's subordination as either a consequence of rights inequality, class, control of capital or the means of [re]production or sex hegemony. Yet, all of the ideological positions included patriarchy as either constitutive of or in collaborative with other social categories in the subordination of women. Thus, regardless of label, patriarchy was a critical component of women's oppression. *See generally* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (Nannerl O. Keohane et al. eds., 1982).

liberation and not just rights because liberation meant deliverance from a culture that denied women basic human freedoms, not the least of which was freedom from torture regardless of marital status.[21] Using the lexicon of the Natural Law aficionados, human dignity underscored the demand for liberation regardless of whether such dignity was god given or the consequence of being human.

In the late 1960's women in different communities around the United States sheltered abused women and children in their homes to provide a way out of abusive relationships. Safe homes sprang up across the United States throughout rural, urban, and suburban America. Not unlike the underground railroad of the nineteenth century, advocates, many of whom were formerly battered women, created a network of individual safe homes to help women escape the violence and oppression that had defined their lives.

From safe homes, emergency shelters emerged. The first shelters that housed collectives of women and children opened in Boston, St. Paul, and San Francisco. Regardless of organizational origins, four principles framed these shelters' ideology: (1) intimate violence was the confluence of male hegemony in the home and women's subordination in the public sphere; (2) the violence was political and not a consequence of women's personalities or families of origin; (3) male intimate violence was a potential in all women's lives; and (4) women's right to self determination was paramount. Thus, feminist ideology framed not only shelter philosophy but also methodology.[22]

Shelters were organized into working collectives with no distinction amid staff and residents. Shelter founders believed that all women were potential victims. Thus residents' narratives were valued and validated. As Martha Mahoney observed, battered women constantly mediated, planned, and strategized to survive.[23] By engaging in "resistant self-direction,"[24] battered

---

21. Be advised, in the following sections about the U.S. Feminist and Battered Women's Movements, there will be relatively few footnotes to any authority. As a member in and leader of both movements, *I* am the authority on both the history and the legal/political theories that will be discussed and analyzed. Fancy that! Law review editors, take a deep breath and stay with me. Second wave feminists coined the phrase the personal is political. As the founding attorney of the Center for Battered Women's Legal Services in 1988, I learned firsthand that this adage was about power and powerlessness-and the battered women I represented were abused not by their male intimate partner but by the criminal "justice" system and the family courts. Indeed in New York, we litigated a case that challenged New York City's Child Protective Services Agency's practice of removing children from mothers because they "failed to stop the abuse" perpetrated by the batterer. This clearly deliniated the powerlessness of women and a system that refused to enforce laws and mandates directed at controlling the assailants from engaging in criminal assaultive conduct. *See* Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004).

22. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 56-58, 61 (1982) (describing the shelter's kitchen as an emotional battlefield of racial mixing); Elizabeth M. Schneider, *The Violence of Privacy*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE, 48-49 (1994).

23. *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 550-57 (1992) [hereinafter Schneider, *Particularity and Generality*] (examining the particular difficulties

women exercised a modicum of control in their daily lives. From residents, staff learned the lengths to which survivors went to safeguard themselves and their children—the ultimate expression of their autonomy.[25] Blurring distinctions between resident and staff, the shelters would return what misogyny had robbed from women: control over their lives.

Politically, the nascent BWM challenged gender asymmetry in law enforcement by contesting a culture that fixed police arrest avoidance within police policies and protocols. By validating women's narratives, advocates learned how failure to treat male intimate violence as a crime undermined women's safety and women's lives. By placing male intimate violence within the calculus of criminal conduct, advocates attacked the underlying cultural assumptions that protected the patriarch and Patriarchy. Transformation of the criminal justice system was one tool used in unraveling a web of laws and practices that confined women to a second-class status.

A. The Law: Two Steps Forward

In the mid to late 1960s, advocates were aware of what I have termed "police arrest avoidance" ("PAA"). "PAA occurs when police refuse to exercise discretion, preferring instead to treat all domestic violence cases the same, regardless of injury, by not arresting the perpetrator."[26] This "option" was policy, not merely practice. Moreover, by the 1970s, the family courts—the usual forum for domestic violence cases—"had reduced these criminal assaults to problems of individual or social pathology."[27] Not only did courts' individuate the violence, but they viewed it as the fault of women.[28]

Social pathology gained currency within law enforcement.[29] "The Law Enforcement and Assistance Administration ("LEAA") created six model

faced by battered women as mothers); Schneider, *supra* note 23, at 45 (identifying the pros and cons of mediation).

24. SCHNEIDER, *supra* note 23, at 85 (quoting Kathyrn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 834-35 (1999)).

25. For a discussion of Western culture's demand that mothers be self-sacrificing even in the face of intimate violence, see SCHNEIDER, *supra* note 23, at 148-57.

26. For more information about PPA, please see the author's seminal article, G. Kristian Miccio, *Confronting the Gendered State: A Feminist Response to Gender Inequality and Gender Violence in the United States and the Irish Republic*, 15 WASH & LEE J. CIVIL RTS. & SOC. JUST. 405 (2009).

27. R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 119 (1992).

28. *Id*. at 155–56. One English magistrate went so far as to conclude that "the men who appeared before him for beating their wives were often 'tortured and taunted to the verge of madness' by women, and he indicted [sic] that it was only understandable that they should use violence." *Id*.

29. U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY, 19-22 (1978). In 1978, the United States Commission on Civil Rights held hearings on the issue of male intimate violence. *Id*. Witness after witness testified that such violence was not the result of familial dysfunction but part of a larger problem of male domination and female subordination. *Id*. Del Martin, one of the founders of the battered women's movement and

projects to train officers in crisis intervention to respond to domestic violence calls. The therapeutic professionals who designed the training and who urged crisis intervention believed that most cases involving intimate violence were in fact devoid of violence.[30] Such incidents were viewed as "family squabbles," where the female emasculated the male partner.[31] Officers were to take on the role of "counselors and mediators, trained in the skills of crisis intervention."[32] Arrest was perceived as totally inappropriate.

Training manuals, supported by LEAA money and used by the police, reinforced both sexist and ethnic stereotypes about who battered and why. As Dobash points out, these materials depicted women as "depressed, menopausal, dominating and 'likely to resort to physical violence.'"[33] In addition, the use of physical force was depicted as common in certain ethnic groups.[34]

Because the police historically treated male intimate violence as a private matter, the new protocols reinforced a dangerous methodology that flattened the topography of the violence. Mediation, counseling, and diversion from the criminal justice system were the only responses regardless of the degree of violence perpetrated by the offender. Absent a loss of human life, crisis intervention and mediation were the only tools in the state's arsenal to address intimate violence. The "new" professional response, conflating police practices with psychological theory, legitimized traditional police behavior.

The institution of the LEAA project transformed police arrest avoidance into a viable strategy supported by a segment of the psychoanalytic profession and adopted by law enforcement policy makers. Arrest was not only *not* the preferred course of action, it was antithetical to what constituted appropriate

---

author of *Battered Wives*, testified that Michigan police were told to avoid arrest and "appeal to the woman's vanity" concerning abatement of the violence. *Id*. Martin commented that in the police training guides used nationwide, male intimate violence was transformed into "family disputes" and such guides rarely made direct reference to *woman* or *wife* beating. *Id*. Marjory Fields, lead attorney in the family law unit of Brooklyn Legal Services and mother of the New York battered women's movement, painted a picture of law enforcement and the courts treating women survivors as pariahs and male offenders as unwitting victims. Fields referred to the New York City Police Department training manual's gendered depiction of the violence; such violence was interpersonal, the result of gendered maladies such as menopause. Police in New York City were trained to believe that if such violence actually existed it was due to the menopausal, domineering rage of the *woman*, and the appropriate course of action was mediation between the parties. Fields recounted how battered women's advocates negotiated with the police to change policies concerning training and rather than change course, however, the training guides continued to de-genderize the violence while enshrining the process of on-site mediation.

30. DOBASH & DOBASH, *supra* note 28, at 161–63 (finding that LEAA training resources taught police officers to conclude that most domestic disputes were nonviolent because the proponents of crisis intervention viewed these occurrences as "rarely involv[ing] violence").

31. *Id*. at 161.

32. *Id*. at 163.

33. *Id*.

34. *Id*.

state (police) action.[35] As a consequence, perpetrators were given a walk around the block, allowed to return home to terrorize again and again.

Against this backdrop, advocates raised the issue of statutory arrest mandates.

In the 1970s a series of cases illustrated PAA. In New York, advocates sued the New York City Police Department, the Probation Department and the Family Courts.[36] The basis of this class action suit was not only PAA but also the failure of the courts and law enforcement to treat male intimate violence as a crime worthy of state condemnation. Three thousand miles across the United States in California, Oakland advocates filed suit against the police, claiming that law enforcement was refusing to arrest perpetrators of male intimate violence.[37] These cases raised the issue of mandatory arrest as *one* strategy to contest the conscious disregard that had been institutionalized in the court and law enforcement systems.

Mandatory arrest was *a* strategy, not the sole strategy of the BWM. Indeed, advocates understood that gender asymmetry, culturally embedded and systemic, framed the collective response to male intimate violence. Thus, the flash point for both discourse and action was equality or rather the *in*equality of women. Criminal justice was merely one system that needed fixing.

Since mandatory practices first evolved as a political strategy, the discourse among feminists has been marked by reluctance and anxiety concerning interaction with the state.[38] Such anxiety reflects more than ambivalence; it reveals the distrust that feminists held for law enforcement.[39]

---

35. *Id*. at 161 ("Arrest was inappropriate for solving the complex social and psychological problems evident in these non-violent 'family squabble.'"). By 1977, seventy percent of large police departments—those with one-hundred staff members or more—were training police in crisis intervention. *Id*. at 162.

36. Bruno v Codd, 393 N.E.2d 976 (N.Y. 1979).

37. Scott v. Hart, No. C76-2395 (N.D. Cal. filed Oct. 28, 1976) (describing a challenge that ultimately led to a settlement with police regarding the nonintervention of Oakland law enforcement in male intimate violence cases); Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 7 (Cal. Ct. App. 1975) (dismissing a complaint against the City of San Jose police department for wrongful death because the department enjoys absolute immunity); *cf*. Thurman v. City of Torrington, 595 F. Supp. 1521, 1528-1529 (D. Conn. 1984) (denying the city's motion to dismiss, stating, "A man is not allowed to [. . .] abuse [. . .] 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 [solely] because the assaulter and his victim are married to each other.'" (quoting Bruno v. Codd, 396 N.Y.S.2d 974, 976 (N.Y. Spec. Term 1977))).

38. *See* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, 182-84 (2002); *see also Beware the State: Suzanne LaFollette*, *in* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR 537, 537–41 (Alice S. Rossi ed., 1973) (describing the life of Suzanne LaFollette and her emphasis on economic independence over state interference).

39. SCHNEIDER, *supra* note 39, at 182–84; *see also* Elizabeth A. Stanko, *Missing the Mark? Policing Battering*, *in* WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES 46, 63–65 (Jalna Hanmer et al. eds., 1989) (noting that feminist criticism of policing has had positive effects as departments have followed outside suggestions). For a discussion of the varying views of radical, conservative, and liberal feminism on the public/private dichotomy and how these views have helped frame the issue of domestic

Because police are gatekeepers to the criminal justice system, they have enforced cultural prescriptions that are essentially gendered, raced, and classed.[40] Thus, the anxiety associated with mandatory arrest is emblematic of the paradox inherent in working with systems that have been the source of the problem.

Feminists appreciated that the police, as agents of the state, should be held accountable for failing to protect battered women. Yet they understood the misuse of police power in marginalized communities and how these communities may respond to policies that mandated arrest in domestic violence cases. Finally, feminists understood that, "[p]olice action cannot by itself stem the tide of violence against women."[41] As Elizabeth Stanko notes, "To do so would require breaking its links with other aspects of social life that maintain and perpetuate women's subordination. Police protection within the context of male domination does not and cannot promise women autonomy."[42]

Notwithstanding deep apprehension, advocates placed mandatory arrest on the table as a political strategy. In 1994, shortly after the indictment of O.J. Simpson for the murder of Nicole Brown and Ron Goldman, a plethora of states passed mandatory arrest. With great fanfare, politicians embraced the mantra of the BWM, "Zero tolerance," and signed on the bottom line. Thus, in thirty-two jurisdictions across the United States law enforcement removed discretion in domestic violence cases.[43] Where probable cause was present in domestic violence cases, the universe of potential options shrunk to one and one only, arrest the assailant.

And then there was *Castle Rock v Gonzales*.

B. The Law: Three Steps Back

By the end of the 1990s a majority of states had incorporated some version of mandates in arrest statutes along with protective orders.[44] In

violence, see KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 37–47 (2003).

40. *See* John Hagan & Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, *in* CRIME & INEQUALITY 14, 22–28 (John Hagan & Ruth D. Peterson eds., 1995) (examining attitudes and reports that correlate police actions with race, gender, and class); *see also* Florida Supreme Court Racial & Ethnic Bias Study Commission, "*Where the Injured Fly for Justice": Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida* 6–9 (Deborah Hardin Wagner ed., 1991) (finding that adult and juvenile minorities in Florida receive disparate treatment from law enforcement and recommending changes to police practices and state statutes). For a series of essays that view even the nomination of a Supreme Court Justice as an inherently racial and gendered process, see RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

41. Stanko, *supra* note 40, at46, 67.

42. *Id*.

43. *See, e.g*., Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. LAWS 217 (codified as N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004)) (repealed Sept. 1, 2005).

44. By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin had passed legislation mandating arrest for domestic violence. R. EMERSON

advocating for mandates however we, failed to take into account an important truism: mandates *sans* accountability are feckless[45] In the absence of accountability, mandates are theoretical and quite frankly meaningless.

One cannot understand the demise of either the Battered Women's Movement in the United States or the end of legal/political progress for battered women unless one truly appreciates the effect of *DeShaney v. Winnebago County* on law, policy, and political advancement. The *DeShaney* decision effectively slammed shut the door to claims of substantive due process violations by the State except when the victim/survivor is in the State's *physical* custody.[46] This crabbed notion of state action is the death knell for Fourteenth Amendment substantive due process claims, not only when battered

---

DOBASH & RUSSELL P. DOBASH,*supra* note 28. The majority of states passed mandatory arrest laws in 1994. Most provisions were drafted with mandatory arrest language and a concept of the batterer regardless of sex, but arrest records would show that most batterers were male and most victims were female. "[T]he following states mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (Michie 2002); CAL. PENAL CODE § 836(c) (West Supp. 2005); COLO. REV. STAT. § 218-6-803.5 (2004); KY. REV. STAT. ANN. § 403.760(2) (Michie 1999); LA. REV. STAT. ANN. § 14:79(E) (West 2004); MD. CODE ANN., FAM. LAW § 4-509(b) (Supp. 2004); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000); MINN. STAT. ANN. § 518B.01, subd. 14(e) (West Supp. 2005); MO. ANN. STAT. § 455.085(2) (West 2003); NEV. REV. STAT. ANN. § 33.070(1) (Michie Supp. 2003); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 1995); N.M. STAT. ANN. § 40-13-6(C) (Michie 1999); N.D. CENT. CODE § 14-07.1-11(1) (2004); OHIO REV. CODE ANN. § 2935.03 (Anderson 2003) (suggesting but not mandating arrest); OR. REV. STAT. § 133.310(3) (2003); 23 PA. CONS. STAT. ANN. § 6113(a) (West 2001); S.D. CODIFIED LAWS § 23A-3-2.1(1) (Michie 1998); TENN. CODE ANN. § 36-3-611(a) (2001); TEX. CODE CRIM. PROC. ANN. art 14.03(a)(3), (b) (Vernon Supp. 2004-2005); UTAH CODE ANN. § 77-36-2.4(1) (2003); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West Supp. 2002); W. VA. CODE ANN. § 48-27-1001(a) (Michie 2004); WIS. STAT. ANN. § 813.12(7)(b) (West Supp. 2004)." Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002). The following states currently mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: "ALASKA STAT. ANN. § 18.65.530(a)(1) (Michie 2002); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2004); D.C. CODE ANN. § 16-1031(a) (2001); IOWA CODE ANN. § 236.12(2) (West 2000) (requiring actual or intended injury to the victim before mandating arrest); LA. REV. STAT. ANN. § 46:2140 (West Supp. 2005); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West 1998); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998) (characterizing arrest as a "preferred response" in the absence of a protection order); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 1995); OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (Anderson 2003) (preferring arrest in response to domestic violence); OR. REV. STAT. § 133.310(6) (2003); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie Supp. 2003); TEX. CODE CRIM. PROC. ANN. Art. 14.03(a)(4) (Vernon Supp. 2004-2005) (allowing, but not mandating, arrest); UTAH CODE ANN. § 30-6-8(2)(f) (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2001); W. VA. CODE ANN. § 48-27-1002 (Michie 2004) (allowing, but not mandating, arrest)."*Id*. at 1855 n.42.

45. As one of the architects of New York's Mandatory Arrest law, I never anticipated the unholy trinity of *DeShaney*, *Castle Rock* and *Burella*. I can honestly say that no one could have predicted the wretched outcome of these cases on not only constitutional interpretation of due process but on conceptions of equality.

46. *See* DeShaney v. Winnebago Cnty. Dept. of Soc. Serv., 489 U.S. 189, 190-200 (1989).

women assert state failure to protect, but in cases where *any* person interposes such an argument.

The scholarship that followed *Deshaney* attempted to reconstruct the legal terrain so that state accountability was not ferreted out of the Fourteenth Amendment.[47] Advocates and scholars alike crafted a theory that they thought would "link" battered women to the state; in other words create the connection that would make accountability possible. The centerpiece of the "theory" was statutory mandates coupled with court issued orders of protection in domestic violence cases. The reasoning was quite simple. Even though the Court had a crabbed interpretation of state conduct, scholars believed that a statutory mandate to arrest would provide the necessary predicate to trigger Fourteenth Amendment protection.

Unlike the Republic of Ireland, the Courts in the United States treat the federal Constitution as a negative rights document. In *DeShaney*, Justice Rehnquist opined, "nothing in the language of the Due Process Clause requires the State to protect the life, liberty and property of its citizens against invasion by private actors. [It] is a limitation on the State's power to act."[48] Consequently, Justice Rehnquist starts from the position that the Constitution is a negative rights document.[49] If the Constitution is a negative rights document, and specifically the Fourteenth Amendment, there is no duty on the part of the state to protect citizens from what is perceived as "private conduct." Essentially, the modern approach to Fourteenth Amendment Due Process protection is "keep your laws off my body."[50] This explains the decision in *Califano v. McRae*,[51] where the Court held, *inter alia*, since the state did not create poverty it has no duty to provide poor women with abortions. Thus, the State can restrict access to abortions by cutting off the flow of funds to poor

47. *See,* Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 569-581 (2006) [hereinafter *Domestic Violence Matters*] (arguing that civil protection order cases trigger a right to counsel because the state has undertaken sufficient action to meet the requirement of state action implicit in the Fourteenth Amendment); *see also,* Caitlin E. Borgman, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect Deshaney?*, 65 N.Y.U. L. Rev. 1280, 1280-83 (1990) (arguing that orders of protection create the necessary link between battered woman and the state.); *Susanne* M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations,* 68 S. CAL. L. REV.1295, 1312-1313 (1995) (orders of protection is state action); Lauren L. Mc Farlane, *Domestic Violence Victims v. Municipalities, Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 958-960 (1991) (asserting that where orders of protection exist, state action exists).,.

48. *Deshaney*, 489 U.S. at 195.

49. *Id*.

50. "Keep Your Laws Off My Body" is a time honored bumper sticker which first appeared in the 1970's.

51. Califano v. McRae, 433 U.S. 916 (1977); *see also* McRae v. Matthews, 421 F. Supp. 533 (E.D.N.Y. 1976), *vacated*, 433 U.S. 1310 (1977) (discussing the facts and opinion of the case).

women who wish to exercise their Fourteenth Amendment liberty interest.[52] And because the "negative" aspect of the theory of negative rights adopts a restrictive view of state action, legal guarantees move beyond women's reach.[53]

Chief Justice Rehnquist's adoption of the negative-rights standard is rooted in principles of federalism that foster clear and unequivocal lines of demarcation between state and federal power. As Laurence Tribe notes, Rehnquist wants to maintain separate spheres of state and federal authority, recognizing only a "coterminous" intersection between state and federal power when the state violates clearly defined negative restraints.[54] For Rehnquist, a negative rights approach safeguards the delicate balance that federalism constructs, and perhaps more importantly, preserves.

Yet Rehnquist's narrow interpretation of the due process clause is antithetical to its origins. Congress enacted the Reconstruction Amendments, and specifically the Due Process Clause of the Fourteenth Amendment, to provide citizens' protection regardless of whether the state or by private actors created the harm.[55] As Michael Gerhardt notes,

> [t]he dual purposes of the fourteenth amendment permeating through *all* of its provisions were (1) to provide constitutional protection for the fundamental or 'God-given' or 'natural' rights of all United States citizens by (2) radically altering the design of federalism . . . to invest the federal government with complete authority to punish the infringement of such rights by either state or private action.[56]

By 1873, with the *Slaughterhouse* case[57] the erosion of Fourteenth Amendment protection began. In 1985 with *Deshaney*, its promise wass weakened.

---

52. Califano v. McRae, 433 U.S. 916; *see also* Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV. L. Rev. 330, 330-332, 334 (1985) (discussing how the abortion funding cases raise questions about negative versus positive rights).

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

54. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 551-53 (2d ed. 1988); *see also* U.S. v Cruikshank, 92 U.S. 542, 550-551 (1876).

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

56. *See* Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426-27 (1990) (emphasis added) (citations omitted).

57. *Id*. at 426-27 Clearly *Slaughterhouse*, which eviscerated the Privileges and Immunities Clause, and *DeShaney*, which neutered substantive due process protection, are in play. But both turn the logic and history of the amendment on its head. *Id*. *See also Cong*.

The social context of *DeShaney* is critical. When the Court decided *Deshaney* in 1985, mandatory arrest was not on the horizon, much less part of public policy. In fact, in *Deshaney,* there were no statutory directives that mandated a *specific* response by the state;[58] discretion was still the better part of valor when it came to child protection. Unlike Child Protective Services policies in *Deshaney*, mandatory arrest severely limits the universe of options open to law enforcement by reducing it to one and only one option-arrest. Where probable cause is present that an order of protection has been violated or an intimate partner has committed a felony, the only "choice" is to arrest the perpetrator.[59] Subsequent elimination of police discretion occurred because police *refused* to exercise any discretion.[60] Thus, passage of mandatory arrest statutes in thirty-two jurisdictions was a direct consequence of police malfeasance.[61]

In *Castle Rock,* Justice Scalia, writing for the majority, held that the Colorado Legislature failed to create a Fourteenth Amendment property interest in the enforcement of an order of protection.[62] Scalia asserts, "[w]e do not believe that these provisions of Colorado law truly make enforcement of restraining orders *mandatory*," *because* "[a] well established tradition of police discretion has long co-existed with [the] apparently mandatory arrest statutes."[63] In thirty-two words, Justice Scalia invalidated not only the findings of the Judiciary Committee of the United States Senate, but also the legislative history of thirty-two states. This is quite an amazing feat, even for the current configuration of this Court.

With the stroke of a pen, the Court wiped out the history of police arrest avoidance that characterized law enforcement conduct for over forty years. Rather than credit the findings of the U.S. Senate and thirty-two states, the Court chose to acknowledge the historic position of discretion in police practices. As Roger Pilon points out in a provocative examination of *Castle Rock*, tradition has trumped not only the text of the statute but the legislative history of two–thirds of the states.[64] While Pilon raises an important issue

---

Globe, 39th Cong., 1st Sess. 2765 (1866), *available at* http://memory.loc.gov/cgi-bin/ampage?collID=llcg&fileName=072/llcg072.db&recNum=846 (statement of Senator Howard).

58. *See* DeShaney, v. Winnebago Cnty. Dept. of Soc. Serv., 489 U.S. 189 (1989).

59. *See* COLO. REV. STAT. § 18-6-803.5 (2014) (Colorado provides for either arrest or where arrest is impractical, seek to secure an arrest warrant).

60. Indeed, Judge Stephanie Seymour of the Tenth Circuit Court of Appeals noted this in her speech to participants at the 2006 Conference on the *Castle Rock* decision.

61. *See,* Marjory Fields, Presentation at the U.S. Comm'n on Civil Rights: Wife Beating: Government Intervention Policies and Practices, 21 (Jan. 30-31, 1978) ("Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help."); *see, e.g*., VAWA SENATE REPORT; *see also* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005-2006).,

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

63. *Id*. at 760.

64. *See* Roger Pilon, *Town of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity*, 2004-2005 CATO SUP. CT. L.REV. 101, 116.

about tradition, he mischaracterizes tradition as police discretion.[65] What drives Scalia's decision to trump thirty-two jurisdictions' legislative history is not police discretion but adherence to the tradition of treating the Fourteenth Amendment as a negative rights provision.

In 2007, the United States Court of Appeals for the Third Circuit ruled that Jill Burella did not have a procedural or substantive due process right to the enforcement of an order of protection nor did she have a viable equal protection claim.[66] The perpetrator in this case was a police officer, the survivor his wife.[67] The Philadelphia Police Department witnessed and/or had knowledge of[68] a pattern of abuse and the perpetrator violated conduct requirements levied by the Police Department.[69] The statute in this case was even clearer than Colorado's; or using Scalia's lexicon, "more mandatory."[70] In Pennsylvania, the Legislature did not insert the word "reasonable," but rather made it quite clear that, "[a] police officer or sheriff *shall* arrest a defendant for violating an order issued under this chapter [Ch. 23]."[71] Moreover, the Pennsylvania Legislature *amended* the Pennsylvania Protection and Abuse Act, enacted in 1990 to clearly establish "must arrest." [72] In fact, the 1994 amendment removed the words "may arrest," and substituted "*shall* arrest,"[73] making it crystal clear that once the order is violated, the police have no other option but to arrest.

Using *Castle Rock* to conclude that Burella, not unlike Jessica Gonzales, did not have a property interest in the enforcement of the order of protection, the Third Circuit Court relied on the "deep-rooted nature of law enforcement discretion, even in the presence of *seemingly* mandatory legislative commands.[74] Justice Fuentes uncritically adopted all of the arguments from the *Castle Rock* majority and reaffirmed the Supreme Court's *observation* that Colorado, and by implication her sister states, did not vest in the petitioner a right to request much less demand an arrest.[75]

---

65. *Id*. At 116-17.

66. Burella v. Philadelphia, 501 F.3d 134, 149-50 (3d Cir. 2007).

67. *Id*. at 136.

68. Officer Reamer served the protective order on the perpetrator and not only witnessed Officer Burella's violation of that order but permitted him into the marital home. Reamer did not arrest Burella as required by statute. *Burella,* 570 F.3d at 138.

69. *Id*. at 137-138.

70. , Castle Rock v. Gonzales, 545 U.S. 748, 762 (2005). While I am paraphrasing J. Scalia, I am in no way endorsing, agreeing with or condoning his interpretation of the word "shall."

71. 23 PA. CONST. STAT. § 6113 (a) (2003) (emphasis added).

72. *See* 23 PA CONST. STAT. § 6113 (1990), which states in pertinent part, "[a]n arrest for violation of an order issues pursuant to this chapter or a foreign protection order may be without warrant upon probable cause whether or not the violation is committed in the presence of the police."

73. Omnibus Amendments Act, ch. 23, sec. 1, § 6113(a) (1994).

74. *Burella*, 501 F.3d at 152 (emphasis added) (citing *Castle Rock*, 545 U.S. at 761).

75. *Id*. at 145.

It is clear that the Third Circuit as well as the United States. Supreme Court have little if any knowledge about male intimate violence. Mandatory arrest was considered strategic by the BWM, because it *shifted* the focus from individual battered women to the State. Rather than place a battered woman in the position of demanding or requesting arrest, mandatory arrest made that "decision" the province of the state. This was an important consideration because advocates believed that if the assailant viewed the State as the culprit, retaliation against women and children might be abated. Moreover, this statutory scheme obviated any demand or request for arrest by battered women: Burella and Gonzales' protective orders made any request/demand redundant and unnecessary because arrest was statutorily mandated.[76] The Third Circuit elevated Castle Rock by animating an erroneous o*bservation* with the force of law.

Judge Ambro's concurrence in *Burella*, correctly lays out the terrain after *Castle Rock*. He concludes that "my colleagues are correct to suggest that a legislature would be hard pressed to draft around *Castle Rock* in light of the well 'established tradition of police discretion [that] has long co-existed with apparently mandatory arrest statutes."[77] While I concur with his conclusion, Justice Ambro made the same mistake as the majority in *Castle Rock*. *Castle Rock* was the first case to raise the issue of *statutory* mandates and police discretion, thus it is incorrect to claim a well-established tradition. Remember, *Deshaney* was not about mandates; in fact, there were no mandates which defined or coerced behavior on the part of Child Protective Services.

IV. THE DEMISE OF A MOVEMENT

It would be rather unfair to blame the Courts for the failure of the Movement to sustain itself. While definitely a contributing factor, there are two key reasons for the demise of the American BWM. The first is burn-out of the Old Guard coupled with new members consistently reinventing the "wheel." Rather than take the time to learn the political and organizational history of the movement, new members and their leadership craft agendas and build organizations that have little to no grounding in the rich feminist history that precedes their (individual) discovery of feminism.[78] Due to historical

76. *See Castle Rock*, 545 U.S. at 760; *Burella*, 501 F.3d at 138.

77. *Burella*, 501 F.3d at 146 (Ambro, J., concurring) (quoting *Castle Rock* 545 U.S. at 748-49).

78. See Kimberle, Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN.. L. REV. 1241 (1993) for an example of derivative scholarship of "intersectionality," from feminist scholars and activists from the 1970's); *cf*. ZILLAH EISENSTEIN, *The Combahee River Collective: A Black Feminist Statement, in*, CAPTIALIST PATRIARCHY AND THE CASE FOR SOCALIST FEMINISM, 367 (Monthly Review Press, 1978). For another example of derivative scholarship, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2012); *cf* GLORIA ANZALDUA & CHERIE MORAGA, THIS BRIDGE CALLED MY BACK (1979); JUDITH BUTLER, BODIES THAT MATTER (1993); ZILLAH EIZENSTIEN, CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM, (1979); BATYA WEINBAUM, THE CURIOUS COURTSHIP OF MARXISM AND SOCIALIST

amnesia, the movement has found itself rehashing the same issues that almost destroyed it in prior decades. Fissures have appeared that promise to fracture state and national coalitions.

Yet it is the second reason that has dealt the final blow, compromising the *political* viability of a movement with roots in a radical liberation politic. The "professionalization" of the shelters has dislocated the BWM from its political roots. With the influx of money from federal, state and local governments, the shelters experienced both an ideological and methodological shift. Additionally, "once the issue of battering gained legitimacy and funding was made available, more established organizations took over the issue that grassroots women had worked so hard to raise."[79]

The transition from political to bureaucratic organization was swift and unyielding. Shelters abandoned non-hierarchical organizing principles. Decision-making was vested in a Board of Directors and an Executive Director whilst disaggregating staff and residents from consensus and shared decision-making. As a result, residents transformed into "clients," with no decision making power and workers turned into staff, with limited decision-making power. Workers who lacked traditional credentials, such as social work degrees, were either demoted or let go. The hierarchical or corporate model of governance was the key organizing principle; dictated by the funding agencies. Consequently, hierarchy supplanted egalitarianism and political purpose was replaced by psychological imperatives.[80] Not unlike traditional social service agencies, the shelters reinterpreted women's needs to be problems of "low self-esteem," and not the far-reaching claims for the legal and political prerequisites of independence.

Simply put, the movement was co-opted. Nothing made this clearer than the silence that followed the *Castle Rock* decision handed down by the U.S. Supreme Court in June of 2005.[81] Advocates took no action because they did not want to endanger their position with politicians by raising the issue of

---

FEMINISM (1977); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

79. SCHECHTER, *supra* note 23, at 75.

80. Interviews with battered women's advocates in New York, California, Colorado (2008-14); Subject of Irish-American Roundtable, Dublin IE, 2010. Indeed at a focus group held in New York shortly after the *Castle Rock* decision, advocates claimed that keeping mandatory arrest was instrumental in order to protect battered women because "they cannot make rational choice in moments of trauma." I can assure you, that poor judgment was never part of the calculus of BWM strategy-the critical issue for advocates of the second wave of feminism was one of equality and the abatement of gender motivate violence against women.

81. Author's conversation with advocates in Colorado, New York, California shortly after the decision is reported, where one Colorado advocate claimed that challenging the decision through legal reform was "not feasible," primarily because it would impair their relationship with legislators. It is important to note that at this point in Colorado, domestic violence programs received no direct funding from the state. It is also important to note that the Colorado Speaker of the House did not disseminate the separation of powers amicus brief written in support of not only Gonzales but also the power of the Legislature to set rules governing police conduct. *As reported to author by Speaker's counsel*.

mandatory arrest and conceptions of accountability. The movement of the 21st Century bore no resemblance to the one formed in the 1960s.[82]

V. THE REPUBLIC OF IRELAND: WHERE CHURCH, STATE AND MOVEMENT COLLIDE

Ireland was colonized by the British and under British rule from 1536 until the establishment of the Free State in 1922.[83] Throughout this period, British Protestants usurped labor, land, culture, and language.[84] The re-conquest of Ireland by Oliver Cromwell in 1649 brought further displacement of Irish Catholics, who were removed from their land and relegated to either tenancy or farmland that was almost uninhabitable.[85] The Irish were forbidden to speak their language, to use their Irish names, or to practice their religion.[86] Catholicism was driven underground along with republicanism; thus cross and sword formed Irish liberation movements.

Rebellions occurred throughout the four centuries of occupation. Yet it was the Easter Rising of 1916 and subsequent execution of Republican leaders that triggered a grassroots uprising culminating in the establishment of the Irish Free State.[87] Women were warriors in Ireland's fight for independence. *Cumann na mBan* (The Irish Women's Council) brought women into the 20th Century fight against the British occupiers.[88] *Nghinidhe na hÉireann*, (Daughters of Ireland), which became part of *Cumann*, gave many women to the fight, including Countess Constance Georgine Markievicz, a formidable leader of the Rising.[89] These women were suffragists, socialists and dedicated Republicans involved in the establishment of a State that would reject class and gender inequity. Women fought side by side with their male counterparts and were captured and sentenced to death by British military courts. Indeed, in a cell in Kilmainham Gaol (*Príosún Chill Mhaighneann)* Countess Markievicz sat awaiting execution for her part in the Rising.[90]

---

82. Since 2005 there have been no attempts by US advocates to shape policy that would answer the misanthropic opinion penned by Scalia and adopted by six of the other Justices. There has been a great deal of talk and posturing by advocates at local and national levels but not one state or federal policy initiated that seeks to correct either the lack of accountability at the state or federal level or governments continued failure to protect the rights and lives of battered women.

83. *See generally*, GOLDWIN SMITH, IRISH HISTORY AND THE IRISH QUESTION (1905).

84. *Id*.

85. *See generally*, Dr. Micheál Ó Siochrú, GOD'S EXECUTIONER: OLIVER CROMWELL AND CONQUEST OF IRELAND (2008).

86. *Id*.

87. *See generally*, MICHAEL FOY & BRIAN BARTON, THE EASTER RISING (1999).

88. ANN MATTHEWS, RENEGADES: IRISH REPUBLICAN WOMEN 1900-1922 (2010).

89. *Id*.

90. Interview with Serena Byrans, Museum Docent, Kilmainham Gaol, in Dublin, Ireland (2013). The Countess was spared the firing squad along with Eamon de Valera, one of the leaders of the Rising and eventual President of the Republic. de Valera was spared because of his American citizenship and Markievicz because of her gender.

Gender was not an issue in the Rising and subsequent battle for independence. Emblazoned on collective memory was the brutality of the British regime toward *all* Irish Catholics. Two historical moments, however, frame Irish commitment to the expulsion of the British colonialists: the famines of 1740-1741 and 1845-1852, deprivations that decimated a culture and population.[91] Conservative estimates place the death toll at over one million Irish during the Great Famine of 1845.[92] These deaths were a consequence of an occupation policy articulated by the British government and executed by a bureaucracy unconcerned with the fate of the indigenous population.[93] Indeed, Britain pursued a policy of mass starvation in Ireland with the intent to destroy the Irish people.[94] The British government *knowingly* implemented a policy of starvation. As human rights activists note, British conduct during its occupation of Ireland and creation of the Famine constituted genocide and would have amounted to a violation of Article II (c) of the Geneva Convention.[95]

Women were not shielded from the corruption or brutality of the occupiers. Gender did not shield women from starvation, torture, or usurpation of their labor. In the mass graves that held the emaciated bodies of victims of Gorta Mór, women, men, and children lay side by side, reminding us that colonization and death are indeed the final equalizers.[96] Consequently, historical memory helped craft the first Constitution, thereby inscribing socialist and gender parity onto the Irish Free State enabling document.

Not willing to reproduce structures that had oppressed the Irish for centuries, the Republicans constituted a government charged with mediating between individual rights and collective obligation. The *Saorstát Eireann* (Irish Free State Constitution) guaranteed the rights of the individual but also vested in the people the right to the land, water, natural resources, mines and minerals.[97] The founders of the State recognized women as integral to the development of a new Ireland. Consequently, no profesional, educational or political option was denied to women under the *Saorstát Eireann*.[98]

---

91. Archival footage (2014) (on file with Famine Museum, Skibbereen, West Cork, Ireland).

92. CIARÁN Ó. MURCHADHA, THE GREAT FAMINE: IRELAND'S AGONY 1845-1852. (Continuum Intl. Pub. Group, 2011).

93. *Id*.

94. *Id*.

95. JACK O'KEEFE, FAMINE GHOST: GENOCIDE OF THE IRISH (iUniverse. 2011).

96. *Id*.

97. IR. CONST., 1922, art.11.

98. *Id*. art. 4,14 ("All citizens of the Irish Free State without distinction of sex, who have reached the age of twenty-one years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum and Initiative. All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex who have reached the age of thirty years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Seanad Eireann.")

From 1922 until the late 1930s, women flourished. They filled university and graduate schools, were part of the professions and had the vote once the Free State was established. There was, however, one area that received little attention—the family. The family remained under the tutelage of the patriarch, whose power was protected by the State.

By the mid-third of the 20th Century, Irish women's position within civil society was perilous and uncertain. With war clouds gathering in Europe, conservativism was on the rise, resulting in the confinement of women to the private sphere. No longer would women stand shoulder to shoulder with men in the factory, academy, or the professions. Irish women's participation in the War of Independence failed to shield her from the vagaries of misogyny.

Gender equality in Ireland shifted dramatically with the institution of the de Valera[99] government due to collaboration with the Church. In crafting the Second Constitution, de Valera regarded separation of church and state as antithetical to traditional Irish culture.[100] Consequently, the new Constitution would explicitly reflect Catholic religious dogma in opposition to the views held by the architects of the Free State Constitution.[101] By 1937 the Church was a key political broker.[102] Indeed, it was the invisible hand that essentially penned the Second Constitution. Although the 1937 Constitution did not establish a state religion, the wall between Catholicism and civil society was dismantled. Thus, Catholic dogma and policies were not only integral to but integrated in the 1937 Constitution (*Bunreacht Na hÉireann*).[103]

Women's participation in Irish society was *legally* limited to housework, childbearing, and child rearing. As John Charles McQuaid, the Archbishop of Dublin and Primate of Ireland noted, "Nothing will change in law and fact that women's natural sphere is in the home."[104] As a political actor the Church exercised its influence over social teaching, moral development, and civil law

---

99. Eamon de Valera was the first President of the Republic of Ireland. Born in New York City in 1882 his father was Spanish and his mother from Knockmore, Ireland.

100. Bill Kissane, *Eamon De Valera and the Survival of Democracy in Inter-war Ireland*, 42 J. CONTEMP. HIST. 213, 213-226 (2007).

101. De Valera added clauses to the new Constitution to "guard with special care the institution of marriage" and prohibit divorce. His constitution also recognised "the special position" of the Catholic Church. *See id*. at 213–226.

102. *Id*. at 220-21.

103. *See*, IR. CONST. pmbl.(BUNREACHT NA HÉIREANN) (1937) ("In the Name of the Most Holy Trinity, from Whom is all authority and to Whom. . .all actions both of men and States must be referred, . . .[h]umbly acknowledge all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trialFalse") (emphasis added).

104. John Charles McQuaid Papers, Sec.5, File 48 (on file with Dublin Diocesan Archives),
(commenting on the 1937 proposed Irish Constitution); *cf*. M. Luddy Hannah Sheehy Skeffington p.50 (Dublin Historical Association of Ireland, 1995) (citing Election Manifesto of Hannah Sheehy Skeffington, 1943, a de Valera supporter in the civil war reminding the Church and the polity that the 1916 Easter Rising Proclamation conferred "equal citizenship equal rights, and equal opportunities," regardless of one's gender).

by reframing women's role in Irish society. With the inclusion of Art. 41§2.1 into the 1937 Constitution that role was immutable.[105]

Art. 41 essentially *nationalized* the womb by constitutionally pronouncing child bearing as a *public* good. Under Art.41, reproduction was not a private act but a public duty. Additionally, women's work was restricted to non-wage labor in the home, creating economic dependency upon husbands. Consequently, the 1937 Constitution transformed the home into a not-so gilded cage where the patriarch was sovereign and his power over wife and child absolute.

The U.S. and Ireland shared a common bond in the structural relationship of familial governance and patriarchy. The power of the patriarch controlled.[106] A life distinct and separate from husbands was denied to wives, making economic independence a nullity. For women then, the fundamental right to work outside the home was subordinate to the familial duties of reproduction and maintenance of the inner life of the familial unit.[107] Marriage was the glue that set structural relationships within the family. Ireland barred married women from working outside the home until the late 1970s: if a woman was employed as a civil servant or by a private employer, she was required to relinquish her position upon marriage.

Bars to divorce and abortion were added to the 1937 Irish Constitution by plebiscite, re-enforcing gendered conceptions of the public good and further entrenching the power of the clerics. Indeed, one could argue that Catholicism has had a rather vise-like grip on both discourse and policy. Public schools were run and maintained by the Church, state courts ordered placement of abused and neglected children to homes run by clergy, and pregnant unwed girls and women were routinely sent by family and the state to mother and baby homes operated by various religious orders.

In both the U.S. and Ireland "*Die Küche, die Kirche, die Kinder*[108]" not only described women's role but confined her to it.

VI. THE IRISH FEMINIST RESPONSE IN THE FIRST WAVE

Irish feminists worked not only for gender equality but also for the eradication of poverty and the elimination of income inequality. Class awareness was a direct consequence of colonization under the British, where

105. "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved." IR. CONST., 1937, art. 41 § 2(1). "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." IR. CONST., 1937, art. 41 § 2(2).

106. See *supra* note 2, at 430.

107. IR. CONST., 1937, art. 41§3(1)-(2). It is interesting to note that if a person's marriage was dissolved via a foreign divorce and that marriage would be valid in Ireland, that person was barred from remarrying "during the lifetime of the other party to the marriage so dissolved." IR. CONST., 1937, art. 41,§ 3(3).

108. "Kitchen, church, and children."

the Irish were relegated to either a master-serf relationship, unable to control the means of production, or a penniless life where they languished and died in calamitous poverty. Irish feminists linked third party control of production with control of *re*production and women's bodies. Unlike the American feminists of the period, Irish feminists understood the connection between the control of laborers to produce goods and the control of women's labor to *re*produce laborers.

Feminists rose in opposition to sections of the Constitution that relegated women to non-wage labor within the family. The Women Graduates Association ("WGA") led the charge against Art.41. WGA organized demonstrations, speakers in women's homes, and authored pamphlets challenging sexist cultural assumptions within Art.41. In her missives, Hanna Sheehy-Skeffington, a feminist and ally to de Valera during the Civil War, accused the de Valera government of abandoning the promise of equality and liberty for all Irish citizens regardless of sex. Sheehy-Skeffington also spoke out against the Church for shaping policy that reified gender inequality. Collaborating with allies in the Dáil,[109] Sheehy-Skeffington and the WGA challenged Art.41 as setting up a constitutional conflict between the prescribed role of woman as mother and the constitutional protections afforded to Irish citizens concerning the right to wage labor.[110] Although not successful in stopping either the influence of the Church or the "biology is destiny provision" in the Constitution, the first wave feminists paved the way for subsequent successes by feminist activists in the mid to latter part of the 20th Century.

VII. THE SECOND WAVE AND THE STRUGGLE FOR BODILY INTEGRITY.

A. The Legal and Cultural Backdrop (1969-present)

The Irish struggle for equality has included a fight for the rights of women to be secure in their bodies. That struggle, however, has been a difficult one for feminists in the Republic. Feminists in Ireland faced a herculean task. As described by Yvonne Scannell,

---

109. The Dáil Éireann is the lower body of the Oireachtas, the Parliament. The upper body is the Seanad Éireann. The Dáil is akin to the U.S. House of Representatives and the U.K House of Commons whilst the Seanad is analogous to the American Senate and the British House of Lords. What differentiates the Irish parliamentary system from the Congressional system in the U.S., is the fact that most bills in Ireland are drawn up by the different Ministries, and the election of the PM is not done via plebiscite, rather through election of members of the Dáil-with the party in power selecting the head of party or the PM. It is interesting to note that the Irish Free State Constitution provided for *direct* democracy, a provision that was redacted from the '37 Constitution.

110. Dáil Debates (1937), *available at* http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/datelist?readform&chamber=dail&year=1937.

> Laws based on the premise that women's rights were inferior to those of men survived in, and indeed even appeared on, the statute books. Despite the constitutional adulation of marriage and motherhood, the legislature preferred to keep women in the home by foul rather than fair means. Contraception was effectively illegal. The economically powerless homemaker was denied access to free legal aid. No financial aid was available as of right to unmarried mothers, deserted wives or prisoners' wives, even when they were fulfilling their "duties" in the home. *The battered wife and mother could not exclude her violent husband from the home* (which was almost invariably his) except by resort to the most cumbersome procedures. If she fled the home, her husband had a right to damages from anyone who enticed her, harboured her, or committed adultery with her.[111]

Scannell notes, the *accident* of being born female restricts women to the home as wife and mother. She would be denied access to economic, political, or community resources, relying totally on the good will of her husband.[112] In 1976 the first set of laws attempting to protect women's bodily integrity was passed. The Family Protection Act of 1976 raised economic issues and physical vulnerability faced by women in the family. Remedies under the Act included damages, criminal prosecution, and injunctive relief for "spousal misconduct."[113] Unfortunately, such remedies were woefully inadequate; they did little, if anything, to abate the violence or provide economic security. Money damages were illusory for women married to men who were unemployed or underemployed, which, in the 1970s, was more the rule than the exception in Ireland. Criminal prosecution was at the behest of the Garda Síochána[114] and the State's Prosecutor, where cultural beliefs about women's proper place and social function aligned with both culture and law. Charges lodged against assailants were few and prosecutions even fewer. Injunctive relief was utterly useless, because the District Court, the court where victims would file for relief, did not have jurisdiction to grant such relief.[115]

Against this backdrop, cultural and legal change was at once difficult and incremental. Even with passage of the Domestic Violence Act of 1996 ("DVA"), familial inviolability and keeping the family intact had precedence over the safety of battered women and their children.[116] Family inviolability conferred rights upon the familial unit, not upon members within the unit. As the family was viewed as the nucleus of civil society, its disruption was treated

---

111. Scannell, Yvonne, *The Constitution and the Role of Women*, *in* THE IRISH WOMEN'S HISTORY READER, 71-73 (Alan Hayes et al. eds., 2001).

112. *Id*. at 73-74.

113. Family Protection Act of 1976 (Act No. 27/1976) (Ir.) *available at http://www.irishstatutebook.ie/1976/en/act/pub/0027/print.html* , [hereafter, FPA of 1976] .

114. Translaes to "Guardians of the Peace," meaning the police in the Republic.

115. *See generally,* Law Society Reform Committee, *Report on Domestic Violence: The Case for Reform* (May 1999).

116. IR. CONST., 1937, art. 41§2.

as hostile to public order and the public good. Thus women's bodily integrity was subordinate to maintenance of the familial unit and the relations within it. Indeed, under the DVA, excluding the batterer from the home was nearly impossible. The statutory scheme provided for three types of orders: safety, barring, and protection; however safety and protection orders would not exclude the batterer.[117] Only the barring order could exclude and one had to separately file for this relief.[118] Safety orders could order the batterer to refrain from committing a crime whilst the protective order was temporary and could be filed *exparte*.[119] The protective order functioned much like a safety order but would be in force until the filing of either a safety or barring order.[120] To make matters worse, if the petitioner sought to bar the respondent from the home, and the parties were not married, the petitioner had to affirm that she was cohabiting with the batterer for a six-months during a nine-month period before the filing date.[121]

Unlike in the United States, the Irish system not only crafted different remedies and timelines depending on the order sought, the system required separate processes. If a woman needed to be protected against assaultive behavior and also wanted a barring order she would have to file for both orders.[122] The safety order could require the respondent to refrain from conduct that "threatens to use violence against or molest or put [the petitioner) in fear" of such violence or molestation."[123] A barring order excludes the respondent from the marital home.[124] Courts are not empowered to issue a barring order as part of a safety order or protective (temporary) order, absent a separate filing for the former. It appears that this limitation is a consequence of four key rights found in the 1937 Constitution: the "constitutional inviolability of the home" (and family as well), the "express right under the Constitution to [one's] good name," and "the express Constitutional protection of familial privacy and

117. Domestic Violence Act 1996 §§ 2, 3, 5 (Act No. 1/1996) (Ir.).

118. *Id*.

119. *Id*. at § 4(3).

120. *Id*. at §§ 2-5.

121. *Id*. At § 3(1)(b).

122. It is interesting to note that in the U.S., all states that have protective orders combine the safety and barring options into one order. New York, for example, employs a standard that looks to providing meaningful protection to petitioner and her children. Consequently, a family court order of protection can include provisions that order the respondent to leave the marital or shared home, to have no contact with the petitioner and, if there are children, to submit to court supervised visitation.

123. Practitioners and Irish trial courts use cases from the U.K. to help determine whether allegations establish molestation. *See,* Davis v. Johnson [*1978*] 2 W.L.R. 553, [1978] U.K.H.L. 1, [1979] A.C. 264 (Ir.)(molest does not require violence or threatened use of violence); Vaughn v. Vaughn [1973] 3 A.L.L. 449, 451-52 (Ir.) (pester and molest are synonymous); Fearon v Aylesford [1884] 14 Q.B.D. 792, 796 (Ir.) (". . .[molest] must be an act which is done with the intent to annoy and does in fact annoyFalse"); *see also,* JIM NESTOR, AN INTRODUCTION TO IRISH FAMILY LAW. (2011).

124. The barring order could also include provisions ordering responded to refrain from assaultive and or threatening behaviour. Domestic Violence Act 1996 § 3 (Act No. 1/1996) (Ir.).

the enjoyment of family life as between [one's] self and . . . children."[125] Within the context of male intimate violence these rights combine to limit women's agency, compromise bodily integrity, and diminish freedom to act in her and her children's self-interest.

While protection of home and hearth and one's good name is important, such rights pale in relation to freedom from violence. Compromising the right to bodily integrity obviates all other rights, including inviolability of the home, reputation, and enjoyment of the "society" of one's children. Indeed, within a hierarchy of rights, to be safe in one's own skin is paramount. The DV Acts of 1996-2002 did not accomplish the goals of the battered women's movement-protection of women's right to bodily integrity and eradication of gender inequality in law and culture. However, rather than capitulate to the politics of convenience or affiliate with the status quo, Irish feminists in the battered women's movement changed course and built a politic that utilized a methodology that incorporated a gender and class analysis into a human rights framework.

B. Irish Feminist Response: Understanding the Gendered State

i. The Theoretical and the Practical

Much has been written in both the United States and the Irish Republic on the "Gendered State."[126] The difference between the two perspectives is striking. First, the Irish have integrated a class analysis into all aspects of feminist organizing.[127] Second, a human rights paradigm frames anti-violence theory and practice in Ireland. Third, the Irish State crafted an affirmative rights constitution, signed onto the Convention to Eliminate Discrimination

---

125. *See*, D.K. v Crowley, [2005] 2 I.R. 744 (Ir.) (incorporating Keating v Crowley, 1 I.L.R.M. 88 (2003) (*Keating* plaintiff awarded damages for the aforementioned Constitutional violations)).

126. LINDA CONNOLLY, THE IRISH WOMEN'S MOVEMENT: FROM REVOLUTION TO DEVOLUTION (2003); JOHANNA KANTOLA, FEMINISTS THEORIZE THE STATE (2006); Andrea Nichols, *Feminist Advocacy: Gendered Organizations in Community Based Responses to Domestic Violence*, 21 FEMINIST CRIMINOLOGY 1, (2011); *MacKinnon and Spivek on the Gendered State*, 25 FEMINIST NEWS (Institute to Research on Women and Gender, Columbia University), Jan 1990 at 1, 10. Mackinnon's take is perhaps the most interesting because she conducts her analysis from a global perspective. She views human rights law as well as the nation-state, as deeply gendered drawing from her work in Bosnia. What is curious about her "take," however is how she glosses over the international instruments that explicitly address gender violence. What MacKinnon seems to be critiquing is the failure of international human rights actors to *immediately* recognize and treat rape in war as a crime against humanity, a war crime and a violation of human rights. In this she is correct.

127. The issue of racism in Ireland has come to light with the influx of Nigerian asylum seekers and new immigrants from Muslim nations. The confluence of race and religion has raised important questions about "who is and who is not Irish." In 2008 the Irish Times and RTE, Irish national radio and television, ran a series of articles and programmes that critiqued the Irish response to intolerance. What is interesting to note is the paucity of hate crimes in Ireland in relation to France, Germany, Italy and other countries in Eastern and Western Europe.

Against Women (CEDAW), and committed to the principles of international covenants and law.

ii. Class Analysis

Developing a theoretical paradigm that integrates a class analysis in both theory and practice is critical to the Irish Battered Women's Movement ("IBWM") in particular and Irish feminism in general. Economic inequality is understood as a form of violence that undermines both the rights and lives of women and its effect is as implacable as gender motivated violence. Moreover, income disparity is treated as a corollary of social injustice, whether it is the product of public or private systems. Severe income disparities contribute to women's vulnerability because they create dependency on a familial structure that in some cases is not only harmful but lethal. As one advocate noted, income inequality outside the home coupled with non-wage labor in the home are part of the *systemic* devaluation of women's labor. There are undoubtedly American feminists who grasp the importance of class analysis in dismantling the gendered state. Yet, American feminism has not incorporated a class analysis into either a *cogent* feminist or anti-violence politic.[128]

During the end of the 20th Century, Irish feminist theory not only contested the notion that patriarchy was the *sole* cause of violence against women but that the state *qua* state is male.[129] Feminist theory emerged that sought to alter a social contract premised on gender, class, and racial asymmetry because the state was constructed along these axes of domination. Consequently, anti-violence organizing in Ireland was not devoted to a single issue; rather, it spanned a political spectrum that addressed issues of gender, racial, and economic inequality.[130] Women's Aid, the largest DV program in the Republic, joined with reproductive justice organizations, the anti-sex-trafficking movement, working women's groups, and non-governmental organizations (NGOs) to alter the social/cultural and legal landscape which contributed to the perpetuation of policies that privileged maleness, wealth, and nationalism. The IBWM crafted a theory of oppression that recognized how the "isms" combined to oppress women and contribute to a cycle of violence that is at once systemic and dynamic. Thus, eradication of all forms of violence—economic, racial, gender, and homophobic dystopia— is essential to a feminist anti-violence politic.

---

128. It is interesting to note that one of the leading American feminist scholars, Catherine MacKinnon does not have a class analysis in deconstructing the gendered state. Indeed since 1991, with the publication of Toward a Feminist Theory of the State, MacKinnon still views the gendered state as a consequence of patriarchy, the ascendency of maleness and the power of Patriarchy. Her term. "feminism unmodified," is a MacKinnonism is a form f radical feminism that is post-Marxist. MacKinnon's work essentialises sex to the exclusion of class and race. *See,* CATHERINE MACKINNON,*supra* note 54.

129. Heidi Gottfried, *Compromising Positions: Emergent Neo- Fordisms and Embedded Gender Contracts*, 51 BRIT. J.L. SOC'Y, 235, 235-259 (June 2000).

130. Linda Connolly, *supra* note 6, at 43-77.

Coalition building and the integration of a politic that reflects the lives of not only battered women but of the poor and of ethnic minorities results in a nuanced approach to male intimate violence. As Patricia Williams reminds, we are the sum of our parts and should not be "partialized." (Williams 1998).[131] As Irish feminists have recognized, to succeed, feminist theory and practice must incorporate women's reality and not merely address physical or sexual violence perpetrated by individual men.[132]

iii. The Irish Constitution, Human Rights, and CEDAW

As part of the European Union, Ireland and Irish anti-violence NGOs such as Women's Aid accept and operate within a human rights paradigm.[133] As signators to CEDAW, Ireland must demonstrate affirmative steps to combat discrimination against women.[134] Moreover, because the Irish Constitution is a positive rights document, affirmative action to eradicate violence against women is a constitutional requirement.[135] The confluence of these three factors constructs a legal landscape in Ireland that is vastly different than that in the States. Indeed, unlike American law, Irish law considers violence against women to be gender motivated violence and therefore a form of discrimination. Within the ambit of international human rights, such violence violates myriad conventions-CEDAW, the Convention Against Torture, the Declaration on the Elimination of Violence Against Women and the Vienna Declaration and Programme of Action from the 1993 World Conference on Human Right.[136]

This international scheme as well as the positive framework of the Irish Constitution provides the *potential* for meaningful protection of women's rights and lives from male intimate violence *and* state failure to protect. Under international treaties, state responsibility extends to *private* violence.[137] This extension is extremely important because violence perpetrated against women in the home is considered private. State responsibility attaches regardless of

131. *See* PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE (1998).

132. Correspondence with Judy Walsh, Director of the Equality Studies Centre, University College of Dublin (2013) (on file with author).

133. See U.N. Center for Social Development and Humanitarian Affairs, Violence Against Women in the Family at 33, U.N. Sales No. E.89.IV.5 (1989).

134. It is interesting to note that American Feminist scholars have written about the link between domestic violence and human rights and how male intimate violence constitutes human rights violations under current international instruments and documents. *See, e.g.*, Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVE 116 (Rebecca Cook ed., 1994); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Law*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook ed., 1994).

135. IR. CONST., 1937, art. 40.

136. Radhika Coomaraswamy, *Combating Domestic Violence: Obligations of the State*, *6* INNOCENTI DIGEST 10 (June 2000).

137. *See, e.g.*, Declaration on the Elimination of Violence Against Women, G.A. Res 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

whether the *direct* harm was perpetrated by a private actor. If there is a connection between state failure to protect and the harm caused by spouse or significant other, the State will be held to account. The international human rights paradigm combines the inaction of the State with the actions of the individual perpetrator. Consequently, Ireland, as a member of the European Union and signator, has expanded not only protection but also responsibility for acts or omissions created by public *and private actors*.

As part of the EU, Ireland adheres to an international framework that not only includes domestic violence as a human rights violation but also provides a foundation to hold the state accountable for what it fails to provide as well as its failure to protect. This is a significant tool in the IBWM cache that is absent from the American BWM. For instance, if the State declines prosecution in DV cases or diminishes protection by law enforcement that could constitute a violation of equal protection under international law. Because Ireland falls under the ambit of international law, the basis for imposing affirmative obligations on the state to provide meaningful protection are international covenants and case law interpreting such covenants.

Under the Vienna Programme, passed at the Vienna Conference of 1985, "the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights."[138] Echoing the Universal Declaration of Human Rights, the Vienna Programme specifically declared, without reservation from any State that "gender based violence . . . and exploitation are incompatible with the dignity and worth of the human person and must be eliminated . . . and every State shall provide an effective framework of remedies."[139] By linking violence and exploitation to conceptions of gender inequality and a denial of fundamental human rights, the Vienna Programme reaffirmed the notion that women, as well as men, are worthy of dignity. Moreover, by requiring affirmative State action, the Programme reinforced conceptions of state accountability for the continuation of violence against women by male intimate partners.

---

138. World Conference on Human Rights, June 14-25, 1993, *Vienna Delcaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF. 157/23 (Jul. 12, 1993). "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support. The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women. The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child."

139. *Id*.

Ireland, as a signator to the International Covenant of Civil and Political Rights ("ICCPR")[140] is required to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[141] Furthermore, according to the ICCPR, "Where not already provided for by existing legislative or other measures, each State party . . . undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[142] The Convention Against Torture and CEDAW create similar state obligations. For instance, CEDAW affirms that states will "exercise due diligence to prevent . . . and develop sanctions . . . and to punish the wrongs caused to women who are subjected to violence."[143]

Although international instruments leave open the particular manner and means by which member States may fulfill their obligation to prevent domestic violence, it would be incorrect to conclude that affirmative action by member States is not required. Indeed, decisions from human rights tribunals suggest otherwise. For example, the IBWM used the case of *X and Y v*. *Netherlands*[144] to raise state accountability for protection. In *X and Y*, a young girl was sexually assaulted by an employee of a private facility where she lived.[145] Her father attempted to file a complaint on her behalf because the child was mentally disabled. [146] When local police refused his affirmation, Mr. X filed suit on his daughter's behalf in the European Court on Human Rights ("ECHR").[147]

The ECHR found under Article 8 of the European Convention, that "there may be positive obligations inherent in an effective respect for private and family life."[148] The ECHR explained that "effective deterrence is indispensable" in sexual assault cases, "where fundamental values and essential aspects of private life" are at stake.[149] Thus, Irish feminists have argued successfully that the ECHR's ruling in *X and Y* requires states to do more than merely provide equal protection. Rather, states are obliged to provide effective deterrence against acts that violate the fundamental right to bodily integrity and personal security in private and family life. Because domestic violence falls within the proscribed behavior contemplated by the ECHR in *X and Y* as well

140. International Covenant on Civil and Political Rights, Oct. 1, 1973, , 999 U.N.T.S. 171 [hereinafter ICCPR].

141. ICCPR art. 2 § 1, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (Dec. 16, 1966).

142. ICCPR art. 2 § 1.

143. *Id*. at art. 4.

144. X. and Y. v. The Netherlands, A91 Eur. Ct. H.R. (1985), *available at http*://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57603.

145. *Id*.

146. *Id*. at 3.

147. *Id*. at 4.

148. *Id*. at 7.

149. *Id*. at 8.

as existing covenants such as CEDAW, states are required to take affirmative steps to end the violence.[150]

There is a radicalized notion of State action under CEDAW, ICCPR and the *X and Y* decision by the European Court of Human Rights: the recognition that gender discrimination *includes* legal, social, economic, and political inequality.[151] States then are required to do more than merely stop human rights abuses—they are required to identify and address the causes of such abuses.[152] Within the context of domestic violence, the State's obligation is to actively pursue solutions to intra-familial violence.[153] Finally, language in international instruments that establish a duty to prevent gender inequality (domestic violence) mandate state action to provide social, economic, legal, and political equality to women survivors of male intimate violence.[154] The Irish feminist vision to end domestic violence not only includes accountability for the violence but creation of jobs, affordable housing, viable health care, and a feminist voice within government and the body politic.[155]

VIII. A DIFFERENCE WITH A DISTINCTION

Violence against women by male intimate partners is no different in Ireland than it is in the States.[156] An Irish fist will cause the same damage to

150. *Id*.

151. *See generally*, CEDAW; ICCPR; *X and Y*.

152. *See* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVE (Julie Peters et al. eds., 1st ed. 1995)

153. *X and Y*, at 7.

154. *See* CEDAW; ICCPR; *X and* Y.

155. Correspondence with Professor Judy Walsh, Director of Equality Studies Center University College Dublin (2014) (on file with author).

156. Collecting data since 2002, Women's Aid has documented that gender violence against women in the home is pervasive and at epidemic proportions. In its Statistical Report for 2012, Women's Aid summed up the problem in Ireland: "1 in 5 women in Ireland who have been in a relationship have been abused by a current or former partner. (O'Connor, M, & Kelleher Associates, Making the Links, Women's Aid, 1995). In 2012, there were 14,792 incidents of domestic violence disclosed to the Women's Aid National Freephone Helpline. There were 9,912 incidents of emotional abuse, 2,859 incidents of physical abuse and 1,554 incidents of financial abuse disclosed. In the same year, 467 incidents of sexual abuse were disclosed to Helpline support workers including 176 rapes. The Women's Aid National Helpline responded to 11,729 calls in 2012. (Women's Aid Annual Report 2012) In 2012, the Women's Aid One to One Support Service provided 508 one to one support visits, accommodated 162 court accompaniments and gave further telephone support to, and advocacy for, women on 1,595 occasions throughout the year. (Women's Aid Annual Report 2012) National Research commissioned by Women's Aid has shown that 18% (1 in 5) of Irish women surveyed who have been involved in intimate relationships with men, have been abused by a current or former partner. National Research by the National Crime Council found that 1 in 7 women have experienced severe abusive behaviour of a physical, sexual or emotional nature from a partner at some times in their lives. The survey estimates that 213,000 women in Ireland have been severely abused by a partner. (Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse, National Crime Council and ERSI, 2005). In a one-day survey on 6th November 2012, 537 women and 311 children were accommodated and/or received support from a domestic violence

self and identity as an American fist. Such violence is gendered and at epidemic proportions.[157] Women's Aid summed up the problem in Ireland in its Statistical Report for 1995: "one in five women in Ireland who have been in a relationship have been abused by a current or former partner.[158] In 2012, the Women's Aid National Freephone Helpline received disclosure of 14,792 incidents of domestic violence.[159] There were 9,912 incidents of emotional abuse, 2,859 incidents of physical abuse and 1,554 incidents of financial abuse disclosed.[160] In the same year, 467 incidents of sexual abuse were disclosed to Helpline support workers including 176 rapes.[161] The Women's Aid National Helpline responded to 11,729 calls in 2012.[162] In 2012, the Women's Aid One to One Support Service provided 508 one to one support visits, accommodated 162 court accompaniments and gave further telephone support to, and advocacy for, women on 1,595 occasions throughout the year.[163]

Both cultures systemically and systematically subordinate women's bodies and rights because of an accident of birth. Indeed, the social, legal and political problems created by the violence are exactly the same. The U.S. and Ireland report that male intimate violence is the leading cause of homelessness and[164] trauma and violence to children.[165] The difference, however, is in how

---

service; 115 helpline calls were received from women; 117 women and 152 children were living in a refuge; 21 women could not be accommodated due to lack of space. (Safe Ireland National One Day Census of Domestic Violence Services 2012)" Taking into consideration that fact that the population of Ireland is comparable to the State of Colorado, (4,000,000,000), this data is as frightening and troubling as the data from the United States. *Women's Aid National and International* Statistics, WOMEN'S AID, http://www.womensa*Id*.ie/policy/natintstats.html#X-201209171229530 (last visited Mar. 18, 2015).

157. *Id*.

158. *Id*. (citing O'Connor, M, & Kelleher Associates, *Making the Links*, 1995).

159. *Women's Aid Annual Report 2012,* WOMEN'S AID at 11, available at http://www.womensaid.ie/policy/publications/annual-report-2012/.

160. *Id*.

161. *Id*. at 14.

162. *Id*. at 4.

163. *Id*.at 20.

164. *See, Women's Aid Annual Report*, WOMEN'S AID, http://www.womensa*Id*.ie/policy/natintstats.html#X-201209171229530. "In 2011, there were 2,129 admissions of women and 3,632 admissions of children to refuge in Ireland. (Safe Ireland Domestic Violence Services National Statistics 2011) On over 2,537 occasions in 2011, services were unable to accommodate women and their children because the refuge was full or there was no refuge in their area. (Safe Ireland Domestic Violence Services National Statistics 2011). In 2003, 26% of women who presented as homeless to the Irish Homeless Persons Unit had become homeless as a result of domestic violence. (O'Connor & Wilson, Safe Home, Sonas Housing Association Model of Supported Transitional Housing, 2004) According to the Council of Europe minimum of one refuge place (space to accommodate a woman and her children) per 10,000 people, there should be 446 family refuge places in Ireland. In reality, there are 143. [Kelly & Dubois (2008) Combating violence against women: minimum standards for support services, Directorate General of Human Rights and Legal Affairs, COE] In a survey of homeless women in Cork, one quarter (24%) of women first became homeless because of domestic violence. This figure

each movement, each cultural iteration of feminism, formed politically to challenge gender inequality.

The American battered women's movement *qua* movement has not crafted a cogent ideology that addresses economic, political, social, gender, and sexual inequality. It has failed to incorporate an analysis that identifies, much less deconstructs, the "isms" that constitute axes of domination in the States. Absent an intersectional ideology or theoretical foundation, movement methodology has been narrowed to critique only one factor that contributes to women's bodily subordination—patriarchy. This limitation affects how the core of the movement—its shelters—are organized, the issues it chooses to address, and the alliances it chooses to develop. Indeed, a grassroots political movement born out of collective struggle in the 1960s has been transformed into a social services faction that delivers much needed services but does so without either political awareness or discernment. What exists has been coopted and assimilated into the political status quo to the detriment of authentic gender equality.[166]

In Ireland, domestic violence is now on the cultural radar screen. There is a federal office, (COSC), devoted to the eradication of gender-motivated violence in both the public and private spheres.[167] Women's Aid has grown into the largest grassroots NGO, while smaller programmes dot the Irish landscape. The NGOs are built on a political foundation that incorporates the various iterations of economic, political, and social inequality that contribute to gender inequity and violations of bodily integrity. Ireland, as a consequence of its participation in the EU, its Constitution, and its recognition and adherence to international law and a human rights paradigm provides the IBWM with the much-needed tools to interrogate and confront male intimate violence and state failure to protect. The question is whether the IBWM will remain a *political*

---

rose to 37% for women aged 27-44. [Good Shepherd Services & Cork Simon Community (2011) Women's Health & Homelessness in Cork]." *Id*.

165. *Id*. "In 2012, there were 3,230 specific incidents of child abuse disclosed to the Women's Aid National Freephone Helpline. In another 1,221calls it was disclosed that children were present in homes where domestic violence was a feature. (Women's Aid Annual Report, 2012) [. . .] Safety and Sanctions, research conducted by Women's Aid into domestic violence and the enforcement of law in Ireland in 1999, showed that children were present in the house or witnessed the violence in a significant amount of cases. (Safety & Sanctions, Women's Aid, 1999) In Making the Links, 64% of women who experienced violence reported that their children had witnessed the violence. (Making the Links, Women's Aid, 1995). An overview of research studies found that in between 30-66% of cases, the same perpetrator is abusing both the mother and the children. [Edleson, J., Children's witnessing of adult domestic violence, Journal of Interpersonal Violence, vol. 14. 839-870, 1999]"

166. For example, shelter staff are now professionalized. Instead of commitment to women's liberation or drawing from one's own experience of being abused, staff are required to possess a college degree and/or an advanced degree in social work or an allied field.

167. Cosc, in Irish is "An Oifig Náisiúnta um Fhoréigean Baile, Gnéasach agus Inscnebhunaithe a Chosc."

force in the elimination of gender inequality or choose the path of least resistance taken by its American counterparts.

The next chapter is yet to be written.