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## *MADISON LECTURE*

### “BRINGING HUMAN RIGHTS HOME”? I THOUGHT THEY WERE ALREADY HERE! HUMAN RIGHTS AND OUR CONSTITUTION\*

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I very much appreciate the invitation to participate in the conversation that has occurred about our Constitution over the last fifty-four years through these Madison Lectures. I will say it was a bit challenging to decide what to add to what has already been said about our Constitution by the members of the judiciary that have preceded me at this podium. Living in The Hague, however, where discussion about human rights in the world is ubiquitous, I began thinking about the protection of human rights and comparing our constitutional jurisprudence to the decisions of international judicial bodies.

It seemed a particularly apt topic of conversation as many American international human rights scholars are urging that we “bring human rights home.”<sup>1</sup> But it made me wonder what “bringing

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\* Copyright © 2016 by Judge Rosemary Barkett, Iran-United States Claims Tribunal. I need to thank so many individuals for their discussion, research, collaboration, and thoughtful debate about this issue. If I could name everyone, I would, but I fear I might miss someone. Instead, let me say that if I’ve talked to you about this (and I’m sure I have), thank you. However, I do need to specifically thank my law clerk, Ellen Gilley, for an incredible amount of research and for patiently working with me through many, many different drafts of this lecture.

<sup>1</sup> See, e.g., *BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008); Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79 (2008).

human rights home” means when we “at home,” at least in my generation, were raised to believe that our constitutional rights have *always* protected our “human rights” to liberty and equality. In fact, U.S. lawmakers have frequently expressed the sentiment that Americans do not need human rights treaties because the Constitution covers all of our basic human rights.<sup>2</sup>

To be sure, our country was established on the basis of the first quintessential human rights document, our Declaration of Independence. We founded our country on the “self-evident” proposition “that all men are created equal” and “endowed . . . with certain unalienable Rights” among which are life, liberty, and the pursuit of happiness.<sup>3</sup> We have prided ourselves on being the first nation to assert in writing that the purpose of our government was to secure and protect these rights.<sup>4</sup> This was the basis upon which the Constitution was presented to the people for ratification.<sup>5</sup> James Madison, writing in support of the adoption of the Constitution, proclaimed that the very purpose of government was the achievement of justice.<sup>6</sup>

And although we were the first to articulate the radical proposition that governments are obliged to protect the individual rights of freedom, equality, and justice, that proposition has now been recognized by countries all over the world,<sup>7</sup> as well as in international

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<sup>2</sup> In January 2015, Senator John Cornyn changed the name of the Senate Subcommittee on the Constitution, Civil Rights and Human Rights to the Subcommittee on the Constitution “because the Constitution covers our most basic rights including civil and human rights.” Colby Itkowitz, *GOP Drops ‘Civil and Human Rights’ from Subcommittee Name*, WASH. POST (Jan. 24, 2015), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2015/01/24/gop-drops-civil-rights-and-human-rights-from-subcommittee-name/>. During the early 1950s, Senator Bricker and his supporters believed that human rights treaties would actually erode constitutional protections, arguing that the Constitution provided more and greater protections than human rights instruments do. *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 83d Cong. 2–3 (1953) (statement of Sen. John Bricker).

<sup>3</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>4</sup> *Id.* (“That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .”).

<sup>5</sup> U.S. CONST. pmb. (stating that the constitutional government was formed to, among other reasons, “establish Justice” and “secure the Blessings of Liberty to ourselves and our Posterity”).

<sup>6</sup> THE FEDERALIST NO. 51, at 256 (James Madison) (Lawrence Goldman ed., 2008) (“*Justice* is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.” (emphasis added)).

<sup>7</sup> The Constitution of the Republic of South Africa is perhaps the most-discussed example, with its specific guarantees of positive rights. *See* S. AFR. CONST., 1996, ch. 1 (“The Republic of South Africa is one, sovereign, democratic state founded on the following values—(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism . . .”); *see also* Canadian

agreements between countries.<sup>8</sup> Today, all members of the United Nations, 193 countries, have ratified at least one of the principal human rights treaties,<sup>9</sup> and over thirty have expressly affirmed their commitment to the Universal Declaration of Human Rights within their own constitutions.<sup>10</sup> Yet, despite this enormous uniformity in recognizing the obligation to safeguard human rights, the protection of these rights differs around the globe.

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Charter of Rights and Freedoms, Part I of the Constitution Act of 1982, §§ 2–22, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (protecting various forms of rights including fundamental freedoms, democratic rights, legal rights, equality rights, language rights, and others); INDIA CONST. arts. 12–35 (defining and protecting fundamental rights); CONSTITUTION OF THE REPUBLIC OF INDONESIA, 2002, art. 28(1) (naming specific rights as human rights that cannot be limited); S. AFR. CONST., 1996, ch. 2 (“(1) This Bill of Rights . . . enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”); Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN. ST. L. REV. 679, 679 (2004) (stating that the constitutions of every nation in Africa recognize human rights).

<sup>8</sup> See, e.g., American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>9</sup> *Human Rights Bodies*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Feb. 16, 2016). For example, 168 nations are parties to the ICCPR. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>10</sup> CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN pmb.; CONSTITUTION OF THE PRINCIPALITY OF ANDORRA art. 5; Art. 75, CONSTITUCIÓN NACIONAL (Arg.); CONSTITUTION OF THE REPUBLIC OF BÉNIN art. 40; CONSTITUTION OF BURKINA FASO pmb.; CONSTITUTION OF THE REPUBLIC OF BURUNDI pmb.; CONSTITUTION OF THE KINGDOM OF CAMBODIA art. 31; CONSTITUTION OF THE REPUBLIC OF CAMEROON pmb.; CONSTITUTION OF THE REPUBLIC OF CAPE VERDE art. 16(3); CONSTITUTION OF THE REPUBLIC OF CHAD pmb.; CONSTITUTION OF THE UNION OF THE COMOROS pmb.; CONSTITUTION OF THE REPUBLIC OF CÔTE D’IVOIRE pmb.; CONSTITUTION OF THE REPUBLIC OF EQUITOREAL GUINEA pmb.; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA art. 13(2); EUROPEAN UNION CONST. art. 2-61 (2004); CONSTITUTION OF THE GABONESE REPUBLIC pmb.; CONSTITUTION OF THE REPUBLIC OF HAITI pmb.; CONSTITUTION OF THE LEBANESE REPUBLIC pmb.; CONSTITUTION OF THE REPUBLIC OF MALI pmb.; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA pmb.; CONSTITUTION OF THE REPUBLIC OF MOLDOVA art. 4(1); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. IV, ch. I, art. 46, LA GACETA, DIARIO OFICIAL [L.G.] 18 February 2014; CONSTITUTION OF THE VIIITH REPUBLIC pmb. (Niger); CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA art. 39(3); POLITICAL CONST. OF PERU fourth final & transitory provision; CONST. OF THE PORT. REP. art. 16(2); CONST. OF ROM. art. 20(1); CONST. OF THE REP. OF RWANDA pmb.; CONST. OF THE REP. OF SEN. pmb.; CONSTITUCIÓN ESPAÑOLA, B.O.E., Dec. 29, 1978, art. 10(2) (Spain); CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA art. 9(f); CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE art. 23; CONSTITUTION OF THE REPUBLIC OF YEMEN art. 6.

Today, I would like to focus on one example of such a difference, and that is the treatment of gender violence and domestic abuse and the state's obligation to protect women and children from that abuse. This is one area in which *our* constitutional jurisprudence, despite its early promise of and rhetorical commitment to human rights,<sup>11</sup> has fallen far shorter in assuring their protection than have international and foreign courts with a much newer history.

The contrast between the international analysis and our domestic jurisprudence in this area is pretty stark. Whereas international bodies view a government's failure to protect women and children from domestic violence as discrimination and a violation of the right to life and liberty and equality, our case law holds that the state is under no obligation to protect women and children from third-party violence. Thus, we not only need to bring human rights home, but to bring human rights *into* the home.

That we in the United States have a history of arbitrarily failing to adequately respond to victims of gender violence, whether in a domestic setting or outside of it, has been continually documented.<sup>12</sup> We know that, as a class, women victims of violence are afforded substantially lesser protections of the law than victims of other crimes.<sup>13</sup>

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<sup>11</sup> *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“[The] liberties [protected by the Fourteenth Amendment] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (“The Eighth Amendment’s protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) (“The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics.”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”). Indeed, the protection of human rights and human dignity has long since been expressed as the goal of the United States government. THE FEDERALIST NO. 45 (James Madison) (E.H. Scott ed., 1898) (“It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this subject.”).

<sup>12</sup> *E.g.*, Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 790–93 (1986) (describing police policies on domestic violence in the 1980s); *see also infra* notes 40–46, 48, 49, 61, 78, 79, and accompanying text (discussing history and recent statistics of gender violence).

<sup>13</sup> For example, an estimated 400,000 rape kits have not been processed in the United States, and most states do not even know how many kits they have unprocessed. Nora Caplan-Bricker, *The Backlog of 400,000 Unprocessed Rape Kits Is a Disgrace*, NEW REPUBLIC (Mar. 9, 2014), <https://newrepublic.com/article/116945/rape-kits-backlog-joe-biden-announces-35-million-reopen-cases>; *see also* *Lenahan v. United States*, Case 12-626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69 ¶ 215(4)-(6) (2011) (recommending the United States implement multifaceted federal and state laws to make enforcement of protective orders mandatory and to adopt programs and policies to

This arbitrary disparity of treatment is most pronounced in cases of domestic abuse, where government actors, even with actual knowledge of a specific risk, overlook or ignore crimes of violence simply because the victim was related to or was in a relationship with the perpetrator.<sup>14</sup>

International and foreign courts addressing domestic violence have considered and weighed the nature, the breadth, and the history of domestic violence and, based thereupon, recognize that a government's failure to protect women and children from domestic violence constitutes a violation of equality principles, as well as a violation of other human rights, and that this violation mandates a remedy.

In contrast, our Supreme Court has failed to consider and weigh these factors, essentially dismissing them as irrelevant in its cases involving domestic abuse. Our case law thus holds that the state has no duty to protect women and children from third-party violence. I suggest that this failure ensures *more* than a vestige of the historically sanctioned "domestic chastisement" laws of the last century. Our case law has, in fact, continued into the present the history of legally denying protection to women and children.

And, on another related front, even if this discrimination were recognized as a constitutional violation, our case law would provide little chance of a remedy. *Monell v. Department of Social Services*<sup>15</sup> and its progeny, along with the broad application of qualified immunity, insulate government actors and municipalities from liability, preventing the imposition of any meaningful damages or any sanction at all.<sup>16</sup>

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eradicate gender stereotypes, including by training police officers); Ronald A. Cooper, *Lack of State Accountability in Acts of Domestic Violence: Understanding the Contrast Between the U.S. and International Approaches*, 29 ARIZ. J. INT'L & COMP. L. 657, 669–79 (2012) (outlining the limits of current methods of responding to domestic violence, including diversion and restraining orders); *infra* notes 43, 61, 78, and accompanying text.

<sup>14</sup> See Cooper, *supra* note 13, at 678 ("However, while the protocols in theory are gender-neutral, it is well-documented that police are often more likely, in practice, to respond to violence between non-intimates than to violence between intimates."); see also *infra* notes 43–45 and accompanying text.

<sup>15</sup> 436 U.S. 658 (1978).

<sup>16</sup> See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258–71 (1981) (holding that municipalities are *not* liable for punitive damages under § 1983). For an overview of section 1983 litigation, see MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION (2d ed. 2008).

The case of Jessica Lenahan, known also as Jessica Gonzales,<sup>17</sup> is a perfect example. Both the Supreme Court of the United States<sup>18</sup> and the Inter-American Commission on Human Rights<sup>19</sup> addressed her identical claim that a city is liable for the violation of human and constitutional rights when its police officers refuse to investigate or enforce a restraining order, which, for Jessica Lenahan, resulted in the murder of her three children.

Jessica Lenahan had obtained a permanent restraining order from the Colorado District Court against her spouse, Simon Gonzales, when the court found that “irreparable injury” and “physical and emotional harm” would result absent an order.<sup>20</sup> Jessica Lenahan called the Castle Rock Police Department (CRPD) on at least four separate occasions to report serious violations of her restraining order.<sup>21</sup> Notwithstanding Colorado’s mandatory arrest law for a violation of a restraining order<sup>22</sup> and the identical mandate written on the order itself,<sup>23</sup> the police did nothing.

One afternoon, after these complaints, Simon Gonzales abducted his three daughters, Leslie, age seven; Katheryn, age eight; and Rebecca, age ten. Jessica Lenahan called the CRPD to report the chil-

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<sup>17</sup> In the 2005 U.S. Supreme Court case, Jessica Lenahan was referred to by her married name, Jessica Gonzales. *Castle Rock v. Gonzales*, 545 U.S. 748 (2005). When she petitioned the Inter-American Commission on Human Rights (IACHR) in 2011, she used and was referred to as Jessica Lenahan. *Lenahan*, IACHR Report No. 80/11. Although both names are used in the IACHR opinion, they refer to the same person.

<sup>18</sup> *Castle Rock*, 545 U.S. 748.

<sup>19</sup> *Lenahan*, IACHR Report No. 80/11.

<sup>20</sup> *Castle Rock*, 545 U.S. at 751–52, 787 (Stevens, J., dissenting); *Lenahan*, IACHR Report No. 80/11 at ¶¶ 20–22, 62, 89.

<sup>21</sup> *Lenahan*, IACHR Report No. 80/11 at ¶¶ 66–67.

<sup>22</sup> COLO. REV. STAT. § 18-6-803.5(3)(b) (2015).

<sup>23</sup> The restraining order contained the following language addressed to law enforcement: “YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL . . . YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM’S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT, OR ARRANGE TRANSPORTATION FOR, THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM’S CHILDREN TO SHELTER.” *Gonzales v. Castle Rock*, 366 F.3d 1093, 1144 (10th Cir. 2004).

dren missing, continued to call throughout the evening, and at one point, showed the police the restraining order. The police did not make any attempt to find Simon Gonzalez or arrest him.<sup>24</sup> At approximately 3:20 AM the following morning, Mr. Gonzales drove to the Castle Rock Police Station and began shooting at the station. The police returned fire, killing Mr. Gonzales, and then discovered the murdered bodies of Leslie, Katheryn, and Rebecca in his truck.<sup>25</sup>

Jessica Lenahan sued the city of Castle Rock under 42 U.S.C. § 1983 for violating her Fourteenth Amendment rights by failing to protect her from a known threat of domestic violence. Due to the Supreme Court's earlier majority decision in *DeShaney v. Winnebago County Department of Social Services*,<sup>26</sup> Jessica Lenahan was foreclosed from arguing that Castle Rock violated her substantive due process rights to life and liberty.

*DeShaney* also involved an appalling case of domestic abuse. The Wisconsin Department of Social Services (DSS), created to respond to and investigate complaints of child abuse, had received many reports of severe beatings continually being inflicted on four-year-old Joshua DeShaney by his father. Though the abuse was chronicled by a series of firsthand accounts by the visiting DSS social worker, the social worker did not intervene and the Department did nothing. Well, they did note the complaints in the file.<sup>27</sup> Joshua's continuous beatings were so bad that he suffered traumatic brain injuries severe enough to require him to live the rest of his life in an institution for the severely retarded.<sup>28</sup>

The Supreme Court majority held that the state had no obligation to do anything and its inaction did not violate Joshua's Fourteenth Amendment rights to life and liberty.<sup>29</sup> The majority declared that, even when the state was aware of the abuse and had created an administrative structure to prevent it, there could be no violation. This was because the state had no obligation in the first place to stop a third party's violent attacks, and therefore the Department was not liable.<sup>30</sup>

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<sup>24</sup> *Castle Rock*, 545 U.S. at 753–54; *Lenahan*, IACHR Report No. 80/11 at ¶¶ 25–31.

<sup>25</sup> *Castle Rock*, 545 U.S. at 754; *Lenahan*, IACHR Report No. 80/11 at ¶ 32.

<sup>26</sup> 489 U.S. 189, 191 (1989).

<sup>27</sup> *Id.* at 192–93. Joshua DeShaney died in November 2015 at the age of thirty-six. Crocker Stephenson, *Boy at Center of Famous 'Poor Joshua!' Supreme Court Dissent Dies*, MILWAUKEE J. SENTINEL (Nov. 11, 2015), <http://www.jsonline.com/news/obituaries/joshua-12-b99614381z1-346259422.html>.

<sup>28</sup> 489 U.S. at 193.

<sup>29</sup> *Id.* at 195 (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

<sup>30</sup> *Id.* at 201.

To circumvent this precedent, Lenahan argued that the City had violated her procedural rights under the Fourteenth Amendment. She argued that the restraining order constituted a protected property interest of which she had been deprived.<sup>31</sup> She based that argument on the language of the restraining order, which included a command in all capitalized letters to the police stating:

YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL . . . .<sup>32</sup>

The Supreme Court majority, however, affirmed the district court's dismissal of her complaint, holding that the restraining order did not create any entitlement to police protection.<sup>33</sup>

They also held that the express mandatory language of the restraining order and the arrest law was not *really* mandatory, and that, notwithstanding the existence of probable cause, police discretion, as a matter of law, *always* trumped a woman's right to rely on the protection a restraining order was intended to provide.<sup>34</sup> The majority couched its decision in terms of "the competing duties of [an] officer or his agency [which] counsel decisively against enforcement in a particular instance."<sup>35</sup> But, the opinion does not mention, much less analyze or weigh, any single existing or possible "competing dut[y]" which would "counsel decisively against enforcement" in this case.

What if no conflicting duty clamored for police attention? Dismissing the complaint without analyzing whether there was in fact some cause for failing to respond permits officers to place everything else—including administrative tasks or doing nothing at all—before protecting a woman from a known threat of violence. Indeed, dismissing the complaint, notwithstanding the allegations of the city's policy of deliberate neglect in domestic abuse cases, makes it hard to imagine under what circumstances a woman could ever rely on a restraining order, even in the many jurisdictions with mandatory arrest requirements.<sup>36</sup> I don't think it too strong to say the decision rather adds to their endangerment.

<sup>31</sup> *Castle Rock v. Gonzales*, 545 U.S. 748, 754–55 (2005).

<sup>32</sup> *Gonzales v. Castle Rock*, 366 F.3d 1093, 1144 (10th Cir. 2004).

<sup>33</sup> *Castle Rock*, 545 U.S. at 768.

<sup>34</sup> *Id.* at 761–63.

<sup>35</sup> *Id.* at 761.

<sup>36</sup> See, e.g., ALASKA STAT. § 18.65.530(a)(2) (2014); CAL. PENAL CODE § 836(c)(1) (West 2008); COLO. REV. STAT. § 18-6-803.5(3)(b) (2015); D.C. CODE § 16-1031(a) (2001); LA. STAT. ANN. § 14:79(E) (2004); MD. CODE ANN., FAM. LAW § 4-509(b) (LexisNexis 2012); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 2007); MINN. STAT. ANN. § 518B.01(14)(e) (West 2006); MO. ANN. STAT. § 455.085(2) (West 2014); NEV. REV. STAT.



I cannot quarrel with the need for police discretion and some deference to it. But discretion, at least in this context, cannot be unfettered. Unfettered discretion provides the opportunity for arbitrary and corrupt action. How far does police discretion extend? Can arrest warrants be ignored? Can a police officer actually watch a husband beat his wife or child and choose to do nothing because it is a private person inflicting the beating?

Seeing Jessica Lenahan's case in terms of the need for police discretion and not in terms of gender discrimination is like the proponents of separate-gender military schools who argued in *United States v. Virginia* that single-sex military schools really had nothing to do with gender and everything to do with "diversity" in educational choices.<sup>37</sup> Justice Ginsburg, writing on behalf of the majority, saw the hollowness of that argument and found that the male-only admission policy of Virginia Military Institute (VMI) violated the Equal Protection Clause.<sup>38</sup>

The Court's skepticism of VMI's argument was tied to the "volumes of history" reflecting a multitude of "official action denying rights or opportunities based on sex . . . ."<sup>39</sup> Likewise, the history of gender violence and domestic abuse refutes the view that condoning the failure to act in these situations is about the necessity for police "discretion." Rather, it is about preserving the historical preference for male authority over women and children and the "privacy" of the home as it was viewed in the last century with the inequality of women and children that lived within it.

It is beyond peradventure that women and children have constituted a class of persons that have historically been, with governmental approval, at risk of losing life or limb simply because of their intrinsic characteristics. Violence was sanctioned as "domestic chastisement" and to be expected by women in order to maintain a male-dominated family structure.<sup>40</sup> Well into the nineteenth century, the law permitted

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§ 33.070(1) (2013); N.J. STAT. ANN. § 2C:25-21(a3) (West 2015); N.D. CENT. CODE § 14-07.1-11(1) (2009); OR. REV. STAT. § 133.310(3) (1999); TENN. CODE ANN. § 36-3-611(a)(2) (West 2014); UTAH CODE ANN. § 77-36-2.4 (LexisNexis 2012); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 2012); WIS. STAT. ANN. § 813.12(7)(b) (West 2007); see also *Domestic Violence Arrest Policies by State*, AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic\\_Violence\\_Arrest\\_Policies\\_by\\_State\\_11\\_07.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf) (last visited Feb. 17, 2016) (listing all fifty states' domestic violence arrest policies).

<sup>37</sup> 518 U.S. 515, 539–40 (1996).

<sup>38</sup> *Id.* at 535–40.

<sup>39</sup> *Id.* at 531.

<sup>40</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, \*444–45 ("The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with the power

corporal punishment so long as permanent injury did not result.<sup>41</sup> Take, for example, the North Carolina case of *Joyner v. Joyner* in 1862, wherein the court declared that “the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place.”<sup>42</sup>

Indeed, violence against women in general as well as in domestic relationships has been deemed not only natural, but a male entitlement. And marriage, rather than protecting women from violence, legitimized it.

Rape was, and in many places still is, considered a private right<sup>43</sup> as well as a spoil of war.<sup>44</sup> It was not until 1976 that the first state (Nebraska) abolished its marital rape exception.<sup>45</sup> And if rape is not viewed as a right, then it is treated as a crime that can be completely disregarded as evidenced by the approximately 400,000 rape kits that

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of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.”).

<sup>41</sup> *State v. Oliver*, 70 N.C. 60, 61–62 (1874) (“If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”); *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) (upholding husband’s entitlement “to exercise the right of moderate chastisement”); see also *Skinner v. Skinner*, 5 Wis. 449, 450, 453 (1856) (holding husband’s “cruel and inhuman treatment” of his wife is excusable and not a ground for divorce because his wife’s “lewd” behavior provoked him).

<sup>42</sup> 59 N.C. (1 Jones Eq.) 322, 325 (1862).

<sup>43</sup> See Marilyn J. Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 185 (1978) (explaining that into the 1970s, a woman’s sexuality was viewed as belonging to a specific man); see also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375, 1486–90 (2000) (noting that certain states have retained the marital rape exemption in some form and the arguments for preserving such an exemption). States that have retained some version of the exemption include Alaska and South Carolina. See ALASKA STAT. § 11.41.432 (2014) (stating that a person cannot be convicted of certain forms of criminal sexual misconduct if he/she is a spouse of the victim); S.C. CODE ANN. § 16-3-658 (2015) (stating that a spouse cannot be convicted of certain criminal sexual misconduct if he/she is a spouse and the act is not reported within 30 days); cf. Press Release, UN Women, Justice Still Out of Reach for Millions of Women, UN Women Says (July 6, 2011), <http://www.unwomen.org/en/news/stories/2011/7/justice-still-out-of-reach-for-millions-of-women-un-women-says> (reporting that more than 2.6 billion women live in countries where marital rape has not been criminalized).

<sup>44</sup> See Danise Aydelott, Note, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT’L L. REV. 585, 587–98 (1993) (describing the historical origins of wartime rape and the continuation of wartime rape into 1993); see also S.C. Res. 1820 ¶ 8 (June 19, 2008) (calling for the immediate cessation of wartime rape, and noting that “despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality”).

<sup>45</sup> See NEB. REV. STAT. § 28-319 (2008); *State v. Willis*, 394 N.W.2d 648, 650–51 (Neb. 1986) (rejecting the common law marital rape exception in light of § 28-319).

have not even been opened, let alone processed, and are collecting dust in evidence rooms across the country.<sup>46</sup>

Likewise, children were considered chattel, treated as labor, and fathers had absolute control over their lives,<sup>47</sup> including, as in *DeShaney*, the right to beat them senseless.

Even when we moved away from approving physical force, domestic violence continued to be viewed as a natural and, above all, private event.<sup>48</sup> It was, as one court noted, “better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive”<sup>49</sup> because maintaining the sanctified realm of the family free from government interference was prioritized over “trifling violence.”<sup>50</sup> This view, although no longer verbalized, is still the underpinning of the failure of police officers, police departments, and governmental entities to protect women and children from domestic violence. And, it continues to be, in a subtler and more subliminal form, the underpinning of court decisions that fail to hold these government actors responsible through sanctions, financial or otherwise, for that failure.

The narrow view espoused in *DeShaney* and *Castle Rock* that there is no right for women and children to be protected by government actors from third-party violence when injury is expected and foreseeable ignores both the history of domestic abuse and the state-created expectation of protection through restraining orders and hotline complaint centers established by the states.<sup>51</sup> There is simply no difference between removing laws from the books that explicitly *permit* domestic violence and replacing them with policies of unfettered “discretion” that in practice *permit* domestic violence.

<sup>46</sup> Caplan-Bricker, *supra* note 13.

<sup>47</sup> Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 266–67 (2014).

<sup>48</sup> See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996) (“Judges . . . often asserted that the legal system should not interfere in cases of wife beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony.”).

<sup>49</sup> *State v. Oliver*, 70 N.C. 60, 61–62 (1874).

<sup>50</sup> *State v. Rhodes*, 61 N.C. 453, 459 (1868) (“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”).

<sup>51</sup> One federal district court has reasoned that failure to prevent domestic abuse could be, in certain instances, an equal rights violation. See *Thurman v. Torrington*, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (“[A] police officer may not knowingly refrain from interference in [domestic] violence . . . simply because the assaulter and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws. In addition, any notion that [the police’s] practice can be justified as a means of promoting domestic harmony by refraining from interference in marital disputes, has no place [when a wife holds a restraining order against her husband.]” (citations omitted)).

As I noted earlier, in a given case, there may be legitimate reasons for a discretionary lack of response. But when the lack of response follows a history of legally sanctioned discrimination, courts should, on a case-by-case basis, examine and weigh the exercise of that discretion. Without this review in the context of gender violence and domestic abuse, women and children will continue to be treated in the discriminatory fashion that Congress found to exist in this country when it passed the Violence Against Women Act (VAWA).<sup>52</sup>

International courts have responded to the issue of domestic violence much differently than has our Supreme Court. After being denied relief by the United States Supreme Court, Jessica Lenahan pursued her claim in the international arena, petitioning the Inter-American Commission on Human Rights (the Commission). The Commission is an organ of the Organization of American States (OAS), of which the United States is a member.<sup>53</sup> The OAS holds that the rights contained in its initial human rights document, the American Declaration of the Rights and Duties of Man (American Declaration),<sup>54</sup> are binding on all members.<sup>55</sup> And the Commission,

<sup>52</sup> 42 U.S.C. § 13981 (1994).

<sup>53</sup> Charter of the Organization of American States arts. 53 (e) & 106, Apr. 30, 1948, 2 U.S.T. 2416, 199 U.N.T.S. 3 [hereinafter OAS Charter].

<sup>54</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); 43 AM. J. INT'L L. SUPP. 133 (1949) [hereinafter American Declaration]. When the OAS adopted its Charter in 1948, the members also adopted the American Declaration of the Rights and Duties of Man.

<sup>55</sup> The OAS regards the American Declaration as binding law because the OAS adopted an amendment to the Charter (Protocol of Buenos Aires, art. 57(e), Feb. 23, 1967, 21 U.S.T. 607, 199 U.N.T.S. 3) naming the IACHR as an organ of the OAS tasked with promoting human rights. At that time, "human rights" was defined only by the American Declaration. See Organization of American States, *Statute of the Inter-American Commission on Human Rights*, 1 October 1979, art I (2), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80 (defining human rights as the rights contained in the American Declaration); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 43 (July 14, 1989) ("[I]t may be said that by means of an authoritative interpretation, the member states of the Organization *have signaled their agreement* that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization *cannot be interpreted and applied as far as human rights are concerned without relating its norms*, consistent with the practice of the organs of the OAS, *to the corresponding provisions of the Declaration.*" (emphasis added)); Roach and Pinkerton v. United States, Case 9647, Inter-Am Comm'n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev.1 ¶¶ 48-49 (1987) ("As a consequence of articles 3(j) [current 3(I)], 16 [current 17], 51(e) [current 53(e)], 112 [current 106] and 150 [current 145] of the Charter, the provisions of other instruments of the OAS on human rights *acquired binding force*. Those instruments, approved with the vote of the U.S. Government, are the following: *American Declaration of the Rights and Duties of Man* . . . human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention

tasked with safeguarding human rights, investigates petitions of alleged violations by a Member state.<sup>56</sup>

In the *Lenahan* case, the Commission held that the police officers' inaction violated Jessica Lenahan's and her children's right to be equal before the law without distinction as to sex.<sup>57</sup> The Commission also found the equivalent of a substantive due process violation, holding that the United States violated Lenahan's and her children's right to "life, liberty and the security of [the] person,"<sup>58</sup> and the children's "right to special protection."<sup>59</sup> In addition, the Commission held that the United States violated their right to access judicial remedies.<sup>60</sup>

Unlike the majority opinion of our Supreme Court, the Commission rooted *its* legal analysis in the history and the present realities of domestic violence in the United States. The Commission noted, among other facts, that: (1) Domestic violence is considered by many law enforcement officers as a "private matter" and not deserving of protection; (2) Police officers often reinforce "traditional patriarchal gender roles"; (3) Approximately 50% of the murders in Colorado were committed by a current or former partner and the victims were disproportionately women; and (4) Approximately 45% of the female homicides were committed by an intimate partner.<sup>61</sup>

Recognizing the historical discrimination against women,<sup>62</sup> the threat domestic violence poses to the fundamental right to life,<sup>63</sup> and the unique vulnerability of domestic abuse victims,<sup>64</sup> the Commission concluded that "gender-based violence is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying

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on Human Rights." (emphasis added)); *Baby Boy v. United States*, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA.Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 17–19 (1981).

<sup>56</sup> OAS Charter, *supra* note 53, art. 106.

<sup>57</sup> *Lenahan*, IACHR Report No. 80/11 at ¶ 170; American Declaration, *supra* note 54, art. II ("All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.").

<sup>58</sup> American Declaration, *supra* note 54, art. I ("Every human being has the right to life, liberty and the security of his person."); *Lenahan*, IACHR Report No. 80/11 at ¶ 170.

<sup>59</sup> American Declaration, *supra* note 54, art. VII ("All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."); *Lenahan*, IACHR Report No. 80/11 at ¶ 170.

<sup>60</sup> *Lenahan*, IACHR Report No. 80/11 at ¶¶ 177, 196; American Declaration, *supra* note 54, art. XVIII ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.").

<sup>61</sup> *Lenahan*, IACHR Report No. 80/11 at ¶¶ 96–99.

<sup>62</sup> *Id.* ¶¶ 96–99, 110, 129.

<sup>63</sup> *Id.* ¶¶ 128–30.

<sup>64</sup> *Id.* ¶¶ 96–99.

the enforcement of women's rights."<sup>65</sup> "[T]his means that States have the obligation to adopt the measures necessary to recognize and guarantee the *effective* equality of all persons before the law . . . ."<sup>66</sup> The Commission explained that this obligation requires a state to use *due diligence* to prevent or respond to gender violence.<sup>67</sup>

The Commission concluded that a State violates its obligations when it knows, or should know, that a woman or her children are facing a real threat of domestic violence and it fails to take "reasonable measures" to protect them from that risk.<sup>68</sup>

Moreover, if there is such a violation, the victim is entitled to a remedy.<sup>69</sup> The State, even when a private party commits the injury, has a positive duty to remedy the violation by both ending the violating act, punishing the actor, *and* restoring the victim.<sup>70</sup>

The Commission declared that by denying Jessica Lenahan relief and holding that she suffered no constitutional violation, the United States Supreme Court did not fulfill this duty to remedy.<sup>71</sup> Moreover, the Commission recognized that this lack of protection was not an isolated occurrence. It noted that in addition to *Castle Rock*, the Supreme Court's restrictive holdings in *DeShaney* and *United States v. Morrison*<sup>72</sup> had severely curtailed, if not eliminated, the remedies available to domestic abuse victims.<sup>73</sup>

In *Morrison*, the Supreme Court held that the civil remedy provided by Congress in the Violence Against Women Act was an uncon-

<sup>65</sup> *Id.* ¶ 110.

<sup>66</sup> *Id.* ¶ 109 (emphasis added).

<sup>67</sup> *Id.* ¶¶ 122–30.

<sup>68</sup> *Id.* ¶ 137, 170; *see also* *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, ¶ 3 (2001) (establishing the standard for the IACHR); *Branko Tomašić and Others v. Croatia*, App. No. 46598/06, Eur. Ct. H.R. ¶¶ 52–53 (2009), <http://hudoc.echr.coe.int/eng?i=001-90625> (determining that the State knew of the risk of harm because the perpetrator had previously been detained); Comm. on the Elimination of Discrimination Against Women, Views: Communication No. 5/2005, *Şahide Goekce v. Austria*, U.N. Doc. CEDAW/C/39/D/5/2005, at ¶ 12.1.4 (2007) ("[I]n light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence . . . ."); Comm. on the Elimination of Discrimination Against Women, Views: Communication No. 6/2005, *Yildirim v. Austria*, U.N. Doc. CEDAW/C/39/D/6/2005, at ¶ 12.1.3–12.1.4 (2007) (deciding that the State knew of the risk of harm because a protective order was issued).

<sup>69</sup> *Lenahan*, IACHR Report No. 80/11 at ¶ 172; *see also* American Declaration, *supra* note 54, art. XVIII ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.").

<sup>70</sup> *Lenahan*, IACHR Report No. 80/11 at ¶ 173.

<sup>71</sup> *Id.* ¶¶ 177–80.

<sup>72</sup> 529 U.S. 598 (2000).

<sup>73</sup> *Lenahan*, IACHR Report No. 80/11 at ¶ 211.

stitutional exercise of Congressional power.<sup>74</sup> The majority asserted that the Commerce Clause gave Congress the power to regulate only *economic* activities that substantially affect interstate commerce, and that domestic violence is not “in any sense of the phrase, economic activity.”<sup>75</sup>

However, logic does not explain this result in light of the Supreme Court’s prior Commerce Clause decision in *Katzenbach v. McClung*,<sup>76</sup> which addressed the Civil Rights Act (CRA). That case involved Ollie’s Barbecue, a small diner in Birmingham, Alabama that refused to serve black patrons on the premises. The Supreme Court held that the CRA extended to private actors to preclude them from racial discrimination.

To support the passage of the CRA, Congress had collected meaningful, but unquantified, evidence that racial discrimination negatively affected interstate commerce.<sup>77</sup> However, prior to passing VAWA, Congress spent four years meeting with experts, and based thereupon, concluded that gender violence impacted interstate commerce.<sup>78</sup> Then, Congress actually calculated and quantified the aggregate economic impact through formal studies.<sup>79</sup>

Both VAWA and the CRA laudably aim to prohibit discrimination by non-state actors who are not themselves directly engaged in interstate commerce. Considering all the data collected by Congress, however, it is unclear how the Supreme Court could find that the regulation of racial discrimination could be an “economic activity” when

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<sup>74</sup> 529 U.S. at 627.

<sup>75</sup> *Id.* at 613.

<sup>76</sup> 379 U.S. 294 (1964).

<sup>77</sup> *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

<sup>78</sup> *Id.* at 634 (citing H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.) (“[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . .”)); *id.* at 631 (citing H.R. REP. NO. 103-395, at 25 (1993) (“Three out of four American women will be victims of violent crimes sometime during their life.”)); *id.* at 631–32 (citing S. REP. NO. 101-545, at 30, 37 (1990) (“Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others . . . [and battering] ‘is the single largest cause of injury to women in the United States.’”)); *id.* at 633 (citing S. REP. NO. 102-197, at 38 (1991) (“[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason.”)); *id.* at 633 (citing S. REP. NO. 101-545, at 33 n.30 (“[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.”)); *id.* at 632 (citing S. REP. NO. 101-545, at 38 (“[A]rrest rates may be as low as 1 for every 100 domestic assaults.”)).

<sup>79</sup> *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

the regulation of gender discrimination is not.<sup>80</sup> It is true that the activity in Ollie's Barbecue occurs between strangers and domestic violence does not, but why this distinction matters is unexplained by the Supreme Court.<sup>81</sup>

*Katzenbach* was decided based on the Court's concern about race discrimination. Sex discrimination should warrant the same concern. Although different in kind and degree, both share a history of legally sanctioned or permissive violence. We cannot ignore the inherent vulnerability of women and children to the kind of violence aimed only at them and the history that legitimized it, to which men, as a class, have never been subjected. No man has ever been considered a chattel owned by his wife and permitted to be beaten into submission. And, although both men and women may walk into a dark alley fearing the possibility of robbery, violence, and even death, only women would universally fear the additional violation of a sexual assault.<sup>82</sup>

It is also unclear, and somewhat ironic, how the Supreme Court has recognized this vulnerability and discrimination as a basis for striking down legislation limiting abortion rights, but not as a ground for protecting women from domestic abuse. In *Planned Parenthood v. Casey*, the Supreme Court took care to explain the uniquely vulnerable position of domestic abuse victims and that special protection and consideration must be afforded to them in the context of an abortion law's spousal notification requirement:

[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands . . . . Many may have a reasonable fear that notifying their husbands will provoke . . . instances of child abuse . . . [and] devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, [and] the withdrawal of financial support . . . .<sup>83</sup>

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<sup>80</sup> See *United States v. Lopez*, 514 U.S. 549, 559–61 (1995) (including *Katzenbach v. McClung* as an example of “[w]here economic activity substantially affects interstate commerce”).

<sup>81</sup> See Marianne Moody Jennings & Nim Razook, *United States v. Morrison: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 *NEW ENG. L. REV.* 23, 48–49 (2000). Jennings and Razook note that a restaurant could be considered an “economic setting,” which could be the basis for the distinction between *McClung* and *Morrison*. However, they go on to note that gender violence also occurs in economic settings, such as the family unit and places of business. *Id.* at 47–48.

<sup>82</sup> See S. REP. NO. 102-197, at 38 (“[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason.”).

<sup>83</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893 (2005).



In contrast, for over a decade, international and foreign courts and bodies have recognized this grave and disturbing reality as a reason to protect women from gender violence itself.<sup>84</sup> The Constitutional Court of South Africa, for example, pinpointed social patriarchal customs as a cause of sexual assault and better police and judicial protection as a solution:

Often, with impunity, men forcibly violate women's bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard. In short, rape of women and children violates a cluster of interlinked fundamental rights treasured by our Constitution.

The threat of sexual violence . . . [goes] to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self determination of women.

[T]he state . . . bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. [And] [w]hen [courts] perform their functions, it is their duty to ensure that [their] fundamental rights . . . are not made hollow by actual or threatened sexual violence.<sup>85</sup>

Likewise, in the case of *Opuz v. Turkey*,<sup>86</sup> the European Court of Human Rights explained that Turkey created a climate that was conducive to domestic violence because police officers consider domestic abuse “a family matter with which they cannot interfere” and courts fail to issue necessary injunctions.<sup>87</sup> In that case, as a result of this cultural attitude, the police chose not to interfere with, detain, or later prosecute a husband for beating and stabbing his wife and mother-in-law.<sup>88</sup>

The Court underscored that the state should have taken preventive measures to protect the wife and her mother because “in domestic violence cases perpetrators’ rights cannot supersede victims’ human

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<sup>84</sup> *E.g.*, *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at ¶ 55 (2001) (holding Brazil liable for claimant’s domestic abuse committed by her husband and recognizing that the country’s judicial and social attitudes “only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women”); *see also* International Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, S. EXEC. DOC. R, 96-2 (1980), 1249 U.N.T.S. 13 (“Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women . . . .”); *infra* notes 86–91 and accompanying text.

<sup>85</sup> *F. v. Minister of Safety & Sec.* 2011 (1) SA 536 (CC) at 21–22, paras. 55–57 (S. Afr.).

<sup>86</sup> 2009-III Eur. Ct. H.R. 107 (finding that Turkey violated the claimant’s rights to life, freedom from torture, and non-discrimination under the law by failing to protect her and her family from her husband’s abuse).

<sup>87</sup> *Id.* at 164.

<sup>88</sup> *Id.* at 149–50.

rights to life and to physical and mental integrity . . . .”<sup>89</sup> In other cases, the European Court of Human Rights has reinforced this holding by mandating that a state’s duty to uphold human rights includes a duty to act when there is knowledge that a human right is at risk.<sup>90</sup>

Similarly, the United Nations Committee on the Elimination of Discrimination against Women identified Hungary’s entrenched traditional stereotypes as a cause of domestic violence, constituting a violation of the equal protection required under the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>91</sup>

These cases make clear that inaction *is* action.<sup>92</sup> As the Seventh Circuit noted, “it seems incongruous to suggest that liability should turn on the tenuous metaphysical construct which differentiates sins of omission and commission.”<sup>93</sup> The majorities in *DeShaney* and *Castle Rock* constructed such an incongruity, which Justice Brennan pointed out in his dissent:

[I]naction can be every bit as abusive of power as action . . . . Today’s opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. . . . I cannot agree that our Constitution is indifferent to such indifference . . . .<sup>94</sup>

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<sup>89</sup> *Id.* at 150–52.

<sup>90</sup> See, e.g., *Kemaloğlu v. Turkey*, App. No. 19986/06, Eur. Ct. H.R. (2012), [http://hudoc.echr.coe.int/eng#{"appno":\["19986/06"\],"itemid":\["001-110253"\]}](http://hudoc.echr.coe.int/eng#{).

<sup>91</sup> Comm. on the Elimination of Discrimination Against Women, on Its Thirty-Second Session, Communication No.: 2/2003, *Ms. A.T. v. Hungary*, ¶¶ 9.3–9.4, U.N. Doc. A/60/38, at 90–91 (Jan. 26, 2005).

<sup>92</sup> In addition to the materials cited *infra* notes 86–91, the European Court of Human Rights in *Rantsev v. Cyprus & Russia*, App. No. 25965/04, Eur. Ct. H.R. (2010), at 114, [http://hudoc.echr.coe.int/eng#{"appno":\["25965/04"\],"itemid":\["001-96549"\]}](http://hudoc.echr.coe.int/eng#{), reiterated that Article 2 of the European Convention on Human Rights “enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.” This means that the state must “[put] in place effective criminal-law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual . . . .” *Id.*

<sup>93</sup> *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979) (holding police responsible after leaving three child passengers alone in a car after arresting the driver and the children left the vehicle exposing themselves to cold weather and traffic and suffering physical and emotional harm).

<sup>94</sup> *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 212 (1989) (Brennan, J., dissenting).

Wherever the fine line needs to be drawn to prevent unjustified or unreasonable state liability, there are certain moments of inaction that are clearly on the wrong side of it. I believe the cases of Joshua DeShaney and Jessica Lenahan fall into that category. The lack of action in those cases reinforces the social tolerance of violence toward women and children. Failing to recognize this inaction as unconstitutional discrimination deprives a class of persons from *effective* equality before the law.

However, as I said earlier, we also need reform on another front as failing to recognize this discrimination is just part of the problem. The recognition of discrimination without any meaningful sanction when it causes harm ensures its continuation. Thus, we must also examine the exceedingly high barrier to a remedy created by *Monell v. Department of Social Service*'s insulation of municipalities from any liability for the actions of their employees.

Although *Monell* held that, under § 1983, a municipality *can* be held liable when execution of their “policy or custom” inflicts the injury, it also held that, unlike other entities, a municipality *cannot* be held liable on a *respondeat superior* theory.<sup>95</sup> As Justice Breyer has noted, this distinction between vicarious liability and the need to establish a custom or policy to support liability is not readily understandable, easy to apply, or susceptible to consistent results.<sup>96</sup>

Suffice it to say the problems involved in proving the existence of an unconstitutional municipal custom or policy are enormous. (I could expand on this, but that would constitute a course, not a lecture!) *Monell*, with the very, very broad application of qualified immunity, makes it almost impossible for private individuals to enforce their basic rights under § 1983 through compensation for their deprivation.<sup>97</sup> And the lack of a sanction creates a culture of inaction.<sup>98</sup>

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<sup>95</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978).

<sup>96</sup> *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting) (joined by Stevens & Ginsburg, JJ.).

<sup>97</sup> For example, the standard for awarding compensatory damages against cities under § 1983 is even higher than the standard for awarding punitive damages against private employers. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2191 (2005); see also Donald G. Scott, *Respondeat Superior Liability of Municipalities for Constitutional Torts After Monell: New Remedies to Pursue?*, 44 *MO. L. REV.* 514, 521–22 (1979); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 *WM. & MARY BILL OF RTS. J.* 913, 913–14 (2015) (“Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, . . . it is broken in many ways, and . . . it is sorely in need of repairs.”).

<sup>98</sup> Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. REV.* 885, 890, 937 (2014) (concluding through empirical research “that officers across the country, in departments large and small, are virtually always indemnified”).

It is not surprising in light of the highly complex body of interpretive law produced by *Monell* that Justice Breyer (and three other Justices) have called for a reexamination of it.<sup>99</sup> This seems all the more justified lately in light of regular news reports of police violating, with impunity, the human rights of our most vulnerable citizens. These judicially created walls of immunity should, at least in this context, be reconsidered.<sup>100</sup>

In contrast—again—international bodies have focused on ensuring effective remedies for victims of human rights violations and breaking down defenses to government liability,<sup>101</sup> so much so that human rights scholars view the right to an effective remedy as “[a] bedrock principle of contemporary international human rights law . . . .”<sup>102</sup> Human rights treaties require remedies for violations.<sup>103</sup> And among international courts, the right to a remedy has been interpreted to mean a right to a *full* remedy, which includes cessation of the conduct *and* an award of damages.<sup>104</sup>

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<sup>99</sup> Bd. of Cty. Comm’rs, 520 U.S. at 430–37 (1997) (Breyer, J., dissenting) (joined by Stevens & Ginsburg, JJ.); *id.* at 416, 429–30 (Souter, J., dissenting) (joined by Stevens & Breyer, JJ.).

<sup>100</sup> See Blum, *supra* note 97, at 962–64 (calling for a reexamination of *Monell* in all contexts).

<sup>101</sup> Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 HARV. INT’L L.J. 323, 323 (2014). *E.g.*, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) (creating complaint mechanisms for alleged victims); Optional Protocol to the Convention on the Rights of Persons with Disabilities, U.N. Doc. A/611611 (Dec. 13, 2006) (same).

<sup>102</sup> Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 694 (2008).

<sup>103</sup> See *id.* at 700, n.17 (listing remedy provisions from a number of human rights treaties). *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him . . . .”); ICCPR, *supra* note 8, arts. 2(3), 9(5), 14(6) (ensuring remedies and compensation for wrongful convictions and imprisonment); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 (“State Parties shall assure to everyone within their jurisdiction effective protection and remedies.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (“Each State Party shall ensure in its legal system that the victim . . . obtains redress and has an enforceable right to fair and adequate compensation . . . .”); Int’l Comm’n of Jurists, *Need for an Effective Domestic Remedy in the Disability Rights Convention: Written Statement of the International Commission of Jurists to the Ad Hoc Committee on Disability Rights Convention*, Jan. 2005, <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf> (“The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.”).

<sup>104</sup> *Id.* at 701–02; see also, *e.g.*, O’Keeffe v. Ireland, Eur. Ct. H.R. (2014) (holding Ireland liable for the sexual molestation of a student by the Principal of a Catholic primary school and awarding damages to her from Ireland). The basis for the right to remedy is

Prompted by both international attention to, and our own recognition of, the breadth and perniciousness of gender violence and domestic abuse, the necessity to reconsider cases like *DeShaney*, *Castle Rock*, *Morrison*, and *Monell* will, I hope, be obvious.<sup>105</sup> As our history recognizes, we have a continuing duty to reconsider and redirect our jurisprudence when it is necessary to ensure that the ideals upon which our existence was originally based are realized in fact.<sup>106</sup>

Our history graphically illustrates that providing equal protection and justice for all requires both diligent and continuing efforts. As Justice Brennan noted, “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”<sup>107</sup>

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rooted in the *Chorzow Factory* case, a 1928 decision of the Permanent Court of International Justice (the precursor to the International Court of Justice), stating that “[t]he essential principle . . . is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” The *Factory at Chorzow* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

<sup>105</sup> That the problem of gender violence is growing not diminishing is reflected in a new dimension of gender violence brought on by social media. Cyber bullying, revenge porn, rape myths, and victim blaming or “slut shaming” are becoming more and more regular, and victims of this abuse may turn to suicide. See Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the “Real” Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL’Y 149, 151 (2015) (describing the cases of Audrie Pott and Rehtaeh Parsons: both were raped, depictions of the rape were circulated on social media, and both committed suicide). We lack effective responses, including legislation that clearly covers these acts. See Gregory Ainsley, *Cyberbullying: The New Gender Harassment and How Legislatures Can Protect Free Speech While Ensuring That Laws Keep Pace with Technological Advances*, 26 WIS. J.L. GENDER & SOC’Y 313, 332–38 (2011) (discussing the challenges to creating cyberbullying legislation); Whitney Strachan, Note, *A New Statutory Regime Designed to Address the Harms of Minors Sexting While Giving a More Appropriate Punishment: A Marring of New Revenge Porn Statutes with Traditional Child Pornography Laws*, 24 S. CAL. REV. L. & SOC. JUST. 267, 282–88 (2015) (explaining various tort claims, such as invasion of privacy or false light, that victims of revenge porn have used and the weaknesses of the few revenge porn statutes in existence).

<sup>106</sup> That *DeShaney* and *Castle Rock* exist should not deter us, for, as Justice Kennedy said in *Obergefell*: “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” 135 S. Ct. 2584, 2602 (2015).

<sup>107</sup> Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1985–1986); see also Justice David H. Souter, Commencement Address at Harvard University (May 27, 2010) (“The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution’s Framers left to be resolved another day; and another day after that, for our cases can give no answers that

Justice Kennedy echoed the thought in this year's historic decision in *Obergefell v. Hodges*, recognizing the pervasive discrimination that had denied the LGBTQ community their constitutional rights to equal protection, privacy, dignity, and liberty:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>108</sup>

Complying with this admonition is neither new nor unprecedented. In fact it is the norm not the exception. Adjustments to our jurisprudence have been made throughout our entire history. We have always worked to eliminate constitutional contradictions and diminish the gap between our avowed foundational principles and the actual protections which our government was formed to secure.

For example, after declaring equality as a foundational principle and at the same time failing to recognize that blacks and women were likewise entitled to equal treatment, we worked to remedy the inconsistency. We all know the progression of our jurisprudence from slavery to *Plessy v. Ferguson*<sup>109</sup> to *Brown v. Board of Education*.<sup>110</sup>

Likewise, we have seen the progression of women's rights after the passage of the Nineteenth Amendment in 1920, which assured women the right to vote. (Although another course could examine why our courts did not recognize that the Fourteenth Amendment, on its face, already gave women, as citizens of the United States, the privilege of voting.) Thereafter, our jurisprudence over time declared that it was illegal to pay women less than men for exactly the same work,<sup>111</sup> to treat women unequally in regard to jury service,<sup>112</sup> to dis-

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fit all conflicts, and no resolution's immune to rethinking when the significance of old facts may have changed in the changing world.").

<sup>108</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>109</sup> 163 U.S. 537 (1896).

<sup>110</sup> 347 U.S. 483 (1954).

<sup>111</sup> *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970) (holding it was illegal for a company to change a job's title so that they could pay women who held the position less than male workers).

<sup>112</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (holding that "women as a class may [no longer] be excluded [from jury service] or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male"); see also *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that litigants may not strike potential jurors solely on the basis of gender).

criminate in employment and in schools on the basis of sex,<sup>113</sup> and to deny women the right to control their own property.<sup>114</sup>

In yet another context, judicial perceptions of the death penalty have not been static over the decades, although much more reform is needed. The Supreme Court uprooted prior precedent to hold that it was cruel or unusual punishment to apply the death penalty to minors in *Roper v. Simmons*<sup>115</sup> and to execute the mentally retarded in *Atkins v. Virginia*.<sup>116</sup>

So whenever the scales of cultural and historical prejudices fall further from our eyes and we perceive yet another previously unacknowledged corner of inequality and injustice, we must examine it anew—or again—to ensure that legal protections exist that conform to the great principles we espouse.

I suggest that the lack of protection for women and children from domestic violence is such an unacknowledged corner, and that our courts have taken a wrong turn in failing to give meaning to our avowed right to life and liberty. I reiterate Justice Blackmun's call to align our jurisprudence with the constitutional principles on which it is based. As he stated in his dissent in *DeShaney*:

It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all”—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.<sup>117</sup>

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<sup>113</sup> See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overturning the Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), and allowing people to sue companies for pay discrimination even if more than six months have passed); *United States v. Virginia*, 518 U.S. 515, 519 (1996) (striking down the Virginia Military Institute's policy of only admitting males); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (recognizing certain forms of sexual harassment as a violation of Civil Rights Act of 1964).

<sup>114</sup> See, e.g., Equal Credit Opportunity Act (ECOA), Pub. L. No. 93-495, 88 Stat. 1521 (codified as amended at 15 U.S.C. § 1691) (1974). Prior to the ECOA, banks required single, widowed, or divorced women to bring a man along to cosign any credit application, regardless of their income. They would also discount the value of those wages when considering how much credit to grant, by as much as 50%. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a husband does not have the right to unilaterally take out a second mortgage on property held jointly with his wife).

<sup>115</sup> 543 U.S. 551 (2005).

<sup>116</sup> 536 U.S. 304 (2002).

<sup>117</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

Domestic violence victims are constitutionally entitled to protection in the United States—under both the Substantive Due Process Clause, which protects fundamental personal rights and liberties,<sup>118</sup> as well as the Equal Protection Clause.

There is no greater liberty interest than the right to live one's life without being maimed or raped or beaten. Nobody can disagree with that statement. Our courts need to consider the reasoning of our international judicial colleagues in recognizing that domestic violence is a violation of our human and constitutional rights and victims of it are entitled to a remedy when a violation occurs. It cannot be that the biggest, richest, most powerful nation in the world has no mechanism to protect human rights.

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<sup>118</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).