

**REFUSING TO REMOVE AN OBSTACLE TO THE REMEDY:
THE SUPREME COURT'S DECISION IN *TOWN OF CASTLE
ROCK V. GONZALES*¹ CONTINUES TO DENY DOMESTIC
VIOLENCE VICTIMS MEANINGFUL RECOURSE**

I. INTRODUCTION

American law has failed to provide women with a meaningful remedy against spousal abuse.² While legislatures have created legal remedies for women who suffer from abuse, the judiciary has historically been unwilling to enforce legislation capable of providing women with meaningful recourse against their abusers.³ Courts have interpreted legislation strictly and narrowly, adhering to the common law and refusing to remove the obstacles that prevent women from fully realizing the law's protection.⁴ Following this trend, in *Town of Castle Rock v. Gonzales*, the Supreme Court reiterated that the State has little or no responsibility in protecting women from abuse, even when mandated by a court order.⁵

Domestic violence has plagued our society throughout time and the law has failed to eradicate abuse occurring between family members.⁶ Common law robbed wives of their legal identities and autonomy through the doctrine of coverture.⁷ When husbands exercised power over their wives through violence, the law provided no legal remedy for their injuries.⁸ There was a time when violence was an accepted

1. 545 U.S. 748 (2005).

2. See *infra* notes 28-87; 168-96 and accompanying text.

3. See *infra* notes 38-95; 168-90 and accompanying text.

4. See *infra* notes 168-90 and accompanying text.

5. See *infra* notes 96-167; 197-216 and accompanying text.

6. See *infra* notes 31-37; 60-95 and accompanying text.

7. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 364 (1989). See *infra* notes 20-27 and accompanying text. William Blackstone described coverture:

By marriage, the husband and wife are one person at law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing . . .

¹ WILLIAM BLACKSTONE, COMMENTARIES *430.

8. See *infra* notes 28-37 and accompanying text.

component of the marital union and common law did not allow women to bring lawsuits against their husbands.⁹ As legislatures began to pass legislation authorizing women to bring lawsuits, the Supreme Court responded by circumscribing the application of those statutes and preventing wives from bringing personal injury suits against their husbands, not wanting to open the court doors to domestic disputes.¹⁰

Today, the Court still leaves the doors of justice closed to those suffering from domestic abuse.¹¹ While legislatures have sought to provide police protection to domestic violence victims by creating court-issued protection orders and implementing mandatory arrest procedures, the Supreme Court has rendered this legislation ineffective, reminding the abused that the law continues to deny them a meaningful remedy against their abusers.¹²

In the midst of the passage of the Married Women's Property Acts,¹³ while recognizing women's need for autonomy and increased property rights, courts refused to provide women with legal recourse against their abusive husbands.¹⁴ In 1910, the Supreme Court ignored the clear intent of the legislature and failed to apply the legislation in a manner consistent with its plain meaning.¹⁵ Rather, the Court implemented its own policy judgments and stripped from the victims of domestic abuse a personal remedy against their abusers. Similarly, in the midst of legislation fortifying court-issued protection orders with arrest mandates, the Court refused to provide women with meaningful protection against abuse.¹⁶ In *Town of Castle Rock v. Gonzales*,¹⁷ the Supreme Court ignored the clear intent of the Colorado legislature and

9. See *infra* notes 28-37 and accompanying text.

10. See *infra* notes 38-59; 169-90 and accompanying text.

11. See *infra* notes 147-67 and accompanying text.

12. See *infra* notes 60-95 and accompanying text; See Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1068-69 (1995) ("Judges are a critical link in the chain of protection for battered women, yet they are the weakest link because they are largely unaccountable for their decisions"); see *infra* notes 238-52.

13. See Tobias, *supra* note 7, at 374 (describing the Married Women's Property Acts as protecting wives' property from their spouses' creditors, keeping their earnings from their husbands, providing women with ownership and control of their property, permitting women to contract, and permitting them to sue without joining their husbands).

14. See *Thompson v. Thompson*, 218 U.S. 611 (1910). See *infra* notes 38-59; 169-90 and accompanying text.

15. See *Thompson*, 218 U.S. at 620-25 (Harlan, J., dissenting). See *infra* notes 182-190 and accompanying text.

16. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that a domestic abuse victim "did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband.").

17. 545 U.S. 748 (2005).

failed to give plain meaning to domestic violence legislation due to its own policy concerns.¹⁸ The Supreme Court continues to substitute its own policy judgments for those of the legislature, thereby preventing the victims of domestic abuse from seeking protection through a meaningful legal remedy.¹⁹

II. BACKGROUND

A. The Roots of Domestic Violence in America: Coverture and Chastisement

Under coverture,²⁰ husband and wife were regarded as one entity; however, the wife was stripped of her legal existence.²¹ Common law organized the “domestic” relations of husband and wife as a type of legal partnership, where the “woman’s role was secondary to the man’s.”²²

18. See *infra* notes 191-216 and accompanying text.

19. See *infra* notes 262-86 and accompanying text.

20. English jurist William Blackstone described coverture:

By marriage, the husband and wife are one person at law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-French a *feme-covert* . . . under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her coverture . . . For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself . . . The husband is bound to provide his wife with the necessaries by law, as much as himself; and if she contracts debts for them, he is obligated to pay them . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband’s concurrence, and in his name, as well as her own: neither can she be sued . . . But in trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person . . . But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void . . . She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion . . . These are the chief legal effects of marriage during coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.

BLACKSTONE, *supra* note 7, at *430-33.

21. See *Thompson v. Thompson*, 218 U.S. 611, 614 (1910) (“At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband . . .”).

22. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 14 (1986) (stating that the legal ideal of unity of the person “limited the activities of the wife while

This marriage partnership was characterized by governance and dependence.²³

Coverture imposed many legal disabilities upon a wife.²⁴ A wife was unable to make contracts, acquire property, or dispose of property, without the consent of her husband.²⁵ Married women could not act as executors or administrators of estates or as legal guardians.²⁶ Similarly, wives had subservient guardianship rights as to their children.²⁷

Married women did not have standing to bring lawsuits.²⁸ Thus, at common law, a married woman could bring neither civil nor criminal actions because the wife's existence merged into the husband's.²⁹ In contrast, a husband could bring suit in his wife's name as well as his own.³⁰

With coverture arose "The Rule of the Thumb," which allowed a husband to chastise his wife using a rod or switch that was no greater than the girth of his right thumb.³¹ English common law allowed husbands to discipline their wives by using physical force.³² The law supported "domestic chastisement," a husband's infliction of physical force as a form of control, upholding it as a vital part of the patriarchal family structure.³³ In *State v. Rhodes*,³⁴ the Supreme Court of North

broadening those of the husband").

23. *Id.* Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 716 (2004) (describing the marital relationship as one where the husband had a license to "broadcast his superiority in the family and to discredit the wife's individuality and independence").

24. SALMON, *supra* note 22, at 14 (stating that "[r]estrictions limited a married woman's ability to act at law").

25. *Id.* Ariela Dubler, Anika Rahman, Kathy Rodgers & Jane Spinak, *Women's Rights: Reframing the Issues for the Future*, 12 COLUM. J. GENDER & L. 333, 338 (2003).

26. SALMON, *supra* note 22, at 14.

27. ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861* 23 (1987) ("The married pair were not equal custodians of their children; he alone was considered the natural protector.").

28. SALMON, *supra* note 22, at 14. *Barber v. Barber*, 62 U.S. 582, 589 (1858).

29. *Crowell v. Crowell*, 105 S.E. 206, 209 (N.C. 1920).

30. SALMON, *supra* note 22, at 14.

31. White, *supra* note 23, at 715 (noting that Ancient Rome created the Laws of Chastisement that permitted husbands to strike their wives as a method of social control). Since the husband was accountable for his wife's actions, "the ancient common law permitted him to chastise her moderately as he would an apprentice who misbehaved." WARBASSE, *supra* note 27, at 22 (citing WILLIAM BLACKSTONE, *COMMENTARIES* *444).

32. White, *supra* note 23, at 715. However, Elizabeth Bowles Warbasse notes that this practice died out in England and English courts began to rule that "the husband who struck his wife when not acting in self-defense or to restrain her when insane, committed an act of cruelty which was valid cause for separation." WARBASSE, *supra* note 27, at 23.

33. White, *supra* note 23, at 715 (observing that, during this time, a woman was viewed as property and could easily be discarded when she committed an act that violated cultural norms). In

Carolina condoned a husband's infliction of physical force upon his wife, refusing to raise "the curtain upon domestic privacy, to punish the lesser evil of trifling violence."³⁵

In this way, men's domination and authority over the home was regularly reinforced by the state.³⁶ The doors of justice remained closed to married women, rendering them powerless to preserve their own physical well-being, as these "substantive and procedural disabilities under which married females labored made it quite improbable that an American court would have recognized a wife's tort suit against her husband."³⁷

B. An Attempt to Remove the Obstacle?: The Married Women's Property Acts

Legislatures finally began attacking coverture by passing the Married Women's Property Acts,³⁸ which modified the common law to

1824, Judge Powhattan Ellis stated:

[E]very principle of public policy and expediency, in reference to the domestic relations, would seem to require, the establishment of the rule we have laid down To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.

WARBASSE, *supra* note 27, at 23 (quoting *Bradley v. State*, 1 Miss. 156, 158 (1824)).

34. 61 N.C. 453 (1868).

35. *Id.* at 459.

36. *Id.* Much literature is devoted to figuring out why men abuse their wives. According to commentator Lisa G. Lerman:

Men are violent and abusive toward women because this behavior allows them to establish and to maintain control within the relationships. Many men engage in this behavior because it is effective in maintaining control, and because no one has ever required them to stop. Woman abuse is such a pervasive problem that society, in addition to holding the abuser responsible, must take responsibility for rearranging law, policy, and social services to prevent domestic abuse.

Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 220 (1992).

37. Tobias, *supra* note 7, at 368-69. Tobias also cites an observation from an early treatise on marriage that "[t]he 'nature of the connexion between [husband and wife is] such that no [battery] can give either a right of action to recover damages.'" *Id.* at 371 (quoting T. REEVE, *THE LAW OF BARON AND FEMME* 65 (1st ed. 1816)).

38. An example is Maryland's "Married Women's Act," enacted in 1898:

Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their

allow women some legal rights.³⁹ The Married Women's Property Acts created "a new legal structure to govern the relationship between husband and wife."⁴⁰ Most statutes granted women property rights, the ability to contract, and the ability to bring claims and appear in court without joining their husbands.⁴¹ With respect to a wife's right to litigate, the remedial language employed usually "authorized a married woman to maintain an action in her own name, for damages, against any person . . . for any injury to her person or character, the same as if she were sole."⁴²

While these statutes at least partially opened the doors of justice to married women, few statutes specifically granted a married woman the right to bring an action against her husband for personal injury or injunction.⁴³ Furthermore, despite this legislation, public acceptance of a husband's physical control over his wife remained.⁴⁴ Thus, when called to interpret the Married Women's Property Acts in individual cases, judges held fast to the common law,⁴⁵ and the mandates of the legislature were often overcome in instances where the legislation curtailed a husband's authority.⁴⁶

marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction.

MD ANN. CODE art. 45, § 5 (1957) (repealed 1984). While this statute has been repealed, its provisions still exist in a modern form. *See* MD. CODE ANN., FAM. LAW § 4-204 (West, Westlaw through 2006 Reg. Sess. and 1st Spec. Sess.).

39. WARBASSE, *supra* note 27, at 275-87 (noting that states differed in the liberalness of their legislation). "From almost complete subservience fostered by the common law [the American married woman] might, in the most liberal states, assume the financial if not the full personal independence possessed by the modern wife." *Id.* at 305.

40. *Id.* at 287.

41. Tobias, *supra* note 7, at 374.

42. *Id.* at 373 (internal quotations omitted).

43. *Id.* at 375.

44. *Id.* at 396 ("[W]hen jurists observed existing society, it may well have been inconceivable to them that legislatures could have intended to intrude upon a husband's control over his wife's body, the most delicate area of the sacrosanct institution of marriage.").

45. Carl Tobias observes that there was technically no common law rule of interspousal tort immunity, but the rule is derived from the "fiction of marital merger." *Id.* at 385.

46. *See, e.g., Husband and Wife. Separation of Property of the Wife. Injunction as a Means of Judicial Separation*, 24 COLUM. L. REV. 676, 676 (1924) (discussing the case of *Shipman v. Shipman*, 40 T.L.R. 348 (1924), which modified an injunction awarded a wife pursuant to a Married Women's Property Act to keep her husband from her residence, finding it "very unlikely that the Married Women's Property acts meant to make the wife's proprietary right superior to the common law right of a husband to enjoy the society of his wife"). *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983) ("[T]he early married women's acts

In *Thompson v. Thompson*,⁴⁷ a wife brought suit against her husband for assault and battery in the District of Columbia.⁴⁸ This action required the Supreme Court to interpret and apply a District of Columbia statute passed pursuant to the Married Women's Property Acts.⁴⁹ The Court addressed the disabilities imposed upon women by coverture and recognized that such statutes had been passed to emancipate women from their husbands' control.⁵⁰ The Court remarked that it endeavored to effectuate the legislative purpose underlying the statute's passage.⁵¹

However, while the Court noted that the statute's language authorized a married woman to bring suit for torts committed against her "as fully and freely as if she were unmarried,"⁵² the Court then went on to state that "[t]he statute was not intended to give a right of action as against the husband."⁵³ Ignoring the plain meaning of the statute, the Court justified its interpretation, stating that it gave "a reasonable effect to the terms used, and accomplishes . . . the legislative intent, which is the primary object of all construction of statutes."⁵⁴ The Court remarked

made only modest adjustments in the coverture law, and that these adjustments generally confirmed rather than confronted prevailing domestic roles of married women.").

47. 218 U.S. 611 (1910).

48. *Id.* at 614.

49. *Id.* at 615-16 (setting forth the statute). The statute provided:

Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser.

Id. (citing § 1155 of the D.C. Code, 31 Stat. 1189, 1374 (1901)).

50. *Thompson*, 218 U.S. at 615 ("In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the State looking to the relief of a married woman from the disabilities imposed upon her as a femme covert by the common law.").

51. *Id.* ("These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms and are to be construed with a view to effectuate the legislative purpose which led to their enactment.").

52. *Id.* at 616.

53. *Id.* at 617.

54. *Id.* at 617-18. However, Carl Tobias notes that "[t]he Acts' imprecise phraseology and the paucity of legislative history . . . make it difficult to discern whether legislatures intended to alter immunity." Tobias, *supra* note 7, at 375.

that a different construction would “open the doors of the courts to accusations of all sorts of one spouse against the other”⁵⁵ and such policy would dictate against its enactment.⁵⁶

This holding is arguably based on the judiciary’s own policy judgments and not those of the District of Columbia legislature.⁵⁷ *Thompson* secured the legacy of interspousal tort immunity.⁵⁸ Despite their newly recognized property rights, this opinion left women with no personal legal remedy to protect themselves against domestic abuse.⁵⁹

C. Domestic Violence, Protection Orders, and Arrest Policies

Following *Thompson*’s mandate, in the decades that followed the initial passage of the Married Women’s Property Acts, the legal system continued to refrain from raising the curtain on domestic violence.⁶⁰ Powerful social movements have exposed domestic violence over time, revealing an epidemic of domestic violence throughout the U.S.⁶¹ In fact, there is a high correlation between wife battering and child abuse.⁶² “Between 53 – 70% of men who abuse women also beat their children.”⁶³

55. *Thompson*, 218 U.S. at 617.

56. *Id.* at 618 (“The possible evils of such legislation might well make the lawmaking power hesitate to enact it”). A closer examination of the reasoning employed by the Court in *Thompson* is set forth more fully *infra* notes 168-190 and accompanying text.

57. Tobias, *supra* note 7, at 387 (stating that rather than referring to legislative materials, courts “employed abstract canons of statutory construction and made choices premised upon their ideas of public policy”). See *supra* note 54.

58. See Tobias, *supra* note 7, at 359 (describing the rule as prohibiting “husbands and wives from successfully pursuing a civil cause of action against each other for personal injuries”).

59. See *Thompson*, 218 U.S. at 619. However, the Court stated that it provided the wife a “remedy for such wrongs.” *Id.* (stating that “[s]he may resort to the criminal courts. . . she may sue for divorce or separation and for alimony. . . [s]he may resort to the chancery court for the protection of her separate property rights”).

60. Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women’s Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 (1989) (“Between the late nineteenth century and the 1960’s, wife abuse was a hidden social problem.”).

61. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 U. ILL. L. REV. 533, 536 (1996) (noting that the feminist movement of the 1960’s was influential in changing both social and legal responses to domestic violence). Marion Wanless also notes that the domestic violence “epidemic cries out for attention and a cure.” *Id.* at 533-34.

62. *Id.* at 551. Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995) (“[In 70%] of cases in which an abused child dies, there is ongoing violence against the mother.”).

63. Wanless, *supra* note 61, at 551. See Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 383 (1998) (“[T]here is a trend towards more violence and more intense violence in America’s families.”).

While the law has formally repudiated the doctrines of coverture and chastisement,⁶⁴ the inequality and conduct underlying these doctrines have persisted.⁶⁵ The attitudes that perpetuate the subordination of women inform the ways that men interact with women and the ways authorities respond to domestic violence, causing millions of women and children to suffer from abuse each year.⁶⁶

Due to the tremendous number of women and children who suffer from domestic violence, states have sought to provide protection through legislation.⁶⁷ Legislatures have confronted the problem, creating legal remedies to help battered women protect themselves and their children.⁶⁸

Civil protection orders were created in the 1970's, and by 1989 all fifty states and the District of Columbia had the protection order available as a civil remedy to victims of domestic violence.⁶⁹ "The civil protection order is the primary weapon in the fight against familial violence."⁷⁰ Civil protection order statutes allow victims to petition courts for injunctive relief against their abusers.⁷¹ Civil protection

64. See, e.g., *Fulgham v. State*, 46 Ala. 143, 146-47 (1871) ("[T]he privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law."). See also *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871) ("Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent.").

65. See generally Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

66. *Developments in the Law: Legal Responses to Domestic Violence III. New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1529 (1993) [hereinafter *Developments in the Law*] ("An estimated 4 million women continue to be battered each year because attitudes that endorse the historical subordination of women remain embedded in both the male psyche and the response systems of society.").

67. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 181 (2000) ("Legislative work has been a major aspect of feminist legal reform efforts respecting domestic violence").

68. Leigh Goodmark, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8-9 (2004).

69. *Id.* at 10 (identifying civil protection orders as the grandmother of domestic violence law). See *United States v. Harrison*, 461 F.2d 1209, 1210 (D.C. Cir. 1972) (recognizing that the law now permits disposition of intra-family offenses "through civil suits praying a civil protection order").

70. Woo, *supra* note 63, at 392. See Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 192, 192 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) ("[T]he issuance of these civil orders has become the chief means of protecting victims of domestic abuse in many jurisdictions.").

71. Goodmark, *supra* note 68, at 10. Goodmark observed that orders often prohibit [A]busers from continuing to assault, threaten, harass, or physically abuse victims; requiring that they stay from victims' homes, places of employment, children's schools, and other places frequented by the victim; precluding batters from contacting their victims; granting custody, visitation, child support, alimony, and other monetary relief;

orders are “vital to the family” that benefits from it, as it is a remedy that easily conforms to the specific needs of the beneficiary.⁷² In 1994, Congress passed the Violence Against Women Act⁷³ requiring states to afford “full faith and credit” to protection orders issued in other jurisdictions.⁷⁴ Issuing a protection order alone, however, is impotent in protecting women from domestic violence.⁷⁵ In most cases, protection orders are not adequately enforced.⁷⁶

Adhering to tradition, police officers remain reluctant to interfere with domestic violence.⁷⁷ Police attitudes and policies have contributed

compelling the batterer to participate in treatment programs; and requiring that the abuser vacate the couple’s shared home.

Id.

72. Woo, *supra* note 63, at 393-94.

73. *Id.* at 396. The Act provides:

(a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another state or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or Tribe.

(b) Protection order. A protection order issued by a State or tribal court is consistent with this section if:

(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process.

Id. (quoting 18 U.S.C. § 2265 (1994)). The Violence Against Women Act (VAWA) has committed \$1.6 billion to prevent domestic violence. *Id.* The VAWA contains five titles that address violence against women: Title I, Safe Streets for Women (increasing sentences for repeat offenders who commit crimes against women); Title II, Safe Homes for Women (focusing on crimes of domestic violence); Title III, Civil Rights for Women (creating a civil rights remedy for violent gender-based discrimination); Title IV, Safe Campuses (granting funds to be spent on problems faced by women on college campuses); Title V, Equal Justice for Women in the Court (providing training for judges that addresses gender bias in courts). *Id.*

74. *Id.*

75. Klein, *supra* note 70, at 207 (“[T]he mere issuance of [a protection order] fails to prevent future abuse against the same victim in almost half of the cases.”). Studies have shown that many abusers that have restraining orders issued against them do not take them seriously. *Id.* at 209 (noting that such offenders are active criminals and need community-based supervision).

76. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 813 (1993). See Klein, *supra* note 70, at 207 (noting that the utility of restraining orders in preventing abuse, if any, is in their issuance, “not in their maintenance”).

77. Carole Kennedy Chaney & Grace Hall Saltzstein, *Democratic Control and Bureaucratic Responsiveness: The Police and Domestic Violence*, 42 AM. J. POL. SCI. 745, 748 (1998) (stating that police departments “historically gave domestic violence a low-priority status, dismissing such incidents as merely order-maintenance problems or ‘social work’ rather than legitimate police work . . . domestic violence as less than a ‘real’ crime . . . ‘a private matter, ill-suited to public intervention”). See generally Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

to this epidemic of violence between intimate partners.⁷⁸ “Police have responded poorly to domestic violence complaints.”⁷⁹

Police departments across the country fail to enforce civil protection orders.⁸⁰ When police officers do respond to protection order violations, police officers seek only to placate the parties and tell abusive spouses to “take a walk around the block” to cool down.⁸¹ Police remain reluctant to arrest.⁸² This practice leaves victims unprotected and perpetuates the cycle of violence, giving abusers the message that their conduct is acceptable.⁸³

A famous 1984 study⁸⁴ of Minneapolis police officers indicated that

78. Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1294 (2000) (quoting Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 33 (James A. Inciardi ed., 2d ed. 1996) (“To date, despite official policies to the contrary, many police officers and prosecutors still strongly believe that society should not intervene in domestic disputes except in cases of extraordinary violence.”). See also Holden, *supra* note 60 (identifying a common belief among law enforcement officers that men should control their families); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1988) (finding that police officer’s remark he did not blame the plaintiff’s husband for hitting her demonstrated an intention to treat domestic abuse cases less seriously than other assaults, as well as animus against abused women).

79. *Developments in the Law, supra* note 66, at 1535 (“This inadequate response stems from beliefs that men may rightfully use force against women, from concerns about police interference in the private sphere of the family, from doubts that the victim will press charges, and from the lack of professional recognition for handling domestic cases.”). See Chaney & Saltzstein, *supra* note 77, at 748 (“[U]ntil recently, police frequently ignored domestic violence calls and, even when officers were dispatched, they rarely did anything about domestic violence”) (internal quotations omitted).

80. Klein & Orloff, *supra* note 76, at 813. Theorists posit that law enforcement is afflicted with class and sex biases, and when “left to their own paternalistic devices, the protective services enforced women’s oppression like other state institutions.” Evan Stark, *Mandatory Arrest of Batterers, A Reply to Its Critics*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 115, 119 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (citing the opinions of British feminist Frances Power Cobbe).

81. Goodmark, *supra* note 68, at 14. See *Donaldson v. City of Seattle*, 831 P.2d 1098, 1105 (Wash. Ct. App. 1992) (“[A] common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could ‘cool off.’”).

82. *Id.* (stating that the more closely related the two parties are the less likely officers are to arrest). See also *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D. Conn. 1984).

83. James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1190-91 (1995).

84. See Lawrence W. Sherman, et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 138-39, nn.7-8 (1992) (citing Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) and LAWRENCE W. SHERMAN & RICHARD A. BERK, *THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT* 7 (1984)). This empirical field experiment was conducted by Lawrence Sherman and Richard Berk, and it studied the deterrent effect of arrest on domestic violence. *Id.* While researchers have had trouble replicating the results of this study, see *id.* at 167, finding that arrest does not have a consistent deterrent effect on wife abusers, many commentators advocate mandatory arrest as an essential tool in stopping domestic

police officers failed to arrest batterers, despite official policies that encouraged arrest.⁸⁵ Additionally, the study found that arrest was the most effective deterrent to further incidents of battering.⁸⁶ These findings led many states to conclude that the statutes underlying civil protection orders did not contain “sufficient civil or criminal tools to enforce them.”⁸⁷

*D. Mandatory Arrest Policies*⁸⁸

Responding to the police’s deficient performance in enforcing protection orders, the U.S. Attorney General issued a report recommending that arrests become police officers’ standard response to domestic assault.⁸⁹ Legislatures have enacted mandatory arrest laws, denying police discretion when responding to domestic violence calls.⁹⁰

violence. See Lerman, *supra* note 36.

85. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1171-72 (1995) (citing Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984)).

86. Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1152 (1994). However, later studies have shown that the employment status of the batterer has a dramatic impact on the deterrent effect of arrest. *Id.* at 1154.

87. Zlotnick, *supra* note 85, at 1171. See Klein, *supra* note 70, at 209 (stating that state intervention cannot be limited to the issuance of civil restraining orders and advocating criminal prosecution).

88. Other arrest policies relating to domestic violence exist. Welch, *supra* note 86, at 1148-50 (1994). Permissive arrest policies allow an officer to make an arrest without a warrant if he or she has probable cause to believe that a protection order has been violated or a crime has been committed. *Id.* at 1149. Police officer discretion is central to such policies. *Id.* “[P]ro-arrest or preferred arrest policies suggest that arrests be made in certain circumstances.” *Id.* at 1150. Police still have discretion to determine whether a particular case fits within those defined circumstances. *Id.*

89. White *supra* note 23, at 755 (citing U.S. Attorney General’s Task Force on Family Violence, U.S. Dept. of Justice Final Report 10-26 (1984)).

90. See Neal Miller, *What Does Research and Evaluation Say About Domestic Violence Laws? A Compendium of Justice System Laws and Related Research Assessments* 91, n.270 (Dec. 2005) (draft), available at <http://www.ilj.org/publications/dv/DomesticViolenceLegislationEvaluation.pdf> (citing ALASKA STAT. § 18.65.530; ARIZ. REV. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b(a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. §§ 236.12(2); KAN. STAT. ANN. § 22-2307(b)(1); L.A. REV. STAT. ANN. § 46-2140; MISS. CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. §2C:25-21; N.Y. CRIM. PROC. LAW § 140.10(4)(c); OHIO REV. CODE ANN. §§ 2935.032(A)(1)(a), 2935.03 (B)(1) (discretionary); OR. REV. STAT. § 133.055(2)(a); R.I. GEN. LAWS §12-29-3; S.C. CODE ANN. § 16-25-70(B); S.D. CODIFIED LAWS ANN. § 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2(2); VA. CODE ANN. §19.2-81.3; WASH. REV. CODE ANN. § 10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2); MO. REV. STAT. § 455.085.1).

Colorado enacted mandatory arrest legislation in 1994, strengthening restraining order laws and

These statutes mandate arrest when a police officer has probable cause to believe that a protection order has been violated.⁹¹

Battered women and children have benefited from mandatory arrest laws.⁹² “Studies have shown that battered women who request police

procedures for victims of domestic violence. Article 10 of the Colorado Revised Statutes title 14, section 108 provides, in pertinent part:

(1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. . .

(2) As a part of a motion of such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary order. . .

(b) Enjoining a party molesting or disturbing the peace of the other party or of any child
 COLO. REV. STAT. ANN. § 14-10-108 (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.). House Bill 94-1253 mandated the arrest of domestic violence perpetrators and restraining order violators. Section 18-6-803.5 of the Colorado Revised Statutes provides, in pertinent part:

(3)(a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seeks a warrant for the arrest of a restrained person. . .

COLO. REV. STAT. ANN. § 18-6-803.5 (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.).

91. See Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97, 97 (1995). An example of such a law is Washington Revised Code section 10.31.100:

The statutory provisions applicable to this appeal read as follows:

(2) The primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party.

(3)(a) When a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer *shall* exercise arrest powers. . .

(2) A police officer *shall* arrest and take into custody . . .

WASH REV. CODE ANN. § 10.31.100 (West, Westlaw through 2006 Legis.). In *Donaldson v. City of Seattle*, a Washington appellate court recognized that, while a police officer generally has considerable discretion in determining whether to make an arrest, “in regard to domestic violence, the rule is the reverse.” 831 P.2d 1098, 1103 (Wash. Ct. App. 1992) (stating that if the officer has legal grounds to arrest pursuant to the statute, he has a mandatory duty to make an arrest).

92. Wanless, *supra* note 61, at 559. “Mandatory arrest policies have significantly increased the number of arrests of batterers for domestic violence crimes.” Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1671 (2004). “[I]n Washington, D.C. in 1990, prior to the passage of a mandatory arrest law, police arrested perpetrators in only 5% of domestic violence cases.” *Id.* “[A]fter the law took effect . . . police arrested perpetrators in 41% of all domestic violence calls.” *Id.* at 1672. In New York City, after a mandatory arrest law was enacted, “felony domestic violence arrests increased by 33%, misdemeanor domestic violence arrests rose 114%, and arrests for violation of protection orders were up 76%.” *Id.* However, mandatory arrest policies are sharply criticized. See e.g., Stark, *supra* note 80, at 115.

assistance before and after the enactment of mandatory arrest laws report an improvement in the quality of police protection” when mandatory arrest laws are followed.⁹³ However, not all mandatory arrest laws are successful at proscribing police officer discretion.⁹⁴ When officers do not comply with mandatory arrest laws, the promise of protection that a court-issued protection order embodies becomes valueless.⁹⁵

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

On June 22, 1999, Simon Gonzales took his three daughters from their mother’s home, violating a restraining order that the Castle Rock Police Department had issued against him.⁹⁶ Their mother, Jessica Gonzales, upon realizing that her children were missing, suspected that Simon had violated the restraining order and notified the Castle Rock Police Department.⁹⁷ During an eight hour period, Jessica Gonzales

93. Wanless, *supra* note 61, at 559.

94. *Id.* at 559-60. Disputes have arisen where the mandatory arrest statute does not explicitly describe the scope of an officer’s duty. In cases where the offender is absent from the scene, courts have not interpreted mandatory arrest statutes to require additional action to locate and arrest the offender. *See Donaldson*, 831 P.2d. at 1104 (highlighting the problems arising from imposing upon police officers a mandatory duty to investigate when the offender is no longer on the scene). *See also Chaney & Saltzstein, supra* note 77, at 749 (citing research findings that, despite mandatory arrest policies, police departments and officers enjoy considerable discretion in responding to domestic violence complaints). It was noted:

Departments have been able to thwart policies they disagree with by giving higher priority and scarce resources to other crime-control efforts; by failing to disseminate or enforce relevant laws and guidelines; or by omitting or downplaying such guidelines in training and supervising uniformed personnel; the ‘street-level’ nature of police work means that policy opposition among patrol officers may also thwart implementation.

Id.

95. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 780 (2005) (Stevens, J., dissenting). *See infra* note 144 and accompanying text.

96. *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1261 (10th Cir. 2002), *aff’d on reh’g*, 366 F.3d 1093 (10th Cir. 2004), *rev’d*, 545 U.S. 748 (2005). The restraining order was issued on May 21, 1999, for the benefit of Jessica Gonzales, Simon Gonzales’ ex-wife. *Id.* Simon Gonzales was troubled, having a history of suicide threats and erratic behavior. *Id.* The restraining order was issued pursuant to section 14-10-108 of the Colorado Revised Statutes, under which a party to proceedings for the dissolution of marriage may obtain a temporary order “[e]njoining a party from molesting or disturbing the peace of the other party or of any child.” *See* COLO. REV. STAT. ANN. § 14-10-108 (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.). The restraining order was made permanent on June 4, 1999. *Gonzales*, 307 F.3d at 1261. The order granted Mr. Gonzales very limited visitation with his children; he was allowed to visit them on weekends and for two weeks during the summer and he could visit during the week with Jessica Gonzales’ approval. *Id.*

97. *Id.* At 7:30 p.m., two officers were dispatched to her home. *Id.* She showed the officers

repeatedly asked the police to enforce the restraining order and locate her children, yet the Castle Rock Police Department never took any action against Simon Gonzales.⁹⁸ At 3:20 a.m., Simon Gonzales arrived at the Castle Rock Police Station and opened fire with a semi-automatic handgun.⁹⁹ The police found Jessica Gonzales' three daughters outside, in the cab of Simon Gonzales' truck.¹⁰⁰ He had murdered the girls earlier that evening.¹⁰¹

B. Procedural History

Jessica Gonzales brought suit against the city of Castle Rock in the District Court of Colorado, claiming that the city violated her 14th Amendment¹⁰² due process rights in failing to enforce the restraining order.¹⁰³ The district court granted defendants' motion to dismiss,

a copy of the order but the officers "stated that there was nothing they could do about the order" and told her to call again if the children were not home by 10 p.m. *Id.*

98. *Id.* Even after Simon Gonzales had called Jessica Gonzales, confirming her suspicions and disclosing his whereabouts, the police refused to take any action. *Id.* At 10 p.m., Jessica Gonzales called the police department, as instructed, but the officers still refused to take action and told her to wait until midnight to call again. *Id.* Jessica Gonzales called the police at midnight, informing them that her children were still missing, but they refused to take action. *Id.* At midnight, she called the police department again from Simon Gonzales' apartment complex and they told her to wait there until police arrived. *Id.* The police never met Jessica Gonzales; she went to the police station at 12:50 p.m., but the officer she met with still refused to enforce the restraining order. *Id.*

99. *Id.* at 1262. Simon Gonzales was shot and killed on the scene. *Id.*

100. *Id.*

101. *Id.*

102. The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

103. *Gonzales*, 307 F.3d at 1260. Jessica Gonzales had brought suit pursuant to 42 U.S.C. § 1983 (1999). *Id.* In addition to the City of Castle Rock, she named Castle Rock police officers Aaron Ahlfinger, R.S. Brink, and Marc Ruisi as defendants. *Id.* To succeed in a § 1983 claim, a plaintiff must show that she was deprived of a constitutional right by a person acting under color of state law. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1098 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005). Plaintiff alleged that the statute that conferred the temporary restraining order created a property right under the 14th Amendment, which thereby imposed upon the police officers a constitutional duty to enforce the restraining order. *Gonzales v. City of Castle Rock*, No. 00-D-1285, 2001 U.S. Dist. LEXIS 26018, at*4 (D. Colo. 2001), *rev'd*, 307 F.3d 1258 (10th Cir. 2002), *aff'd on reh'g*, 366 F.3d 1093 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005). Plaintiff alleged that § 18-6-803.5(3) of the Colorado Revised Statutes required defendants to take action against Simon Gonzales. *Id.* Section 18-6-803.5 (3) provides, in pertinent part:

(a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer *shall* use every reasonable means to enforce a protection order.

(b) 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:

finding that Jessica Gonzales had failed to state a claim upon which relief could be granted.¹⁰⁴

On appeal, a panel of the Tenth Circuit Court of Appeals affirmed the district court's dismissal of Jessica Gonzales' substantive due process claim, but found that she had successfully alleged a procedural due process claim.¹⁰⁵ The court analyzed the Colorado statute that set forth the conditions under which the state would enforce the temporary restraining order to determine whether it conferred an entitlement "which would enjoy due process protection against state deprivation."¹⁰⁶ After examining the Colorado statute's explicit language, its prior

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such an order.

COLO. REV. STAT. § 18-6-803.5 (3) (1999) (emphasis added).

104. *Gonzales*, 2001 U.S. Dist. LEXIS 26018, at *1-14. The district court stated that "[e]ven when there is a protectable property interest, the Due Process Clause does not generally confer an 'affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Gonzales*, 2001 U.S. Dist. LEXIS 26018, at *7 (citing *DeShaney v. Winnebago*, 489 U.S. 189, 196 (1989)). In determining whether plaintiff had a property interest entitled to procedural due process protection, the court looked to state law to determine whether existing rules had created for plaintiff a legitimate claim of entitlement in the temporary restraining order. *Gonzales*, 2001 U.S. Dist. LEXIS 26018, at *7. The court stated that COLO. REV. STAT. § 18-6-803.5(3) would allow plaintiff to have a legitimate claim of entitlement to enforcement of the restraining order if the "regulatory language is so mandatory that it creates a right to rely on that language." *Id.* at *13. (quoting *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). Jessica Gonzales cited case law in support of her claim that found both procedural due process rights and substantive due process rights in the enforcement of restraining orders. *Id.* at *13 n. 3; *See also* *Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) (concluding that a protective order obtained pursuant to state law creates a property right); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264 (E.D. Pa 1990) (concluding that mandatory language contained in a restraining order created a property interest in police enforcement). However, the district court was not compelled by the reasoning of those courts. *Gonzales*, 2001 U.S. Dist. LEXIS 26018, at *9. Instead, the district court found that even though the statute includes mandatory language, it was not truly mandatory as an arrest is premised on probable cause and the process by which officers determine whether probable cause exists requires that police officers exercise discretion. *Id.* at *11.

105. *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1261 (10th Cir. 2002), *aff'd on reh'g*, 366 F.3d 1093 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005).

106. *Id.* at 1264. In determining whether the Colorado statute at issue conferred an entitlement that enjoys due process protection, the panel followed the guidelines the Supreme Court set forth in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). *Gonzales*, 307 F.3d at 1264. The panel stated that when "a plaintiff contends that a constitutionally protected property interest is created by a state statute, we have held that such an interest arises when 'the regulatory language is so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process.'" *Id.* (quoting *Cosco*, 195 F.3d at 1223 (10th Cir. 1999)). The panel found that the statute included mandatory language. *Gonzales*, 307 F.3d. at 1265.

judicial interpretations,¹⁰⁷ and its legislative history,¹⁰⁸ the court found that the statute created a protected property interest falling under the Due Process Clause.¹⁰⁹

On rehearing en banc, the Tenth Circuit followed its panel decision and reversed the district court's dismissal of Jessica Gonzales' procedural due process claim.¹¹⁰ The court stressed that it was both the court-issued restraining order and the Colorado statute that established the basis for Jessica Gonzales' procedural due process claim, as both "specifically dictated that [the order's] terms must be enforced."¹¹¹

As mandatory language was included in both the restraining order itself and the statute which dictated the terms of its enforcement, it was the clear intent of the Colorado legislature to grant Jessica Gonzales entitlement to its enforcement.¹¹² The court found that, while situations may require police discretion, the recipient of a court-ordered restraining order is still entitled to "a reasoned police response or reasonable protection."¹¹³ Jessica Gonzales should have been afforded some form of process prior to [the police's] non-enforcement of the restraining order.¹¹⁴

107. The panel noted that the "Colorado courts have stated unambiguously that in Colorado statutes, 'shall' does in fact mean 'shall.'" *Id.* at 1265. *See* *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1994) ("The word 'shall,' when used in a statute, involves a 'mandatory connotation' and hence is the antithesis of discretion or choice.").

108. The panel concluded that the legislative history of the statute "clearly indicates that the legislature intended to impose a mandatory obligation on the police as well as on other involved in the criminal justice system who deal with domestic abuse." *Gonzales*, 307 F.3d at 1265.

109. *Id.* at 1266.

110. *Gonzales*, 366 F.3d at 1096. The court also held that the individual police officers named in plaintiff's complaint were entitled to qualified immunity. *Id.* The *en banc* court was not asked to address Ms. Gonzales' substantive due process claim. *See id.*

111. *Id.* at 1101 n.5. Jessica Gonzales' property interest attached when the state court judge issued the restraining order. *Id.* at 1103. The court also stated that Colorado Revised Statutes section 18-6-803.5(3) derived its force "from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police." *Id.* at 1104 n.9.

112. *Id.* After citing legislative history, related statutes (*see* COLO. REV. STAT. § 18-6-803.6(b)) and related commentary, the court stated that "[t]he Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders." *Id.* at 1108.

113. *Id.* at 1107.

114. *Id.* at 1111-12. In making this ruling, the court rejected defendants' argument that "there is no practical pre-deprivation process under § 18-6-803.5(3) . . . which can be afforded to the holder of a restraining order. The only conceivable scenario would be to require law enforcement . . . to entertain a later hearing." *Id.*

C. United States Supreme Court Decision

1. Majority Opinion¹¹⁵

In deciding the certified issue,¹¹⁶ the Court refused to defer to the determinations made by the federal courts presiding over Colorado as to Colorado law.¹¹⁷ First the Court asked whether the Colorado statute at issue made police action mandatory;¹¹⁸ second, the Court examined whether Jessica Gonzales was entitled to enforcement of the restraining order;¹¹⁹ third, the Court analyzed whether an interest in a temporary restraining order could be property within the meaning of the due process clause.¹²⁰ The Court answered each of these inquiries in the negative.¹²¹

The Court found that, even though the statute appears to make enforcement of the temporary restraining order mandatory, the statute did not make such enforcement truly mandatory.¹²² Central to this determination was the Court's perception that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."¹²³ The Court stated that the Colorado Legislature would have to take extra steps to make police action mandatory.¹²⁴ The Court aligned the Colorado statute at issue here with arrest statutes that include seemingly mandatory language but are not

115. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750 (2005). Justice Scalia delivered the opinion of the Court, in which Justices Rehnquist, O'Connor, Kennedy, Souter, Thomas, and Breyer joined.

116. The certified issue was "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated." *Id.* at 750-51.

117. *Id.* at 757-58. While the Court recognized that it usually gives deference to the views of a federal court as to the law of a State within its jurisdiction, it regarded deference to the Tenth Circuit as inappropriate. *Id.* (stating that the Tenth Circuit did not draw upon a "deep well of state-specific expertise" in its opinion despite having cited case-law and having quoted language from the restraining order, statute, and a state legislative hearing transcript).

118. *Id.* at 760-64.

119. *Id.* at 764-66.

120. *Id.* at 766-68.

121. Responding to the Tenth Circuit's observation that a domestic abuse restraining order would be valueless if its beneficiary were not entitled to its enforcement, the Court stated, "[t]he creation of grounds on which [Simon Gonzales] could be arrested, criminally prosecuted, and held in contempt was hardly 'valueless' . . ." *Id.* at 760.

122. *Id.* at 761.

123. *Id.* at 760.

124. *Id.* at 761 ("[A] true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order' or even 'shall arrest . . . or . . . seek a warrant.'").

carried out as such.¹²⁵ The Court observed that such action cannot truly be mandatory when officers must take the circumstances of the violation into account before acting.¹²⁶

The Court did recognize that mandatory-arrest statutes relating to domestic violence are more mandatory than traditional mandatory arrest statutes in some states.¹²⁷ However, the Court opined that such arrests are mandatory only when the offender is present at the scene.¹²⁸

Next, the Court stated that even if the domestic-violence context underlying the statute mandated enforcement of the restraining order, it did not automatically follow that state law gave Jessica Gonzales an entitlement to the enforcement of the restraining order.¹²⁹ If the Colorado legislature had obligated police officers to take action, such an obligation would purport to “serve public ends rather than private ends.”¹³⁰ The statutory scheme from which Jessica Gonzales derived her interest did not specifically identify “protected persons” entitled to enforcement of the statute.¹³¹

The Court stated that even if Colorado law had conferred upon Jessica Gonzales a personal entitlement to enforcement of the restraining order, the Court would probably not recognize it as a property interest under the Due Process Clause.¹³² As a temporary restraining order has

125. *Id.* at 761-62.

126. *Id.*

127. *Id.* at 762. The Court also acknowledged the similar language used in the Colorado statute mandating arrest for a domestic-violence offense. *Id.* See COLO. REV. STAT. § 18-6-803.6(1) (1999) (“When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed, the officer shall, without undue delay, arrest the person suspected of its commission . . .”).

128. *Castle Rock*, 545 U.S. at 762 (questioning how mandatory arrest statutes in the domestic violence context operate when the offender is not present to be arrested, stating “much of the impetus for mandatory-arrest statutes and policies derived from the idea that it is better for police officers to arrest the aggressor in a domestic-violence incident than to attempt to mediate the dispute or merely ask the offender to leave the scene”). Bolstering this argument, the Court cited the provision of the Colorado statute that provides “when an arrest is impractical, the officer shall seek a warrant.” *Id.* at 763 (citing COLO. REV. STAT. § 18-6-803.5(3)(b)). Additionally, as Jessica Gonzales did not point to a specific means of enforcement provided by the statute, it could not be mandatory. *Castle Rock*, 545 U.S. at 763 (stating that indeterminacy is not the hallmark of a duty that is mandatory and that a person can not be entitled to something when the identity of the alleged entitlement is vague).

129. *Id.* at 764-65.

130. *Id.* at 765. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (finding no constitutionally protected liberty interest in prison regulations phrased in mandatory terms, in part because “such guidelines are not set forth solely to benefit the prisoner”).

131. *Castle Rock*, 545 U.S. at 765-66.

132. *Id.* at 766-68. See also Scott Lewis, *Failure to Enforce Restraining Order Does Not State a Constitutional Claim*, WIS. L.J., July 6, 2005, available at <http://www.wislawjournal.com/archive/2005/0706/lewis-0706.html> (interpreting the Court’s opinion to mean that “the ‘benefit’ conferred

no ascertainable monetary value, the Court found that it does not “resemble any traditional conception of property.”¹³³

2. Concurring Opinion¹³⁴

Justices Souter and Breyer agreed that police enforcement has a public focus and police discretion is inherent in giving effect to a restraining order.¹³⁵ Accordingly, these considerations “argue against inferring any guarantee of a level of protection or safety that could be understood as the object of a ‘legitimate claim of entitlement,’ in the nature of property arising under Colorado law.”¹³⁶ As Jessica Gonzales was claiming a benefit in “a variety of procedural regulation” and not a substantive interest, she was not entitled to the procedural protection afforded by the Due Process Clause.¹³⁷

3. Dissenting Opinion¹³⁸

The dissent noted that federal law did not preclude the state of Colorado from creating individual entitlement to police protection.¹³⁹ Justices Stevens and Ginsburg stated that if a Colorado statute or a valid order entered by a Colorado judge granted an individual such as Jessica Gonzales an entitlement to mandatory police protection, then such a law or order would create the functional equivalent of a contract for protective services as that which would exist between private parties.¹⁴⁰

by enforcement was an indirect or incidental benefit flowing from the traditionally discretionary decision to arrest or not arrest based upon probable cause”).

133. *Castle Rock*, 545 U.S. at 766. The Court also stated that “the alleged property interest here arises *incidentally* . . . out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense.” *Id.* at 766-67 (emphasis in original). See *O’Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 775 (1980) (holding that indirect benefits conferred upon Medicaid patients when the government enforced minimum standards of care for nursing-home facilities did not trigger due process protections). The Court indicated that it did not want to extend due process protection to something “as vague and novel as enforcement of restraining orders.” *Castle Rock*, 545 U.S. at 766.

134. *Id.* at 769 (Souter, J., concurring). Justice Breyer joined Justice Souter’s concurring opinion. *Id.*

135. *Id.* at 769-70.

136. *Id.* at 770 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

137. *Id.* at 770-71 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), and noting that process is not an end in itself). Therefore, finding no “distinction between the object of [her] asserted entitlement and the process she desires in order to protect her entitlement,” the concurrence was not willing to substitute federal process for state process. *Id.* at 772.

138. *Id.* at 773 (Stevens, J., dissenting). Justice Ginsburg joined Justice Stevens’ dissenting opinion. *Id.*

139. *Id.*

140. *Id.*

The dissent criticized the majority's refusal to "defer to the judgment of more qualified tribunals in seeking the correct answer to [a] difficult question of Colorado law."¹⁴¹

The dissent squarely disagreed with the three determinations made by the majority.¹⁴² First, the majority did not fully account for the "unique case of 'mandatory arrest' statutes in the domestic violence context."¹⁴³ Under the statute, the police lacked the discretion to do nothing.¹⁴⁴ Second, the majority failed to recognize that the Colorado statute at issue was enacted for the benefit of "the narrow class of persons" and the order at issue "was specifically intended to provide protection to [Jessica Gonzales] and her children."¹⁴⁵ Finally, the dissent criticized the majority for finding that police enforcement in these circumstances was not "property" within the meaning of the due process clause.¹⁴⁶

IV. ANALYSIS

A. Refusing to Remove an Obstacle to the Remedy

In *Castle Rock v. Gonzales*, the majority passed up an opportunity to end the executive branch's resistance to enforcing protection orders.¹⁴⁷ Instead, it rendered civil protection orders meaningless in the

141. *Id.* at 775.

142. *Id.* at 779.

143. *Id.* at 779-80 (noting that, in enacting the statute at issue, the Colorado General Assembly joined a nationwide movement of States that took aim at the crisis of police under-enforcement in the domestic violence sphere by implementing mandatory arrest statutes). The dissent stated, "[W]hen Colorado passed its statute in 1994, it joined the ranks of 15 States that mandated arrest for domestic violence offenses and 19 States that mandated arrest for domestic restraining order violations." *Id.* at 781.

144. *Id.* at 783.

145. *Id.* at 779.

146. *Id.* ("[A] citizen's property interest in such a commitment is just as concrete and worthy of protection as her interest in any other important service the government or a private firm has undertaken to provide.")

147. See Sarah M. Buel, *For Battered Women, a Chilling Court Ruling*, AUSTIN AM.-STATESMAN, July 15, 2005, at A15 (observing that the *Castle Rock* Court sent the message to domestic violence victims that their calls to the police for help might not be answered). Buel insightfully states:

Four battered women are killed every day in the United States . . . [i]f foreign terrorists were killing four Americans per day, it's likely that the F-16s would be fired up and troops readied. But apparently if the terrorist is a current or former partner, the Supreme Court warrants discretionary assistance.

Id.

context of domestic violence.¹⁴⁸ Jessica Gonzales sought review of Castle Rock Police Department's official policies and practices regarding its enforcement of protection orders to determine if the state had a procedure that destroyed entitlement without employing proper procedural safeguards.¹⁴⁹ Jessica Gonzales did not claim that the Due Process Clause itself required the Castle Rock Police Department to protect her and her children against harm from her ex-husband.¹⁵⁰ Instead, she argued that procedural due process protection attached to her *court-issued protection order*, which prevented her interest from being evaporated by police officer inaction.¹⁵¹ Unfortunately, the Court quickly dismissed the significance of the arrest mandates that had been printed on the protection order itself¹⁵² and focused its inquiry on

148. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1109 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005) (stating that in light of the mandatory statute, its legislative history, and the legislative scheme's grant of immunity to officers who erroneously enforce protection orders any other conclusion would "render domestic abuse restraining orders utterly valueless"). *Contra* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (stating that any characterization of restraining orders as "valueless" is "sheer hyperbole"). The Court thought that it was enough that the restraining order made otherwise lawful conduct by Simon Gonzales unlawful, "[w]hether or not respondent had a right to enforce the restraining order." *Id.* "The creation of grounds on which he could be arrested, criminally prosecuted, and held in contempt was hardly 'valueless' – even if the prospect of those sanctions ultimately failed to prevent him from committing three murders and a suicide." *Id.*

149. Compare *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (emphasizing that, in that case, it was the "state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference").

150. Such a claim would have failed under the Court's holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989). In that case, "local child-protection officials had failed to protect a young boy from beatings by his father that left him severely brain damaged." *Id.* at 191-193. The *Castle Rock* Court stated that *DeShaney* held that "the so-called 'substantive' component of the Due Process Clause does not 'requir[e] the State to protect the life, liberty and property of its citizens against invasion by private actors.'" *Castle Rock*, 545 U.S. at 755 (quoting *DeShaney*, 489 U.S. at 195).

151. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

152. *Castle Rock*, 545 U.S. at 758 (2005) (recognizing that the critical language did not come from any part of the order itself but "from the preprinted notice to law-enforcement personnel that appeared on the back of the order"). *But see* *City of Castle Rock v. Gonzales*, 366 F.3d 1093, 1096 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005) (observing that the restraining order stated that "the court . . . finds that physical or emotional harm would result if you are not excluded from the family home"). "The order also contained explicit terms directing law enforcement officials that they 'shall use every reasonable means to enforce' the restraining order, they 'shall arrest' or where impractical, seek an arrest warrant for those who violate the restraining order, and they 'shall take the restrained person to the nearest jail or detention facility.'" *Id.* at 1097. It was erroneous for the Court to conclude that since the critical language did not appear on the same side of the restraining order as that signed by the state-court trial judge it was not part of the order at all. See *Castle Rock*, 545 U.S. at 758. Additionally, the Court noted that the order was directed to the restrained party.

whether Jessica Gonzales had a protected entitlement to enforcement of the underlying mandatory arrest statute.¹⁵³ The Court substituted its policy judgments for those of the legislature, emphasizing that traditional police discretion softens statutes that appear to mandate arrest, and thereby found the statute at issue not truly mandatory.¹⁵⁴

Due process is flexible and the type of procedural protection it provides depends on the nature of the property right that the government seeks to infringe upon.¹⁵⁵ Had the Court recognized Jessica Gonzales' property interest in her protection order, it would have had to balance the governmental and private interests affected by the government's (in)action.¹⁵⁶ Additionally, the Court would have been required to consider the degree of potential deprivation that could arise from the government's (in)action.¹⁵⁷ Faced with this analysis, the Court would have found it difficult to reach the result that it sought to achieve.¹⁵⁸

Id. The town of Castle Rock argued this point in oral argument. Transcript of Oral Argument at 9, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) ("In order to take a statute and try and find a property interest, we would want to have it phrased in terms of the beneficiary rather than the person restrained [n]one of that is here.").

153. *Castle Rock*, 545 U.S. at 758 (stating that the pre-printed notice to law-enforcement personnel merely "restated the statutory provision describing 'peace officers' duties' related to the crime of violation of a restraining order"). This shift in focus made it easier for the Court to disregard Jessica Gonzales' interest in the protection order. *See also* Brief for the Petitioner at 23, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (stating that the fact that the statute was coupled with a restraining order in this case is "largely a distinction without a difference").

154. *See Castle Rock*, 545 U.S. at 760. *See also* Brief for the Petitioner, *supra* note 153, at 13 (arguing that the statute, when read against the backdrop of the traditional discretion afforded to law enforcement, "is merely directory, not mandatory").

155. *Mathews*, 424 U.S. at 334 (noting that due process is not a technical conception with fixed content but is related to time, place and circumstances).

156. *Id.* Three factors must be considered in determining what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court has distinguished between government acts and government failures to act; when the former causes harm it is actionable, but when the latter occurs, it is not actionable. *See* Lawrence O. Gostin, *The Negative Constitution: The Duty to Protect*, HASTINGS CENTER REP., Sept. 1, 2005, at 10. However, the difference between the two is often difficult to determine, as "[a]ny government failure to act is usually embedded in a series of affirmative policy choices." *Id.*

157. *Mathews*, 424 U.S. at 341.

158. *See, e.g.* Buel, *supra* note 147 (criticizing the *Castle Rock* Court's majority for its "intellectually dishonest approach of pretending to locate legal justification when protection of municipal coffers would seem to be the guiding force"). Justice Breyer conveyed this concern during oral argument, stating: "Suppose shall does mean shall [b]ut you might have a statute that says the fire department shall respond to fires, the police department shall respond to crimes, the Army shall respond to attacks." Transcript of Oral Argument, *supra* note 152, at 8.

The Castle Rock Police Department did not take *any* action to enforce Jessica Gonzales' protection order.¹⁵⁹ "Their response, in other words, was a sham which rendered her property interest in the restraining order not only a nullity, but a cruel deception."¹⁶⁰ This practice demonstrated extreme disregard of the significance of a court order.¹⁶¹ In the face of the potential violence and injury that was likely to result in the absence of its enforcement, the Castle Rock Police Department clearly violated the Due Process Clause.¹⁶²

The Court avoided this inquiry by finding that a protection order is not "property" within the meaning of the Due Process Clause.¹⁶³ However, in order to make this finding, the Court ignored the clear intent of the Colorado legislature and nationwide legislative efforts to combat domestic violence through mandatory arrest laws.¹⁶⁴ Additionally, the Court ignored the significance of the court-issued protection order.¹⁶⁵ In order to preserve the tradition of police discretion,¹⁶⁶ the Court deviated from Fourteenth Amendment

159. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005) ("[T]he police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order If one considers that the process to which she was entitled was a bona fide consideration by the police of a request to enforce a restraining order, she was denied that process as well.").

160. *Id.*

161. *Id.* See also G. Kristian Miccio, *What Does "Shall" Mean?*, DENVER POST, July 17, 2005, at E3 ("Colorado took away any discretion from police because of overwhelming evidence that police refused to arrest boyfriends and husbands when these men assaulted their girlfriends or wives."); Sarah M. Buel, *If Courts and Police Refuse to Protect Us, Where Will we Turn?*, KANSAS CITY STAR, July 10, 2005, at B7 ("How . . . can we sanction the Castle Rock officer who, on Gonzales' sixth plea for help, still refused to investigate? Instead, he went to dinner.").

162. *Gonzales*, 366 F.3d at 1115 ("Ms. Gonzales' repeated phone calls to the police department and the officers' seemingly outright dismissal of her claims" did not constitute "the opportunity to be heard at a meaningful time and in a meaningful manner."). See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982) ("A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated.").

163. See *Lewis*, *supra* note 132 (stating that the Court "would not address the liability of Castle Rock based on its alleged 'custom or policy' of non-enforcement because no constitutional violation existed").

164. 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, 94-95 (2005).

165. See Christopher J. Roederer, *Another Case in Lochner's Legacy, the Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order is a "Sham," "Nullity," and "Cruel Deception."*, 54 DRAKE L. REV. 321, 333 (2006) ("The Tenth Circuit Court of Appeals found that the statute's force was derived from the restraining order that was 'issued by a court on behalf of a particular person and directed at specific individuals and the police.'").

166. See Michael Mattis, Note, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool? A Discussion of the Tenth Circuit's Decision in Gonzales v. Castle Rock*,

jurisprudence and rendered thoroughly developed domestic violence legislation meaningless.¹⁶⁷

B. Old Tools in a New Box?

The Court's approach to interpreting the statute in *Castle Rock* appears reminiscent of that employed in *Thompson* and other opinions that interpreted provisions of the Married Women's Property Acts.¹⁶⁸ By passing legislation associated with the Married Women's Property Acts, Congress and state legislatures began to pass statutes to relieve women of the disabilities imposed upon them by coverture and to emancipate them from their husbands.¹⁶⁹ These statutes purported to

82 DENV. U.L. REV. 519, 534 (2005). In his dissent, Judge Kelly of the Tenth Circuit noted:

Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution.

Gonzales v. City of Castle Rock, 366 F.3d 1093, 1119 n.2 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005) (Kelly, J., dissenting) (quoting *Estate of Gilmore*, 787 F.2d 714, 722-3 (1st Cir. 1986)). See also Brief for the Petitioner, *supra* note 153, at 12-13 (“[T]his Court should be wary of ever recognizing a non-traditional Roth-type property interest in police enforcement procedures, infringement of which would depend on the substantive result to establish a prima facie claim of procedural failure every time the police were unsuccessful in protecting against private-party violence.”).

167. Roederer, *supra* note 164, at 118.

168. See *Freethy v. Freethy*, 42 Barb. 641 (N.Y. Gen. Term 1865). In *Freethy*, the New York Supreme Court considered whether “section 3 of chapter 172 of the Laws of 1862,” which provided that “any married woman may bring and maintain an action in her own name, for damages, against any person . . . for any injury to her person or character, the same as if she were sole,” permitted a wife to bring a tort suit against her husband. *Id.* The court considered:

It is true that the words “any person” are very comprehensive, and might in a proper case be held to include a husband; but the question is, whether, in view of all that the act contains, and of all the surrounding circumstances, we can infer that the legislature intended that a wife might bring such an action. If the words used necessarily included the husband, we should not be at liberty to say that they were inoperative; but they do not; and it is our duty to ascertain, if we can, whether the legislature *meant* to include suits against him.

Id. The court held that it did not, after considering the following rules of statutory construction:

In all doubtful matters, and when the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law, in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration; for if the parliament had that design, they should have expressed it in the act.

Id. (internal quotations omitted).

169. See *Thompson v. Thompson*, 218 U.S. 611, 615 (1910). In *Schultz v. Schultz*, the Supreme Court of New York departed from precedent and held that the Married Women's Property Acts did afford women the right to sue their husbands in tort, stating:

give women the right to control and dispose of their own property, to sue for trespass upon their rights in property, and to sue others for assaults committed against them.¹⁷⁰

However, courts undercut the liberating effect these laws would have on women's lives.¹⁷¹ Judges "mobilized language and interpretive tools that permitted them to continue to apply received common law orthodoxy and ignore transformative visions apparent in the new legislation,"¹⁷² while still claiming to construe them "with a view to effectuate the legislative purpose which led to their enactment."¹⁷³ Courts viewed the legislation associated with the Married Women's Property Acts as "statutes in derogation of the common law," and when presented with a hint of ambiguity in legislative intent, courts interpreted them strictly and narrowly.¹⁷⁴ The Supreme Court instructed courts to construe these statutes "hav[ing] in mind the old law and the change intended to be effected by the passage of the new."¹⁷⁵ Unfortunately,

But without pursuing this subject further, it is considered quite sufficient to say that the language of the statute is, as conceded by some of the learned judges to whose opinions reference has been made, quite comprehensive enough to include the husband as one of the persons against whom the wife may bring an action for an assault and battery, and who has been relieved from liability under the language of the statute only by judicial resort to what is declared to have been the right in an action of this character, in accordance with the language of the statute, would be to promote greater harmony by enlarging the rights of married women and increasing the obligations of husbands by affording greater protection to the former, and by enforcing greater restraint upon the latter in the indulgence of their evil passions. The declaration of such a rule is not against the policy of the law. It is in harmony with it, and calculated to preserve peace, and in a great measure prevent barbarous acts, acts of cruelty regarded by mankind as inexcusable, contemptible, detestable.

It is neither too early nor too late to promulgate the doctrine that if a husband commits an assault and battery upon his wife he may be held responsible civilly and criminally for the act, which is not only committed in violation of the laws of God and man, but in direct antagonism to the contract of marriage, its obligations, duties, responsibilities and the very basis on which it rests.

63 How. Pr. 181 (N.Y. Gen. Term 1882).

170. *Thompson*, 218 U.S. at 615. See e.g. § 1155 of the District of Columbia Code, 31 Stat. 1189, 1374 (1901), *supra* note 49.

171. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 290-91 (2000).

172. *Id.* at 291.

173. *Thompson*, 218 U.S. at 615.

174. See *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) ("[C]ourts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far."). In *Man and Wife in America: A History*, Hendrik Hartog explains that "the most important such judicial tool was the interpretive standard that 'statutes in derogation of the common law,' which is what all those statutes were, ought to be interpreted strictly and narrowly, against any expansive meaning." HARTOG, *supra* note 171, at 291.

175. *Thompson*, 218 U.S. 611.

this translated into maintaining certain inequities of the old status regime under the guise of revolutionary social change.¹⁷⁶

Thus, while recognizing that the legislature sought to free women from the complete control of their husbands, the Court immediately circumscribed the rights conferred by those statutes.¹⁷⁷ Sometimes the courts rejected the explicit language of the statute and rendered statutes impotent.¹⁷⁸ Courts substituted their own policy judgments for those of the legislature, refusing to give statutes their logical meanings unless legislatures used explicit language to change the common law.¹⁷⁹ Courts

176. See Chused, *supra* note 46, at 1361 (“[T]he early married women’s acts made only modest adjustments in coverture law and that these adjustments generally confirmed prevailing domestic roles of married women.”). See also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). Siegel observes that while legislatures have attempted to abolish certain unequal status relationships, courts often resist significant changes in the law; thus, courts maintain the old law while giving it modern justification. *Id.* at 1118-19. The justification adopted by the legal system to maintain status relationships “evolve as they are contested.” *Id.* at 1114.

177. See *infra* notes 178-90 and accompanying text.

178. HARTOG, *supra* note 171, at 291. See, e.g., *Cole v. Van Riper*, 44 Ill. 58, 1867 WL 5096 (1867) (addressing the question of whether the Married Women’s Property Act allowed a married woman to convey real estate without the joinder of her husband). The Married Women’s Property Act at issue in *Cole v. Van Riper*, provided:

[A]ll the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding the marriage, be and remain during coverture, her sole and separate property under her sole control, and be held, owned possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband.”

Id. at *3. The court noted that the legislature “used very sweeping language, but it must be interpreted with reference to the evil intended to be cured, and in such manner as to be made to harmonize with other statutes which are left unrepealed, so far as such harmony can be secured without disregarding the legislative intent.” *Id.* at *4 (stating that “repeal by implication is never favored”). The court would not apply the plain language of the statute, stating that the “statute cannot be enforced according to its literal terms without impairing, to a very large extent, the strength of the marriage tie.” *Id.* The Court reasoned:

[T]he object of the legislature was, not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, imprudence, or possible vice of the former, by enabling her to withhold her property from being levied upon and sold for the payment of his debts or squandered by him against her wishes.”

Id.

179. HARTOG, *supra* note 171, at 291 (“The judges who mobilized the standard worried about disturbances to ‘family solidarity;’ they remained committed to the subordination of wives; and they often understood the statutes as unjustified redistributions of rights and powers from husbands to wives”).

refused to give such statutes a “literal interpretation” because to do so would impair “to a very large extent, the strength of the marriage tie.”¹⁸⁰ Courts feared the far-reaching policy implications that such an interpretation could have on a husband’s authority.¹⁸¹

In *Thompson v. Thompson*,¹⁸² the Court recognized that the legislature conferred upon women new rights; however, the court stated that “[t]he statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband.”¹⁸³ The Court reasoned that a different construction of the statute would “open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband.”¹⁸⁴

The Court passed judgment on such legislation and opined that Congress was aware of the “radical changes in the policy of centuries which such legislation as is here suggested would bring about.”¹⁸⁵ While conceding that it was within the power of the legislature to alter the law, the court would not give full effect to this intent.¹⁸⁶ “Such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative

180. *Cole*, 44 Ill. 58, 1867 WL 5096, at *4.

181. *Id.* In determining whether the statute at issue allowed a married woman to convey her real property without joining her husband to the deed, the court reasoned:

If this language is to receive a literal interpretation, a married woman . . . would have the right to forbid her husband to enter upon the premises, and he would be a trespasser The wife could thus divorce her husband . . . without the aid of a court of chancery. Or again, suppose in a house thus owned and occupied, the furniture is also the wife’s property. Can she forbid the husband the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book only upon her permission? This would be all very absurd, and we know the legislature had no idea of enacting a law to be thus interpreted.

Id.

182. 218 U.S. 611, 619-20 (1910). In that case, a wife brought suit against her husband to recover for assault and battery. *Id.* at 615. She alleged that the husband had beaten her over the course of several days, knowing at the time that she had been pregnant. *Id.* at 620.

183. *Id.* at 617.

184. *Id.* at 619 (“[I]t was not the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves.”).

185. *Id.* at 618 (“It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about.”).

186. *Id.* at 618.

intention.”¹⁸⁷ If the legislature had decided to permit wives to bring suit against their husbands for injuries, “it would have been easy to have expressed that intent in terms of irresistible clearness.”¹⁸⁸

The Court constrained the more radical implications of the marriage reform statutes and sought to prevent wives from bringing questions of spousal violence into the courts.¹⁸⁹ In this way, the Court refused to provide women with a remedy against their violent partners in order to preserve the spousal dynamic in the household and in society.¹⁹⁰

Akin to the evolutionary nature of the Married Women’s Property Acts that eventually improved women’s legal rights,¹⁹¹ the social movements that have drastically changed domestic violence law in the last few decades have caused legislatures to fashion new legal remedies for victims of domestic violence.¹⁹² Legislatures have fortified court-

187. *Id.*

188. *Id.* See also *Freethy v. Freethy*, 42 Barb. 641 (N.Y. Gen. Term 1865). In *Freethy*, the court stated:

It is true, as has been suggested, that if the act was not intended to authorize such suits against the husband, he might have been excluded from its operation by express words; but it is also true, and I think more reasonable to suppose, that if the legislature had intended to include such suits, it would have used language clearly denoting such intention.

Id.

189. See Siegel, *supra* note 176, at 1117. Reva Siegel explains that the legal system justified the inconsistency of the law, granting women rights but restricting them as against their husbands, by pointing to public policy concerns. *Id.* at 1118. She explains:

[M]arriage was an affective relation that subsisted and flourished in a private domain beyond the reach of the law. A wife could not enforce a contract with her husband compensating her for work performed in the family sphere because such labor was to be performed altruistically, rather than self-interestedly: for love, not pay. A wife could not bring a tort claim against a husband who battered her because such conflicts were to be resolved altruistically, by marital partners who would, or should, learn to forgive and forget. Adjudication of intramarital contract or tort claims, courts reasoned, would destroy marital harmony and expose private aspects of the conjugal relation to the corrosive glare of public scrutiny. Thus, with the reform of marital status law, the discourse of marital status began to shift from the language of hierarchy to the language of inferiority.

Id. at 1118 (internal footnotes omitted).

190. HARTOG, *supra* note 171, at 293 (noting that *Longendyke v. Longendyke*, *infra* note 235, deemed a wife’s tort suit against her husband to be “destructive of that conjugal union and tranquillity, which it has always been the object of the law to guard and protect”). *Thompson v. Thompson*, 31 App. D.C. 557, 560 (1908) (stating its unwillingness to “undermine the basis of society by disregarding sanctity in the home”).

191. Tobias, *supra* note 7, at 382-83 (describing the amendment process as “evolutionary” and recognizing as plausible the argument that the Acts “eroded unity, enhanced wives’ legal status, or emancipated them and, thus, altered the notion of tort immunity”).

192. See generally Peter K. Manning, *The Preventive Conceit: The Black Box in Market Context*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 83 (Eve. S. Buzawa & Carl G. Buzawa eds., 1996).

issued protection orders, mandating arrest when police officers have probable cause to believe an order has been violated.¹⁹³

However, when faced with a revolutionary legislative mechanism for combating domestic violence, the Supreme Court in *Town of Castle Rock v. Gonzales* refused to give effect to the Colorado court's promise of mandatory protection.¹⁹⁴ The Court succumbed to the common law and coverture's legacy and denied Jessica Gonzales a meaningful remedy for domestic violence.¹⁹⁵ The Court articulated new Fourteenth Amendment Due Process jurisprudence while ignoring the clear intent of the Colorado legislature in the name of traditional police discretion.¹⁹⁶

C. Thompson's Rationale Pervades the Court's Opinion in Castle Rock

Mrs. Thompson, the plaintiff in *Thompson v. Thompson*,¹⁹⁷ sought relief, asking the Court to remove the legal obstacles preventing her from utilizing a civil remedy for the assault inflicted upon her by her husband.¹⁹⁸ She asked the Court to give plain meaning to the statute and apply it accordingly.¹⁹⁹ The Court closed the doors of the court to her claims for redress against her husband, depriving her of a remedy for her injuries.²⁰⁰ Similarly, Jessica Gonzales asked the Court to require the executive branch to give legal effect to her court-issued protection order.²⁰¹ She requested that the Court read the mandatory-arrest statute underlying her remedy plainly, thus recognizing her entitlement to its enforcement.²⁰² The Court refused to do so and stripped her protection order of any remedial meaning.²⁰³

The dissenters in *Thompson* criticized the majority opinion,

193. Miller, *supra* note 91.

194. See Roederer, *supra* note 164, at 118.

195. *Id.* ("By writing in 'may' to a statute that stated 'shall,' the Court has chosen the liberty of police officers to arbitrarily ignore their duties to enforce court ordered restraining orders over the safety and security of the victims of domestic violence.")

196. See Gostin, *supra* note 156, at 10 (stating that viewing as discretionary police enforcement of restraining orders was "a strained interpretation of state law"). See Roederer, *supra* note 164, at 94 (stating that in spite of the statute's plain language, history and purpose, the Supreme Court found that police had discretion, "almost as a matter of constitutional law," to arbitrarily ignore restraining orders).

197. *Thompson v. Thompson*, 218 U.S. 611 (1910).

198. *Id.* at 614.

199. *Id.* at 611 ("A statute will not be so construed that remote inferences withdraw a case from its general provisions which is clearly within its words and perfectly consistent with its intent.")

200. *Id.* at 619.

201. See Roederer, *supra* note 165, at 326-27.

202. *Id.*

203. Roederer, *supra* note 164, at 93-94.

warning that the majority's construction of the statute would have "the effect to defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning."²⁰⁴ Likewise, in *Castle Rock*, the Supreme Court defeated the Colorado legislature's clearly expressed intention to mandate the enforcement of court-issued protection orders.²⁰⁵

The Colorado statute at issue strayed from common law principles.²⁰⁶ "Under the common law, the State does not have a duty to come to the aid of another and people do not have a right for the state to come to their assistance to protect them from harm caused by other people."²⁰⁷ In order to overcome the common law rule, the Colorado legislature created a statute that "imposes a special duty on the entity for a particular class of persons."²⁰⁸

However, the Court did "not believe that—these provisions of Colorado law truly made enforcement of restraining orders *mandatory*."²⁰⁹ [A] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."²¹⁰ Like the *Thompson* court demanded, the Court in *Castle Rock* required clearer language on the part of the Colorado legislature to elicit an interpretation of the statute as mandatory.²¹¹

204. 218 U.S. at 623-24 (Harlan, J., dissenting). Justices Holmes and Hughes joined Justice Harlan's dissent. *Id.*

205. The Colorado House Judiciary Hearings on House Bill 1253 provide:
Recognizing domestic abuse as an exceedingly important social ill, lawmakers:

wanted to put together a bill that would really attack the domestic violence problems. . . and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe. First of all, . . . the entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy. So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal. And so we hope that House Bill 1253 starts us down this road.

Brief for the Respondent at 21, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (quoting Transcript of the Colorado House Judiciary Hearings on House Bill 1253, Feb. 15, 1994). See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 784 (2005) (Stevens, J., dissenting) ("[I]nnovation of the domestic violence statutes was to make police enforcement, not 'more mandatory,' but 'simply mandatory.'").

206. Roederer, *supra* note 165, at 324.

207. *Id.*

208. *Id.* at 325.

209. *Castle Rock*, 545 U.S. at 760 (emphasis in original).

210. *Id.*

211. *Id.* at 761 ("Against that backdrop [of police discretion], a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every

The Colorado statute “derogated the common law” public duty doctrine.²¹² As the Court was not prepared to recognize a right that would significantly alter police officers’ duties, the Court read the statute strictly and narrowly, refusing to apply the plain meaning of the statute.²¹³ “Mandatory” does not mean “mandatory” when it infringes upon police officer discretion, despite the legislature’s clear intention for the language to mean just that.²¹⁴ The Court substituted its own policy judgments for those of the Colorado legislature.²¹⁵ The Colorado legislature created an entitlement to enforcement of civil protection orders to which the Supreme Court should have afforded Due Process protection.²¹⁶

D. A Devastating Interpretation of Federal Constitutional Law

“Property,” as a legal concept, evades static definition.²¹⁷ The Constitution does not determine which interests constitute property interests.²¹⁸ State legislatures have the power to create property interests and to define their dimensions.²¹⁹ A person has a property interest in

reasonable means to enforce a restraining order”). Petitioner Castle Rock advocated this point during oral argument. *See* Transcript of Oral Argument, *supra* note 152, at 16 (“I think we need a much clearer statement from the Colorado legislature itself, both that it’s written in terms of the beneficiary – getting her an entitlement against the police, rather than in terms of what the person restrained is.”).

212. *See* Roederer, *supra* note 164, at 98-100.

213. *Id.* at 98-99, 105-12.

214. *Castle Rock*, 545 U.S. at 760-61; Roederer, *supra* note 164, at 105.

215. *Id.* at 118.

216. *Id.* at 94-95.

217. *See* *Mullane v. Cent. Hanover Bank & Trust, Co.*, 339 U.S. 306, 313 (1950). In *Mullane*, the Court held:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. “The bundle of power and privileges to which we give the name of ownership is not constant though the ages. The faggots must be put together and rebound from time to time.” Emily Field Van Tassel, *Rebinding the Sticks: A Comment on Is Coverture Dead?*, 82 GEO. L.J. 2291, 2291 (1994) (quoting BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928)). *See* *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972) (stating that “property [is a] broad and majestic term[]. . . property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money”).

218. *Roth*, 408 U.S. at 577.

219. *Id.* (“[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”). *But see* Transcript of Oral Argument, *supra* note 152 at 14. Justice Scalia strips states of this discretion, stating, “Perhaps what you mean is that what is a property interest for purposes of Colorado law, if

benefits to which that person “has a legitimate claim of entitlement.”²²⁰ The State creates entitlement when it promises a service or a benefit.²²¹ When the Colorado legislature fortified its civil protection orders²²² by including language that mandated arrest or other appropriate action, the state entitled the holder of the protection order to its proper enforcement.²²³ “Police protection against violence is as valuable as other government services or benefits.”²²⁴ In this way, the Colorado legislature placed the court-issued civil protection order within the protection of the Due Process clause.²²⁵

Various notions of property have been found to require Fourteenth Amendment Due Process protection.²²⁶ In many instances, intangible property such as a driver’s license,²²⁷ disability benefits,²²⁸ welfare benefits,²²⁹ and a horse trainer’s license²³⁰ has been granted protected status. Significantly, Due Process has been afforded to civil litigants who seek recourse in the courts as plaintiffs attempting to address grievances.²³¹ A cause of action is property which may be converted into one’s possession by judgment or order.²³²

Colorado chooses to nominate some utterly zany thing of a property interest, it doesn’t necessarily mean that it’s a property interest for purposes of the Federal Constitution.” *Id.*

220. *Roth*, 408 U.S. at 577.

221. Gostin, *supra* note 156, at 10-11 (“If the state had promised its eligible citizens a service (such as education) or a benefit (such as Medicaid), clearly an ‘entitlement’ would exist”). See also *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (finding that where Ohio law provided for free public education and compulsory school attendance, school officials could not suspend students without affording them procedural due process protection).

222. See *Gonzales v. Castle Rock*, 366 F.3d 1093, 1108 (2004), *rev’d*, 545 U.S. 748 (2005) (“Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders.”).

223. The Court’s argument that mandatory arrest statutes are not really mandatory does not stand on solid ground. See *supra* note 214.

224. Gostin, *supra* note 156, at 11. “Police enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 790 (2005) (Stevens, J., dissenting).

225. *Castle Rock*, 545 U.S. at 790 (“Colorado law *guaranteed* the provision of a certain service, in certain defined circumstances, to a certain class of beneficiaries, and respondent reasonably relied on that guarantee.”) (emphasis in original).

226. *Id.* at 789-90.

227. *Bell v. Burson*, 402 U.S. 535 (1971).

228. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

229. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

230. *Barry v. Barchi*, 443 U.S. 55 (1979).

231. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (recognizing that due process protection extends to causes of action as well as access to the courts).

232. See *Prosser v. Prosser*, 102 S.E. 787, 788 (S.C. 1920) (stating that a tort giving a woman a claim for damages is property, which she may by action reduce into her possession); *Brown v. Brown*, 89 A. 889, 892 (Conn. 1914).

When our legal system began to break down the formal laws of coverture, it gradually allowed women to bring lawsuits.²³³ Statutes and case law existing during this time expressly recognized that judgments arising from such lawsuits constituted the woman's "sole and separate property."²³⁴ As courts began to interpret the Married Women's Property Acts, many concluded that women could not bring actions in tort against their husbands to redress the abuse inflicted upon them.²³⁵ Interspousal tort immunity obstructed women from receiving a remedy for their abuse and so the civil protection order was created.²³⁶ The civil protection order, effectuated by its mandatory arrest language, commands due process protection for the victims of domestic violence.²³⁷

The Supreme Court denied Jessica Gonzales due process protection by stripping her court-issued protection order of value.²³⁸ The Court ignored the fundamental principle that "deprivations of law require remedies."²³⁹ Finding that Jessica Gonzales did not have a

233. See *Prosser*, 102 S.E. at 788 (acknowledging a wife's right to recover damages for injuries to her person, or for other torts sustained by her, against her husband).

234. See *Johnson v. Johnson*, 77 So. 335, 338 (Ala. 1917); *Musselman v. Galligher*, 32 Iowa 383, 384 (1871); *Patterson v. Franklin*, 84 S.E. 18, 19 (N.C. 1915); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920); *Bogen v. Bogen*, 12 S.E.2d 649, 650 (N.C. 1941); *Hamstetler v. Duke Power Co.*, 32 S.E.2d 611, 612 (N.C. 1945), *overruled by* *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980); *King v. Gates*, 57 S.E.2d 765, 767 (N.C. 1950), *superseded by statute as stated in* *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 266 S.E.2d 818, 820 (N.C. 1980); *Fiedler v. Fiedler*, 140 P. 1022, 1024 (Okla. 1914); *Moran v. Quality Aluminum Casting Co.*, 150 N.W.2d 137, 143 (Wis. 1967);

235. See *Longendyke v. Longendyke*, 44 Barb. 366 (N.Y. Gen. Term 1863); *Thompson v. Thompson*, 218 U.S. 611 (1910).

236. See *supra* notes 69-76 and accompanying text. The civil protection order is remedial in nature. See *United States v. Harrison*, 461 F.2d 1209, 1210 (D.C. Cir. 1972) (quoting Judge Ryan's comments on the enactment of legislation providing for civil protection orders: "[t]he paramount consideration concerning this legislation is that it is remedial. It is designed to provide a remedy where no remedy heretofore existed").

237. See *Stark, supra* note 80, at 120 (stating that pro-arrest policies give women power "to command greater due process *in and of itself*") (emphasis in original).

238. See Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636-40 (2004) (arguing that the right to a remedy is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment). The right to a remedy was specifically recognized at common law in 1703, when the Chief Justice of the Kings Bench in *Ashby v. White* stated:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.

Id. at 1637 (quoting *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703)).

239. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). See John C.P. Goldberg,

constitutionally protected entitlement to the enforcement of her protection order, the Court prevented the values and mandates espoused by the Colorado legislature from having legal meaning.²⁴⁰ “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”²⁴¹ The Court was required to provide Jessica Gonzales a meaningful remedy for the deprivation of her court-issued protection order.²⁴²

“Our judicial system . . . is premised on the universally accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law.”²⁴³ In connection with her divorce action, Jessica Gonzales received a protection order against her ex-husband, Simon Gonzales.²⁴⁴ The protection order, *itself*, ordered the police to arrest Simon Gonzales in the event of its breach.²⁴⁵

The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 YALE L.J. 524, 529 (arguing for recognition of a right to a body of law, grounded in the 14th Amendment’s Due Process Clause, empowering individuals to seek redress against harm).

240. See Thomas, *supra* note 238, at 1638 (“Rights standing alone are simply expressions of social values . . . [i]t is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees.”). Professor Thomas exemplifies this idea by discussing how, in the school desegregation cases, the right involved was school students’ right to equal protection of the laws and “the ordered remedies defined this right by providing meaningful contours to the right by prohibiting the racial assignment of students, requiring integrated schools, and redressing realities causally related to segregation.” *Id.* at 1638-39.

241. *Id.* at 1639 (quoting *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953)) (quoting *The Western Maid*, 257 U.S. 419, 433 (1922)). Professor Thomas also states that “[w]ithout remedies, rights are mere ideals, promises, or pronouncements that may or may not be followed.” *Id.*

242. See *id.* at 1638 (stating that state constitutional rights to a remedy “were adopted to ensure the independence of the judicial against corruption and control by the other political branches”). “The Supreme Court has held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally adequate remedy that provides ‘meaningful’ relief.” *Id.* at 1641. *But see* Transcript of Oral Argument, *supra* note 152, at 10 (advocating that Jessica Gonzales had the remedy of a contempt proceeding available to vindicate the violation of her protection order).

243. Thomas, *supra* note 238 at 1640 (“The enforcement component of a remedy is its critical aspect that distinguishes it from an idea that actualizes the right in a tangible manner.”). See also *United States ex. rel. Goldman v. Meredith*, 596 F.2d 1353, 1359 (8th Cir. 1979) (stating that the court could not “create a sanctuary for judgment debtors” by shielding book-entry accounts from judicial process).

244. *Gonzales v. Castle Rock*, 307 F.3d 1258, 1261.

245. Unfortunately, the Supreme Court dismissed the significance of the court-issued protection order, stating that “[t]he critical language in the restraining order came not from any part of the order itself (which was signed by the state-court trial judge and directed to the restrained party, respondent’s husband), but from the preprinted notice to law-enforcement personnel that

Perhaps what makes Jessica Gonzales' property right perplexing is that, in order for it to have been satisfied, it required executive action.²⁴⁶ However, many court judgments require execution²⁴⁷ for their satisfaction.²⁴⁸ When a judgment debtor's property becomes encumbered by a judgment lien, a sheriff is often required to carry out an execution sale.²⁴⁹ Additionally, courts have power to issue a variety of orders that require officers of the executive branch of government to arrest individuals.²⁵⁰

"The power to enforce the performance of the act must rest somewhere."²⁵¹ The Supreme Court's interpretation of the Colorado statute and protection order converted the remedial mandates of civil protection orders in the domestic violence context into "mere description[s] of favored behavior."²⁵²

E. The Court Should Have Considered the Reasoning Employed By Other Courts

In deciding *Castle Rock*, the Supreme Court failed to meaningfully consider how other jurisdictions interpreted mandatory arrest statutes and upheld protection orders.²⁵³ The Tenth Circuit took notice of courts

appeared on the back of the order." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 758 (2005).

246. *Id.* at 758-59.

247. Execution is defined as "[a] court order directing a sheriff or other officer to enforce a judgment, usu[ally] by seizing and selling the judgment debtor's property." BLACK'S LAW DICTIONARY 467 (7th ed. 2000).

248. Justice Ginsburg made this point during oral argument. Transcript of Oral Argument, *supra* note 152, at 9 ("This is a court order that enforcement officials carry out . . . How does it differ from, say, a money judgment and . . . levying execution on property?").

249. An execution sale is "[a] forced sale of a debtor's property by a government official carrying out a writ of execution." BLACK'S LAW DICTIONARY 1074 (7th ed. 2000).

250. A body execution is "[a] court order requiring an officer to take a named person into custody, usu[ally] to bring the person before the court to pay a debt." BLACK'S LAW DICTIONARY 467 (7th ed. 2000). A close-jail execution is "[a] body execution stating that the person to be arrested should be confined in jail without the privilege of movement about the jailyard." *Id.*

251. *Thomas*, *supra* note 238 at 1640 (quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838)).

252. *See id.* ("Neutralizing a right by eliminating its remedy and converting it into a mere description of favored behavior effectively nullifies the attendant right and deprives the courts of the ability to protect our legal rights").

253. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). *But see* Brief for the Petitioner, *supra* note 153, at 21 (citing case law such as *Doe ex. rel. Nelson v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990), *Doe ex. rel. Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996), *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002), for the proposition that "[e]very other circuit to have considered the issue has rejected the Tenth Circuit's reasoning"). The cases cited to by petitioner, however, are not domestic violence cases and do not involve court orders. *See Nelson*, 903 F.2d at 500; *Fein*, 93 F.3d at 863; *Jones*, 296 F.3d at 421.

that found that a court order creates an entitlement subject to procedural due process protections.²⁵⁴ For example, in *Coffman v. Wilson Police Department*,²⁵⁵ the United States District Court for the District of Pennsylvania recognized that a court order creates a property right.²⁵⁶ Further, the court held that this particular “order of the court create[d] a property interest in police enforcement” that is cognizable under the Due Process Clause.²⁵⁷

An order of the court, served upon the police department, stating that the department “shall”²⁵⁸ enforce the order, created an entitlement.²⁵⁹ The protection order warranted protection, giving Coffman the right to a reasonable police response.²⁶⁰ Significantly, the

254. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1102 (10th Cir. 2004), *rev'd*, 545 U.S. 748 (2005).

255. 739 F. Supp. 257 (E.D. Pa. 1990). In *Coffman*, Terry L. Coffman had been granted a protection order pursuant to the Pennsylvania Protection From Abuse Act against her husband who often physically and mentally abused her. *Id.* at 259. The protection order contained mandatory language, instructing officers that they “shall enforce” the order. *Id.* Coffman’s husband breached this court order, harming her within her home, and thereafter continued to violate the court order. *Id.* at 259-60. The police did not take action to enforce her court order. *Id.* Finally, Coffman’s husband shot her in the chin and throat. *Id.* at 260. Coffman brought suit pursuant to 42 U.S.C. § 1983, alleging that “the governmental defendants, by failing to arrest or restrain [her husband] deprived Coffman of her entitlement to police protection under the Protection From Abuse Act and therefore violated her rights under the Due Process Clause of the Fourteenth Amendment.” *Id.* See also *Siddle v. City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991). In *Siddle*, a woman had obtained a protection order against her abusive husband, preventing him from “abusing, beating, molesting or assaulting” her. *Id.* at 505. The court found that the protection order was a protected property interest. *Id.* at 509-10.

256. *Coffman*, 739 F. Supp. at 264 (noting that if a court order did not create a property right, “much of the work of this, or any other court, would be nugatory . . . civil disputes are referred to courts precisely because the court can issue an order that compels one person to hand property to another”).

257. *Id.* at 264.

258. *Id.* The court stated that “[t]he word “shall” is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation.” *Id.*

259. *Id.* The court explained how the order constituted a *Roth*-type property interest:

Although, in the context of *Roth*, property interests generally arise from sources other than judicial orders, it is in no way remarkable that an order could create an entitlement. After all, courts have held that employment contracts can create property interests removable only by due process of law. See, e.g. *Perry v. Sindermann*, 408 U.S. 593, 601-03, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Courts are more clearly sources of state law than are middle-ranking functionaries in a college employment office. Furthermore, the court derived its power to issue orders from the legislature. Although the legislature did not itself grant a protectible interest, it enabled the court to create one (just as the legislature may not have created an interest in continued employment by a state employee, but may have empowered a state actor to create such an interest by issuing an employment contract).

Id.

260. *Id.* at 266 (“The plaintiff’s property right is to a reasoned police response; if the Department failed to dispatch a vehicle because other calls had greater importance, then her interest,

court stated that scope of plaintiff's entitlement was defined by proper police discretion and that its holding did not run the risk of opening the courtroom doors to a deluge of litigation.²⁶¹

F. Coverture's Legacy: The Implications of Castle Rock on Domestic Violence Law

"[A] protective order that is not enforced is merely an expensive piece of paper."²⁶²

1. *Thompson's* Legacy: The Interspousal Immunity Doctrine

The Supreme Court's decision in *Thompson* led many states to adhere to the interspousal immunity doctrine.²⁶³ *Thompson* closed the doors of justice for many years to married women seeking recourse against their husbands.²⁶⁴ *Thompson* condoned the unwillingness of state judiciaries to unveil the problem of domestic violence, which allowed the problem to persist.²⁶⁵

However, unlike *Castle Rock*, *Thompson's* effects were limited to state substantive law and, therefore, states were free to reject the Court's reasoning.²⁶⁶ While many courts adopted the doctrine recognized by *Thompson*, the opinion led many state judiciaries to eventually discredit

though not her wish has been fulfilled.").

261. *Id.* ("There is . . . a great deal of discretion in police work, and so the property right here is not reducible to a sum certain," but "[t]he well-developed body of case law and practice that governs proper police response makes the scope of this property interest certain enough to be protectible.").

262. Truss, *supra* note 83, at 1202.

263. See *Boblitz v. Boblitz*, 462 A.2d 506, 510 (Md. 1983), *modified*, *Bozman v. Bozman*, 830 A.2d 450, 454 (Md. 2003). The Court noted:

Under the guidance of the majority position in *Thompson*, . . . [in] . . . 1965 the Supreme Court of Ohio in *Lyons v. Lyons*, 208 N.E.2d 533, 536-37 (Ohio 1965), [*overruled* by *Shearer v. Shearer*, 480 N.E.2d 388, 393 (Ohio 1985)], declared, "This court is not convinced that a useful purpose would be served in overthrowing the rule of interspousal immunity from suit so well established in a majority of jurisdictions in this country."

Id. See Tobias, *supra* note 7, at 408-09 (1989) (marking *Thompson* as "a watershed for interspousal tort immunity.").

264. See *Boblitz*, 462 A.2d at 510 (noting that it was not until 1965 that courts began to depart from the rule stated in *Thompson*). Those still adhering to the rule include: Georgia (see *Larkin v. Larkin*, 601 S.E.2d 487 (Ga. Ct. App. 2004)) and Louisiana (see *Hamilton v. Hamilton*, 522 So.2d 1356, 1359 (La. Ct. App. 1988)). Today, the doctrine is widely criticized. See *Bozman*, 830 A.2d at 466 (stating "[t]he majority of the States, we discovered, were of the view that the doctrine was outdated and served no useful purpose, that 'there presently exists no cogent or logical reason why the doctrine of interspousal tort immunity should be continued'").

265. See Siegel, *supra* note 77.

266. *Boblitz*, 462 A.2d at 510-15 (surveying trend away from *Thompson* reasoning).

these policy concerns and abrogate the doctrine of interspousal immunity.²⁶⁷

267. See, e.g., *Fernandez v. Romo*, 646 P.2d 878, 881-82 (Ariz. 1982) (in banc). The *Fernandez* Court held;

The doctrine of interspousal tort immunity cannot be supported by an antiquated and narrow ‘unity’ doctrine that perpetuates the fiction of female disability if not inferiority. . . . it cannot operate today as a reason for supporting the doctrine of interspousal tort immunity We do not believe. . . . that the family harmony or domestic tranquility will be harmed by allowing suit for injuries.

Id. See *Windauer v. O’Connor*, 485 P.2d 1157, 1158 (Ariz. 1971) (“An intentional tort inflicted by one spouse on another so clearly destroys the concept of unity that the basis for the doctrine is lost.”); *Klein v. Klein*, 376 P.2d 70, 72 (Cal. 1962) (adopting the reasoning of *Self v. Self*, 376 P.2d 65 (Cal. 1962), and stating that “[t]he argument about inundating the Courts with trifling suits is palpably unsound”). In *Brown v. Brown*, 89 A. 889, 891 (Conn. 1914), the court held:

If a cause of action in her favor arises from the wrongful infliction of such injuries upon her by another, why does not the wrongful infliction of such injuries by her husband now give her a cause of action against him? If she may sue him for a broken promise, why may she not sue him for a broken arm? In the fact that the wife has a cause of action against her husband for wrongful injuries to her person or property committed by him, we see nothing which is injurious to the public, or against the public good, or against good morals.

Id. See also *Flagg v. Loy*, 734 P.2d 1183, 1186 (Kan 1987) (“Does the doctrine of interspousal tort immunity promote and protect family harmony and tranquility? We think not.”); *Brown v. Gosser*, 262 S.W.2d 480, 484 (Ky. 1953) (“[The legislature] has enunciated the public policy of the state It is not a function of the courts to enunciate a contrary policy.”); *Burns v. Burns*, 518 So.2d 1205, 1210 (Miss. 1988) (“The idea that maintenance of interspousal immunity will promote the public interest in domestic tranquility is wholly illusory.”); *Merenoff v. Merenoff*, 388 A.2d 951, 959 (N.J. 1978) (“The threat to domestic harmony posed by a legal action between spouses is an imponderable; the cohesiveness of a marriage may be jeopardized as much by barring a cause as by allowing it.”); *Shearer v. Shearer*, 480 N.E.2d 388, 391 (Ohio 1985) (“To continue to deny access to the courts on the grounds of ‘what may be,’ in the face of overwhelming experience to the contrary in the many other states, is nothing more than a denial of due process.”); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338, 342 (W. Va. 1978) (“[I]t is difficult to perceive how any law barring access to the courts for personal injuries will promote harmony.”); In *MacDonald v. MacDonald*, 412 A.2d 71, 74 (Me. 1980) the court discussed how *stare decisis* applied to the doctrine of interspousal tort immunity:

In recent years, too, we have forcefully stated that in matters of tort involving the marital relationship we cannot “stubbornly, hollowly and anachronistically” stay bound by the “shackles” of the “formalisms” of the common law. We have also stressed the by so declaring, we do not undermine the principle of *stare decisis*. Rather, we prevent it from defeating itself; we do not permit it to mandate the mockery of reality and the “cultural lag of unfairness and injustice” which would arise if the judges of the present, who like their predecessors cannot avoid acting when called upon, were required to act as captives of the judges of the past, restrained without power to break even those bonds so withered by the changes of time that at the slightest touch they would crumble.

MacDonald, 412 A.2d at 74; *Boblitz*, 462 A.2d at 517 (internal citations omitted). Dean Prosser stated:

The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed;

2. The Likely Impact of *Castle Rock*

Like the “alternative remedies” suggested by the Court in *Thompson*, the “alternative remedies” suggested by the Court in *Castle Rock* are likely to have a hollow ring.²⁶⁸ By finding that a protection order is not worthy of the Constitution’s safeguards, *Castle Rock* has stripped the victims of domestic abuse of another means of protection.²⁶⁹ Now a lasting component of Fourteenth Amendment jurisprudence, *Castle Rock* will have devastating effects. The early cases following *Castle Rock* confirm this fear.²⁷⁰

and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy – and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

Boblitz, 462 A.2d at 520 (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* 862-63 (4th Ed. H.B. 1978)).

268. See *Boblitz*, 462 A.2d at 509 (“The available ‘alternative remedies’ suggested by the [*Thompson*] Court have a hollow ring.”); See Transcript of Oral Argument, *supra* note 152, at 16 (stating that Colorado law provides several alternative remedies to Mrs. Gonzales in the absence of procedural due process protection). Petitioner *Castle Rock* explained that when a restraining order is violated, its holder can petition the court for a contempt order against the person who violated the order and even the police, if their conduct was willful and wanton. *Id.* In *Merenoff v. Merenoff*, 388 A.2d 951 (N.J. 1978), the court stated:

We add, on a closing note as to the existence of reasons asserted for the continuation of the doctrine of interspousal immunity, that no court in this day and age subscribes seriously to the view that the abrogation of marital immunity for tortious injury is “unnecessary” because redress for the wrong can be obtained through other means. This additional, “alternative remedy” theory was advanced generations ago as a justification for retaining interspousal tort immunity in *Thompson v. Thompson*, and was even then the subject of dissent. The criminal law may vindicate society’s interest in punishing a wrongdoer but it cannot compensate an injured spouse for her or his suffering and damages. Divorce or separation can provide escape from tortious abuse but can hardly be equated with a civil right to redress and compensation for personal injuries.

Merenoff, 388 A.2d at 962 (internal citations omitted); *Boblitz*, 462 A.2d at 518 (internal citations omitted). Dean Prosser stated:

Apart from stare decisis or judicial inertia, and the policy of strict construction of status changing the common law, it has been said that each spouse has remedy enough in the criminal and divorce law – which obviously is untrue, since neither compensates for the damage done, or covers all the torts that may be committed.

Id. at 520 (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* 862-63 (4th Ed. H.B. 1978)).

269. See *Roederer*, *supra* note 164, at 93 (observing that the Supreme Court views the Constitution as “a charter of negative liberties” and “will go to great lengths to conserve the status quo distribution of rights and entitlements”).

270. See, e.g., *Starr v. Price*, 385 F. Supp. 2d 502, 512 (M.D. Pa. 2005) (finding that, in light of *Castle Rock*, plaintiff’s Protection From Abuse Order “did not create a legitimate entitlement to its enforcement”); *Caldwell v. City of Louisville*, No. 3:01CV-195-S, 2005 U.S. Dist. LEXIS 20640, at *5 (W.D. Ky. 2005), *rev’d*, 2006 U.S. App. LEXIS 23719 (6th Cir. 2006) (finding that *Castle Rock*

The legal system fails to provide victims of domestic violence with any real protection.²⁷¹ Officers of the executive branch must enforce protection orders; however, the judiciary, as demonstrated in *Castle Rock*, does not wish to make sure that the executive branch carries out this duty.²⁷²

In some jurisdictions, interspousal tort immunity prevents an abused spouse from seeking an individualized legal remedy for her injuries.²⁷³ In all jurisdictions, 42 U.S.C. § 1983 prevents an individual from bringing suit a governmental actor having qualified immunity.²⁷⁴ As a protection order does not enjoy due process protection, an abused spouse that has obtained a court-issued protection order has no remedy against police officers who refuse to enforce her judgment.²⁷⁵ Police departments throughout the country are persistently unwilling to enforce protection orders. Therefore, a protection order in the hands of an abused spouse may now be valueless, embodying an “empty promise.”²⁷⁶

It does not appear that our government now provides abused spouses with a meaningful remedy against domestic violence any more

precluded plaintiff from bringing a procedural due process claim); *Howard v. Bayes*, 457 F.3d 568, 576 (6th Cir. 2006) (“[A]s was the case in *Castle Rock*, neither the state legislature nor judiciary has affirmatively indicated that the statutes at issue confer an entitlement or property interest on victims of domestic abuse.”); *Abram v. Busby*, No. 3:04-CV-00245 GTE, 2006 U.S. Dist. LEXIS 8991, at *17 (E.D. Ark. 2006) (stating in light of *Castle Rock*, “Plaintiff’s claim that his due process rights were violated fails as a matter of law”).

271. See *Lewis*, *supra* note 132 (opining that the *Castle Rock* decision would affect Wisconsin “in the sense that a failure to enforce a restraining order or injunction under Wis. Stat. §§ 813.112 (domestic abuse), 813.22 (child abuse), or 813.125 (harassment) – which all contain the mandatory “shall arrest” language similar to the Colorado statute – does not state a cognizable federal constitutional claim”).

272. Cf. William Spieler, Editorial, *Self-Defense and Self-Determination Under the Gun*, WASH. POST, July 5, 2005, at A12 (criticizing any opponents to Congress’ efforts to overturn the D.C. handgun ban). Spieler cites *Castle Rock* for the proposition that the government has no affirmative duty to protect its citizens. *Id.* Spieler voices his concerns on that issue by stating “[i]t’s one thing to be reminded that you aren’t due any protection and that the police can legally ignore 911 calls. It’s another to be simultaneously told that you cannot have the means in your own hands to effectively defend yourself.” *Id.*

273. See *supra* note 264.

274. *County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 (1998).

275. To succeed in a § 1983 claim, the abused spouse would have to show that she was deprived of a constitutional right by a person acting under color of state law. See *Jacobs, Visconti & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). As demonstrated by the *Castle Rock* opinion, it is invariably difficult to successfully aver a cause of action against such state actors.

276. See *Gostin*, *supra* note 156, at 11 (stating that when the state establishes an agency to prevent spousal abuse, it promises that it will respond in cases of obvious threats to health).

than it did in 1910.²⁷⁷ State legislatures must now contemplate a means to achieve their policies, which may prove difficult without assistance from the judiciary in enforcing new legislation.²⁷⁸

G. A Failure of Separation of Powers: Courts Must Raise the Curtain on Domestic Violence

“Legal remedies are an essential tool in stopping domestic violence.”²⁷⁹ Victims of domestic violence will only have true recourse against their abusers when all branches of government work together to provide a meaningful remedy.²⁸⁰ “[O]ur . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which ‘would preclude the establishment of a Nation capable of governing itself effectively.’”²⁸¹ As Madison explained, separation of powers does not mean that the branches “ought to have no *partial agency* in, or no

277. See generally Siegel, *supra* note 77.

278. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768-69 (2005) (stating that states are not “powerless to provide victims with personally enforceable remedies”). While § 1983 “did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.” *Id.*

279. Lerman, *supra* note 36, at 220.

280. See *id.* at 221:

Failure of coordination will cause the failure of any individual remedy. For example, if a statute requires the police to make arrests but the police department does not adopt a policy implementing the statute, the officers responding to calls may not even be aware of the statute. If a particular department adopts a policy implementing the statute, but the officers do not receive adequate training about the nature of woman abuse, they either may fail to make arrests or make inappropriate arrests. If the police are asked to make arrests but the prosecutor files charges in few of the arrest cases, the police may refuse to act, because they believed that making arrests in cases that will be dropped is a pointless exercise. If the prosecutor adopts a policy of aggressively prosecuting abuse cases but fails to provide victim advocacy services to maintain contact with victims, attend to their safety needs and help them to understand the law enforcement system, then the prosecutor often is doomed to frustration because the victims of abuse are less likely to remain available to testify. If the prosecutor sets up a good system within the office and obtains a high rate of convictions and guilty pleas, but the mental health community does not develop expertise on treatment of abusers and establish close communication with the courts, then most abusers will receive little effective attention. If the probation department fails to monitor abusers who have been convicted of or who plead guilty to charges of spouse abuse, then there will be no deterrent to engaging in post-conviction recidivism.

Id. (internal citations omitted).

281. *Clinton v. Jones*, 520 U.S. 681, 702 (1997) (quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989)).

controul over the acts of each other.”²⁸²

The courts must leave policy decisions to the legislature and interpret laws according to their plain meaning.²⁸³ As Justice Harlan stated in his dissent in *Thompson*, “[w]ith the mere policy, expediency, or justice of legislation the courts . . . have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be.”²⁸⁴ The legacy of *Thompson* and the potential implications of *Castle Rock* inform the government that all three branches must work together to provide meaningful remedies to the victims of domestic abuse.²⁸⁵ It is only then that the victims of domestic abuse will be given Due Process of the law.²⁸⁶

V. CONCLUSION

From the beginning, violence has shaped the experiences of women in the United States.²⁸⁷ Despite legislative movements sparked by social change and awareness, our legal system provides no more protection to the victims of domestic abuse than it did in 1910.²⁸⁸ While women in the United States have gained more political rights, the legal system has refused to provide the abused a meaningful remedy for their injuries.²⁸⁹

The Supreme Court’s opinion in *Castle Rock*²⁹⁰ illustrates that more conscious efforts must be made by every branch of the legal system to eradicate domestic abuse.²⁹¹ The entire legal system must work together to raise the curtain on domestic violence.²⁹² Legislatures must continue to promote social change in the area of domestic violence, and courts must enforce legislation without questioning the legislature’s

282. THE FEDERALIST NO. 47 at 325-26 (James Madison) (J. Cooke ed. 1961) (emphasis in original).

283. See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981) (“Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales.”); *Morrison v. Olson*, 487 U.S. 654, 678 (1988) (“[Separation of powers] insur[es] the independence of the Judicial Branch and insur[es] that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by the other branches.”).

284. *Thompson v. Thompson*, 218 U.S. 611, 622 (1910) (Harlan, J., dissenting).

285. See Schafran, *supra* note 12.

286. See Goldberg, *supra* note 239.

287. See *supra* notes 20-95 and accompanying text.

288. See *supra* notes 262-78 and accompanying text.

289. See *supra* notes 233-52, 279-78 and accompanying text.

290. 545 U.S. 748 (2005).

291. See *supra* notes 271-75 and accompanying text.

292. See *supra* notes 279-86 and accompanying text.

policy determinations.²⁹³ Police departments must enforce strict policies aimed at protecting the abused, while being held accountable when failing to provide any measure of protection. The legal system must heed a woman's pleas for help and prevent court orders from becoming mere mockeries.²⁹⁴

Nicole M. Quester

293. *Id.*

294. See Legal Momentum, In the Courts: *Castle Rock v. Gonzales*, http://legalmomentum.org/legalmomentum/inthecourts/2006/03/castle_rock_v_gonzales_125_s_c.php (quoting Jennifer K. Brown, Vice President and Legal Director of Legal Momentum: "The world has recognized that women and children are entitled to government protection against family violence[,] . . . [o]ur Supreme Court has permitted police to make a mockery of that protection by dismissing women's pleas for help.").