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Failure to Protect: Our Civil System's Chronic Punishment of Victims of Domestic Violence

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NOTES

FAILURE TO PROTECT: OUR CIVIL SYSTEM'S CHRONIC PUNISHMENT OF VICTIMS OF DOMESTIC VIOLENCE

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ABSTRACT

This Note examines the effectiveness and enforceability of civil restraining orders in domestic violence cases in the wake of Town of Castle Rock v. Gonzalez, which held that there is no constitutional right to the enforcement of a restraining order. This Note analyzes the impact of Gonzales and the effectiveness of various restraining order statutory schemes more broadly. This Note subsequently addresses that as a result of experiencing continued contact from their attackers, victim mothers are more likely to have their children removed by the state in child welfare proceedings, due to the established presumption in most family courts that domestic violence victims are unfit parents. Ultimately, this Note advocates against a presumption of parental unfitness for domestic violence victims in child welfare proceedings and in favor of a more mandatory enforcement scheme for restraining orders in order to best protect the constitutional rights of victim mothers and their children.

INTRODUCTION

In 1999 in Castle Rock, Colorado, sisters Rebecca, Kathryn, and Leslie Gonzales, ages 10, 8, and 7 were playing in their yard when their father, Simon Gonzales, kidnapped them from the custody of their mother, Jessica. Prior to the incident, Simon and Jessica had separated and were going through a divorce. Eventually, Simon started behaving dangerously and erratically. According to Jessica, at one time, she found him in their garage, standing on a stool with his neck in a noose, in front of their three daughters. Jessica made repeated contact with the police after the attempted suicide; she reported, "He would stalk us. He would break into the house. He didn't have a key, when he wasn't

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living there." In order to protect herself and her daughters, Jessica obtained a restraining order against Simon. The restraining order stipulated that Simon could only be with his daughters on alternate weekends and during prearranged weeknight dinners. One month after the issuance of the restraining order, on a night on which Simon was not scheduled to see his daughters, he took them from the yard of Jessica's home and drove away in his pickup truck. Assuming it was Simon, Jessica called the police and informed them of the situation. She immediately showed the responding officers the restraining order against Simon. The police later told 60 Minutes, "What safer place can children be than with one of the parents, the mother or the father . . . and we had no indication from past records that he was ever violent . . . ." Based on this lack of concern, the police drove around looking for Simon, but subsequently did nothing. When Jessica eventually contacted Simon and found that he was outside Denver with the girls, she asked the police to locate him, but they refused. Ultimately, Jessica called the Castle Rock police four times before she drove to the station to tell the officers that her husband had violated a restraining order and that her girls had been gone for seven hours. According to the police, Simon Gonzales drove to the Castle Rock police station at 3:20 A.M. and opened fire with a semi-automatic gun that he had purchased that evening after picking up his daughters. In the firefight, police shot Simon to death. When the police opened the cab of Simon's pickup, they found that Simon had shot Rebecca, Kathryn, and Leslie each once in the head at point-blank range, after leaving an amusement park where he had taken them. He had driven around with their bodies beside him for several hours.[1] Jessica sued the Town of Castle Rock for the police department's failure to enforce the restraining order she had obtained against Simon. Jessica's case made it to the Supreme Court before a majority lead by Justice Scalia held that Jessica had no remedy for the loss of her family; restraining orders, it seemed, were discretionary.[2]

Jessica's case is not unique, and unfortunately, victims like Jessica enjoy no constitutional vindication for the harms they experience at the hands of their abusers and in the face of law enforcement inaction. In the wake of Jessica's case, *Town of Castle Rock v. Gonzales*, it appears that restraining orders are at the utmost discretion of the police, and their enforcement is by no means mandatory.[3] As a result, many domestic violence victims run the risk of remaining vulnerable to and in contact with their attackers, and no constitutional remedy exists to vindicate the rights of victims harmed by attackers who were mandated by law to stay away.

Unfortunately, the failure of our civil system to vindicate the rights of battered women in the wake of unenforced restraining orders is but

1. Rebecca Leung, Gonzales v. Castle Rock*: Supreme Court To Decide If Mother Can Sue Her Town And Its Police*, CBS NEWS, 60 MINUTES (March 17, 2005), http://www.cbsnews.com/news/gonzales-vs-castle-rock/.

2. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

3. *Id.*

one of many inadequacies faced by these victims. Perhaps the most glaring flaw in our civil system exists in our nation's tendency to punish mothers who are victims of domestic violence for "failing to protect" their children. Increasingly, many states have enacted legislation that allows family courts in state custody proceedings to remove custody from battered mothers on the grounds that by remaining in contact with their attackers or by existing in an abusive relationship, the mothers are unfit on the grounds that they have "failed to protect" their children from domestic violence. As a result, many children are removed from otherwise fit mothers and placed in foster care due to societal fears of the dangers associated with a child's exposure to domestic violence.[4]

Certainly, there are cases in which domestic violence victims do not wish to cut off all contact from their attacker, and certainly, society has an interest in preventing a child's exposure to domestic violence. However, when combined, the practices described above create a system in which battered mothers simply cannot win; ours is a system in which our police forces can fail to protect a mother from the violence of her attacker, as well as one in which a mother's failure to protect her children from the same attacker can lead to the termination of her parental rights. Thus, this Note will examine the failure of existing civil rights law to protect victims of domestic violence, both in terms of victim safety and in maintaining the family unit. Part I of this Note will analyze the effectiveness and enforceability of restraining orders in domestic violence cases in the context of *Town of Castle Rock v. Gonzales*. Part II of this Note will then analyze our civil system's failure to maintain the family unit in domestic violence cases due to a prevailing presumption that victims of domestic violence are unfit parents, despite the Supreme Court ruling of *Stanley v. Illinois*, which held that courts must make an individualized finding of parental fitness in order to comply with due process. Ultimately, this Note will argue that our civil system has created a regime that renders meaningless, rather than vindicates, the civil rights of domestic violence victims; Part III of this Note advocates for statutory and institutional solutions to make restraining orders more effective and to protect against the presumption of parental unfitness for battered mothers.

I. Domestic Violence, Restraining Orders, and *Town of Castle Rock v. Gonzales*

Before examining the impact of *Town of Castle Rock v. Gonzales* on the effectiveness and enforceability of restraining orders, one must first understand the danger of domestic violence in the United States. The Centers for Disease Control and Prevention define domestic violence as intimate partner violence, which includes actual or threatened physical,

4. *See, e.g.*, The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 Fordham Urb. L.J. 849 (1999); Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 Am. U.J Gender Soc. Pol'y & L. 797 (2012).

sexual, psychological, or stalking violence by a current or former intimate partner, whether of the same or opposite sex.[5] The CDC defines an intimate partnership as a close personal relationship that may be characterized by the partners' emotional connectedness, regular contact, ongoing physical contact and sexual behavior, identity as a couple, or familiarity or knowledge of each other's lives; however, this list is not dispositive.[6] The CDC defines physical violence as the intentional use of physical force with the potential for causing death, disability, injury or harm, and includes, but is not limited to, scratching, pushing, shoving, throwing, grabbing, biting, choking, shaking, hair-pulling, slapping, punching, hitting, burning, the use of a weapon, and the use of restraints or one's body, size, or strength against another person.[7] The CDC's definition of intimate partner violence also includes such behaviors as psychological aggression, manipulation, excessive monitoring, exploitation of vulnerability, and gas lighting (the presenting of false information to the victim with the intent of making them doubt their own memory and perception).[8]

Domestic violence has become an extremely prevalent form of violent crime in the United States. According to the CDC, 20 people per minute will become victims of intimate partner violence. DOJ findings reveal similar results; between 2003 and 2012, domestic violence accounted for 21% of all violent crime. The DOJ found that over 74% of domestic violence victims were female, and that current or former boyfriends commit most domestic violence in the United States. As of the year 2000, approximately one in three females murdered in the United States is killed by a partner, whereas approximately one in twenty U.S. males murdered is killed by a partner.[9]

Over time, the United States experimented with various regimes to address domestic violence. Disturbingly, American common law provided battered women with no legal recourse until the late nineteenth century.[10] Between 1871 and 1883, three states enacted statutes criminalizing spousal abuse. In the early 20th century, family courts began cropping up in order to combat domestic relations issues. While the initial statutes enacted by Alabama, Massachusetts, and Maryland placed domestic violence in the criminal context, family courts aimed to de-criminalize the issue by employing social workers who advised

5. MARTIE P. THOMPSON, ET AL., NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, MEASURING INTIMATE PARTNER VIOLENCE VICTIMIZATION AND PERPETRATION: A COMPENDIUM OF ASSESSMENT TOOLS 1 (2006).

6. MATTHEW J. BREIDING, ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 11 (2015).

7. *Id.*

8. *Id.* at 12–15.

9. THOMPSON, *supra* note 5, at 1.

10. Amy Z. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 543 (2014).

married couples to solve abuse issues through counseling.[11] Not until the 1970s, with a wave of "grassroots feminism," did domestic violence shelters begin to act as safe-havens for battered women; the 1970s also saw the creation of the Office of Domestic Violence within the U.S. Department of Justice, fierce advocacy for police intervention in domestic violence, and the legislation of civil protective remedies in many states.[12] Despite this progress, public opinion and the opinion of law enforcement reflected the notion that men did not need to be arrested or jailed for what was likely a "respon[se] to marital stress."[13]

In 1984, a case called *Thurman v. City of Torrington* brought to light the grossly inadequate societal and legal responses to domestic violence and sparked the enactment by many states of mandatory arrest laws.[14] In *Thurman*, the plaintiff, Tracey Thurman, a mother, sued the defendant, the City of Torrington, Connecticut, under 42 U.S.C. §§ 1983, 1985, 1986, and 1988, as well as the Fifth, Ninth, and Fourteenth Amendments to the Constitution. Tracey alleged that the defendant violated her constitutional rights by the nonperformance or malperformance of City police officers.[15] In that case, over the course of a year, Tracey endured numerous threats against her life and her child by her estranged husband Charles, which the Torrington Police department largely overlooked.[16] Ultimately, Charles brutally attacked Tracey with a knife until police began to arrive; unperturbed and uninhibited by the officers, Charles continued to beat Tracey in the presence of the officers until he was eventually taken into custody.[17] The District Court in *Thurman* held that the conduct of the police officers implicated the Equal Protection Clause and §1983.[18] The court in that case held that if officials have notice of the possibility of domestic attacks, they are under "an affirmative duty to take reasonable measures to protect the personal safety of such persons," and "failure to perform this duty would constitute a denial of equal protection."[19] As a result of this duty to protect victims of domestic violence, the *Thurman* court held that if the City of Torrington wished to discriminate against domestic violence victims, it must articulate an important governmental interest for doing so. The court in that case subsequently emphasized the "outdated misconception" of the notion of a husband's prerogative to physically discipline his wife and ultimately held that the City of Tor-

11. *Id.* at 543.

12. *Id.* at 543–44.

13. *Id.* at 544 ("One study conducted in the early 1970s showed that out of twenty-three cases in which men were arrested for severely beating their wives, only nine of the defendants went to jail. The author of the study attributed the lenient sentencing to the court's belief that the men were merely 'responding to marital stress' or to their wives' incendiary conduct. Women were 'agents provocateurs' in their own thrashings.") (footnotes omitted).

14. *Id.* at 545.

15. Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

16. *Id.* at 1524–45.

17. *Id.* at 1526.

18. *Id.* at 1528.

19. *Id.* at 1527.

rington's motion to dismiss Tracey Thurman's complaint would be denied.[20] In response to *Thurman*, the United States experienced a shift in the police response to domestic violence, stemming in part from *Thurman* and in part from the publication of an empirical study on the effects of mandatory arrest in domestic violence situations.[21] However, while the overall response of America's civil and criminal systems to domestic violence increased in intensity over time, as I will discuss below, our civil system fails to vindicate the rights of victims when such victims are harmed in the *absence* of an arrest for the violation of a restraining order.

Restraining orders are an integral part of our justice system's effort to protect domestic violence victims. Every year, millions of battered women seek restraining orders, also called protection orders, as a way to prevent further abuse by their attackers.[22] Since Pennsylvania became the first state to make civil protection orders available to domestic violence victims over 40 years ago, today, all 50 states have enacted statutes providing for their ability; according to the Council of Juvenile and Family Court Judges, civil protection orders are the predominant legal remedy that victims seek to end the violence against them.[23] When a victim seeks a civil restraining order, a court can grant an injunction to the respondent (in domestic violence contexts, the abuser) prohibiting them from contacting, harming, harassing, or stalking the victim. Civil restraining orders can also be tailored to situations in which the parties have children together, in that orders may assign physical and legal custody of the children to the victim while setting conditions for supervised visitation or exchange. Therefore, civil restraining orders allow domestic violence victims to bypass the rigidity of the criminal justice system, giving them more control over the outcome with a view to their specific needs.[24]

In addition to providing domestic violence victims more flexibility, civil restraining orders provide other advantages to the individuals who seek them. For instance, such orders are an especially important tool in protecting victim safety because the risk of experiencing violence increases significantly both during and after separation; this risk stems from a perpetrator's perceived loss of control over the victim. As a result, victims who separate from their abusers not only run a greater risk of experiencing child abduction, acts of violence, threats, and stalking, but of actually being murdered by their intimate partner abuser.[25] Because of the heightened importance of restraining orders as a safety tool, the role of law enforcement in protecting domestic violence vic-

20. *Id.* at 1527–28.

21. Zelcer, *supra* note 10, at 545.

22. EMILIE MEYER, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE DEP'T, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 1 (2010).

23. *Id.* at 2.

24. *Id.* at 2–3.

25. *Id.* at 2 (citing PATRICIA & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 42 (2000)).

tims from further abuse becomes exceedingly important. A section of the Civil Protecting Orders Improvement Guide, a work presented by the National Council of Juvenile and Family Court Judges, Family Violence Department, was authored by and written for law enforcement officers working to protect victims of abuse.[26] According to this guide, law enforcement officers have several roles in the effective enforcement of civil protection orders; these roles include serving the protection order and notifying the victim, promoting safety through weapons seizure, and enforcing violations of protection orders.[27] These roles are designed to keep battered women safe in the wake of obtaining a protective order against their abuser; while many victims of intimate partner violence do experience increased safety as a result of obtaining a civil restraining order,[28] barriers in both service and enforcement of restraining orders frustrate the fulfillment of law enforcement roles.

Despite the importance of law enforcement roles in the effective promulgation and enforcement of restraining orders, law enforcement's fulfillment of such roles has been far from exemplary. First, many domestic violence victims perceive a significant failure of law enforcement to take the danger they are in seriously and to realize the consequences of a failure to enforce protective orders. For instance, a Gender Bias task force created in Texas to analyze the adequacy of the Texas judicial system's response to domestic violence conducted a survey to examine the adequacy of police enforcement against domestic violence and the effectiveness of protective orders. One-half of women polled by the task force in its judicial survey indicated a belief that law enforcement officers frequently do not take domestic violence seriously enough.[29] Second, scholarship and statistics agree that these perceptions are grounded in fact; police views with respect to the severity and importance of domestic violence differ in relation to their perceptions of other violent crime.[30] Only 36% of the 2.1 million domestic violence incidents reported to the police between 1998 and 2002 resulted in an arrest of the abuser.[31] Convictions for family assault are less harsh than those for felony assault as among state court felony convictions; 45% of family assault offenders received a sentence of more than two years, compared with 77% of felony assault offenders.[32] In addition to milder punishments and lower likelihoods of arrest for perpetrators, victims who seek restraining orders against their abusers often see these orders

26. MEYER, *supra* note 22, at 1.

27. *Id.* at 1–3.

28. *Id.* at 3 ("Studies reveal that between 30 percent and 77 percent of victims report that the process and act of receiving the order ends the violence.").

29. 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 (1995).

30. *See, e.g.*, Sarah Metusalem, *Should There Be a Public Duty to Respond to Private Violence? The Effect of* Town of Castle Rock v. Gonzales *on Restraining Orders*, 38 U. TOL. L. REV. 1037, 1054 (2007); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46–47 (1992).

31. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 207846, FAMILY VIOLENCE STATISTICS, INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (2005).

32. *Id.* at 2.

go unenforced.[33] An estimated 60% of restraining orders are violated within a year of their issuance; 29% of such violations are violent.[34] Scholars offer several proposed explanations for under-enforcement. One theory posits that law enforcement officers harbor latent biases against women,[35] while other scholars assert that police departments consider domestic violence calls unglamorous, non-prestigious, and unrewarding; such assertions point to police categorization of domestic violence cases as inherently dangerous police work.[36] Other scholars suggest that deference to family privacy has been used to explain inaction, as has the (ludicrous) perception that domestic violence is a "victimless crime"; another offered explanation for officer inaction is the belief that legal involvement is ineffective, and thus, futile.[37] Whatever the reason for police inaction with respect to domestic violence and the enforcement of restraining orders, the continued prevalence of domestic violence demonstrates our system's flaws.

Despite the prevalence and severity of domestic violence in our country, and despite the prevailing importance of civil protection orders or restraining orders to the victims who seek their protection, the evidence demonstrates that such victims fail to see such orders enforced and continue to experience violence at the hands of their abuser. In 2005, the Supreme Court majority in *Castle Rock v. Gonzales* vindicated traditions of police inaction in response to domestic violence and in the face of restraining orders and effectively hamstringed the most meaningful civil remedy for domestic violence victims harmed by police in action.

Following her husband Simon's murder of their three children, Jessica Gonzales filed suit under 42 U.S.C. § 1983, alleging that the town of Castle Rock violated the Due Process Clause of the Fourteenth Amendment on the grounds that Castle Rock's police officers, acting pursuant to official policy or custom, failed to respond to her repeated reports to the police that her husband had taken the girls in violation of her restraining order against him.[38] The Supreme Court considered whether an individual who has obtained a state issued 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.[39] The majority, led by Justice Scalia, first evaluated the language of the Gonzales restraining order, which commanded Simon Gonzales not to molest or disturb the peace of Jessica or any of their children and to remain at least one hundred yards from the family

33. Michael Mattis, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool? A Discussion of the Tenth Circuit's Decision in* Gonzales v. Castle Rock, 82 DENV. U. L. REV. 519, 520 (2005).

34. Stephanie Smiertka, *The Federal Fortress Surrounding Police Liability for Failure to Enforce Protection Orders*, 21 BUFF. J. GENDER, L. & SOC. POL'Y 87, 87–88 (2012).

35. Mattis, *supra* note 33, at 520.

36. Zorza, *supra* note 30, at 47–52.

37. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 299 (1985).

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

39. *See id.* at 750–51.

home at all times.[40] The Court evaluated two "Notices" on the restraining order, one directed at the restrained party and one directed at law enforcement. The order stated that the restrained party "may be arrested without notice if a law enforcement officer has probable cause to believe" that the restrained party knowingly violated the order. The notice to law enforcement stated,

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.[41]

In light of the language of the order, the *Castle Rock* majority considered the scope of procedural due process rights. The Fourteenth Amendment mandates that no state shall deprive any person of life, liberty, or property without due process of law, and through § 1983, Congress created a federal cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.[42] A prior case, *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, held that substantive due process does not require the state to protect the life, liberty, and property of its citizens against invasion by private actors, but left open the question of whether state child protection statutes gave the child victim an "entitlement" to due process protection to receive protective services from the state.[43] While that case dealt with the duty of police officers to protect a child from danger, the question of "entitlement" presents itself both in *DeShaney* and *Castle Rock*. While the majority acknowledged the question left open by *DeShaney* it moved on to consider what constitutes a benefit for the purpose of determining whether an individual has an interest protected by due process.[44] According to Justice Scalia, a benefit is conferred on an individual having more than an abstract need, desire, or unilateral expectation; instead, the individual must have a legitimate claim of entitlement stemming from an independent source, such as state law, and the entitlement must not be granted or denied at the discretion of government officials.[45]

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40. *See id.*

41. *Id.* at 751–52 (citing Town of Castle Rock v. Gonzales, 366 F.3d 1093, 1143–44 (10th Cir. 2004)).

42. *Id.* at 755 (citing U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1983 (2000)).

43. *See id.* at 754–55 (citing DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989)).

44. *See id.*

45. *See id.* at 756.

In light of this interpretation of the law, Justice Scalia concluded that despite its language, the Colorado restraining order statute did not make the enforcement of such orders mandatory.[46] The Justice argued that U.S. common law supports a historic tradition of discretion in law enforcement matters, citing *Chicago v. Morales* as an example.[47] Justice Scalia also pointed out that all police officers must use some discretion in deciding when and where to enforce city ordinances.[48] Justice Scalia also found that the language of Colorado's restraining order statute, stating that "every reasonable means" shall be employed to enforce a restraining order, was not strong enough to be considered mandatory and that the statute itself was too broad and vague to confer a legitimate entitlement, given that it allows police officers to choose between seeking a warrant for the attacker's arrest and arresting the attacker immediately.[49] Finally, Justice Scalia wrote that even if the Supreme Court were to accept that Colorado's restraining order statute carried mandatory enforcement, Jessica Gonzales enjoys no constitutional remedy for its failure to be enforced under a procedural due process claim under § 1983 because she has no legitimate property interest in its enforcement.[50] The majority opinion stated that the seeking of an arrest warrant is an entitlement to *procedure* only and that the right to enforcement of a restraining order carries no "ascertainable money value."[51] Ultimately, Justice Scalia concluded that Jessica Gonzales did not have a due process property interest in police enforcement of the restraining order against her husband; therefore, the *Castle Rock* majority did not reach the question of whether the police's failure to enforce the restraining order deprived Jessica Gonzales of that interest without due process.[52]

While *Castle Rock* remains good law, many legal scholars critique this decision on a number of grounds.[53] First, commentators attack the majority's position on the basis that the majority misunderstands the requisite for property interests resulting in a benefit or entitlement.

46. *See id.* at 760.

47. *See id.* at 761. *Chicago v. Morales* invalidated a local ordinance requiring police, on observing a person they reasonably believed to be a street gang member loitering in any public place with one or more persons, to order all such persons to disperse, and made failure to obey such an order a violation. The Supreme Court invalidated the statute on the grounds of unconstitutional vagueness, in that it failed to provide fair notice of prohibited conduct and establish minimal guidelines for enforcement. *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

48. *See Town of Castle Rock*, 545 U.S. at 761.

49. *See id.* at 763 (citing COLO. REV. STAT. § 18-6-803.5(3)(b) (2005)).

50. *See id.* at 768.

51. *Id.* at 766–67.

52. *Id.* at 763–69.

53. *See, e.g.*, Allison J. Cambria, Note, *Defying a Dead End: The Ramifications of* Town of Castle Rock v. Gonzales *on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155 (2007); Metusalem, *supra* note 30; G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2006); Sara B. Poster, *An Unreasonable Constitutional Restraint: Why the Supreme Court's Ruling in* Town of Castle Rock v. Gonzales *Rests on Untenable Rationales*, 17 TEMP. POL. & CIV. RTS. L. REV. 129 (2008); Smiertka, *supra* note 34.

One of the cases relied on by the Court to bolster its argument in favor of police discretion, as opposed to an entitlement, actually invalidated a statute affording too much discretion to police.[54] In *Chicago v. Morales*, the Court invalidated an ordinance allowing Chicago police officers to arrest persons who failed to disperse after an officer perceived a person he reasonably believed to be a street gang member loitering in a public place with such persons; the Court held this ordinance unconstitutionally vague and invalidated it in light of the "absolute discretion" afforded to police on the statute's face.[55] In addition, other critics of the Court's understanding of a property interest attack Justice Scalia's assertion that such interests must have an ascertainable money value, arguing that this standard is overly broad, conceptually vague, and illogical. Clearly, some possessions are too valuable to be given a price at all or have values that simply cannot be assigned to a dollar amount; a restraining order has great value to the victim it is designed to protect, yet such protection is not a tangible item that can be bought or sold.[56] In addition, ascertainable money value is not a pre-requisite for a property interest under the due process clause.[57] For example, in *Board of Regents of State Colleges v. Roth*, the Supreme Court held that an employee's interest in his or her continued public employment was a property interest within the meaning of the Due Process Clause; in that case, the Court acknowledged that property interests protectable under due process encompass more than real estate, chattels, or money.[58] Other such interests that the Court has held to constitute property interests include public employment, drivers' licenses, parole proceedings, probation, public education, and certain statutorily-defined causes of action; importantly, none of the aforementioned, Court-endorsed property benefits carry an ascertainable money value.[59] Thus, the majority's decision in *Castle Rock* rests on untenable arguments and rationales. Whatever the perceived shortfalls of the majority's position, however, it appears that the impact of the decision will only vindicate and reaffirm previous police tendencies towards inaction and underenforcement of restraining orders.

According to a guide for the improvement of civil protection orders, "[d]ependable enforcement is central to victim safety and perpetrator accountability and helps ensure that the protection order is not a hollow document, but rather a commitment on behalf of the system to support and protect."[60] Scholarship is somewhat divided on the

54. *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

55. *Id.* at 60; *see also id.* at 71 (Breyer, J., concurring) ("The ordinance is unconstitutional, not because a policemen applied this discretion wisely or poorly in a particular case, but rather because the policemen enjoys too much discretion in *every* case.").

56. *See* Poster, *supra* note 53, at 137–39.

57. *See id.* at 139–40.

58. *See id.* at 140–41 (citing Bd. of Regents of State Coll. v. Roth, 408 U.S. 564 (1972)).

59. *See id.* at 141–43.

60. MEYER, *supra* note 22, at 16.

effects of *Castle Rock* on lower court decisions.[61] Some commentators suggest that the application by lower courts of Justice Scalia's decision is largely confused or inconsistent as applied to procedural due process claims, while it has a more profound effect on law enforcement agencies specifically.[62] Several lower court decisions have rejected procedural due process claims, justifying the denials on *Castle Rock* grounds, while one court allowed the claim only for its decision to be reversed on appeal.[63]

One criticism not of the Court's reasoning, but of its result argues that the Court's decision severely limits the available civil remedies for victims of domestic violence who are harmed by under-enforcement of restraining orders. In *Castle Rock's* wake, the only viable federal constitutional claim for victims is one under the Equal Protection Clause; however, Equal Protection claims carry "nearly insurmountable pleading standards," making such challenges largely unsuccessful.[64] In addition, the state-created-danger doctrine has proved ineffective as a remedy also because of its burden of proof. That doctrine requires that the plaintiff demonstrate that the police increased danger to the victim by failing to enforce a restraining order, and in light of recent precedent, many trial courts refuse to uphold such claims because of a perceived failure of plaintiffs to demonstrate that a failure to enforce equates to an "affirmative action" that increases danger.[65] As a result, the *Castle Rock* decision leaves victims harmed by law enforcement inaction with little or no available civil remedies for their harm.

Commentators have also analyzed prospective law enforcement reactions to the *Castle Rock* decision. Some scholarship argues that since law enforcement agencies no longer face the specter of successful procedural due process claims, they will have little incentive to implement any changes in their procedure in terms of the way departments handle incidents of domestic violence and the enforcement of restraining orders.[66] Furthermore, if examining the behavior and rationale of the Castle Rock police department offers any evidence, that police department felt that they acted entirely appropriately, even given the devastating facts of that case.[67] As mentioned above in this Note, police attitudes regarding the importance of restraining order enforcement prior to *Castle Rock* reflected a tendency to view order violations as less important or of less seriousness than other offenses; scholarship suggests that the *Castle Rock* decision, in failing to hold non-enforcers accountable for their actions, only vindicated such indifference. A

61. *See, e.g.*, Cambria, *supra* note 53; Metusalem, *supra* note 30; Poster, *supra* note 53.

62. *See* Metusalem, *supra* note 30, at 1046.

63. *See id.* at 1046–1051 (citing Starr v. Price, 385 F. Supp. 2d 502 (M.D. Pa. 2005); Majors v. City of Oakland, No. 05-00061 CRB, 2005 U.S. Dist. LEXIS 15726, (N.D. Cal. July 21, 2005); Howard v. Bayes, 457 F.3d 568 (6th Cir. 2006)).

64. *See* Smiertka, *supra* note 34, at 89–90.

65. *Id.*

66. *See* Metusalem, *supra* note 30, at 1054.

67. *See id.* at 1054 (citing Pam Lambert et al., *Could Cops Have Saved Her Kids?*, PEOPLE, Apr. 11, 2005, at 91).

chief concern arising from such vindication is that it not only indirectly harms domestic violence victims through a limiting of civil remedies, but also harms them directly though weakening restraining orders as a tool for protection.[68]

Finally, the failure to provide a civil remedy for domestic violence victims in the wake of an arguably inactive criminal justice system and an arguably ineffective civil restraining order system brings into sharp relief several very tangible, severe, and quantifiable harms. For example, the Department of Health and Human Services conducted a study revealing that the costs of intimate partner rape, physical assault, and stalking exceed $5.8 billion each year, with the majority of that cost allocated for direct medical and mental health care services.[69] Nearly $1 billion of such costs stem from lost productivity from paid work and household chores for victims of nonfatal intimate partner violence, and nearly another $1 billion stems from lifetime earnings lost by victims of intimate partner violence homicide.[70] Despite the startling severity of these statistics, the Department of Health and Human Services estimates that due to exclusions of several cost components about which data were unavailable or insufficient, including certain medical services, social services, and criminal justice services, the costs presented by their report likely *underestimate* the problem of intimate partner violence in the United States.[71] These statistics demonstrate not only the horrible prevalence of domestic violence, but also the devastating economic harm this epidemic does not only to the individual victim, but also to society. Because the mechanisms our criminal system currently has in place do not adequately prevent or address domestic violence, our civil system needs to provide remedies to further deter wrongdoing by encouraging active participation from our criminal justice system. By effectively eradicating feasible civil remedies, the *Castle Rock* decision has the potential to leave wholly unaffected the astounding economic and societal harm sustained by the United States and the staggering ranks of victims abused each year.

II. The Intersection of Domestic Violence and State Initiated Custody Proceedings

Due to the lack of effectiveness of most restraining orders, especially in light of their discretionary nature following *Town of Castle Rock v. Gonzales*, our current system fails to adequately protect victims of domestic violence and their families from perpetrators of domestic violence. As if the devastating damage caused by forceless restraining orders did not place mothers and families at enough risk, another

68. *Id.* at 1054 (explaining that some police departments have responded positively to the *Castle Rock* decision by increasing training regimens and implementing policies favoring arrest in light of some recognition of a problem regarding the perception of the seriousness of restraining orders).

69. Dep't of Health and Human Servs., Costs of Intimate Partner Violence Against Women in the United States 2 (2003).

70. *Id.*

71. *Id.*

aspect of the way in which our country handles domestic violence presents an even greater threat to the sanctity of the family unit. Increasingly, either through state common law or through explicit legislation, many states are using the existence of domestic violence in the family home as a justification for removing custody of the children from a battered mother and placing custody in the hands of the state social services body. However, such systemic removal of children from otherwise fit parents is a direct contradiction of the Supreme Court's holding in *Stanley v. Illinois*, which stands for the proposition that a family court must make individualized findings of parental fitness before deciding to remove custody of a child from either parent.[72]

In *Stanley v. Illinois*, the Supreme Court considered the propriety of removing child custody from an unmarried father, absent independent findings of parental unfitness.[73] In that case, Peter Stanley's children were removed from him by the State and placed with court-appointed guardians after their mother passed away on the grounds that he was an illegitimate father.[74] On appeal, Peter claimed that he personally had never been shown to be an unfit parent; as a result, Peter claimed that he had been deprived of the equal protection of the law guaranteed to him by the 14th amendment. Opposite Peter, the State argued that unwed fathers are presumed unfit to raise their children, so it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children.[75] The Court thus considered whether the method of procedure by presumption of unfitness could be allowed to stand in light of the fact that Illinois allowed married fathers, whether divorced, widowed, or separated, and mothers, even if unwed, the benefit of the presumption of fitness rather than unfitness.[76] The *Stanley* court held that the Due Process Clause renders the State's offered justification for refusing a father a fitness hearing insufficient when the issue at stake is the dismemberment of his family.[77] Thus, the Court concluded that parents are constitutionally entitled to a fitness hearing before their children are removed from their custody, and the denial of such a hearing is contrary to the Equal Protection Clause.[78]

Despite *Stanley*'s seemingly clear holding, several states have enacted legislation that effectively allows the State to remove custody from victim mothers. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Guam, Hawaii, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming have all enacted legislation that includes domestic violence as

72. *See* Stanley v. Illinois, 405 U.S. 645 (1972).
73. *Id.*
74. *Id.* at 646.
75. *Id.* at 647.
76. *Id.* at 646–57.
77. *Id.* at 658.
78. *Id.*

a factor to be considered in custody and visitation determinations.[79] Alaska, Connecticut, Delaware, Minnesota, Montana, Utah, Washington, and West Virginia have enacted explicit legislation stating that children's exposure to domestic violence constitutes child abuse and or neglect.[80] In 1996, New York enacted a law mandating its courts to consider proven allegations of domestic violence in deciding child custody and visitation cases in light of the "best interests of the child" as well as "other factors . . . as the court deems relevant."[81] Prior to 1996, New York law mandated only that courts consider domestic violence when a child had directly witnessed the incident.[82] The statutory basis for such laws stems from the Family Court Act, or the FCA.[83] The FCA breaks down the definition of a "neglected child" into two sections with respective subparts based on the type of harm experienced by a child under the age of eighteen.[84] Under the FCA, a parent neglects a child when the parent fails to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter, or education under the law, or with medical, dental, optometric, or surgical care despite being financially able to do so or offered financial or other reasonable means to do so, resulting in the physical, mental, or emotional impairment of the child.[85] A parent may also be adjudicated as neglectful if they fail to exercise a minimum degree of care in providing the child with proper supervision or guardianship or by inflicting or allowing to be inflicted harm or a substantial risk thereof.[86] For removal, the party bringing the neglect allegations must prove that removal is necessary to avoid imminent risk to the child's life or health.[87]

Scholars suggest that such legislation stems from state concerns about the negative impacts of a child's exposure to domestic violence.[88] The legislative history of the New York law mandating court consideration of proven domestic violence is especially demonstrative; the history cites studies indicating that children exposed to domestic violence are at risk of developing anxiety, depression, low self-esteem, developmental difficulties, and socialization difficulties. The legislative history emphasizes that children who live in a climate of domestic violence learn to use physical violence as an outlet for anger and are more likely

79. Resource Ctr. on Family Violence: Child Prot. and Custody, a project of the Family Violence and Domestic Relations Program of the Nat'l Council of Juvenile and Family Court Judges, Domestic Violence as a Factor to Be Considered in Custody/Visitation Determinations (2013).

80. Resource Ctr. on Family Violence: Child Prot. and Custody, a project of the Family Violence and Domestic Relations Program of the Nat'l Council of Juvenile and Family Court Judges, Children's Exposure to Domestic Violence Constitutes Child Abuse And/Or Neglect (2014).

81. The "Failure to Protect" Working Group, *supra* note 4, at 850 (citing 1996 N.Y. Laws ch. 85 § 1; N.Y. Dom. Rel. Law § 240(1) (McKinney 1996)).

82. *Id.*

83. *Id.* at 851–52 (citing N.Y. Fam. Ct. Act § 1012 (McKinney 1998)).

84. N.Y. Fam. Ct. Act § 1012(f) (McKinney 1998).

85. N.Y. Fam. Ct. Act § 1012(f)(i)(A) (McKinney 1998).

86. N.Y. Fam. Ct. Act § 1012(f)(i)(B) (McKinney 1998).

87. The "Failure to Protect" Working Group, *supra* note 4, at 851.

88. *Id.* at 850–51 (citing 1996 N.Y. Laws ch. 85, at 121).

to use violence to solve problems throughout their lives.[89] However, it is possible that domestic violence advocates could never have foreseen that the FCA would lead to "failure to protect" decisions in which battered mothers, not their abusers, are adjudicated as having neglected their children.[90]

Procedure on the investigation and removal of children based on allegations of neglect through possible exposure to domestic violence varies state by state, but New York's system may offer an example. In New York, the state's child welfare division has a responsibility to investigate reports of neglect or abuse to determine whether the report is "indicated"; if so, this body must determine whether the children are in imminent risk of harm and thus should be removed from the home.[91] In the domestic violence context, child welfare workers have no guiding standards as to when to remove a child from a home based on a mother's perceived inaction and are not trained in how to assess domestic violence cases; as a result, scholarship suggests that responses to domestic violence cases are inconsistent and vary from worker to worker. New York law requires the welfare division to offer services to the mother before removing children from the home, such as a safety plan for the mother and children, arrangements to stay at a shelter, or an order of protection. However, some scholars suggest that children are too often removed before any effort is made to provide such services; sometimes, such services may also not be safe or available options, depending on the facts of a given case.[92]

Some scholars point to a case called *In Re Lonell J.* as the seminal case shaping the development of child welfare cases in which domestic violence is implicated as the means of neglect.[93] In that case, a New York appellate court considered whether an infant and toddler were neglected based on a pattern of domestic violence between parents in the presence of the children.[94] There, evidence on the record demonstrated that the father beat the mother in front of the children, that the mother complained to a caseworker that the father was raping her, that the police had been called on several occasions, and that an order of protection was issued at one point.[95] The court in *Lonell* ruled that the catch-all provision of § 1012 of the Family Court Act "clearly contemplates that the instances of neglectful behavior mentioned therein are not an exclusive list."[96] That court rejected prior decisions holding that removal of a child who had witnessed domestic violence could only occur when the child was placed in imminent risk of physical impairment and also rejected decisions relying on expert testimony to demon-

89. *Id.* (citing 1996 N.Y. Laws ch. 85, at 121).
90. *Id.* at 851.
91. The "Failure to Protect" Working Group, *supra* note 4, at 855.
92. *Id.* at 855–56.
93. *Id.* at 852.
94. *See* In re Lonell J., 673 N.Y.S.2d 116 (N.Y. App. Div. 1998).
95. *Id.* at 116–117.
96. *Id.* at 117.

strate the harm done to the children.[97] Ultimately, the *Lonell* court concluded that the mother in question was not "willing to take the child away from the abusive father," although the court did not elaborate as to what "taking the child away" meant. Finally, the court reasoned that to fail to hold that abuse in the presence of children constitutes neglect would be synonymous with holding that domestic violence is necessarily less serious than substance abuse. The court thus found that domestic violence between parents in the presence of their children may be sufficient to establish neglect under the Family Court Act, even absent expert testimony, and remanded the case for proceedings to determine an appropriate remedy that would further the child's best interests.[98]

A later case, *Nicholson v. Scoppetta*, appears to undercut *Lonell*'s ruling. In *Nicholson*, a class of mothers and children brought suit under § 1983, challenging the constitutionality of their city's policy of removing children from mothers' custody solely on the ground that the mothers had failed to prevent the children from witnessing domestic violence against the mothers.[99] In that case, the court held that evidence that a caretaker allowed a child to witness domestic abuse against the caretaker is insufficient, without more, to satisfy the statutory definition of a neglected child, and that emotional injury arising from witnessing domestic violence can rise to a level that justifies the removal of a child, but that the witnessing itself does not give rise to any presumption of injury.[100] The court in that case also specifically stated that the court did not read *Lonell* "as supportive of a presumption that if a child has witnessed domestic violence, the child has been harmed and removal is appropriate. That presumption would be impermissible."[101]

While *Nicholson* seems to suggest that the filing of § 1983 suits may be a possible solution to the problem of failure to protect custody decisions, it fails to adequately address many existing neglect regimes. For instance, Connecticut's abuse and neglect statute states,

> The State of Connecticut finds that family violence can result in abuse and neglect of the children living in the household where such violence occurs and the prevention of child abuse and neglect depends on coordination of domestic violence and children protective services. The Commissioner of Children and Families may consider the existence and impact of family violence in any child abuse investigation and may assist family members in obtaining protection from family violence.[102]

Notably, the Connecticut statute contains no requirement that the child witness or be exposed to the violence at all. While other states, such as Delaware, include requirements in their statutes that the child must witness the violence or be exposed to it through sight or sound,

97. *Id.* at 117–118.
98. *Id.* at 116–119.
99. *See* Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004).
100. *Id.* at 840.
101. *Id.* at 855.
102. CHILDREN'S EXPOSURE TO DOMESTIC VIOLENCE CONSTITUTES CHILD ABUSE AND/OR NEGLECT, *supra* note 80.

other states, like Connecticut, Montana, and Washington, carry no such requirement. Washington broadly defines "negligent treatment" as "an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences."[103] Montana's statute is equally broad, stating that a "child in need of protection or services . . . is one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home."[104] Therefore, several states define neglect so broadly that even a child who has not been physically exposed to domestic violence may be considered to be neglected by a non-abusive parent, and as a result, *Nicholson* appears to inadequately solve the problem full-stop.

There are several reasons why "failure to protect" custody decisions adversely affect both the victim and the children. First, the removal of children from their homes is extremely detrimental to their well-being; second, such decisions serve to disincentivize parents who are victims of domestic violence from seeking the help they need; third, such decisions directly contradict the principle laid out in *Stanley*; fourth, and most importantly, the Supreme Court's holding in *Castle Rock* taken in combination with such "failure to protect" custody decisions creates a system in which victims may be punished for failure to protect their children while law enforcement are almost never held accountable for their failure to protect victims. This creates an impossible situation for victims of domestic violence who wish to maintain custody of their children and simultaneously protect themselves and their children from harm.

While removing children from a home where domestic violence has occurred does appear to be a viable short-term approach to protecting children from harm, evidence suggests that removal often has severe consequences for the children and the family unit.[105] Scholarship points to studies showing that upon removal, reunification is unlikely, and the entry into foster care can pose substantial risks to the child.[106] For instance, children in foster care are placed at a 75% higher risk of mistreatment, become twice as likely to *die*, and are four times as likely to be sexually abused; other risks include health problems, inadequate medical care, behavioral problems, and emotional problems. In addition, removal from the home may be particularly emotionally harmful for children who have been exposed to domestic violence. Compared to other children, they tend to perceive their world as "unpredictable and unsafe"; thus, removing them from the home they know may be more traumatic for them.[107] Therefore, while children who are exposed to domestic violence do face real risks by remaining in the family home where the violence has occurred, they

103. *Id.*
104. *Id.*
105. Lindauer, *supra* note 4, at 811.
106. *Id.* at 811.
107. *Id.* at 811–12.

are exposed to perhaps even more serious harms and increased emotional trauma if they are removed from the custody of a non-abusive parent.

One of several ominous consequences of our civil system's punishment of battered mothers through "failure to protect" custody decisions is that such decisions discourage battered mothers from seeking the services they need to escape domestic violence.[108] Evidence suggests that when social service organizations identify domestic violence as an indicator of child abuse, child abuse reports increase and the number of battered women seeking services decreases.[109] Such a system has the potential to put battered mothers in fear of mandated reporters such as social workers, teachers, doctors, or the police—all actors who, in a perfect world, have the potential to help domestic violence victims seeking protection.[110] As a result, "failure to protect" regimes not only fail to solve the initial problem of the abuse by failing to remove the abuser himself from the home or from the victim's life, but also have a chilling effect on victims' willingness to seek assistance from very important state actors for fear of implicating themselves in a possible child welfare proceeding.

"Failure to protect" custody decisions also directly contradict the premise laid out in *Stanley*, which mandates individualized findings of parental unfitness before a child can be removed from the custody of any parent. Such decisions are inconsistent with *Stanley*'s assertion that the state must prove that a parent neglected or abused their child in order for custody to be removed, because charging battered mothers with "failure to protect" implies that by preventing violence against themselves, they have, by proxy, neglected their children.[111] The *Stanley* decision stands for the proposition that parents have a constitutional right to an individualized determination of parental fitness before parental rights may be terminated. While many custody removals do not ultimately result in the termination of parental rights, the importance of the right to parent one's children as vindicated by *Stanley* demonstrates that removal decisions based on "failure to protect," a doctrine that punishes an innocent parent for the abuse of another, flies in the face of Supreme Court precedent.

Finally, "failure to protect" custody decisions place victim mothers in an impossible situation given our criminal and civil system's inadequate abilities to protect victim mothers in turn. If an abuser attacks a victim who has children, say in violation of a restraining order, she is faced with a set of choices. She can call the police, who may do one of two things. Given the *Castle Rock* decision, which vindicated police discretion in responding to restraining orders even in the face of seem-

108. The "Failure to Protect" Working Group, *supra* note 4, at 849.

109. *Id.* at 857.

110. *Id.* ("The policy of removing children from battered mothers can be interpreted to mean that any time a battered mother goes to a social worker, talks to her children's teacher, goes to her doctor or calls the police to report domestic violence, she may be placing the custody of her children in jeopardy.").

111. *Id.* at 849.

ingly mandatory statutory language, the police may not do anything at all. The Supreme Court has squarely decided that at least constitutionally speaking, they will not be held accountable for their inaction. Or, the police may respond to the scene. In that case, the victim may be placed in a position where state actors entering her home take note of the fact that her children were present while the abuse took place, potentially exposing her to involvement with a local child protection agency that may seek to have custody removed. Not wanting to subject herself and her family to custody court involvement, the victim may decide not to report her abuse, running the risk of injuring herself in the process. This impossible choice reflects a vast misunderstanding on the parts of the courts and legislatures as to why victims of domestic violence stay with their attackers.

Put most simply, for domestic violence victims, the decision to leave their attacker can be dangerous in and of itself.[112] First, as discussed *supra*, one of the most dangerous times for a woman in an abusive relationship is the time in which she and her children leave the batterer, because the batterer becomes more likely to stalk, harass, or even kill. In addition, women who choose to leave their abusers may find themselves dislocated or even homeless and with potentially impacted financial resources. For instance, in one 12-month period in the late 1990s, New York City's Victim Services Agency received 34,175 requests for domestic violence shelter, as well as an average 38.2 unduplicated requests for shelter every single day, while the average availability of the shelter was roughly 11 spaces.[113] In addition, research demonstrates that the majority of parents involved in child welfare cases are indigent; this, coupled with the fact that approximately one-third of battered women lose their jobs as a direct result of abuse, demonstrates that the abuse of women is a serious form of economic control over women.[114]

Instead of taking into account the physical, emotional, and financial challenges faced by domestic violence victims considering cutting ties with an abuser, our system punishes victims for their failure to find their way out of toxic relationships by removing child custody. Often, child welfare agencies ignore the fact that a woman has taken one of the most (theoretically) effective steps towards ending the abuse and her contact with the abuser when she obtains a restraining order. In *Lonell*, the Court noted that at one point during the cyclical abuse that the mother in that case endured, the mother obtained an order of protection; however, in the same breath, the Court implied that the mother in this case was not "willing" to "take the child away from the abusive father."[115] This sends the message that even if a mother does decide to obtain a restraining order, and even if the police do enforce it, that this may not be enough to prevent the removal of her children

112. The "Failure to Protect" Working Group, *supra* note 4, at 858.
113. *Id.* at 859.
114. Lindauer, *supra* note 4, at 815–16.
115. *In re Lonell J.*, 673 N.Y.S.2d at 117–18.

based on a perceived "failure to protect." Therefore, our child welfare system's imposition of negligence-based "failure to protect" legislation and common law makes our civil system's already inadequate restraining order regime even more unworkable.

III. Proposed Remedies to the Catch-22 Experienced by Battered Mothers

Because our current regime's approach to the intersection of domestic violence and child welfare is murky, scholarship is not well settled as to what constitutes the most effective remedy. However, in order to combat the "Catch-22" imposed by failure to protect jurisprudence and *Castle Rock*'s limiting of available remedies to domestic violence victims harmed by police inaction, three possible improvements to our civil system may be effective: increasing the strength of mandatory enforcement restraining orders, re-defining our system's conception of neglect, and the effective training of police in the dynamics of domestic violence relationships.

First, increasing both the implementation and forcefulness of mandatory arrest statutes for restraining orders may be very effective at separating victims from their attackers, thus increasing the victim's safety and decreasing her likelihood of becoming involved in state-initiated custody proceedings. Some scholars argue that mandatory arrest laws are the best approach because they deter offenders and increase domestic violence arrests by eliminating police discretion without necessarily changing police perception towards arrest.[116] Other scholars emphasize the importance of mandatory arrest statutes in terms of their ability to overcome the cycle of violence; these scholars point to the increased likelihood of violence in the immediate aftermath after a victim takes action as one of the reasons why mandatory arrest statutes are so important. When a victim takes legal action, her attacker may retaliate based on a perception that his relationship, and thus, his control over the victim are coming to an end. Therefore, mandatory arrest statutes are thought to greatly protect a victim's safety in the vulnerable time period after a victim chooses to take action. In fact, a majority of states employ mandatory arrest statutes.[117] However, in *Castle Rock*, the Supreme Court undermined the original intent of state mandatory arrest legislation by holding that the restraining order statute at issue did not mandate arrest, despite the fact that lower courts had interpreted otherwise.[118] Some commentators argue that in effect, the *Castle Rock* decision prohibits state legislatures from creating mandatory enforcement provisions because the Court held that even though the plain language of the Colorado statute mandated enforcement, the statute created no *entitlement* to enforcement.[119] This, however, does not

116. Metusalem, *supra* note 30, at 1055.

117. Cambria, *supra* note 53, at 162–65.

118. Metusalem, *supra* note 30, at 1055; Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005).

119. Smiertka, *supra* note 34, at 115–16.

make mandatory arrest statutes completely unworkable; in light of *Castle Rock*'s holding, mandatory arrest statutes may be made more powerful by including stronger language to give law enforcement a more "clear direction" and by including increased penalties for violation of a restraining order.[120] In *Castle Rock*, the majority opined that the language in the Colorado statute stating that officers "shall arrest" an individual violating a restraining order was not strong enough to trigger a mandatory arrest.[121] Therefore, advocates of mandatory arrest laws suggest that states adopt language similar to Alaska's statute, which is entitled "[m]andatory arrest for crimes involving domestic violence, violation of [restraining] orders, and violation of conditions of release," or Nevada's, which states, "[e]very temporary or extended order must include a provision ordering any law enforcement officer to arrest an adverse party if the officer has probable cause to believe that the adverse party has violated any provision of the order"; these statutes clearly remove the officer's discretion in deciding whether or not to make an arrest for violation of an order, thereby making arrest mandatory.[122]

Critics of mandatory arrest laws object to their implementation on a number of grounds—a chief concern being that such laws interfere with the autonomy of victims.[123] Such critics argue that such laws fail to consider victim preferences with regard to arrest in situations in which many women do not actually want their husbands or partners to be arrested, even if they do seek police intervention.[124] Critics of mandatory arrest also argue that mandatory arrest laws result in an increase in the number of women arrested and pose special problems for mothers.[125] States with mandatory arrest laws experience a rate of female arrests as high as 30% due to police inability to identify the initial or primary aggressor. Importantly, mandatory arrest policies may create particular difficulties for women with children living in the home; in those situations, compulsory state involvement may implicate the policies of child protection organizations who have expanded their definitions of child abuse to include situations in which children reside in a home in which an incident of domestic violence has occurred.[126] In this way, mandatory arrest may be an imperfect solution for victim mothers living in states with strong failure to protect regimes.

Proponents of mandatory arrest would counter that mandatory arrest statutes have the opposite effect, in that they actually empower women by providing a mechanism that circumvents abuse cycles in which women are isolated and manipulated so severely that they are unable to take affirmative steps in having their abusers arrested. Advocates of mandatory arrest argue that such regimes can renew a victim's

120. Metusalem, *supra* note 30, at 1055.
121. *Id.* at 1058; *See also Town of Castle Rock*, 545 U.S. at 760.
122. *See* Metusalem, *supra* note 30, at 1059–60 (emphasis omitted).
123. *Id.* at 1056–57.
124. Zelcer, *supra* note 10, at 548.
125. *Id.* at 550–51.
126. *Id.* at 551.

self-esteem by helping her to realize that her community cares about her safety in light of the social message such regimes send that domestic violence is a crime that will not be tolerated.[127] Strong arguments survive both in favor of and against mandatory arrest statutes. On one hand, strengthening mandatory arrest laws takes away the discretion that the *Castle Rock* decision read into the Colorado restraining order statute in order to justify the inaction of the Castle Rock police department. On the other hand, mandatory arrest laws may be too cumbersome and too broad to effectively deal with the diverse nature of domestic violence cases, and may invite state involvement in situations in which such involvement may result in severe collateral damage, such as the loss of custody of the victim's children.

Some critics of mandatory arrest restraining order statutes advocate instead for "preferential arrest" regimes.[128] Preferential arrest laws contain language indicating that the state expects an arrest to occur in certain circumstances by restricting police discretion but allowing the police to retain some discretion. Preferential arrest statutes are designed to take into account the fact that domestic violence incidents vary from situation to situation, and that victim responses in turn vary based on different arrest policies.[129] One example of such a law is California's statute, which states,

> (a) Every law enforcement agency in this state shall develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls by January 1, 1986. These policies shall reflect that domestic violence is an alleged criminal conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred.
>
> (b) The written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed.[130]

However, this Author would submit that such statutes do not withstand the weight of the *Castle Rock* opinion. *Castle Rock* held that a statute containing much stronger language did not mandate arrest and thus did not create an entitlement to enforcement; on those grounds, the majority effectively destroyed available civil remedies for domestic violence victims harmed by an abuse of any perceived police discretion. In this Author's opinion, increasing the strength of mandatory arrest statutes may be very effective at protecting domestic violence victims and their children; however, such an implementation may increase state involvement in victims' lives, creating increased exposure to mandated reporters. This, in turn, may be an unworkable solution in

127. Cambria, *supra* note 53, at 165.
128. Zelcer, *supra* note 10, at 554.
129. *Id.*
130. *Id.* at 554–55 (citing CAL. PENAL CODE § 13701 (West 2012)).

regimes in which negligence broadly encompasses the failure to protect one's children from domestic violence.

Second, some scholarship suggests that a complete overhaul of our civil system's conception of neglect is needed in order to simultaneously protect victim parents and maintain the family unit. Some scholars point to a guide called the Greenbrook Initiative as a potential means of helping end the trend of "failure to protect" jurisprudence. The Greenbrook Initiative aimed to assist child welfare agencies, domestic violence service providers, and juvenile courts in collaborating to effectively respond to families dealing with domestic violence.[131] As part of the Initiative, the Department of Justice together with the U.S. Department of Health and Human Services granted financial and other support to six communities with differing needs and demographics in order to implement a series of recommendations over a five year period. The Initiative explored three areas of systemic change: "philosophical approach to co-occurrence, screening and assessment, and case planning and service array for adult victims of domestic violence and domestic violence perpetrators."[132]

Though the Initiative was first experimented with over a decade ago, the goals and objectives of the initiative may serve as a helpful model in structuring future reforms. Specifically, the Initiative recognized some of the most important legal challenges created by the intersection of domestic violence and child welfare. First, the Initiative recognized that a battered mother's decision to remain with her abuser is a more nuanced question than whether or not she is comfortable with placing her children in potential danger. For instance, the Initiative's Recommendations state,

> Many people frequently ask, "Why do battered women stay when this places them and their children in jeopardy?" This question misses the way battered women calculate their risks and make decisions about their lives. The questions a battered woman may ask herself are more complete, such as: "If I leave, will the violence be worse?" "Should I leave and place myself and my children in poverty?"[133]

As a result of an understanding of the impossible situations in which battered mothers find themselves, the Recommendations emphasize that broad, blanket rules of general applicability cannot adequately address the diverse array of domestic violence cases, recognizing that the abuse will always vary in degree and severity. The Recommendations point out that in some jurisdictions, domestic violence is automatically considered to pose a serious risk to the child and thus warrants the

131. Lindauer, *supra* note 4, at 813.

132. *Id.* at 813–14 (citing Duren Banks et. al., *Changing Policy and Practice in the Child Welfare System Through Collaborative Efforts to Respond Effectively to Family Violence*, 23 J. INTERPERSONAL VIOLENCE 903, 906 (2008)).

133. SUSAN SCHECTER AND JEFFREY L. EDLESON, ET AL., EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES FAMILY VIOLENCE DEPARTMENT 11 (1999).

opening of a protection case, while in other jurisdictions, domestic violence is rarely considered to present a child protection risk at all; the Recommendations condemn both of these responses as inadequate. Instead, the Recommendations encourage jurisdictions to avoid the creation of a child protection system that simply removes more and more children for their own safety by working towards three core values: creating safety, enhancing well-being for children and adults, and building permanency and stability for children. This emphasis on "permanency and stability" reflects a recognition by the Greenbrook Initiative that children function best if they remain safely with their families.[134] As a way to ensure stability and permanency, the Recommendations encourage child welfare administrators and juvenile court personnel to try to keep children affected by maltreatment and domestic violence in the care of their non-offending parent whenever possible; they also encourage communities to design service systems that entitle any adult or child victim to receive help with *or without* opening a child protection case.[135] In order to balance the important, but at times, juxtaposed goals of safety and stability, the Recommendations suggest two types of interventions that help battered adults and remove risks to children exposed to violence: 1) remove risk caused by the perpetrator of violence through means tailored to the specific facts of each case, including but not limited to arrest, batterer intervention programs, protective orders, monitoring of compliance with court orders, substance abuse treatment, and fatherhood classes; and 2) further safety and stability for victims and children through tailored means, including but not limited to housing and financial support services, transportation, childcare, job training, child support, custody and visitation orders, and help from domestic violence advocates.[136] Scholarship suggests that the findings of the Greenbrook Initiative were varied, based on its report.[137] Although tangible results of the Initiative seem hard to pin down or identify, successful collaboration was identified as one of the Initiative's successes. Though data collection for the initiative ended in 2006, several sites continued the Initiative on their own using rollover funds from the grants.[138] Therefore, while the measurable successes of the Greenbrook Initiative may have yet to be seen, this Author would submit that the goals and objectives of the Initiative may serve as a very helpful model for future reforms.

A more legally concrete approach towards effectively addressing the intersection of domestic violence and child welfare would be through legislation geared at protecting battered mothers from presumptions of neglect. For example, one legislative approach is a "battered woman defense" such as the one proposed in 1994 by a New York State assemblyman that amended the definition of neglect to provide a defense that the parent had "a reasonable expectation, apprehension

134. *Id.* at 19–22.
135. *Id.* at 14–15.
136. *Id.* at 20.
137. Lindauer, *supra* note 4, at 814.
138. *Id.*

or fear that acting to stop or prevent such abuse would result in substantial bodily harm to parent or other person legally responsible for the care of the or to the child."[139] The amendment also would have permitted the parent to put on expert testimony showing their inability to protect the child was due to a reasonable expectation, apprehension, or fear that preventing or stopping the alleged abuse or neglect would result in physical injury to the subject child or respondent.[140] Other proposed legislative solutions emphasize the provision of services to domestic violence victims.[141] Either way, because existing laws such as the Family Care Act are vague enough to permit courts to engage in "failure to protect" jurisprudence, an effective way of combating the broad and permissive language allowing courts to view victimhood as a form of negligence may be through enacting specific legislation.

Finally, some scholars suggest that training police to better understand the dynamic inherent to abusive relationships may help protect victims and their children. For instance, the Civil Protection Orders Improvement Guide's strategies for responding officers spells out several ways for such officers to prioritize effective enforcement.[142] The Guide encourages officers to arrest violators of protection orders when the respondent has constructive knowledge of the order, unless state law requires verification of service and enforce the protection order if it is valid on its face.[143] These measures alone do not appear to ask much more of the responding officer than to comply with state law with respect to restraining orders; however, the Guide does encourage several other strategies that go above and beyond the statutory guidance included on most protection orders. For instance, the Guide encourages officers to take measures to combat jurisdictional issues often associated with the enforcement of protection orders when custody is at issue; the Guide encourages officers to enforce custody provisions in out-of-state and tribal orders even if the officer's state statutes do not provide for awards of temporary child custody within protection orders by referring victims to appropriate court or advocacy agencies, considering arresting the respondent for parental kidnapping or interference with custody (if applicable), and working directly with other applicable jurisdictions when enforcing custody provisions in protection orders. In addition, it suggests that officers examine the context and history of the abuse in parental kidnapping cases, to refrain from leaving the scene without referring the victim to available resources, to document violations of protection orders even when they may not constitute an arrest-able offense, to build a stalking or sexual assault case when appropriate, to recognize that individual violations may be part of a larger pattern, and to explore with the victim ways that law enforcement can help increase her safety. In addition, this Guide, written by law

139. The "Failure to Protect" Working Group, *supra* note 4, at 866 (citing A. 11870, 208th Sess. N.Y. (1994) (amended 1999)).

140. *Id.* at 866.

141. *Id.* at 866–87.

142. MEYER, *supra* note 22, at 14.

143. *Id.*

enforcement officers, also lays out strategies not just for responding officers but for department leaders in order to strengthen effective enforcement of orders; those strategies include developing protocols that clearly direct officers to arrest respondents for probable cause violations of protection orders as required or permitted under state law, developing protocols for prompt service of related arrest warrants, and facilitating officer access to databases and registries so that they can obtain the full text of protection orders and the status of service 24 hours a day.[144]

However, scholars point to studies indicating that 98% of police academies offer domestic violence training to officers for an average of only 12 hours, paling in comparison to other components of police training; in addition, only about half of police departments in the country require specialized training for call dispatchers.[145] But, despite these obvious imperfections, proponents of officer training as a solution suggest that this approach has the potential to be effective if officers are trained in some of the more complicated aspects of domestic violence calls, such as uncooperative parties, mutual combatants, alcohol or drug involved violence, and violations of protective orders. In addition, partnerships between police departments and victim advocacy groups may prove to be a valuable means of confronting challenges such as institutionalized racism and sexism, inadequate federal and state funding, and problems within police culture; as of 2013, approximately 65% of police departments had partnered with victim advocacy groups.[146] However, while adequate officer training certainly has the potential to improve on-the-ground officer responses to domestic violence calls, the current prevalence of domestic violence in the United States will require a much more comprehensive effort.

Conclusion

Clearly, domestic violence is an epidemic problem in the United States. While our criminal justice system has made a broad effort to address the problem through criminalizing what historically was considered as a matter of private concern, the prevalence of domestic violence demonstrates that the system's response has been imperfect. In addition, law enforcement attitudes towards domestic violence reflect a perception that domestic violence cases are low-priority. Specifically, cases such as *Castle Rock* demonstrate two sobering truths: 1) police failure to enforce restraining orders is a very real problem with devastating consequences; 2) with no civil remedy in federal court for non-enforcement, victims of police inaction stand little to no chance of having their rights to the enforcement of orders designed to protect them vindicated.

Our civil system's failure to vindicate the rights of domestic violence victims is problematic in and of itself. This is circular: domestic violence victims enjoy little to no civil remedy when law enforcement

144. *Id.* at 14–16.
145. Zelcer, *supra* note 10, at 556.
146. *Id.* at 556–57.

officers literally *fail to protect* them through failure to uphold and enforce protection orders, allowing batterers to continue their abuse, yet the same victims may be punished by our child welfare system for *failing to protect* their children when they remain in abusive relationships. This cyclical system sends a message to battered mothers that society does not care about protecting them, but will take every reasonable step to prevent their children from being exposed to the abuse that society allows to continue.

If we are to protect victims of domestic violence from further abuse and work towards keeping the family unit intact, our system must change.