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## Women, Children, and Victims of Massive Crimes: Legal Developments in Africa

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# Women, Children, and Victims of Massive Crimes: Legal Developments in Africa

Justice Richard J. Goldstone

## **Abstract**

This issue of the Fordham International Law Journal is devoted to African themes. The articles concentrate on the most vulnerable in Africa, namely children, women and the victims of massive crimes.

# CONCEPTUALIZING INTIMATE VIOLENCE AND GENDER EQUALITY: A COMPARATIVE APPROACH

Valorie K. Vojdik\*

## INTRODUCTION

Intimate violence against women is a global pandemic. The World Health Organization (“WHO”) in 2006 concluded that domestic violence against women is universal and pervasive.<sup>1</sup> In fifteen nations studied by WHO, fifteen percent to seventy-one percent of women in intimate relationships reported having been physically assaulted by an intimate male partner.<sup>2</sup> The consequences are devastating to women and society. Violence against women damages women and girls—physically, emotionally, sexually, and economically—and violates their human rights, denying them equality, security, dignity, and fundamental liberties.

Both international and national law historically have conceptualized domestic violence as a private matter between individuals within the family, outside the scope of state regulation.<sup>3</sup> Over the past decade, however, the international community has recognized that violence against women reflects and reinforces women’s subordination, denying them the right to equality and enjoyment of fundamental freedoms, including life, liberty, and security of the person.<sup>4</sup> The Declaration for the Elimination of

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1. See WORLD HEALTH ORG. (“WHO”), THE WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN vii (2005), available at [http://www.who.int/gender/violence/who\\_multicountry\\_study/summary\\_report/en/](http://www.who.int/gender/violence/who_multicountry_study/summary_report/en/) (“[V]iolence against women by their male partners is common, wide-spread and far reaching in its impact.”).

2. See *id.* at 5 (“The proportion of ever-partnered women who had ever experienced physical or sexual violence, or both, by an intimate partner in their lifetime, ranged from 15% to 71%, with most sites falling between 29% and 62%.”).

3. See U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, ¶ 6, U.N. Doc. E/CN.4/1999/68/Add.4 (Mar. 10, 1999) (prepared by Radhika Coomaraswamy) [hereinafter *Integration of the Human Rights of Women*].

4. See Radhika Coomaraswamy, *Combatting Domestic Violence: Obligations of the State*,

Violence Against Women, adopted by the United Nations (“U.N.”) General Assembly in 1994, condemns violence against women and encourages states to take steps to prevent and eliminate it.<sup>5</sup> The Convention for the Elimination of Violence Against Women (“CEDAW”) similarly has been interpreted to prohibit gender-based violence, which is defined as discrimination against women.<sup>6</sup> Both documents reject the notion that domestic violence is a private matter and instead impose positive duties upon the state to protect and prevent violence between private individuals.

Despite the recognition by the international community that intimate violence denies women their right to equality and civil liberties, the United States Supreme Court has continued to conceptualize domestic violence as a private matter that does not implicate the right to equal treatment or due process under the federal constitution. The Supreme Court has resisted efforts to constitutionalize a right to be protected from domestic or gender-motivated violence. In recent decisions, the Court has held that the U.S. Constitution does not impose affirmative obligations on the federal government to prevent violence between private persons,<sup>7</sup> that Congress lacks the power to create a federal civil rights remedy intended to redress gender-motivated violence,<sup>8</sup> and that there is no constitutionally protected property interest in the enforcement of a mandatory arrest statute under the Due Process Clause.<sup>9</sup> Rather than conceptualize domestic

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INNOCENTI DIG., June 2000, at 10, 10-11, *available at* <http://www.unicef-icdc.org/publications/pdf/digest6e.pdf>. Coomaraswamy argues that with respect to the human rights violation of domestic violence, states have a duty under international law to take “preventive and punitive steps” in response to such rights violations, including criminalization, legislation, police action and community services. *See id.* at 2.

5. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter Declaration on the Elimination of Violence against Women].

6. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

7. *See DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989) (holding that there is no Due Process Clause violation when the state fails to protect an individual from injury by a private actor).

8. *See United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that the Commerce Clause does not grant Congress the power to create a federal remedy for domestic violence).

9. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that an individual does not have “a property interest in police enforcement of the restraining order against her husband”).

violence as an issue of gender equality that concretely affects women's enjoyment of fundamental liberties guaranteed under the Constitution, the Supreme Court has defined domestic violence as a private crime of violence that occurs within the domestic sphere, outside the purview of the federal courts.

The U.S. approach contrasts markedly with that of the South African Constitutional Court, which explicitly has recognized that domestic and gender violence reinforce the subordination of women. Rather than view violence against women as a private matter, the Constitutional Court has employed a contextualized approach that focuses on the effects of widespread gender-based violence on women's right to gender equality, bodily integrity and security of the person, and full enjoyment of their civil liberties. Rejecting the public/private dichotomy, the Constitutional Court has held that the South African Constitution imposes affirmative obligations on the State to protect women from private violence. The Constitutional Court repeatedly has upheld national domestic violence legislation, recognizing that it is a means to fulfill the State's constitutional obligation to afford women gender equality and other fundamental rights.<sup>10</sup>

The difference in approach does not reflect merely a difference in the content of the constitutions, but also in the courts' conceptualization of the nature and effect of intimate violence upon women. The U.S. Supreme Court has conceptualized domestic violence as a violent crime between individuals that is subject to individual state regulation rather than an issue of gender subordination or equality that implicates women's constitutional rights and civil liberties. In contrast, the South African Constitutional Court has repeatedly recognized that intimate violence, and violence against women, subordinates women and denies them access to equality, dignity, and other fundamental constitutional rights.

The conceptualization of intimate violence against women has critical implications for the role of the state in the prevention and eradication of intimate violence. In this Article, I examine the treatment of domestic violence as a human rights is-

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10. See, e.g., *Carmichele v. Minister of Safety & Sec. & Another* 2001 (10) BCLR 995 (CC) ¶ 62 (S. Afr.) (noting that an affirmative obligation to protect women from domestic violence for the police exists under the interim constitution, statutory law, and international law).

sue under international law. I then compare the dramatically different theoretical approaches of the United States Supreme Court and the South African Constitutional Court to conceptualizing intimate violence and gender equality under their respective constitutions. By employing a comparative law approach, this Article helps illuminate the different judicial conceptions of violence against women, the nature of the right to equality, and the role of the state in promoting or redressing the gendered impact of intimate violence.

Part I discusses the treatment of domestic violence as a human rights issue under international law, focusing on the shift in the conceptualization of violence against women from a private matter to a human rights issue. By framing gender-based violence as a means to perpetuate the social, economic, and political inequality of women, the international community has imposed positive obligations upon the state to not only punish but to prevent gender-based violence and to eliminate its root causes.

In Parts II and III, I contrast the approaches of the highest courts of the United States and South Africa. Part II analyzes the conceptualization of domestic violence as a private crime by the U.S. Supreme Court and its refusal to constitutionalize a right to be free of gender-based violence. By framing gender-based violence within the framework of formal equality, the Supreme Court erases the relationship between intimate violence and women's full and equal enjoyment of their fundamental constitutional rights and benefits. The refusal of the Supreme Court to conceptualize intimate violence as an issue of equality threatens the potential of criminal justice reforms to obligate the state to eradicate gender-based violence. The criminalization of intimate violence sends a strong normative message that such conduct violates important social norms and will not be tolerated by the state. Focusing on criminal justice reforms that punish perpetrators, however, can reinforce the traditional notion that intimate violence is the result of individual deviance rather than the systematic subordination of women in society.

Part III analyzes the approach of the South African Constitutional Court, which has explicitly conceptualized intimate violence as a means of gender subordination that denies women equality, self-determination, and access to fundamental rights and liberties. The Court has held that the South African Consti-

tution imposes affirmative obligations on the state to prevent and rectify intimate violence. In construing violence against women as a violation of the right to equality, the Court repeatedly has emphasized that the Constitution guarantees substantive rather than formal equality. The Court also has recognized the inter-relatedness of the rights guaranteed by the Constitution, holding that rights to equality, liberty, and dignity are meaningless in the absence of the fulfillment of basic socioeconomic rights. The Court's jurisprudence, therefore, has tremendous potential to transform both the legal and the socioeconomic subordination of women that reflect and perpetuate violence against women.

### I. INTERNATIONAL LAW REGARDING INTIMATE VIOLENCE

The international community has come to recognize that violence against women is not merely a private family matter but a fundamental human rights issue that requires affirmative state action.<sup>11</sup> Historically, state governments have engaged in a widespread pattern of non-enforcement of criminal sanctions against perpetrators of domestic violence.<sup>12</sup> Because domestic violence occurs within private familial or intimate relationships, states have rationalized non-intervention by invoking the public/private dichotomy in which domestic violence is categorized as a private matter rather than a public harm.<sup>13</sup>

Discrimination on the basis of sex is prohibited under the Universal Declaration of Human Rights and numerous interna-

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11. See generally Declaration on the Elimination of Violence against Women, *supra* note 5.

12. See *Integration of the Human Rights of Women*, *supra* note 3, ¶ 242 ("Overwhelmingly, States are failing in their international obligations to prevent, investigate and prosecute violence against women in the family.")

13. See *id.* ("With few exceptions, domestic violence continues, to varying degrees, to be treated by Governments as a private family matter."); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rts., Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, 14, EICN.412006161 (Jan 20, 2006) (prepared by Yakin Erturk), [hereinafter Report of Special Rapporteur] (identifying the public/private dichotomy in international human rights law as "one of the main obstacles to the protection of women's rights" and "an ideological barrier to the development of the human rights discourse in many societies . . ."); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, in *WOMEN'S RIGHTS, HUMAN RIGHTS*, 135 (Julie Peters & Andrea Wolper eds., 1995) (arguing that the public/private separate sphere ideology rationalizes the refusal of governments to deal with family violence).

tional covenants, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights, and the American Convention on Human Rights.<sup>14</sup> None of these documents, however, explicitly prohibits gender-based violence against women or defines it as a violation of women's fundamental right to equality or civil liberties. As Hilary Charlesworth has argued, these international instruments have defined equality as formal equality, requiring non-discrimination against women in certain contexts.<sup>15</sup>

Over the past twenty years, women's groups have engaged in an intense campaign to focus the international community's attention on the pervasiveness of violence against women and its devastating impact on women's position in society.<sup>16</sup> Feminist scholars have sought to conceptualize gender-based violence as a means of gender subordination that not only impairs women's right to equality but perpetuates women's disempowerment and socioeconomic inequality.

In 1994, the United Nations Commission on Human Rights appointed a Special Rapporteur on violence against women. In a subsequent report, the Special Rapporteur concluded that violence against women and girls "is one of most pervasive of human rights violations, denying women and girls equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms."<sup>17</sup> Rejecting the public/private dichotomy used to rationalize the non-interference of states in domestic violence, the Special Rapporteur explained that states actively construct the

14. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in *HUMAN RIGHTS OF WOMEN, NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note 15, at 59, 63-64.

15. See, e.g., Hilary Charlesworth, *What Are Women's International Human Rights?*, in *HUMAN RIGHTS OF WOMEN, NATIONAL AND INTERNATIONAL PERSPECTIVES* 59, 63-64 (Rebecca Cook, ed., 1994).

16. Elisabeth Friedman chronicles the mobilization of global women's rights activists to insist that international law recognize women's rights as human rights. She describes the activism of the Center for Women's Global Leadership and the United Nations Development Fund for Women ("UNIFEM") in mobilizing for recognition of women's rights and their "seizure" of the 1993 U.N. World Conference on Human Rights. Their activism resulted in a day-long presentation of panels describing the failure of human rights law to protect and promote women's human rights. As a result of their efforts, the Vienna Declaration and Programme of Action expressly incorporated their concerns. See Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 18-35 (Julie Peters & Andrea Wolper, eds., 1995).

17. Coomaraswamy, *supra* note 4 at 2.

status, rights, and remedies of women within the family through a host of laws that have reinforced women's subordination.<sup>18</sup> These include laws regulating sexuality, violence, privacy, divorce, adultery, property, succession, employment, and child custody.<sup>19</sup> Through regulation of the so-called private or domestic sphere, states actively construct and maintain the subordinate position of women in society.

The adoption by the Committee for the Elimination of Discrimination Against Women to define gender-based violence as prohibited discrimination marked a fundamental shift in the understanding of the nature and impact of violence against women. The Convention for the Elimination of Discrimination Against Women ("CEDAW") outlaws discrimination against women and, while it does not specifically address domestic violence, the Committee on the Elimination of Discrimination Against Women has interpreted its mandate to prohibit violence against women.<sup>20</sup> *General Recommendation No. 19* of CEDAW specifically addresses violence against women.<sup>21</sup> It recognizes that gender-based violence "is a form of discrimination that inhibits women's ability to enjoy rights and freedoms on an equal basis with men."<sup>22</sup> The Recommendation defines gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately."<sup>23</sup> It broadly defines gender-based violence to include "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."<sup>24</sup>

Rejecting the notion that domestic or gender-based violence is a purely private matter between individuals, *General Recommendation No. 19* explicitly states that gender-based violence constitutes within the meaning of Article 1 of CEDAW and "im-

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18. *See id.* ¶ 7 ("Such laws validate and entrench the dominant ideology of the traditional family and the woman's position within it").

19. *See id.*

20. *See* Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against Women, in Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/44/38 (1989) (recommending that States should include information about sexual violence, domestic abuse, and sexual harassment.).

21. *See generally id.*

22. *See id.* ¶ 1.

23. *Id.* ¶ 6.

24. *Id.*

pairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international or under human rights conventions,” including the right to life, the right to be free of torture or cruel, inhuman or degrading treatment; the right to equal protection; the right to liberty and security of the person and the right to the highest attainable physical and mental health.<sup>25</sup> Gender-based violence, the Recommendation states, has been justified by traditional attitudes and stereotypes that women are subordinate to men.<sup>26</sup> Focusing on the discriminatory effect of gender-based violence, the Recommendation explains that such violence deprives women “of the equal enjoyment, exercise, and knowledge of human rights and fundamental freedoms.”<sup>27</sup> The Recommendation spells out the concrete effects of gender-based violence upon women’s lives. Recognizing that “[f]amily violence is one of the most insidious forms of violence against women,” the Recommendation explains that such violence impairs women’s right to equality.<sup>28</sup> Specifically, family violence not only puts women’s health at risk, but “impair[s] their ability to participate in family life and public life on a basis of equality.”<sup>29</sup>

Having defined gender-based violence as an issue of equality, the Recommendation explicitly requires states to take positive measures to eliminate violence against women. Discrimination under CEDAW is not limited to state action; the Recommendation states that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts [of violence] if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>30</sup>

To fulfill their obligations under CEDAW, the Committee on the Elimination of Discrimination Against Women expressly recommends that States Parties should take “appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.”<sup>31</sup> Specific recommendations

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25. *Id.* ¶ 7(a),(b),(c),(d),(g).

26. *Id.* ¶ 11.

27. *Id.*

28. *Id.* ¶ 23.

29. *Id.*

30. *Id.* ¶ 9.

31. *Id.* ¶ 24(a).

include ensuring that laws involving gender violence adequately protect women; providing protective and support services for victims; and providing effective complaint procedures and remedies for gender-based violence, including compensation.<sup>32</sup> In addition, states should take measures to overcome attitudes, customs, and traditions that perpetuate violence against women.<sup>33</sup>

The Declaration on the Elimination of Violence Against Women, adopted by the United Nations General Assembly in 1994, similarly rejects the traditional notion of intimate violence as solely a matter that affects women in their family roles. This declaration recognizes that violence against women “is a manifestation of historically unequal power relations between men and women” and one means of subordination of women.<sup>34</sup> Rather than conceptualize violence against women as a criminal act between private persons, the Declaration recognizes the concrete impact of gender-based violence upon women’s fundamental rights and liberties, clearly framing violence against women as an issue of gender equality. Further, the Declaration states that violence against women “constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms” and “is an obstacle to the achievement of equality, development and peace.”<sup>35</sup>

Because the Declaration recognizes the concrete effect of violence against women on their status as citizens, it urges States to take positive action to eliminate and prevent violence against women.<sup>36</sup> Such action includes legal measures to protect women against violence not only by the State, but by private persons.<sup>37</sup> The Declaration provides that States should pursue a policy of eliminating violence against women that includes “[e]xercis[ing] due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>38</sup> Specifically, states should develop “preventive ap-

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32. *Id.* ¶ 24(b), (f).

33. *Id.* ¶ 24(e).

34. *See* Declaration on the Elimination of Violence against Women, *supra* note 5, at pmb1.

35. *Id.*

36. *See id.* art. 4 (“States should pursue by all appropriate means and without delay a policy of eliminating violence against women.”).

37. *See id.* art. 4(c).

38. *Id.*

proaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence.”<sup>39</sup>

Another example of the changing conception of violence against women as an issue of gender equality can be found in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted by the Organization of American States in 1994 (“Convention of Belém do Pará”).<sup>40</sup> Rejecting the notion that violence against women is a private matter between individuals, the Convention of Belém do Pará conceptualizes violence against women within the context of gender inequality. Its preamble states that violence against women is “a manifestation of the historically unequal power relations between women and men.”<sup>41</sup> Violence against women is defined broadly to include “physical, sexual and psychological violence.”<sup>42</sup> Article 3 specifically provides that women’s rights are “to be free from violence in both the public and private spheres.”<sup>43</sup> Rejecting the public/private dichotomy that rationalizes state inaction, the Convention of Belém do Pará requires states to take affirmative steps to prevent and eradicate violence against women. States must “pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.”<sup>44</sup> Specifically, it requires States “to apply due diligence to prevent, investigate and impose penalties for violence against women.”<sup>45</sup> Seeking to eradicate the root causes of violence against women, the Convention of Belém do Pará specifies that States must take all appropriate measures “to modify legal or customary practices which sustain the persistence and tolerance of violence against women.”<sup>46</sup>

By establishing state responsibility for the prevention and elimination of domestic violence, the due diligence standard embodied in these documents erodes the public/private dichotomy that historically insulated the state from responsibility for

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39. *Id.* art. 4(f).

40. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63.

41. *Id.* pmb.

42. *Id.* art. 1.

43. *Id.* art. 3.

44. *Id.* art. 7.

45. *Id.* art. 7(b).

46. *Id.* art. 7(e).

violence between intimate partners. Framing intimate violence as an issue of gender equality focuses attention on the concrete effects of violence upon women's lives, both inside the home and outside in the public sphere.

Recent opinions by the Committee for the Elimination of Discrimination Against Women and the Inter-American Commission on Human Rights help establish a body of law that seeks to hold States accountable for failure to address gender-based violence. While those decisions addressed violation of the States' duty to punish domestic violence and protect women, they also found that the States' inaction perpetuated traditional notions that women are subordinate to men. The Committee for the Elimination of Discrimination Against Women in 2006 issued a decision in *A.T. v. Hungary*<sup>47</sup> finding that Hungary failed to fulfill its obligations under CEDAW.<sup>48</sup> Ms. A.T. had been repeatedly and brutally beaten by her husband, who had threatened to kill her.<sup>49</sup> Hungary did not provide any procedure for Ms. A.T. to obtain a protective or restraining order against her husband, or offer her shelter to protect her from violence.<sup>50</sup> The Committee found that Hungary had not fulfilled its obligation to prevent violence against women and to protect women from violence, as required under Article 2(a), (b), and (e) of CEDAW.<sup>51</sup> It concluded that Hungary's failure violated A.T.'s human rights and fundamental freedoms, particularly her right to security of person. It was particularly concerned that Hungary had not adopted any legislation to combat domestic violence, provide orders of protection, or provide shelters to protect women from violence.<sup>52</sup>

In addition, the Committee looked beyond Hungary's failure to institute appropriate legal reforms and social services to protect women. It found that the facts demonstrated the persistence of traditional gender stereotypes regarding the role and responsibilities of women and men in the family. Accordingly,

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47. Views of the Committee on the Elimination of Discrimination against Women under Article 7, ¶ 3, of the Optional Protocol the Convention on the Elimination of All Forms of Discrimination Against Women, Communication No.: 212003, Ms. A.T. v. Hungary.

48. *Id.* ¶¶ 2.1, 2.2, 2.3.

49. *Id.* ¶¶ 9.3, 9.4.

50. *Id.* ¶ 9.3.

51. *Id.* ¶ 9.4.

52. *Id.* ¶ 9.4; see also CEDAW, *supra* note 6, art. 5.

the Committee held that Hungary violated Article 5 of CEDAW, which requires states to “modify the social and cultural patterns of conduct” to eliminate prejudices and practices which are based on the presumed inferiority or the superiority of men or women or upon stereotyped sex roles,<sup>53</sup> as well as Article 16, which requires states to “to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations . . . .”<sup>54</sup>

In *Maria Da Penha v. Brazil*, the Inter-American Commission on Human Rights in 2001 similarly ruled that Brazil had violated its obligations under the Convention of Belém do Pará by failing to prosecute and punish domestic violence perpetrated upon the petitioner by her husband.<sup>55</sup> As a result of her husband’s violence, the petitioner suffered irreversible paraplegia.<sup>56</sup> The Commission found that Brazil’s fifteen year failure to prosecute or punish the domestic violence committed against the petitioner indicated that Brazil condoned the violence, which exacerbated the effects of the violence upon the petitioner.<sup>57</sup> Significantly, the Commission found that the condonation of this violence by the Brazilian legal system “perpetuate[s] the psychological, social, and historical roots and factors that sustain and encourage violence against women.”<sup>58</sup> The Commission concluded that Brazil was liable for failure to protect the right of the petitioner to life; physical, mental, and moral integrity; personal safety and dignity; equal protection; and judicial recourse for protection against acts that violate her rights.<sup>59</sup>

*A.T.* and *Maria Da Penha* illustrate the persistence of state indifference to domestic violence that international law now condemns. While both focused on the failure of the States to address the effects of violence after it occurs, they also focused on the role of the State in condoning violence against women and perpetuating traditional ideologies that rationalize women’s subordination. Both provide doctrinal support to encourage

53. *Id.* ¶ 9.4; see also CEDAW, *supra* note 6, art. 5.

54. *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

55. *Id.* ¶ 2.

56. *Id.* ¶ 55.

57. *Id.*

58. *Id.* ¶ 58.

59. *Id.*

States to move beyond the mere criminalization of violence against women and to take positive action to modify traditional and customary law, beliefs, and structures that condone and perpetuate violence against women.

## II. UNITED STATES: RESISTANCE TO CONSTITUTIONALIZING THE RIGHT TO PROTECTION FROM INTIMATE VIOLENCE

In contrast to the international treaties and documents identifying domestic violence as a means of gender subordination, the U.S. Supreme Court has not treated domestic violence as an issue of gender discrimination or equality that justifies constitutional protection. Its approach rests upon an artificial distinction between the public and private, in which domestic violence has been conceptualized as a private harm to individuals that occurs within the privacy of the family rather than as an issue of gender discrimination or subordination that impedes women's enjoyment of equality, life, liberty, or property.

While the U.S. Constitution does not explicitly guarantee the right to gender equality, the Fifth and the Fourteenth Amendments guarantee individuals the right to equal treatment under the law as well as protection from the arbitrary deprivation of life, liberty, and property by the State.<sup>60</sup> The Due Process Clause of the Fifth Amendment applies to the federal government and provides, *inter alia*, that no person shall "be deprived of life, liberty, or property, without due process of law."<sup>61</sup> The Fourteenth Amendment provides, *inter alia*, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . equal protection of the laws."<sup>62</sup> The Supreme Court has interpreted the Fifth and Fourteenth Amendments to guarantee the right to equal protection on the basis of gender. However, the Supreme Court has interpreted these rights quite narrowly.

As a threshold matter, the Supreme Court has interpreted the Constitution to guarantee negative rather than positive rights. The Supreme Court has held that the Constitution guarantees individuals freedom from state action that interferes with

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60. *Id.* amend. V, XIV.

61. *Id.* amend. V.

62. *Id.* amend. XIV.

the exercise of their constitutional rights; it does not positively obligate the State to take affirmative action to ensure access or fulfillment of such rights.<sup>63</sup> In *Harris v. McRae*, the Supreme Court held that the Constitution did not require the government to provide funding for low-income women to obtain abortions.<sup>64</sup> While the government may not interfere with the right of women to obtain abortions, it is not required as a matter of due process to fund the procedure, even if the result is that an individual woman may be barred as a practical matter from exercising her right. As the Court explained, “[a]though the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.”<sup>65</sup> *Harris* embraces the view of the Constitution as embracing negative liberties rather than positive rights.<sup>66</sup>

The Supreme Court also has interpreted the Fifth and Fourteenth Amendments to prohibit discrimination by state actors, not private persons.<sup>67</sup> Moreover, only discrimination that is intentional is prohibited. Facially neutral policies with discriminatory effects alone do not violate the right to equal protection; proof of specific discriminatory intent is required.<sup>68</sup> As a result, the right to equal protection cannot be invoked to challenge state action that disproportionately harms women, absent evidence of a specific intent to discriminate against them.

In applying the guarantee of equal protection, the Supreme Court has adopted a formalistic theory of equality that focuses on eliminating differences in treatment between men and women. As feminist scholars have long recognized, the right to gender equality has generally been considered to embrace formal equality, not substantive equality. Formal equality rests on

63. See Robin West, *The Constitution and the Obligations of Government to Secure the Material—Preconditions for a Good Society: Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1906-07 (2001).

64. 448 U.S. 297, 317-18 (1980) (no obligation to fund abortions or other medical services).

65. *Id.*

66. See, e.g., *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

67. *Id.* at 272.

68. See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 2-5 (1994).

the notion that likes “should be treated alike” and requires that men and women be treated the same to the extent that they are similarly situated.<sup>69</sup> The issue for courts is whether the state has treated men and women differently without sufficient justification.<sup>70</sup> In contrast, substantive equality considers the effects of state action upon women, recognizing that women are often differently situated from men for a number of reasons, including past discrimination or disadvantage, and that such differences may justify differential treatment. While the Court’s gender jurisprudence can be read to reflect antisubordination concerns, it continues to define discrimination as different or unequal treatment by the state.

Constitutionalizing a right to protection from domestic violence under U.S. equality jurisprudence, therefore, is extremely difficult. Because intimate violence occurs between private citizens, the Supreme Court has had difficulty conceptualizing it as a form of discrimination that is cognizable as a violation of equal protection. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative duty upon the state to protect the life, liberty, and property of its citizens against invasion from other citizens.<sup>71</sup> The petitioners, Joshua DeShaney and his mother, sued to recover damages sustained by Joshua, who at four years of age suffered severe brain damage at the hands of his father, whom a state social service agency had investigated for suspected child abuse but had taken no action.<sup>72</sup> Petitioner sought to recover damages from the state, alleging the state had deprived him of his liberty without due process of law by its failure to protect him, in violation of his rights under the Due Process Clause of the Fourteenth Amendment.<sup>73</sup>

The Supreme Court in *DeShaney* held that the state’s failure to provide the petitioner with adequate protection against his father’s violence did not violate the substantive component of

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69. See generally *id.*

70. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989).

71. *Id.* at 193.

72. See *id.*

73. See *id.* at 203.

the right to Due Process.<sup>74</sup> The Court held that the Due Process Clause forbids the state itself from depriving individuals of life, liberty, and property without due process of law; it does not, however, affirmatively require the state to protect its citizens from harm by other citizens.<sup>75</sup> Thus, the Due Process Clause operates as a “limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”<sup>76</sup>

In *Castle Rock v. Gonzales*, the Supreme Court held that, under *DeShaney*, the state has no affirmative duty as a matter of substantive due process to protect women from private violence.<sup>77</sup> The Court’s equality jurisprudence, therefore, continues to embrace the public/private dichotomy that has been rejected under CEDAW, the Declaration on the Elimination of Violence Against Women, and the Convention of Belém do Pará.

Under the Fourteenth Amendment, it is possible to challenge discriminatory state statutes or policies that permit the non-enforcement of domestic violence statutes as violations of the right to equal protection. If states deny female victims of intimate violence the same protection or process afforded to male victims, for example, such differential treatment will be seen as a violation of the right to equal treatment. As a practical matter, however, such statutes or policies are now usually phrased in gender-neutral terms (referring, for example, to “spousal violence”).<sup>78</sup> Equal protection challenges to facially neutral statutes are difficult to sustain. To prove unlawful gender discrimination, it must be established that the state acted because of an intent to discriminate on the basis of gender; evidence that non-enforcement disparately affects women (since women are disproportionately the victims of domestic violence) is insufficient to establish a violation.<sup>79</sup> Consequently, numerous federal courts have held that facially neutral spousal assault poli-

74. See *id.* at 196.

75. *Id.* at 195.

76. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

77. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L. J.* 2117, 2189-90 (1996).

78. See, e.g., *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

79. See Siegel, *supra* note 77, at 2191 (noting that a number of federal courts have not subjected facially neutral spousal assault policies to heightened scrutiny); see also *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying motion to dismiss claim of wife against police for alleged discrimination in failing to enforce assault law against husband.).

cies do not discriminate on the basis of gender.<sup>80</sup>

To redress the lack of enforcement of domestic violence statutes, federal and state legislators have enacted various reforms to remedy a systematic bias against prosecution of domestic violence and to provide redress for victims in the federal courts. These have included adoption of the federal Violence Against Women Act ("VAWA"), which created a federal civil rights remedy for victims of domestic violence, and adoption by numerous states of mandatory arrest statutes, designed to eliminate police discretion in refusing to enforce domestic violence criminal laws.<sup>81</sup> Unfortunately, the Supreme Court has been hostile to attempts to create federal civil rights and constitutional remedies for victims of domestic violence.<sup>82</sup>

In *United States v. Morrison*, the U.S. Supreme Court struck down section 13981 of VAWA that created a federal civil remedy for victims of gender-motivated violence.<sup>83</sup> The U.S. Congress adopted VAWA to prevent and redress violence against women.<sup>84</sup> Section 13981 of VAWA radically redefined violence against women as a civil rights issue.<sup>85</sup> Section 13981 provided that "persons within the United States shall have the right to be free from crimes of violence motivated by gender."<sup>86</sup> To enforce that right, VAWA provided a civil right of action against persons who commit "a crime of violence motivated by gender" for compensatory and punitive damages, injunctive and declaratory relief.<sup>87</sup> The statute defined a crime motivated by gender as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."<sup>88</sup>

In adopting VAWA, Congress relied on a substantial record of factual findings that gender-motivated violence affected interstate commerce, limiting and interfering with women's employment opportunities, impoverishing women, and causing significant state expenditures for health care and other costs that af-

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80. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (2006).

81. *See, e.g., Town of Castle Rock*, 545 U.S. 748.

82. *See United States v. Morrison*, 529 U.S. 598, 618 (2000).

83. *See* 42 U.S.C. § 13981(a).

84. *Id.*

85. *Id.* § 13981(b).

86. *Id.* § 13981(c).

87. *Id.* § 13981(d)(1).

88. *See* H.R. Rep. No. 103-395, at 25 (1993).

fect the United States economy. For example, Congress found that three out of four American women will be victims of violent crimes sometime during their life;<sup>89</sup> “as many as 50 percent of homeless women and children are fleeing domestic violence”;<sup>90</sup> between 2000 and 4000 women die yearly from domestic abuse;<sup>91</sup> and that, according to partial estimates, violent crime against women costs the United States at least three billion dollars per year.<sup>92</sup> Congress also found that states had discriminated against women in their treatment of gender-based crime, perpetuating discriminatory stereotypes that often result in insufficient investigation, prosecution, and punishment of gender-motivated crime.<sup>93</sup> Attorney generals from thirty-eight states supported the adoption of the federal civil rights remedy, conceding that “the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds.”<sup>94</sup>

Despite the voluminous fact-findings of the impact of domestic violence, the U.S. Supreme Court held that a federal civil rights remedy for gender-based violence in VAWA was an unconstitutional exercise of Congressional power.<sup>95</sup> The Court rejected the argument that Congress had the authority to create the federal cause of action under the Commerce Clause, which permits Congress, *inter alia*, to regulate activities “having a substantial relation” to, or that “substantially affect,” interstate commerce.<sup>96</sup> Gender-motivated crimes of violence, the Court held, are not “economic in nature.”<sup>97</sup> The Court held that Congress relied on an improper “method of reasoning” that purported to regulate non-economic, violent crime because of its nationwide, aggregated impact upon the national economy.<sup>98</sup> The Commerce Clause, the Court held, requires a distinction between

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89. See S. Rep. No. 101-545, at 37 (1990).

90. *Id.* at 36.

91. *Id.* at 33.

92. See *United States v. Morrison*, 529 U.S. 598, 620 (2000).

93. See *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 34-36 (1993).

94. See *Morrison*, 529 U.S. at 625.

95. *Id.* at 609.

96. *Id.* at 613.

97. See *id.* at 615.

98. *Id.* at 617-18.

“what is truly national and what is truly local.”<sup>99</sup> Violence against women, the court held, is non-economic, violent crime, traditionally a “local” concern regulated by states.

The Court also rejected the argument that VAWA’s civil remedy was a proper exercise of Congress’ remedial power under section 5 of the Fourteenth Amendment, which authorizes Congress to enforce through legislation the equal protection and due process guarantees of the Fourteenth Amendment.<sup>100</sup> Although Congress found pervasive bias in the state justice systems against victims of gender-motivated violence, VAWA created a civil remedy against private actors, not the state actors who had discriminated on the basis of gender.<sup>101</sup> The Court held that Congress’ section 5 powers do not extend to the conduct of private actors.<sup>102</sup>

In holding that VAWA did not regulate interstate commerce, the Court ignored Congressional findings documenting the devastating impact of domestic violence upon the lives of women and the national economy. As the dissent points out, the Court also ignored that gender-motivated violence operates in a similar manner to racial discrimination in the 1960’s. In *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung*, the Supreme Court relied upon evidence of the consequences of racial discrimination by motels and restaurants on interstate commerce to uphold Title II of the Civil Rights Act of 1964, which banned racial discrimination in hotels and restaurants, against challenges under the Commerce Clause.<sup>103</sup> In contrast, the Court rejected similar evidence in *Morrison*—evidence which was much more voluminous and well-documented.

Rather than engage in a contextual analysis of the statute that took into account Congressional findings regarding the im-

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99. *See id.* at 627.

100. *See id.* at 626.

101. *See id.*

102. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *see also Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

103. *See Siegel, supra* note 77, at 2206 (noting that federalism claims about VAWA’s civil rights remedy are persuasive in significant part because they perpetuate traditional discourses of marital status in new idiomatic form. But one need not trace the lineage of these federalism claims to appreciate how the controversy over regulation of “gender-motivated violence” that we are examining will function to modernize discourses of gender status).

pact on women's civil rights,<sup>104</sup> the Court substituted a formalistic analysis that framed the legal issue as whether the legislation regulated the "truly local" versus the "truly national" and economic versus non-economic activity. Ignoring the discriminatory impact of gender-motivated violence on women, the Court recharacterized "gender-motivated violence against women" as "violent crime," which it then categorized as a "local" concern unworthy of constitutional protection. Seen through the lens of what Catherine MacKinnon describes as "categorical formalism,"<sup>105</sup> VAWA becomes a statute about crime, not a statute creating a civil rights remedy to punish and deter the discriminatory effects of gender violence.<sup>106</sup> Treating domestic violence as a "crime," as Elizabeth M. Schneider has argued, denies its gendered nature by ignoring the social context in which it occurs and its impact on women's liberty, autonomy, and enjoyment of full citizenship.<sup>107</sup>

While *Morrison* can be read as a part of the Rehnquist Court's efforts to limit the power of the federal government to legislate matters concerning the states, it also rests on the public/private distinction that historically has underpinned the state's refusal to enforce criminal laws against perpetrators of violence within the family.<sup>108</sup> In categorizing domestic violence as a local concern, the majority ignores the myriad of federal laws that regulate the family, including federal tax law, pension law, property, divorce, and child custody.<sup>109</sup> By ignoring the crucial role that federal law plays in constructing women's status and rights within the family, *Morrison* reinvoles the public/private distinction that the Declaration for the Elimination of Violence and CEDAW have condemned.

In *Castle Rock*, the Supreme Court in 2005 rejected another

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104. Catherine MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 173-74 (2000) (referring to the majority's analysis of VAWA as employing "categorical formalism").

105. See generally Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000).

106. See ELIZABETH M. SCHNEIDER, BATTERED WOMEN: FEMINIST LAW-MAKING 230 (2000).

107. See *id.* at 124.

108. See Judith Resnik, "Naturally" Without Gender: *Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1741 (1991).

109. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

attempt to constitutionalize the right to protection from domestic violence. The Court held that a Colorado mandatory arrest statute did not give a woman a constitutionally protected property interest under the Due Process Clause in the enforcement of a restraining order against her physically abusive husband.<sup>110</sup> The petitioner had obtained a restraining order against her estranged husband, who violated the order and took the couple's three children from the family home around 5:00 p.m.<sup>111</sup> Petitioner repeatedly called the police, begging them to enforce the restraining order and arrest her husband, but the police said there was nothing they could do.<sup>112</sup> At around 3:20 a.m., the husband arrived at the police station with a semi-automatic handgun and opened fire. The police shot back at him, killing him. The police found the murdered bodies of the couple's children in his vehicle outside.<sup>113</sup> Petitioner sued the town for damages, claiming that Colorado's mandatory arrest statute created a property interest which the state could not arbitrarily deny under the Due Process Clause.<sup>114</sup>

The statute at issue was adopted by the Colorado state legislature for the purpose of eliminating police discretion in enforcement of restraining orders.<sup>115</sup> It stated that "[a] peace officer shall use every reasonable means to enforce a protection order."<sup>116</sup> It directed that "[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause" that s/he has violated the order.<sup>117</sup>

The issue of whether the Colorado statute gave the plaintiff an entitlement to enforcement of the restraining order which enjoyed procedural due process protection, the Court notes, was

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110. *Id.* at 751.

111. *Id.* at 753.

112. *See id.*

113. *See id.* at 754 (complaining that the "town's actions 'were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to' respondent's civil rights.").

114. *See id.* at 758-59.

115. COLO. REV. STAT. ANN. § 18-6-803.5(3)(a) (West 2006).

116. *Id.* §§ 18-6-803.5(3)(b)-(b)(1).

117. *See Town of Castle Rock*, 545 U.S. at 755.

left open in *DeShaney*.<sup>118</sup> The Court held it did not.<sup>119</sup> As a matter of procedural due process, a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.<sup>120</sup> The majority held that the Colorado statute did not create a truly mandatory duty to enforce the restraining order.<sup>121</sup> Despite the use of the word “shall” in the statute, the majority held that this seemingly mandatory language did not override a “well-established tradition of police discretion” in enforcing criminal statutes, even those that seemed mandatory.<sup>122</sup> Given this tradition of police discretion, the Colorado legislature had not adequately indicated that it intended its statute to be a true mandate of police action, despite having used the word “shall” in the statute.<sup>123</sup> Moreover, the statute mandated either arrest or seeking an arrest warrant and, therefore, did not mandate a particular course of action.<sup>124</sup> Even assuming that the duty was mandatory, the majority held that would not necessarily mean that the law conferred a personal entitlement to enforcement of the statute.<sup>125</sup>

Further, the majority held that “it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.”<sup>126</sup> Under *Board of Regents of St. Colleges v. Roth*, the property interests subject to protection under the due process clause “extend well beyond actual ownership of real estate, chattels, or money” and include state-conferred benefits and services, including welfare benefits, public education, and drivers’ licenses.<sup>127</sup> The right to enforcement of a restraining order, however, does not have “some ascertainable monetary value,” which the majority held is implicitly required by *Roth*.<sup>128</sup> Further, the alleged property interest arises incidentally from “a

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118. *See id.* at 755-56. The Court concludes that the state of Colorado did not create this entitlement.

119. *See id.* at 762-65.

120. *See id.* at 759-61.

121. *Id.* at 760.

122. *See id.* at 758-63.

123. *See id.* at 762-66.

124. *Id.* at 765-66.

125. *Id.*

126. *Id.* at 789-90 (Stevens, J., dissenting).

127. *Id.* at 791.

128. *Id.* at 767 (majority opinion).

function that government actors have always performed," *i.e.* "arresting people whom police have probable cause to believe have committed a criminal offense."<sup>129</sup>

Given its holdings in *DeShaney* and *Castle Rock*, the majority concluded that "the benefit that a third party may receive from having someone else arrested for a crime" does not "trigger protection" under either substantive or procedural due process.<sup>130</sup> These decisions, the majority explained, reflect its reluctance to treat the Fourteenth Amendment as a "font of tort law" that would impose liability upon state and municipal actors.<sup>131</sup>

The Court's analysis of the criminal statute in *Castle Rock* ignores the long history of police inaction that has resulted in the adoption of mandatory arrest statutes in numerous states specifically to eliminate police discretion in this area. In a dissent joined by Justice Ruth Bader Ginsburg, Justice Stevens wrote that the Court gives "short shrift to the unique case of 'mandatory arrest' statutes in the domestic violence context" adopted by states with the "unmistakable goal of eliminating police discretion in this area."<sup>132</sup> The dissent locates the Colorado statute within the context of a nationwide movement of states that sought to redress "the crisis of police underenforcement" in the domestic violence sphere by adopting mandatory arrest statutes to eliminate police discretion.<sup>133</sup> Other state courts have interpreted these mandatory arrest statutes to "eliminate the police's traditional discretion to refuse enforcement of criminal statutes."<sup>134</sup> In concluding that Gonzales had a legitimate claim of entitlement to enforcement created by state law, the dissent concluded that Colorado intended to eliminate police discretion and, the dissent concluded, the text "perfectly captures" this purpose by using the word "shall."<sup>135</sup> While the precise means of enforcement may have been to arrest or to seek an arrest warrant, the dissent noted that the police "lacked the discretion to simply do nothing."<sup>136</sup>

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129. *Id.* at 768.

130. *Id.*

131. *Id.* at 779 (Stevens, J., dissenting).

132. *Id.* at 779-81.

133. *Id.* at 782.

134. *Id.*

135. *Id.* at 784-85.

136. *Id.* at 787-88.

Moreover, the statute conferred a direct benefit of enforcement on a specific group of persons, *i.e.* recipients of domestic restraining orders, defined as “protected person[s]” in section 18-6-803.5(1.5)(a).<sup>137</sup> As the dissent observed, *Roth* recognized that a purpose of the institution of property is to protect the interests of persons in claims upon which they rely in their daily lives.<sup>138</sup> Police enforcement of protective orders, the dissent stated, provides a valuable benefit similar to that provided by a private security company that should constitute a protected property interest.<sup>139</sup> Police enforcement of a restraining order is a government service “no less concrete and no less valuable than other government services, such as education.”<sup>140</sup>

In its analysis, the majority in *Castle Rock* again replaced a contextualized analysis of the failure of police to enforce restraining orders with a formalistic analysis that ignored the gendered nature and impact of domestic violence. The Court discounts the value of mandatory enforcement of restraining orders to women, ignoring that police protection from domestic violence is critical to insuring the safety of the lives of millions of women in this nation. Surely the right to be free of violence is as important to women’s lives as the right to drive a car. In characterizing Ms. Gonzalez’ claim as that of a “third party” seeking an arrest of another person, the majority erases the gendered nature of domestic violence which not only physically harms women, but denies them equal access to employment, housing, travel, and the right to life itself. By characterizing the failure of police to enforce a protective order as a “tort,” the Court locates the nature of the wrong as the idiosyncratic negligence or malfeasance of individual police officers rather than the systemic refusal of the state to punish domestic violence as a crime. Each of the classificatory steps reinvokes the public/private distinction as a rationalization for disclaiming state responsibility for guaranteeing the fundamental right to life and liberty to its female citizens.

In *Morrison* and *Castle Rock*, the U.S. Supreme Court thwarted the use of the federal Constitution to redress systematic

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137. *Id.* at 789-92.

138. *See id.*

139. *Id.*

140. *See* SCHNEIDER, BATTERED WOMEN: FEMINIST LAWMAKING, *supra* note 106, at 210-31.

gender-based discrimination against women by the State. In both cases, the Court rejected a contextualized understanding of the enormous effects of domestic violence upon millions of women's lives in favor of a formalistic analysis that reinvokes the public/private dichotomy. Rather than conceptualize domestic violence as impairing women's equality or civil rights, the Supreme Court has categorized domestic violence in gender-neutral terms, *i.e.* as a "violent crime" that implicates "local" concerns that do not justify federal constitutional protection. This categorization implicitly rests upon the public/private dichotomy rejected by the Declaration for the Elimination of Violence Against Women and CEDAW.

The Court's conceptualization of violence as a private, family matter limits and shapes the legal strategies to redress domestic violence. Advocates have successfully lobbied for criminal law reforms to compel the state to punish domestic violence, such as broaden the definitions of intimate violence, enhancing criminal penalties, and adopting mandatory arrest and no-drop policies.<sup>141</sup> While the criminalization of domestic violence sends the critical message that private violence is a public issue, it focuses on the criminal culpability of individuals rather than on the structural inequalities that reinforce and perpetuate gender-based violence. Domestic violence becomes a problem of "crime control," as Elizabeth Schneider argues, rather than a problem of gender inequality or subordination of women.<sup>142</sup> Criminalizing domestic violence ironically risks reinforcing the traditional judicial notion that it is a "local" matter subject to state regulation rather than a civil rights issue that implicates federal constitutional rights.

### III. SOUTH AFRICA: STATE IS CONSTITUTIONALLY REQUIRED TO PREVENT AND ELIMINATE VIOLENCE AGAINST WOMEN

The South African Constitutional Court, in contrast to the United States Supreme Court, recognizes that domestic violence is a means of gender subordination which the state has an affirmative obligation to eradicate. The difference in approach reflects substantive differences in the nature and scope of the

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141. *Id.* at 230.

142. *Id.* at 790.

two constitutions, as well as in the willingness of the Constitutional Court to understand domestic violence as gender subordination with concrete effects upon women's civil liberties.

The South African Constitution differs substantially from that of the United States, explicitly guaranteeing the right to gender equality as a foundational constitutional norm, recognizing that equality has not yet been achieved, and authorizing measures to protect and advance persons disadvantaged by unfair discrimination.<sup>143</sup> In contrast to the United States, whose Constitution was drafted by men, women activists in South Africa played a fundamental role in insuring a constitutional and political commitment to gender equality in post-apartheid South Africa.<sup>144</sup> Because the struggle for women's equality occurred within the context of the struggle for national liberation, South African women activists effectively mobilized the political and organizational skills acquired during the struggle for racial equality to compel the inclusion of women's issues in the Constitution.<sup>145</sup> While the struggle against racial apartheid took precedence over issues of gender equality, women in the African National Congress ("ANC") began to press for the inclusion of gender equality as part of the national liberation struggle and the transition to post-apartheid South Africa.<sup>146</sup>

In 1991, the ANC Women's League organized a meeting of about forty women's organizations with the goal of developing a Charter of Women's Rights to identify the needs of women and include their concerns in the constitution. The league subsequently formed the Women's National Coalition ("WNC"), a broad coalition of over 105 national and regional women's organizations, to coordinate a national political campaign to mobilize and educate women and entrench equality for women in the

143. See Justice Zak Yacoob, *Some Perspectives on the Movement Towards and the Struggle for Equality in Our Context*, in *EQUALITY LAW: REFLECTIONS FROM SOUTH AFRICA AND ELSEWHERE* 1-2 (F. du Bois, A. Fagan, S. Jagwanth, R. Jooste, E. Kalula, K. Lehmann & D.P. Visser eds. 1994).

144. See Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 425, 440-41 (1999); see also Catherine Albertyn, *Women and the Transition to Democracy in South Africa*, in *GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER* 47-63 (Christina Murray ed. 1994).

145. See Andrews, *supra* note 144, at 441-42; see also Felicity Kaganas and Christina Murray, *Law and Women's Rights in South Africa: An Overview*, in *GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER* 1 (Christina Murray ed., 1994).

146. See Albertyn, *supra* note 144, at 48.

new Constitution.<sup>147</sup>

During the transition to democracy, the WNC and women activists succeeded in developing a consensus concerning women's subordination in South African society and in securing a political commitment to the role of the state in eliminating gender inequality.<sup>148</sup> As Catherine Albertyn explains, the WNC "sought to construct an understanding of equality that took account of the social, economic and cultural reality of women's lives."<sup>149</sup> The women's movement in South Africa was supported by international feminist groups, activists, and scholars engaged in similar struggles.<sup>150</sup> During the negotiations over the new constitution between the major South African political parties, the WNC lobbied the participants to include the right to gender equality in the new Constitution.<sup>151</sup> They also successfully persuaded the ANC to name female candidates to one-third of its electoral lists of parliamentary candidates in the 1994 election, ensuring substantial representation by women in parliament.<sup>152</sup>

As a result of their efforts, they succeeded in securing both a constitutional and political commitment to gender equality and non-sexism. Section 9 of the South African Constitution expressly guarantees the right to equality on the basis of gender.<sup>153</sup>

147. See *id.* at 50-51.

148. See Gay W. Seidman, *Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State*, 13 GENDER & SOC'Y 287, 302 (1999).

149. Albertyn, *supra* note 135, at 52.

150. See Andrews, *supra* note 144, at 427-28.

151. See Albertyn, *supra* note 144, at 57-60.

152. See Andrews, *supra* note 144, at 440-41.

153. S. AFR. CONST. 1996 s. 9. Section 9 of the Bill of Rights provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

*Id.* s. 9.

The Constitution also specifically guarantees the right to dignity,<sup>154</sup> the right to bodily and psychological integrity,<sup>155</sup> and the right not to be treated or punished in a cruel, inhuman, or degrading way.<sup>156</sup> Unlike the U.S. Constitution, which guarantees merely negative liberties, Section 7 of the Constitution obliges the state to respect, promote, and fulfill the Bill of Rights.<sup>157</sup> Thus, the South African Constitution affirmatively obligates the state to take steps to realize the rights guaranteed by the Constitution.

The right to equality under the South African Constitution is much broader in scope than the right to equal protection in the U.S. Constitution. Section 9(3) provides that the state “may not unfairly discriminate directly or indirectly” on several enumerated grounds, including sex and gender.<sup>158</sup> While the U.S. Supreme Court has interpreted the right of equal protection to prohibit only intentional discrimination, the Constitutional Court has held that “conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination.”<sup>159</sup> Consequently, lack of specific evidence of intent is not dispositive.<sup>160</sup> While the Supreme Court has interpreted the right to equal protection to apply only to state action, Article 9(4) expressly prohibits any “person” from unfairly discriminating on one or more of the enumerated grounds.<sup>161</sup>

Unlike the right to equal protection under the U.S. Constitution, the right to equality under the South African Constitution embraces substantive rather than formal equality. As Saras Jagwanth explains, in interpreting Section 9, the Constitutional Court “has stressed that a rigid, formal approach must be rejected in favour of a substantive, contextual and asymmetrical analysis” that interprets the right to equality in light of past and

154. *See id.* s. 10.

155. *See id.* s. 12(2).

156. *See id.* s. 12(1)(e).

157. *See id.* s. 7(2).

158. *See id.* s. 9(3). Other grounds include, *inter alia*, sexual orientation, religion, disability, age, and social belief.

159. *City Council of Pretoria v. Walker* 1998 (3) BCLR 1 (CC) at 52 (S. Afr.).

160. *See id.* The Court noted, however, that absence of an intent to discriminate may be relevant in determining the unfairness of discrimination. *See id.* ¶ 39.

161. *See S. AFR. CONST.* 1996 s. 9(4); *see also* Saras Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience*, 36 *CONN. L. REV.* 725, 726 (2004).

continuing discrimination.<sup>162</sup> The Constitutional Court recognizes that certain groups in South Africa suffered “considerable unfair discrimination” in the past which must be taken into account.<sup>163</sup> Courts must carefully examine the impact of the discriminatory action upon the particular people concerned “to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”<sup>164</sup> Section 9(2) specifically authorizes the government to adopt affirmative action legislation and programs to “protect or advance persons, or categories of persons, disadvantaged by unfair discrimination” to “promote the achievement of equality.”<sup>165</sup>

In addition to embodying a commitment to substantive gender equality, the South African Constitution guarantees individuals a broad range of socioeconomic rights, including the right to health and housing.<sup>166</sup> The state must take reasonable measures to assure the progressive realization of these rights.<sup>167</sup> In a series of decisions, the Constitutional Court has acknowledged that these socioeconomic rights are justiciable.<sup>168</sup> Significantly, the

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162. *Id.* at 727.

163. *Nat'l Coalition for Gay & Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39, (CC) at 35 (S. Afr.).

164. *President of S. Afr. v. Hugo*, 1997 (6) BCLR 708, (CC) at 74 (S. Afr.), available at 1997 SACLX LEXIS 91, at \*68-69. In determining whether a challenged policy violates the right to equality, the court must first determine whether the provision differentiates between people or groups. If so, the court will first determine whether the policy bear[s] a rational connection to a legitimate government purpose[.]” *Harkson v. Lane*, 1997 (11) BCLR 1489 (CC) at PP 42-53, available at 1997 SACLX LEXIS 20, at \*53-68. If it does not, Section 9(1) has been violated. If the challenged policy does bear a rational connection, the court will proceed to consider whether the policy is discriminatory. *Id.* at \*67. If the policy discriminates on one of the enumerated grounds, it is presumed to constitute unfair discrimination. *Id.* If the policy is “objectively” based on a ground which has “the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner,” the court will consider whether the discrimination is unfair. *Id.* In determining whether the discrimination is unfair, courts must consider various factors, including the position of the complainants in society and whether they have suffered from past patterns of discrimination, the nature of the provision or power and the purpose sought to be achieved by it, and any other relevant factors.

165. S. AFR. CONST. 1996 s. 9(2).

166. *Id.* s. 26(1); 27.

167. *Id.* s. 26(2); 27.

168. *See, e.g., Gov't of the Republic of South Africa v. Grootboom & Others* 2000 (11) BCLR 1169 (CC) (S. Afr.).

Constitution explicitly provides that the rights contained therein are inter-related.

In addition to its commitment to substantive equality and socioeconomic rights, the South African Constitution explicitly recognizes the injustices of its past. In its preamble, the Constitution explicitly identifies as a foundational goal “heal[ing] the divisions of the past and establish[ing] a society based on democratic values, social justice and fundamental human rights” in which “every citizen is equally protected by law.”<sup>169</sup>

Applying these constitutional provisions, the Constitutional Court has held repeatedly that the Constitution provides women with the right to be free of domestic violence and the state has an affirmative obligation to prevent and eliminate such violence. The Court has explicitly adopted a nuanced and contextual analysis of domestic violence that recognizes that it is a form of gender subordination that impedes women’s equality, liberty, and other fundamental liberties. In addition, the Court has also considered the inter-relationship between the right to equality and other rights guaranteed in the Bill of Rights, such as the right to security of the person and the right to dignity. By engaging in a nuanced analysis of the concrete effects of gender-based violence on women in South Africa, the Court has given substance to the right to equality.

In *Carmichele v. Minister of Safety & Security & Another*,<sup>170</sup> the Constitutional Court expressly held that the South African Constitution imposed positive duties upon the state to take preventive measures to protect individuals whose lives are at risk from the criminal acts of others. In *Carmichele*, the female appellant had been viciously attacked by Francois Coetzee, who was free on bail pending trial on charges of raping a woman.<sup>171</sup> The police and prosecutor had recommended that Coetzee be released without bail and failed to inform the court regarding a prior conviction.<sup>172</sup> The applicant sued the Minister for Safety and Security and the Minister of Justice and Constitutional Development for damages, claiming that the police and prosecutors had negligently failed to prevent Coetzee from harming her.<sup>173</sup> The

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169. S. AFR. CONST. 1996, pmb1.

170. 2001 (10) BCLR 995 (CC) (S. Afr.).

171. *See id.* ¶¶ 12, 21.

172. *See id.* ¶ 13.

173. *See id.* ¶ 25.

applicant claimed that the police and prosecutors owed her a duty to ensure her constitutional rights to life, dignity, freedom and security, privacy and freedom of movement.<sup>174</sup> Further, she argued that the Constitution imposed a particular duty on the State to protect women against violence, crime and sexual abuse.<sup>175</sup>

Explicitly rejecting the U.S. Supreme Court's approach in *DeShaney*, the Constitutional Court held that the State's obligation to protect the right to life was not limited to adopting criminal laws to deter the commission of crime.<sup>176</sup> The Court held that the South African Constitution entrenches the right to life, dignity, and freedom and security of the person.<sup>177</sup> The Constitution does not merely prohibit the state from interfering with these rights but imposes certain positive duties upon the State and all of its organs to promote and protect these rights.<sup>178</sup> In particular situations, the Constitutional Court held the State has a positive obligation to take preventive measures to protect an individual whose life is at risk from the criminal acts of another.<sup>179</sup>

Although the common law did not recognize such a duty on the part of the State, the Constitutional Court held that the Bill of Rights applies to the common law and that section 173 of the Constitution gives all higher courts the power to develop the common law taking into account the interest of justice.<sup>180</sup> Section 39(2) provides that, when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. The Constitutional Court's analysis, therefore, was informed by its understanding that the South African Constitution is transformational in nature.<sup>181</sup> Whether the police had a legal duty to act must be decided "in the context of a constitutional state founded on dignity, equality and freedom and in

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174. *See id.* ¶ 27.

175. *See id.* ¶ 29.

176. *See id.* ¶ 45.

177. *See id.* ¶ 43.

178. *See id.* ¶ 44.

179. *See id.* ¶ 45.

180. *See* S. AFR. CONST. 1996 s. 173.

181. *See* Christopher J. Roederer, *The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U.S. and South Africa: Conservation Versus Transformation*, 13 TULSA J. COMP. & INT'L L. 91 (2005); *see also* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998).

which government has positive duties to promote and uphold such values.”<sup>182</sup>

In contrast to the categorical formalism employed by the U.S. Supreme Court in *Morrison* and *Castle Rock*, the South African Constitutional Court’s analysis in *Carmichele* focused on the gendered nature of sexual violence and its impact upon women’s freedom and equality. The Court held that “few things can be more important to women than freedom from the threat of sexual violence.”<sup>183</sup> Sexual violence “goes to the core of women’s subordination in society” and is “the single greatest threat to the self-determination of South African women.”<sup>184</sup> As a state agency, the police are responsible to protect the public in general and women and children in particular from violent crime.<sup>185</sup> The Court also held that South Africa had a duty under international law to prohibit gender-based discrimination that impairs women’s enjoyment of fundamental rights and freedoms and to take steps to prevent the violation of those rights.<sup>186</sup> Applying these principles, the Supreme Court of Appeals affirmed the judgment of the High Court on remand that the police and prosecutors owed the applicant a legal duty to protect her against the risk of sexual violence by Coetzee.<sup>187</sup>

Further, in *State v Baloyi*, the Constitutional Court upheld the Prevention of Family Violence Act 133 of 1993 (“the 1993 Act”).<sup>188</sup> The appellant, Godfrey Baloyi, challenged the Act after his wife obtained an interdict pursuant to the Act enjoining Baloyi from assaulting his wife and their child, as well as a warrant for his arrest, which was suspended pursuant to the terms of the Act.<sup>189</sup> Subsequently, the appellant allegedly assaulted the complainant and threatened to kill her; he was convicted by a magistrate for violation of the interdict.<sup>190</sup> Baloyi argued that the Act unconstitutionally infringed on his right to be presumed

182. *Carmichele*, (10) BCLR 995 (CC) ¶ 43.

183. *Id.* ¶ 62.

184. *See id.*

185. *See id.* ¶ 62.

186. *See id.*

187. *See generally id.*

188. *State v. Baloyi* (Minister of Justice & Another Intervening) 2000 (2) SA 425 (CC) (S. Afr.). At the time of the decision, the Act was about to be replaced by the Domestic Violence Act 116 of 1998.

189. *See id.* ¶ 3.

190. *See id.*

innocent and have his guilt proved beyond reasonable doubt.<sup>191</sup>

The Constitutional Court held that the 1993 Act, properly construed, does not impose a reverse onus on the accused to prove his innocence.<sup>192</sup> As in *Carmichele*, the Constitutional Court in *Baloyi* held that the State has a constitutional obligation to deal effectively with domestic violence.<sup>193</sup> While recognizing that all crime harms society, the Constitutional Court distinguished domestic violence, focusing on “its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life.”<sup>194</sup> Domestic violence “cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.”<sup>195</sup> The Court noted the devastating social and economic costs of domestic violence to the victims and the nation’s communities.<sup>196</sup>

The Court held that the South African Constitution obligated the State to take affirmative action to prevent and eliminate domestic violence. Section 12(1) provides that “[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.”<sup>197</sup> Section 7(2) of the Constitution provides that “[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights.”<sup>198</sup> The Court held that, read together, these sections obligate the State to “protect the right of everyone to be free from private or domestic violence.”<sup>199</sup> In addition, the Constitution obligates the State to protect the right to bodily and psychological integrity, the right to dignity, the right to not be subjected to torture in any way, and the right to not be treated or punished in a cruel, inhuman, or degrading way.<sup>200</sup> The Court also held that international law obligated the government to seek to remedy the injustice of domestic violence, including the breaches of violations of the Universal Declaration

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191. *See id.* ¶ 8.

192. *See id.* ¶ 25.

193. *See id.* ¶ 29.

194. *Id.* ¶ 11.

195. *Id.*

196. *Id.*

197. *Id.*; *see also* S. AFR. CONST. 1996 s. 12(1)

198. S. AFR. CONST. 1996, s. 7(2).

199. *Baloyi*, 2000 (2) SA 425 (CC) ¶ 11.

200. *See id.*

of Human Rights, the Declaration on the Elimination of Violence against Women, CEDAW, and the African Charter on Human and People's Rights.<sup>201</sup>

While the U.S. Supreme Court has ignored the gendered dimension of domestic violence, the Constitutional Court in *Baloyi* held that domestic violence implicates the constitutional right to gender equality.<sup>202</sup> Justice Sachs explained that domestic violence is "systemic, pervasive and overwhelmingly gender-specific."<sup>203</sup> As such, it "reflects and reinforces patriarchal domination, and does so in a particularly brutal form."<sup>204</sup> The Court recognized that notions of patriarchy, autonomy, and privacy have been used to justify non-interference by the state into what is perceived as a private or intimate matter.<sup>205</sup> The Court specifically recognized that the ineffectiveness of the criminal justice system in addressing family violence:

[I]ntensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorization of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behavior are normalized rather than combated.<sup>206</sup>

Nonenforcement violates the foundational commitment to non-sexism and the right to gender equality under the South African Constitution.<sup>207</sup>

The South African Constitutional Court reiterated these principles in a 2005 decision upholding the Domestic Violence Act 116 of 1998 (the "Domestic Violence Act"), the successor to the act analyzed in *Carmichele*. In *Omar v. The Government of the Republic of South Africa*, the Constitutional Court upheld the constitutionality of Section 8 of the Domestic Violence Act, which provides for a court to authorize a warrant of arrest when it issues a protective order.<sup>208</sup> The Court held that Section 8 does

201. *See id.* ¶ 13.

202. *See id.* ¶ 12.

203. *See id.*

204. *See id.*

205. *See id.* ¶ 12.

206. *Id.* (citing *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1552 (1993)).

207. *Baloyi* 2000 (2) SA (CC) ¶ 12.

208. *See generally Omar v. South Africa* 2006 (2) BCLR 253 (CC) (S. Afr.).

not violate the rights to freedom and security of the person, a fair trial and access to the courts guaranteed by the South African Constitution.<sup>209</sup>

In its analysis, the Court considered the social context and purpose of the Domestic Violence Act. In its preamble, the Act recognizes that domestic violence is a serious social evil; that the South African Constitution assures the right to equality and freedom of security of the person; and other international commitments and obligations require the State to end violence against women and children.<sup>210</sup> The stated purpose of the Act is to “afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide” and to ensure that the “state give full effect to the provisions of the Act” and “to convey that the State is committed to the elimination of domestic violence.”<sup>211</sup>

Declaring the high incidence of domestic violence as “utterly unacceptable,” the Constitutional Court recognized that domestic violence causes severe psychological and social harm.<sup>212</sup> Significantly, the Court stated that “the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicitly therein, are obvious.”<sup>213</sup> Citing *Baloyi*, the Court in *Omar* reiterated that domestic violence reflects and reinforces patriarchal domination and that the ineffectiveness of the criminal justice system in addressing such violence exacerbates the subordination of the victim and normalizes sexist behavior.<sup>214</sup>

The Court concluded that domestic violence “brutally offends the values and rights enshrined in the Constitution,” including non-sexism, human dignity, equality and the advancement of human rights and freedoms.<sup>215</sup> In addition, domestic violence offends various rights guaranteed in the Constitution: the right to freedom and security of the person, which includes the right to be free from all violence whether public or private;

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209. *See id.*

210. *See id.* ¶ 11.

211. *Id.*

212. *Id.* ¶ 13.

213. *Id.*

214. *See id.* ¶ 16.

215. *See id.* ¶ 17.

the right to dignity; life; equality; and privacy.<sup>216</sup> Again citing *Baloyi*, the Court held that the South African Constitution obligates the State “to deal effectively with domestic violence.”<sup>217</sup> International law also obligates South Africa to prohibit gender-based discrimination and to take reasonable measures to prevent the violation of women’s fundamental rights and freedoms.<sup>218</sup> The Court recognized that the Act addresses “[t]he historical ambivalence of the role of law enforcement” by requiring the police to take specific steps in addressing complaints of domestic violence.<sup>219</sup>

The South African Constitution’s commitment to non-sexism and non-racism, guarantee of substantive gender equality, and provision of justiciable socioeconomic rights similarly offers a powerful arsenal with the potential to transform the position of women in South African society. The Constitution itself acknowledges the historical discrimination faced by South African women and explicitly seeks to transform its society. In affirming the States’ positive duty to prevent and eliminate violence against women, the Constitutional Court has employed a contextualized analysis of domestic violence that recognizes its role in creating and perpetuating women’s historical subordination and vulnerability to gender-based violence.

While the Court’s decisions have focused on the role of the police and criminal justice system in protecting women from violence, the Court also has held that the right to equality requires the State to provide women with the basic socioeconomic rights guaranteed in the Constitution. In *Government of the Republic of South Africa v. Grootboom*, the Constitutional Court held that South Africa violated its obligation to take reasonable measures to progressively recognize the right to housing guaranteed under Section 26 of the Constitution, taking into account the limitations of available resources.<sup>220</sup> Linking the achievement of equality to

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216. *See id.*

217. *Id.*

218. *See id.*

219. *Id.* ¶ 21.

220. *See* *Government of the Republic of South Africa v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (1999). Irene Grootboom was rendered homeless after she was evicted from a squatter settlement near Cape Town, along with 510 children and 390 other adults. The Constitutional Court held that Section 26 prohibited the state from impairing the right of access to adequate housing and required the state to take reasonable measures to progressively realize the right to housing, taking into account

the attainment of basic socioeconomic rights, the Court explained that:

All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [The Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.<sup>221</sup>

Women's rights advocates thus have a doctrinal basis to argue that the State must remedy the violations of women's socioeconomic rights in order to prevent violence against women. For example, advocates could challenge the failure of the state under Section 26 to provide adequate shelter or housing for women who flee domestic violence or who are ostracized from their community after seeking legal protection from their husbands. Without access to adequate shelter under Section 26, women are vulnerable to continued violence, which in turn violates the right to equality under Section 9.

The transformative potential of the legal rights afforded women in South Africa, not surprisingly, faces substantial practical challenges. While the Constitution has tremendous potential to alter the position of women in South African society, most women lack access to the courts, especially those living in rural areas. In 1994, 74% of police stations in South Africa were located in white suburbs or business districts.<sup>222</sup> This means that black women in rural areas are faced with prohibitive travel costs that impair their access to police protection and the court system, as well as necessary support services. As in many other societies, violence against women remains pervasive and deeply-engrained in patriarchal attitudes that continue to put women's lives at risk

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the limitations of available resources. In doing so, the government must pay particular attention to those who are most vulnerable.

221. *Id.* ¶ 23.

222. LISA VETTON, ADDRESSING DOMESTIC VIOLENCE IN SOUTH AFRICA: REFLECTIONS ON STRATEGY AND PRACTICE VIOLENCE AGAINST WOMEN: GOOD PRACTICE IN COMBATING AND ELIMINATING VIOLENCE AGAINST WOMEN 5-6 (2005) available at <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>.

despite the criminalization of such violence under law. The conceptualization of domestic violence as an issue of equality, however, is a critical step in holding the State accountable for the eradication of both the causes and the effects of intimate violence.

### *CONCLUSION*

More than ten years after the adoption of the Declaration for the Elimination of Violence against Women, the U.S. Supreme Court has refused to recognize a constitutional right to protection from domestic violence. In contrast, the South African Constitutional Court has recognized that the State has affirmative obligations to prevent and eliminate domestic violence. The difference does not merely result from doctrinal differences; it also reflects different conceptions of domestic violence and gender equality. By understanding domestic violence as a means of gender subordination, the Constitutional Court has been able to acknowledge the role of the State in perpetuating violence. The U.S. Supreme Court, on the other hand, characterizes domestic violence as a gender-neutral crime that does not implicate equality or other civil rights.

The difference in conceptualization of intimate violence and its relationship to gender equality arises in part from the different jurisprudence of the right to equality. By embracing formal equality as the measure of the right to equal protection, the U.S. Supreme Court has largely ignored the context in which violence occurs and its concrete effects on women's ability to fully enjoy the fundamental rights to life, liberty, and equal protection guaranteed by the Constitution. Instead, the Supreme Court has chosen to conceptualize intimate violence against women in the abstract. Decisions about whether to recognize a constitutional right to be free from private violence, for example, turn not on a contextualized discussion of the concrete, real-life impact of violence on women. Instead, the U.S. Supreme Court engages in what MacKinnon and others refer to as "categorical formalism," a barren analytical move that denies the gendered nature and effects of violence, ignores the history of state condemnation of violence against women, and continues to dichotomize the private (family) and the public (state), relegating violence against women to the private and local rather than

invoking the power of the federal constitution to protect the very life and liberty of women.<sup>223</sup>

By examining the changing conceptions of violence against women in international law and the jurisprudence of the South African Constitutional Court, the limitations of the U.S. approach become clear. To the extent that the Supreme Court has signaled a willingness to consider international law and norms with respect to homosexuality and cases involving the death penalty,<sup>224</sup> engaging in a comparative analysis of the jurisprudence of violence against women hopefully will broaden the Court's understanding of the relationship between violence against women and women's right to equality under the federal Constitution.

This is not to say that the human rights approach is the silver bullet to eradicating violence against women. In evaluating the transformative potential of a human rights approach to domestic violence, it is important to consider the practical difficulties in employing the international conventions, declarations and documents that define domestic violence as discrimination. The 2006 report of the Special Rapporteur on Violence Against Women, for example, takes a critical look at the effectiveness of the due diligence standard in eradicating the causes of gender-based violence.<sup>225</sup> The Special Rapporteur concludes that States have focused their due diligence efforts on legislative reform, access to justice, and the provision of services to victims.<sup>226</sup> The focus has been on violence after it has occurred rather than on efforts to prevent violence, compensate victims, and hold non-state actors responsible for their acts.<sup>227</sup> In particular, the Report concludes that States have neglected their obligation to transform the patriarchal social structures and cultural values that condone and perpetuate violence against women.<sup>228</sup> The challenge remains to eliminate the root causes and consequences of domestic violence.

The transformative potential of the legal rights afforded wo-

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223. See MacKinnon, *Disrupting Male Sovereignty*, *supra* note 104.

224. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

225. See generally Report of Special Rapporteur, *supra* note 13.

226. *Id.* at 6.

227. *Id.*

228. *Id.*

men in South Africa also faces substantial challenges, both social and economic. As Penelope Andrews argues, the legacy of racism and apartheid includes a deep-rooted masculinist culture that perpetuates women's subordinate position through violence.<sup>229</sup> Andrews identifies three manifestations of South African culture that have produced a masculinist culture that condones violence against women: the maintenance of apartheid through militarization and forced conscription of white men, who engaged in brutal tactics to repress blacks; the valorization of black men in the townships who confronted the apartheid regime and developed a culture of violence, including sexual violence against women, as part of their masculine identity; and the role of traditional customary law in enforcing the subordination of women.<sup>230</sup> The roots of violence toward women cannot be solved by mere invocation of constitutional rights.

The transformative potential of the guarantee of socioeconomic rights similarly is limited by a lack of economic resources sufficient to eliminate the glaring inequalities and poverty faced by the majority of South Africans.<sup>231</sup> As of 2001, approximately 57% of South Africans lived below the poverty line.<sup>232</sup> Between 1996 and 2001, the percentage of persons below the poverty line did not change; the gap between the rich and the poor in fact widened.<sup>233</sup> With more resources, the government of South Africa would be better able to provide shelter and services for victims of domestic violence as well as reduce the socioeconomic inequalities faced by women that make them particularly vulnerable to violence. Despite these limitations, many in South Africa continue to believe in the power of the Constitution to inspire a vision of a more equitable society that can make the promise of substantive equality real.<sup>234</sup>

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229. Andrews, *supra*, note 144, at 457.

230. *Id.* at 437-39.

231. See Heinz Klug, *Five Years On: How Relevant is the Constitution to the New South Africa*, 26 VT. L. REV. 803, 803-05 (2002). Klug argues that the Constitution continues to have relevance for the majority of South Africans, despite the admitted lack of resources available to the government to redress the vast socioeconomic inequalities that continue to pervade the society.

232. See CRAIG SCHWABE, HUMAN SCIENCES RES. COUNCIL, FACT SHEET: POVERTY IN SOUTH AFRICA, July 26, 2004, available at [http://www.sarpn.org.za/documents/d0000990/P1096-Fact\\_Sheet\\_No\\_1\\_Poverty.pdf](http://www.sarpn.org.za/documents/d0000990/P1096-Fact_Sheet_No_1_Poverty.pdf).

233. *Id.*

234. Klug, *supra* note 231.

The shift toward a human rights approach to intimate violence offers a contextualized understanding of the relationship between intimate violence and gender subordination. Recognizing the pervasiveness of violence against women and the devastating consequences on women's daily lives is a critical first step in devising strategies to empower women and liberate their full potential as equal citizens.