

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"

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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.

—*Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117
(10th Cir. 2004) (en banc), *rev'd*, 125 S. Ct. 2796 (2005).

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I. INTRODUCTION

Section I of the majority opinion in *Town of Castle Rock v. Gonzales*¹ starts with the following statement:

The horrible facts of this case are contained in the complaint that respondent Jessica Gonzales filed in Federal District Court. . . . Respondent alleges that petitioner . . . violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution when its police officers, acting pursuant to official policy or custom, failed to respond properly to her repeated reports that her estranged husband was violating the terms of a restraining order.²

Subsequently, Ms. Gonzales’s estranged husband killed their three daughters and drove, with their bodies in the cab of his pickup truck, to the police station; once there, he opened fire on the police, who returned fire and killed him.³ Sadly, incidents such as this are not uncommon.⁴

In 1994, Colorado joined a wave of states that enacted legislation to address this very problem:⁵ death and injury to victims of domestic

1. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

2. *Id.* at 2800 (footnote omitted).

3. *Id.* at 2802.

4. See Am. Bar Ass’n Comm’n on Domestic Violence, <http://www.abanet.org/domviol/stats.html> (last visited Feb. 28, 2006) [hereinafter ABA Comm’n] (“[I]n 1994, 38% of domestic homicides were multiple victim, usually combining a spouse homicide and suicide, or child homicide.”).

5. Justice Stevens noted in his dissent that nineteen states “mandated arrest

violence caused in part by the custom of police to avoid the enforcement of restraining orders.⁶ The Colorado General Assembly passed legislation targeting domestic violence in general and the mandatory enforcement of restraining orders in particular.⁷ Section 18-6-803.5(3) of the Colorado Revised Statutes states in 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.

for domestic restraining order violations” in 1994. *Castle Rock*, 125 S. Ct. at 2818 (Stevens, J., dissenting). Another commentator puts the more recent number of states that have enacted mandatory arrest statutes for violating protection orders at twenty-four. Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 9 (2005); see also NEAL MILLER, INST. L. & JUST., DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 31 (2004), http://www.ilj.org/publications/DV_Legislation-3.pdf (identifying thirty-one states, including legislation up to 2003). Currently, there are thirty-five states and territories that mandate enforcement and thirteen states that make enforcement discretionary. See *infra* Appendix (listing each state’s legislation pertaining to arrests for the violation of restraining or protection orders). Five states do not have clear legislation on the issue. See *infra* Appendix.

6. One of the most important factors leading to the development of mandatory arrest laws is the consistent dismissive attitude that police have displayed toward domestic violence. Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 541–43 (1996). Every state now allows police officers to make an arrest without a warrant when the officer has probable cause to believe that domestic violence has occurred. Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1854 & n.39 (2002) (indicating that Alabama and West Virginia, the last two states to “prohibit warrantless arrest in misdemeanor domestic violence cases,” now permit warrantless arrest); see also Wanless, *supra*, at 541. “However, police officers have made little use of their expanded arrest power. Even when probable cause is clearly present, police officers still frequently try to calm the parties and act as mediators.” *Id.* at 541 (footnote omitted). Further, Wanless refers to three studies that have shown that arrest records are very poor when there are no policies or laws mandating arrest. *Id.* at 541–42. These studies found that when the decision was left to the police, the arrest rate ranged between 3% and 10%. *Id.* In one of the studies, “police made arrests in only 13% of the cases where the victim had visible injuries.” *Id.* at 542. Still another study found that police made an arrest in only 14% of the cases where the victim requested an arrest; another study put the figure at 39%. *Id.* The most fundamental reason for the laws is the tragic number of deaths and injuries to women and children, due in part to the ineffectiveness of prior forms of intervention and to the dismissive attitudes of the police. *Id.* at 540–42, 545–46; see also ABA Comm’n, *supra* note 4 (presenting statistics about domestic violence relating to women and children).

7. Act of May 31, 1991, ch. 76, 1991 Colo. Sess. Laws 418 (codified as amended at COLO. REV. STAT. § 18-6-803.5 (2004)).

(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:

(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 order.⁸

The statute not only identifies the police as having a duty to enforce the protection order but also identifies the beneficiary of the order. Subsection (1.5)(a) identifies the “protected person” as “the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.”⁹

In effect, the Colorado General Assembly has forged a “special relationship” between the police and those who have obtained restraining orders, creating duties for the police to enforce restraining orders and a right or entitlement for those who have obtained orders to have them enforced. This alters the common law distribution of entitlements and duties; 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.¹⁰ Under the common law, the police have no duty to come to a person’s aid unless there is this special relationship.¹¹ This can be summarized by the idea that the police owe a general duty to everybody, and with a few exceptions, they owe it to nobody.¹² As paradoxical as this sounds, the

8. COLO. REV. STAT. § 18-6-803.5(3)(a)–(b) (emphases added).

9. *Id.* § 18-6-803.5(1.5)(a).

10. *See DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 196, 199–200 (1989) (stating the common law rule “that the Due Process Clauses generally confer no affirmative right to governmental aid” and providing exceptions “when the State takes a person into its custody and holds him there against his will”); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005).

11. RESTATEMENT (SECOND) OF TORTS §§ 314A, 323 (1966); *see also* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R. 5TH 273 (2001).

12. *See Riss v. City of New York*, 240 N.E.2d 860, 862 (N.Y. 1968) (Keating, J., dissenting).

public duty rule works to defeat claims by specific individuals absent a special relationship establishing a specific duty to the plaintiff or the plaintiff's class.¹³

Traditionally, special relationships are limited to those cases in which the police have committed to taking action on behalf of the particular plaintiff¹⁴ or those in her class.¹⁵ One way of overcoming the general duty doctrine and creating a special relationship is through a statute that imposes a special duty on the entity for a particular class of persons.¹⁶

This is what the Colorado General Assembly did.¹⁷ The point of the legislation was to remove the discretion of the police to either enforce or ignore the court orders and to make them something more than just a "sham" or "a cruel deception."¹⁸ The legislation and the court order were

13. The public duty doctrine extends beyond police duties to all public entities. D. DOBBS, *THE LAW OF TORTS* § 271, at 723 (2003). Exceptions can be found when the conduct in question is not merely negligent but reckless, intentional, or egregious, or when the entity induces reliance by the plaintiff, stands in a special relationship to either the wrongdoer or the victim, and the entity is guilty of a misfeasance (negligent action) rather than a nonfeasance (negligent omission). *See id.* at 724–27. Professor Dobbs refers to recent case law in a few states that have rejected the public duty doctrine, including Alaska, Arizona, Colorado, Florida, Louisiana, Massachusetts, Nebraska, New Mexico, Oregon, and Wisconsin. *Id.* at 725–26 n.23. In many of these cases the courts noted that the public duty rule was a form of immunity and thus, should not survive when immunity has been abrogated. *Id.*

14. *Williams v. State*, 664 P.2d 137, 140 (Cal. 1983) (“[W]hen the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization.”); *see, e.g., Morgan v. County of Yuba*, 41 Cal. Rptr. 508, 510 (Dist. Ct. App. 1964) (stating the cause of action as “the negligent omission to perform an act voluntarily assumed” where police failed to keep their voluntary promise to inform plaintiff’s wife of the release of a prisoner who had threatened to kill her and when released did kill her). The rule has been characterized as an application of the “good Samaritan” rule that attaches once one volunteers to assist. *See Davidson v. City of Westminster*, 649 P.2d 894, 900 (Cal. 1982) (citing RESTATEMENT (SECOND) OF TORTS §§ 323–24).

15. *See, e.g., Florence v. Goldberg*, 375 N.E.2d 763, 767 (N.Y. 1978) (noting that “the police department voluntarily assumed” the specific duty to guard a school crossing and, without notice, failed in that duty).

16. DOBBS, *supra* note 13, at 724. Dobbs also refers to statutes creating a duty to investigate and report child abuse. *See id.*

17. *See supra* notes 7–9 and accompanying text.

18. *See Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1104 (10th Cir. 2004) (en banc) (interpreting the statute’s imposition of duties on peace officers), *rev’d*, 125 S. Ct. 2796 (2005); *id.* at 1117 (“[The police officers’] response, in other words, was a sham which rendered her property interest in the restraining order not only a nullity,

designed to clarify that in addition to their general public duties, the police have specific duties to a certain class of individuals covered by the legislation and to the particular person specified in the court order.¹⁹ The idea was to forge a special relationship with a class of people that the police historically have wanted to avoid.²⁰ Thus, at last, those who had obtained restraining orders could count on being protected, and an era of arbitrary enforcement was to come to an end. Yet last term, the United States Supreme Court essentially rewrote the Colorado law and undid its protections by removing any prospect for a constitutional remedy for those directly harmed by police officers' arbitrary decisions to violate the law by not enforcing restraining orders.²¹

Ms. Gonzales sued under 42 U.S.C. § 1983 claiming violations of the Fourteenth Amendment Due Process Clause, and arguing that the City of Castle Rock and its police department should not be allowed to arbitrarily deprive her of the rights the legislature gave to people in her class and to her personally—namely, the right to the enforcement of a restraining order when both the statute and the court order state that enforcement is mandatory.²² In other words, this case is not about whether the police were

but a cruel deception.”). As noted by the circuit court, the property right held by Ms. Gonzales was not created by the abstract legislative process which brought the legislation into being, but by the “order issued by a court on behalf of a particular person and directed at specific individuals and the police.” *See id.* at 1104 n.9.

19. *See supra* note 18 and accompanying text.

20. *See* Heather C. Melton, *Police Response to Domestic Violence*, 29 J. OF OFFENDER REHABILITATION 1, 1 (1999), available at <http://www.crab.rutgers.edu/~goertzel/CJreadings/PoliceDomesticViolence.pdf> (“Historically, police response has been severely limited and confined to a policy under which officers ended up chronically distancing themselves from a task they felt did not belong under their jurisdiction.”). The reasons for the avoidance include sexist attitudes, the view that domestic violence is a purely private matter, the resistance the police encounter from perpetrators and victims, the danger for police responding to domestic calls, and the fact that the police are often ill-equipped to mediate or counsel perpetrators and victims. *See id.* at 3. An influential study in Minneapolis indicated that arrests are a more effective way to address the problem. *See id.* at 2 (noting that the study “appeared to advocate for a policy of arrest for police response to domestic violence”). Marion Wanless argues that mandatory arrest statutes aid police as they take the quasi-police function of mediation out of the domestic violence scenario and replace it with the arrest function, which police are more comfortable with and better trained to perform. Wanless, *supra* note 6, at 547.

21. *See* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005) (finding that under the Due Process Clause, Ms. Gonzales did not have a property interest in enforcement of her protection order).

22. *Id.* at 2802. The Court explained as follows:

required to either arrest or obtain an arrest warrant for Ms. Gonzales's estranged husband, much less about whether they had a duty to protect her children from the fatal harm that they suffered at his hands.²³ Instead, her claim was that "she had a property interest in police enforcement of the restraining order against her husband; and that the town deprived her of this property without due process by having a policy that tolerated nonenforcement of restraining orders."²⁴

The alleged facts, which were required to be accepted as true given the posture of the case, were "that her deprivation was not the result of random and unauthorized behavior by the individual officers. Rather, . . . the deprivation was the result of a custom and policy of the City of Castle Rock not to enforce domestic abuse protective orders."²⁵ Ms. Gonzales alleged the following:

[T]he City of Castle Rock, through its police department, has created an official policy or custom of failing to respond properly to complaints of restraining order violations and the City's police department maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to protective orders, and provides for or tolerates the non-enforcement of protective orders by its police officers.²⁶

The Supreme Court, in an opinion by Justice Scalia, ruled that Ms. Gonzales could not state a claim for which relief could be granted because she had no property right to have the court order enforced,²⁷ notwithstanding that the legislature had required that such enforcement was mandatory in all cases. Although the property right in this case is not, for example, the typical right not to have government take private land, the

The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." . . . In 42 U.S.C. § 1983, Congress has created a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Id. at 2802–03 (quoting U.S. CONST. amend. XIV, § 1).

23. As the Tenth Circuit Court of Appeals noted, "Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties." *Gonzales*, 366 F.3d at 1116.

24. *Castle Rock*, 125 S. Ct. at 2803.

25. *Gonzales*, 366 F.3d at 1112–13.

26. *Id.* at 1113 (internal quotations omitted).

27. *Castle Rock*, 125 S. Ct. at 2810.

Supreme Court in *Goldberg v. Kelly*²⁸ abandoned the strict distinction between rights and mere privileges when it recognized that welfare benefits could be considered property for the purposes of the Due Process Clause.²⁹ This holding was solidified in *Board of Regents v. Roth*,³⁰ where the Court stated, “the Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.”³¹ The Court also stated the following:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.³²

But, the existence of an entitlement is determined by “an independent source such as state law” and the “rules or understandings” that it creates.³³

The majority opinion in *Castle Rock* began its analysis by quoting

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

29. *Id.* at 261–62. Professor Charles Reich has commented about the case:

The question is: how much responsibility should the community take for the protection of the individual?

The community must choose among three responses. It can deny social responsibility entirely. It can make economic protection of the individual a goal, but balance this goal against other goals which may be given an equal or higher priority. Or the community can make individual security an absolute right. *Goldberg v. Kelly* took the middle ground. It was a modest, moderate decision giving procedural protection to welfare recipients.

Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731 (1990) (footnote omitted).

30. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

31. *Id.* at 571.

32. *Id.* at 577.

33. *Id.* Professor Reich is generally credited with being the driving intellectual force behind the assault on the right-privilege distinction and for the recognition of “new property rights.” See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich’s list of new property include income and benefits, jobs, occupational licenses, franchises, contracts, subsidies, public resources, and services, such as the postal service, police and fire services, and education, among others. *Id.* at 733–37; see discussion *infra* Part III (addressing the issue of the property right in question).

much of this language from *Roth*.³⁴ It did not spend any time on the question of whether Ms. Gonzales had “more than an abstract need or desire” to have a property interest in the benefit or “more than a unilateral expectation of it,” a claim upon which she relied in her daily life.³⁵ This claim “must not be arbitrarily undermined” because she unquestionably did expect and rely, and that reliance was arbitrarily undermined on the accepted facts.³⁶ Rather, the Court turned to the second prong of the test to determine if, in fact, the State had created such an entitlement.³⁷

In doing so, the Court was relatively thorough in its attempt to nail down the lid of the coffin on § 1983 procedural due process claims for the breach of mandatory arrest statutes. The Court drove at least four nails into the coffin with a set of arguments that can be summarized as follows: (1) the alleged mandatory arrest statute is not mandatory because it still allows for police discretion, and thus, it cannot give rise to an entitlement;³⁸ (2) even if the statute was mandatory, it mandates one of two options: make an arrest or seek an arrest warrant; because the second option is a procedure and not an end in itself, this cannot give rise to an entitlement;³⁹ (3) even if the statute mandated a nondiscretionary duty on the part of the police, it would still not follow that the intention was to provide the plaintiff a right or entitlement rather than simply fulfilling a public end, as does much of the criminal law;⁴⁰ and (4) even if it did establish an entitlement, it is not a property entitlement protected by the Due Process Clause of the Fourteenth Amendment because it does not have monetary value and was an incidental benefit of a general duty.⁴¹

In the process of making these arguments, the Court ignored the plain language of the statute⁴² and the restraining order, as well as the legislative

34. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2803 (2005).

35. *Id.* (quoting *Roth*, 408 U.S. at 577).

36. *Id.* at 2823 (Stevens, J., dissenting) (quoting *Roth*, 408 U.S. at 577).

37. *Id.* at 2807–09 (majority opinion).

38. *Id.* at 2806–07. It is unclear if the Court is holding that no mandatory arrest statute can really be mandatory or if it is holding merely that this statute’s language fails to be clearly mandatory. See discussion *infra* Part II.A.

39. *Id.* at 2807–08. Justices Souter and Breyer, in their concurring opinion, rest on this argument. See *id.* at 2811–12 (Souter, J., concurring).

40. *Id.* at 2808–09 (majority opinion).

41. *Id.* at 2809–10.

42. Justice Scalia is known for his textualist approach to interpretation, which, in his hands, is in keeping with a conservative approach to entitlements. As stated by Professor Bradford C. Mank:

history of the statute.⁴³ It refused to certify the question to the Colorado Supreme Court so that it could decide whether its mandatory arrest statute, along with the court order, creates the state right or entitlement at issue.⁴⁴ Finally, the Court refused to defer to the decision of the six-judge panel of the Tenth Circuit, although deference is the general rule in cases involving state law questions.⁴⁵

These issues of method or approach to the case are addressed in a preliminary fashion by the Court before the four sets of arguments previously mentioned are discussed.⁴⁶ These issues of methodology will be addressed first, in Part II. As will be demonstrated, if the Court had approached the case in a principled fashion based on accepted canons of interpretation and precedent, there would have been no need to reach the four sets of arguments and Ms. Gonzales's case could have proceeded on the merits. Part III will address each set of arguments in turn, demonstrating that: (1) the enforcement statute is mandatory because it does not allow for the type of discretion that undermines the duty of enforcement;⁴⁷ (2) the options to arrest or to seek an arrest warrant are not discretionary options and they are not merely procedures, but are ends that give rise to an entitlement;⁴⁸ (3) the statute serves both public and private ends and the history of the legislation and other similar legislation indicates that that the intention was to create a right or entitlement in the mandatory

Justice Scalia and other modern textualists often use "clear-statement canons" that require express congressional authorization for a particular type of government regulatory action; this results in narrow constructions of a statute. Clear-statement principles are specific applications of the common law's traditional presumption in favor of narrowly construing statutes that arguably change the law. Most scholars believe that clear-statement principles generally tend to narrow the scope of statutory language.

Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 551 (1997-1998) (footnotes omitted). As will be demonstrated, in *Castle Rock*, Justice Scalia and the majority avoid the textualist approach because it would require the recognition of new entitlements. See discussion *infra* Part II.A.

43. See discussion *infra* Part II.A.

44. See discussion *infra* Part II.B.

45. See discussion *infra* Part II.B.

46. See *Castle Rock*, 125 S. Ct. at 2802-04 (discussing the Court's holding as to the four arguments).

47. See discussion *infra* Part III.A.

48. See discussion *infra* Part III.B.

enforcement;⁴⁹ and (4) because the entitlement was created by the democratically elected and accountable representatives of the people of Colorado, because it does have monetary value, and because it is central to the purpose of the legislation, it is inappropriate for the Supreme Court to unilaterally diminish this entitlement to something unworthy of due process protection under the Fourteenth Amendment.⁵⁰ Part IV presents the argument that the Court has rewritten the Colorado statute, or effectively struck down its mandatory arrest provisions for the purposes of 42 U.S.C. § 1983 procedural due process claims, because it disagrees with the state-based positive property right purportedly created by the statute.

The Court has done to property rights the functional equivalent of what it did to liberty rights one hundred years ago in *Lochner v. New York*.⁵¹ The *Lochner* Court—as a result of what can fairly be called judicial activism—struck down a law enacted by the New York legislature to protect the health and safety of bakery workers where those workers otherwise had no protections from the arbitrary whims of their more powerful employers.⁵² In *Castle Rock*, the Court has sided with local government, insulating it from claims based on the arbitrary denial of the right of enforcement, rather than helping a cognizable group of vulnerable residents whom the state has made it mandatory for municipalities to protect. The Court has elevated the liberty of police officers to ignore their duty to enforce court-ordered restraining orders over the safety and security of the victims of domestic violence.

The damage that is done by a failure to hold the police accountable in such cases is not limited to the harm that is caused to victims such as Ms. Gonzales's daughters, who might still be alive today if the police had carried out their duties. It even extends beyond those who will suffer in the future because of the message such a decision sends. The damage is to our constitutional compact and the rule of law. The damage is also to the separation of powers—it undermines the role of the legislature to make law, and of our judiciary to interpret that law. Giving the police full discretion to decide which laws to enforce and which laws to ignore transfers the lawmaking and interpretive functions of the legislature and courts to the police department—it effectively gives them veto power. The Fourteenth Amendment was designed to ensure that states do not arbitrarily dole out rights and entitlements to some and deny them to

49. See discussion *infra* Part III.C.

50. See discussion *infra* Part III.D.

51. *Lochner v. New York*, 198 U.S. 45 (1905); see discussion *infra* Part IV.

52. *Lochner*, 198 U.S. at 64.

others.⁵³ Victims have a right to redress for the types of violations enumerated in 42 U.S.C. § 1983, thereby giving teeth to the requirement of due process.⁵⁴ The Court's decision renders toothless the Due Process Clause of the Fourteenth Amendment and § 1983, as well as the state legislation and the court order.⁵⁵

II. THE MAJORITY'S APPROACH TO THE CASE

A. *The Plain Language of the Statute and Restraining Order and the Disregard for Legislative History*

As noted previously, section 18-6-803.5(3)(a) of the Colorado Revised Statutes states in part, "A peace officer shall use every reasonable means to enforce a protection order."⁵⁶ Subsection (3)(b) reads in part:

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

53. See discussion *infra* Part IV.

54. See 42 U.S.C. § 1983 (2000) (stating that state actors who deprive individuals of their constitutional rights are liable to the injured party).

55. This is worse than the case in which one branch of government drafts a check that another branch arbitrarily refuses to honor. This is not a case in which a mere property right is at stake, and, as the Court stated in *Santosky v. Kramer*, 455 U.S. 745 (1982), the "desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Id.* at 758-59 (quotation omitted). Ms. Gonzales did not make the deprivation of life or liberty claim in her case, presumably because that would have been more awkward than pigeonholing the deprivation as one of property. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2811 (2005) (Souter, J., concurring) (referring to her property claim as "unconventional"). The legislation and court order in question were primarily designed to protect the life and liberty of Ms. Gonzales and her children. It is unfortunate that the pigeonhole approach of the Court discourages arguing that the lives and liberty of Ms. Gonzales and her children were put in jeopardy without due process of law, because that is most clearly what transpired, rather than some crude deprivation of a property interest. Ms. Gonzales had, in fact, shown "[the police] a copy of the [temporary restraining order (TRO)] and requested that it be enforced." *Id.* at 2800 n.1 (majority opinion) (alterations in original) (quotation omitted). The problem is that the rights to life and liberty are considered negative rights or liberties, not positive rights. See *Rogers v. City of Port Huron*, 833 F. Supp. 1212, 1216 (E.D. Mich. 1993) (noting that "the Constitution is a charter of negative rather than positive liberties" (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980))). Thus, it is awkward to argue that the State has taken on the obligation to secure one's life or liberty, which is what mandatory arrest statutes and restraining orders are designed to do.

56. COLO. REV. STAT. § 18-6-803.5(3)(a) (2004).

that:

(I) The restrained person has violated or attempted to violate any provision of a protection order⁵⁷

Section 18-6-803.5(1.5)(a) also identifies the beneficiary of the order, stating that “[p]rotected person” means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.”⁵⁸ Thus, it is not the statute alone that imposes the duty and creates the benefit, but the statute along with the actual individualized court order. 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.”⁵⁹ The court pointed to the specific language of the court order in this case, which stated, “[y]ou *shall* use every reasonable means to enforce this restraining order.”⁶⁰ The restraining order also required that the officer

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.⁶¹

While it is conceded that the repeated use of the word “shall” is not the same word as “mandatory,” there are few words with a clearer meaning.⁶² “You shall” means that one is required to, or one has a duty to, do that which follows the verb.⁶³ On a plain textualist reading of the

57. *Id.* § 18-6-803.5(3)(b) (emphases added).

58. *Id.* § 18-6-803.5(1.5)(a).

59. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1104 n.9 (10th Cir. 2004) (en banc), *rev'd*, 125 S. Ct. 2796.

60. *Id.* at 1103–04 (alteration in original) (quotation omitted).

61. *Id.* (quotation omitted).

62. *See DiMarco v. Dep’t of Revenue*, 857 P.2d 1349, 1352 (Colo. Ct. App. 1993) (“The factor which most heavily weighs in favor of a mandatory construction is the use of the word ‘shall’ in the provision at issue. Unless the context indicates otherwise, the word ‘shall’ generally indicates that the General Assembly intended the provision to be mandatory.” (citing *People v. Dist. Court*, 713 P.2d 918 (Colo. 1986))).

63. The definition of “shall” reads as follows:

statute it is difficult to explain what other meaning “shall” could have, given that neighboring provisions use the word “may.”⁶⁴ The majority of the *Castle Rock* Court read them to mean the same thing,⁶⁵ but to do so violates one of the most basic canons of statutory construction.⁶⁶ It effectively voids the word “shall” in the text, rendering it superfluous. Although ignored by the Court, the Colorado Statutes Revised provide guidance as to how its provisions are to be read, stating that “words and phrases shall be read in context and construed according to the rules of grammar and common usage.”⁶⁷

The Court seems to concede that the plain meaning of these provisions does mandate enforcement, but it does not think they mean what they say because of the well-established tradition of discretion that

[S]hall, vb. 1. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) <all claimants shall request mediation>. 3. May <no person shall enter the building without first signing the roster>. • When a negative word such as not or no precedes shall (as in the example in angle brackets), the word shall often means may. What is being negated is permission, not a requirement. 4. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>. 5. Is entitled to <the secretary shall be reimbursed for all expenses>. • Only sense 1 is acceptable under strict standards of drafting.

BLACK’S LAW DICTIONARY 1407 (8th ed. 2004) (first and last emphases added).

64. See, e.g., COLO. REV. STAT. § 18-6-803.5(6)(a) (2004) (stating that “[s]uch peace officer *may* transport, or obtain transportation for, the alleged victim to shelter” (emphasis added)).

65. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805–06 (2005) (concluding that in light of the “well established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes[.]” the Colorado Statute did not truly make enforcement mandatory). This immediately brings the question to mind: How does the majority interpret “Thou shalt” in the Ten Commandments?

66. *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (“It is, moreover, ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))); see also COLO. REV. STAT. § 2-4-201(1) (2004) (“In enacting a statute, it is presumed that . . . the entire statute is intended to be effective . . .”).

67. COLO. REV. STAT. § 2-4-101. See generally *In re A.R.W.*, 903 P.2d 10, 14 (Colo. Ct. App. 1994) (“When the language of a statute is plain and its meaning is clear, the court must interpret it as written.” (citing *Hohn v. Morrison*, 870 P.2d 513 (Colo. Ct. App. 1993))).

has coexisted with other mandatory arrest statutes.⁶⁸ Justice Scalia quotes the commentary to the ABA Standards for Criminal Justice for this view, but the language he quotes does not actually further the view. The reasons he gives for why mandatory arrest statutes are not mandatory include “legislative history, insufficient resources, and sheer physical impossibility.”⁶⁹

In his scholarly work, Justice Scalia rejects the use of legislative history as a means of determining the meaning of a statute; in fact, he claims that use of legislative history is undemocratic.⁷⁰ Yet, in *Castle Rock*, he cites it as authority for his departure from the plain meaning of the text. If we are now to take legislative history seriously, then it is important to look to the actual legislation or legislation of its type rather than to a broader category of legislation. The legislative history of the Colorado statute and statutes of its type (i.e., mandatory arrest statutes in the restraining order or protection order context rather than mandatory arrest statutes generally) does reinforce the mandatory reading of the legislation.⁷¹ The majority of the Court did not point to any evidence that the drafters of the Colorado statute meant “may” when they used the term “shall.”⁷² This is not a case of the Tenth Circuit Court of Appeals looking out into the crowd at a cocktail party and picking out its friends.⁷³ At this particular party, there simply were no guests who disagreed with the view

68. *Castle Rock*, 125 S. Ct. at 2806.

69. *Id.* (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 1-4.5, cmt. at 1-124 to 1-125 (2d ed. 1980)).

70. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 29–30 (Amy Gutmann ed., 1997) (“My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”). Justice Scalia further states “that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” *Id.* at 17.

71. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1107–08 (10th Cir. 2004) (en banc), *rev'd*, 125 S. Ct. 2796 (2005) (citations omitted). “The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders.” *Id.* at 1108.

72. See *Castle Rock*, 125 S. Ct. at 2814 (Stevens, J., dissenting) (“[T]he Court does not even attempt to demonstrate that the . . . majority was ‘clearly wrong’ in its interpretation of Colorado’s . . . statute; nor could such a showing be made.”).

73. Justice Scalia references Judge Leventhal’s turn of phrase to the effect that legislative history is like a cocktail party where one can always look over the heads of the crowd and pick out her or his friends. See Scalia, *supra* note 70, at 36.

that this statute was designed to make enforcement of restraining orders mandatory.⁷⁴ In such instances where the language is clear and there is no evidence of a contrary view in the legislative history, the interpretation appears well grounded.⁷⁵ The conduct here is worse than looking out over the party for one's friends in order to bolster one's personal views of the meaning of the legislation.⁷⁶ Having been unable to find a friend at this party, or at any other party dealing with restraining orders, the Court has gone party hopping in order to find friendly support for its views.⁷⁷

74. Justice Scalia noted that

The Court of Appeals quoted one lawmaker's description of how the bill "would really attack the domestic violence problems":

"[T]he 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.

"[T]he entire system must send the same message . . . [that] violence is criminal. And so we hope that House Bill 1253 starts us down this road.

Castle Rock, 125 S. Ct. at 2805 n.6 (quoting *Gonzales*, 366 F.3d at 1107 (alterations in original) (internal quotation marks omitted)). Justice Scalia does not refer to any contrary authority regarding the legislative history of this statute, nor any regarding the host of mandatory arrest statutes in the restraining order or protection order context. *See id.* at 2805–06. Similarly, the petitioner did not refer to any evidence of contrary intent with regard to mandatory arrest statutes in the context of restraining orders or protection orders. *See* Petitioner's Opening Brief at 25–30, *Castle Rock*, 125 S. Ct. 2796 (No. 04-278), 2004 WL 3007308; Petitioner's Reply Brief at 5–7, *Castle Rock*, 125 S. Ct. 2796 (No. 04-278), 2004 WL 2358206. The Reply Brief, like Justice Scalia's opinion, addresses other types of mandatory arrest statutes. Petitioner's Reply Brief, *supra*, at 5–7.

75. There really can be no worry of an undemocratic interpretation in such cases, at least not on Justice Scalia's own views. *See* Scalia, *supra* note 70, at 35–36 ("Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility.").

76. The Colorado legislature must have been aware of the existing legislation in other jurisdictions (at least fifteen others), and the fact that in Oregon, the first jurisdiction to implement such legislation, the courts decided that the legislation meant what it said when it used the term "shall"—that enforcement was mandatory. *See* *Nearing v. Weaver*, 670 P.2d 137, 140 (Or. 1983) (en banc) (holding the statute's mandatory directive formed the basis for the suit because it was "a specific duty imposed by statute for the benefit of individuals previously identified by judicial order"). For further treatment of *Nearing*, see *infra* note 186 and accompanying text.

77. Justice Stevens alludes to this fact when he states the following:

Setting this aside, the other two reasons given in the ABA commentary do not in any way detract from the mandatory nature of the statute and its directive or of the directive in the court order.⁷⁸ If “insufficient resources” or “sheer impossibility” turned mandatory requirements into discretionary choices then there would be nothing in the law that was mandatory, except for perhaps death and taxes. Insufficient resources and sheer impossibility may be justifications for why the police are unable to immediately arrest or obtain a warrant, but they do not defeat the requirement to “use every reasonable means to enforce a protection order.”⁷⁹ The drafters of the statute presumably understood that “ought” implies “can” and did not mandate the impossible.⁸⁰ The fact that impossibility might excuse performance of a duty once the

First, the Court places undue weight on the various statutes throughout the country that seemingly mandate police enforcement but are generally understood to preserve police discretion. As a result, the Court gives short shrift to the unique case of “mandatory arrest” statutes in the domestic violence context; States passed a wave of these statutes in the 1980’s and 1990’s with the unmistakable goal of eliminating police discretion in this area.

Castle Rock, 125 S. Ct. at 2816 (Stevens, J., dissenting). In addition, Justice Stevens refers to the following:

“The 1994 Colorado legislative session produced several significant domestic abuse bills that strengthened both civil and criminal restraining order laws and procedures for victims of domestic violence. . . . Although many law enforcement jurisdictions already take a proactive approach to domestic violence, arrest and procedural policies vary greatly from one jurisdiction to another. H.B. 94-1253 mandates the arrest of domestic violence perpetrators and restraining order violators [sic]. H.B. 94-1090 repeals the requirement that protected parties show a copy of their restraining order to enforcing officers. In the past, failure to provide a copy of the restraining order has led to hesitation from police to enforce the order for fear of an illegal arrest. The new statute also shields arresting officers from liability; this is expected to reduce concerns about enforcing the mandatory arrest requirements.”

Id. at 2817 n.7 (quoting Fuller & Stransberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327, 2329 (1994)).

78. See *Castle Rock*, 125 S. Ct. at 2806, for a discussion of the ABA commentary.

79. COLO. REV. STAT. § 18-6-803.5(3)(a) (2004).

80. The notion that “ought” implies “can” is a classic ethical maxim that one is not obligated to do that which one cannot do. The idea is generally attributed to Immanuel Kant in his work on ethics. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 107 (Thomas Kingsmill Abbot trans., Prometheus Books 1996) (1788); see also COLO. REV. STAT. § 2-4-201(1)(d) (2004) (“In enacting a statute, it is presumed that . . . [a] result feasible of execution is intended.”).

impossibility arises does not negate the duty when the impossibility is not present. There is no evidence whatsoever that insufficient resources or impossibility are implicated in general in this context, much less in the specific case of Ms. Gonzales.

Venturing even further afield in order to find a friend, the Court cites and quotes from its decision in *City of Chicago v. Morales*⁸¹ to justify its view. That reasoning is further addressed below, but let it suffice to say that the case is off point. *Morales* involved an ordinance that included the phrase “shall order” all persons to disperse in certain circumstances.⁸² The Court found that the police still had discretion in the face of this language.⁸³ The Court determined that the ordinance was unconstitutionally vague because it did not set minimal guidelines for law enforcement or provide adequate notice to the public of what was proscribed.⁸⁴ Specifically, the “in certain circumstances” part of the phrase, rather than the “shall order” part, was held to be unconstitutionally vague⁸⁵ and the reason for the finding that there was police discretion.⁸⁶ The mandatory nature of “shall order” was not at issue.⁸⁷ In fact, to the extent that it indicated that the police would enforce the ordinance, it furthered the argument that the ordinance could be applied arbitrarily in violation of due process.

B. *Refusal to Certify the Question to the State Supreme Court or to Defer to the Circuit Court*

Although the Supreme Court made the central question in *Castle Rock* the state law issue regarding the establishment of an entitlement in favor of Ms. Gonzales,⁸⁸ a majority of the Court did not find it prudent to

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

82. *Id.* at 47 n.2, quoted in *Castle Rock*, 125 S. Ct. at 2806.

83. *Id.* at 62 n.32, quoted in *Castle Rock*, 125 S. Ct. at 2806.

84. *Id.* at 56–60.

85. The circumstances in which the police were to order people to disperse was when they determined that people were “loitering,” but the definition for “loitering” was found to be vague. *See id.*

86. *Id.* at 64.

87. *See id.* at 62 n.32 (stating that no party argued that the word “shall” did not afford the police any discretion when enforcing the city ordinance).

88. Justice Scalia may be thinking that the real issue in the case is a federal issue when he concludes near the end of his decision that “[t]his result reflects our continuing reluctance to treat the Fourteenth Amendment as a font of tort law.” *Castle Rock*, 125 S. Ct. at 2810 (internal quotation omitted). This is an indication of his hostility to the § 1983 legislation, which explicitly makes violation of the Fourteenth Amendment a font for tort law. *See id.* at 2802–03 (indicating that “Congress has

certify the question to the Colorado Supreme Court.⁸⁹ The Court rejected the idea that it should certify the case on the basis that the parties did not desire to have the question certified.⁹⁰

Justice Stevens, in his dissent, stated a strong array of arguments in favor of sua sponte certification of the question, including “federal-state comity, constitutional avoidance, judicial efficiency, [and] the desire to settle correctly a recurring issue of state law.”⁹¹ One might add that if the Court was worried about activism by judges who are not democratically accountable, that worry is more valid in the case of the United States Supreme Court and the federal circuit court than the Colorado Supreme Court.⁹² Although not democratically elected, judges in Colorado are subject to periodic retention votes by the citizens of the state.⁹³ Thus, there is a further check on any activist tendencies that is not present in the federal system.

Even if the Court did not find these arguments persuasive, it still would have been the practice to defer to the circuit court’s determination as to the matter of state law absent a finding that the decision was “clearly wrong.”⁹⁴ The reasons for the rule of deference are based on both

created a federal cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” (internal quotation omitted)).

89. *Id.* at 2804 n.5.

90. *Id.*

91. *Id.* at 2816 n.6 (Stevens, J., dissenting); *see also id.* at 2815–16 (discussing the Supreme Court’s tradition of deference to state courts on questions of state law).

92. Justice Scalia’s views on judicial activism and principles of interpretation are discussed in his published works. *See, e.g.,* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–65 (1989) (considering the benefits of constitutional interpretation by the “originalist” approach); Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–85 (1989) (explaining the role that rules play in establishing consistency in judicial interpretation).

93. *See* COLO. BAR ASS’N, *Where Do (Colorado) Judges Come From?*, <http://www.cobar.org/group/display.cfm?GenID=429> (last visited Feb. 10, 2006).

94. The Court in *Brockett v. Spokane Arcades, Inc.* stated the following:

The Court has stated that it will defer to lower courts on state-law issues unless there is “plain” error, the view of the lower court is “clearly wrong,” or the construction is “clearly erroneous,” or “unreasonable.” On occasion, then, the Court has refused to follow the views of a lower federal court on an issue of state law. In *Cole v. Richardson*, we refused to accept a three-judge District Court’s construction of a single statutory word based on the dictionary definition of that language where more reliable indicia of the legislative intent were available.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 n.9 (1985) (citations omitted).

efficiency and local knowledge of law and practice.⁹⁵ It is an activist move to take the state law question out of the hands of both the state court and circuit court sitting in the relevant state, absent some compelling reason. In response to Ms. Gonzales's contention that the Supreme Court was obliged to give deference to the circuit court, Justice Scalia flippantly stated: "We will not, of course, defer to the Tenth Circuit on the ultimate issue."⁹⁶ His reason is stated as follows:

We have said that a "presumption of deference [is] given the views of a federal court as to the law of a State within its jurisdiction." That presumption can be overcome, however, and we think deference inappropriate here. The Tenth Circuit's opinion . . . did not draw upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and state-legislative-hearing transcript.⁹⁷

None of this helps the Court's argument. The per curiam decision in *Leavitt v. Jane L.*⁹⁸ was based on the finding that the circuit court was clearly wrong in failing to give effect to the plain language of the statute.⁹⁹ Perhaps more importantly, whereas the circuit court in *Gonzales v. City of Castle Rock*¹⁰⁰ did not reverse the district court on the issue before the Supreme Court, the issue of establishing an entitlement, the "Court of

95. *Castle Rock*, 125 S. Ct. at 2814 ("This policy is not only efficient, but it reflects 'our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States.'" (quoting *Brockett*, 472 U.S. at 500-01)); *Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946) (endorsing "great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice'" (quoting *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944))); *see also* *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (per curiam) ("Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases.").

96. *Castle Rock*, 125 S. Ct. at 2803 (majority opinion).

97. *Id.* at 2804 (alteration in original) (citations omitted).

98. *Leavitt v. Jane L.*, 518 U.S. 137 (1996) (per curiam).

99. *Id.* at 138. As the Court stated, "The Court of Appeals' opinion not only did not regard the explicit language of § 317 as determinative—it did not even use it as the point of departure for addressing the severability question." *Id.* at 140. It further opined, in the section cited by Justice Scalia, that the "general presumption [of deference] is obviously inapplicable where the court of appeals' state-law ruling is *plainly wrong*, a conclusion that the dissent does not even contest in this case." *Id.* at 145 (emphasis added). In *Castle Rock*, it is Justice Scalia who is ignoring the explicit language of the statute, not the circuit court.

100. *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) (en banc), *rev'd*, 125 S. Ct. 2796 (2005).

Appeals panel [in *Leavitt*] consisting of judges from Oklahoma, Colorado, and Kansas . . . reversed the District Court of Utah on a point of Utah law,” and it was that very issue that was before the Court.¹⁰¹ Thus, unlike in *Leavitt*, there were no compelling reasons to deviate from the general rule of deferring to the circuit court. The Court has failed to establish that there is a more permissive standard than the “clearly wrong” standard. As argued above, the circuit court opinion, based on the language of the restraining order, the statutory text, and the state-legislative-hearing transcript, was solidly grounded and by no means could it be labeled clearly wrong.¹⁰² The Court does not even attempt to label it as such but merely states that “we think deference inappropriate here.”¹⁰³ The Court has both distorted the rule and misapplied it to the facts of the present case.

III. THE COURT'S ASSAULT ON THE PROPERTY ENTITLEMENT TO THE MANDATORY ENFORCEMENT OF A RESTRAINING ORDER

A. *The Mandatory Enforcement Statute*

The first set of arguments by the Court to justify its decision rests on the claim that the purported mandatory arrest statute is not mandatory because it allows for discretion.¹⁰⁴ The Court justified this holding in part by comparing the mandatory arrest language of this statute with other states' statutes that on their faces mandated arrest, but in fact had been held to be discretionary.¹⁰⁵ According to the Court, “Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”¹⁰⁶ The Court seems to indicate that it is impossible to create a true mandatory enforcement statute—a statute that gets rid of all police discretion.¹⁰⁷ In fact, the Court quotes *Morales*, which held it is “common sense that *all* police officers must use some discretion in

101. *Leavitt*, 518 U.S. at 145. As the dissent in *Castle Rock* points out, “those courts disagreed only over the extent to which a probable-cause determination requires the exercise of discretion.” *Castle Rock*, 125 S. Ct. at 2815 n.2 (Stevens, J., dissenting).

102. *See supra* note 97 and accompanying text.

103. *Castle Rock*, 125 S. Ct. at 2804 (majority opinion).

104. *Castle Rock*, 125 S. Ct. at 2805–06.

105. *Id.* at 2806–07 (citing ABA STANDARDS FOR CRIMINAL JUSTICE § 1-4.5, cmt. at 1-124 to 1-125 (2d ed. 1980)).

106. *Castle Rock*, 125 S. Ct. at 2803 (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1989)).

107. *See id.* at 2805–06 (“It is hard to imagine that a Colorado peace officer would not have some discretion to determine that . . . the circumstances of the violation . . . counsel decisively against enforcement in a particular instance.”).

deciding when and where to enforce city ordinances.”¹⁰⁸ The very next sentence appears to provide hope for a mandatory enforcement statute because the majority opined, “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’).”¹⁰⁹

If this last sentence is the holding of *Castle Rock*, then there is hope that if states make language clearly mandatory they would give rise to mandatory action. Perhaps statutory language such as “really mandatory,” “absolutely mandatory,” or “no discretion” should be supplied. Clearer language may at least convince some members of the Court that the state in question intended to create a right to mandatory enforcement. This does not necessarily follow, however, for if the *Morales* language quoted in *Castle Rock* is the real holding, then no matter how strong the language is, it is not humanly possible to remove all of the discretion. If all you need is an iota or modicum of discretion to defeat the entitlement claim, then the claim will always be defeated.

This line of analysis goes too far. The Court is correct to hold that, as a matter of common sense, there is no way to remove all discretion. As long as the statute directs human beings to carry out a function, there will always be some discretion as to when or how a person will carry out the function.¹¹⁰ This would defeat almost every entitlement claim that has arisen, be it health care, as pointed out by Justice Stevens,¹¹¹ or any of a number of other entitlements that the courts have found to give rise to due

108. *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (emphasis added), quoted in *Castle Rock*, 125 S. Ct. at 2806.

109. *Castle Rock*, 125 S. Ct. at 2806 (quoting COLO. REV. STAT. § 18-6-803.5(a)–(b) (1999)).

110. This is why it is common for the courts to distinguish between different types of discretion. As the circuit court noted:

In *Allen*, the Supreme Court noted one could use the term “discretion” in two distinct ways. “In one sense of the word, an official has discretion when he or she is simply not bound by standards set by the authority in question.” In the alternative, “the term discretion may instead signify that an official must use judgment in applying the standards set him [or her] by authority.”

Gonzales v. City of Castle Rock, 366 F.3d 1093, 1105–06 (10th Cir. 2004) (en banc) (alteration in original) (internal quotation marks, footnote, and citations omitted) (quoting *Bd. of Pardons v. Allen*, 482 U.S. 369, 375 (1987)), *rev’d*, 125 S. Ct. 2796. At best, the discretion here is in how to carry out the policy or instructions set down for the officer, and not the discretion to ignore the policy or to set new policy.

111. *Castle Rock*, 125 S. Ct. at 2820 (Stevens, J., dissenting).

process protection including: (1) continued public employment in *Perry v. Sindermann*;¹¹² (2) free education in *Goss v. Lopez*;¹¹³ (3) garnished wages in *Sniadach v. Family Finance Corp.*;¹¹⁴ (4) professional licenses in *Barry v. Barchi*;¹¹⁵ (5) drivers' licenses in *Bell v. Burson*;¹¹⁶ (6) causes of action in *Logan v. Zimmerman Brush Co.*;¹¹⁷ and (7) the receipt of government services, including utility services in *Memphis Light, Gas & Water Division v. Craft*,¹¹⁸ disability benefits in *Mathews v. Eldridge*,¹¹⁹ and welfare benefits in *Goldberg v. Kelly*.¹²⁰

There may or may not be more or less discretion as to when or how these entitlements are delivered, but there can be no question that there is some discretion. Given that a majority of the Court would not be inclined to deny these entitlements,¹²¹ then the question shifts back to how much discretion is too much. This may depend on the nature of the endeavor, for some endeavors require less by way of exercising judgment or discretion. In the case of police enforcement, it would not be wise for the State to require that no matter what an officer was doing, the officer would be required to drop everything immediately and locate and arrest someone for whom there is cause to suspect she violated a restraining order. This could lead to absurd results—the officer, for example, may be in the middle of trying to arrest someone who is on a shooting spree. Nonetheless, the State may wish to give those within its borders the right to have a court-ordered protection order enforced. It may wish to take away the discretion of the police to ignore these orders as a matter of policy and practice. Thus, it is reasonable that the legislature choose language that is appropriate to the task, given the conditions. While the use of “all deliberate speed” has proven too flexible,¹²² the use of “shall use every reasonable means to

112. *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972).

113. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

114. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969).

115. *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

116. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

117. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

118. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–12 (1978).

119. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

120. *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970).

121. That is, the Court would not deny a person's entitlement unless that decision came after the person received due process. *See, e.g., Memphis Light, Gas & Water Div.*, 436 U.S. at 16 (“This Court consistently has held that ‘some kind of hearing is required at some time before a person is finally deprived of his property interests.’” (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974))).

122. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). The relief granted in *Brown II* was flawed in that it did not actually provide a remedy for the

enforce a restraining order”¹²³ along with “shall arrest, or . . . seek a warrant”¹²⁴ as found in the Colorado legislation, appears appropriate to this end.

The appropriateness of this language is bolstered by the fact that other states have used similar language in their statutes, and courts have found these statutes to give rise to a right or entitlement to enforcement.¹²⁵ Justice Stevens, in his *Castle Rock* dissent, refers to four cases from four different states that have interpreted their mandatory arrest statutes to mean what they say—that an arrest is mandatory.¹²⁶ The majority largely ignores these decisions and the statutes upon which they are based. Justice Stevens mentions them and connects them together with the Colorado statute and a whole wave of statutes throughout the country that were enacted for the purpose of removing or limiting the discretion of the police to enforce protection or restraining orders.¹²⁷ Nonetheless, their authority is dubious given that Justice Stevens does not address the exact language of

plaintiffs. Professor Paul Gewirtz writes the following:

“All deliberate speed” authorized and yielded an imperfect remedy; the delay that it permitted resulted in a failure to implement fully the rights and substantive remedial goals stated (albeit vaguely) in *Brown I*. This delay meant not only that effective relief for some members of the plaintiff class would be postponed but also that some members of the plaintiff class would fail to receive relief at all since they would graduate before any desegregation would actually occur.

Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 612 (1983) (footnotes omitted). This is demonstrated in the slow implementation of desegregation post-*Brown II*. See generally, CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 125–34 (2004) (discussing the slow implementation of *Brown* by the states in the decades following the decision).

123. COLO. REV. STAT. § 18-6-803.5(3)(a) (2004).

124. *Id.* § 18-6-803.5(3)(b).

125. See *Town of Castle Rock v. Gonzalez*, 125 S. Ct. 2796, 2817–19 (2005) (Stevens, J., dissenting) (discussing a number of similar mandatory statutes enacted in other states and the subsequent court decisions interpreting them as allowing no discretion).

126. *Id.* at 2818–19 (citing *Campbell v. Campbell*, 682 A.2d 272, 274 (N.J. Super. Ct. Law Div. 1996); *Nearing v. Weaver*, 670 P.2d 137, 140 (Or. 1983) (en banc); *Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999); *Donaldson v. City of Seattle*, 831 P.2d 1098, 1103 (Wash. Ct. App. 1992)).

127. *Castle Rock*, 125 S. Ct. at 2818–19 (Stevens, J., dissenting); see sources cited *supra* note 5 (noting that nineteen states mandated arrests for domestic violence restraining order violations yet failing to state the exact language of the statutes).

the statutes in question.¹²⁸

A survey of these four cases and the statutes they refer to should answer any nagging questions about how relevant they are to the Colorado case. A brief survey reveals that although there are a few important differences, the language in those statutes is no more mandatory than that found in the Colorado statute.¹²⁹ If we look to the recent case of *Conerly v. Town of Franklinton*,¹³⁰ based on Louisiana legislation, it is apparent the language at issue in that case was less mandatory than that in the Colorado statute addressed in *Castle Rock*.¹³¹ Thus, if the Colorado General Assembly wished to make enforcement optional or discretionary, it could have used language found in other jurisdictions clearly indicating so.

1. *Oregon*¹³²

The language of the current Oregon statute is nearly identical to that of the Colorado statute. It reads as follows:

133.310. Arrests without warrants.

....

(3) A peace officer *shall arrest and take into custody* a person without a warrant when the peace officer has probable cause to believe that:

128. See *Castle Rock*, 125 S. Ct. at 2818–19 (Stevens, J., dissenting).

129. Compare, e.g., COLO. REV. STAT. § 18-6-803.5(3)(a)–(b) (stating that “[a] peace officer shall use every reasonable means to enforce a protection order” and that “[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person”), with TENN. CODE ANN. § 36-3-611(a) (2001) (providing that a “law enforcement officer shall arrest the respondent without a warrant if” the officer has proper jurisdiction, “has reasonable cause to believe the respondent has violated or is in violation of an order for protection,” and “has verified whether an order of protection is in effect against the respondent”).

130. *Conerly v. Town of Franklinton*, No. Civ.A. 03-1507, 2005 WL 1501421 (E.D. La. June 20, 2005).

131. *Id.* at *2 (interpreting a Louisiana statute “which provides that police officers shall use every reasonable means, including immediate arrest, to enforce a protective order”).

132. In 1977, Oregon was the first state to enact mandatory arrest laws in domestic violence cases. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 63 (1992) (discussing the enactment of Oregon’s mandatory statute).

(a) There exists an order issued pursuant to ORS 30.866, 107.095(1)(c) or (d), 107.716, 107.718, 124.015, 124.020, 163.738 or 419B.845 restraining the person;

(b) A true copy of the order and proof of service on the person has been filed as required in ORS 107.720, 124.030, 163.741 or 419B.845; and

(c) The person to be arrested has violated the terms of that order.¹³³

When analyzing the provision, the court in *Nearing v. Weaver*¹³⁴ stated the following:

ORS 133.310(3) prescribes that a peace officer “shall arrest and take into custody a person without a warrant” when the officer has probable cause to believe that an order under the statute has been served and filed and that the person has violated the order. . . . The widespread refusal or failure of police officers to remove persons involved in episodes of domestic violence was presented to the legislature as the main reason for tightening the law so as to require enforcement of restraining orders by mandatory arrest and custody.¹³⁵

The court went on to point out that the mandatory language in the

133. OR. REV. STAT. ANN. § 133.310(3) (West Supp. 2005) (emphasis added). Note that the mandatory arrest statute did not immediately result in more arrests by the police; rather, the arrest rates remained low. See Ruth Gundle, *Civil Liability for Police Failure to Arrest: Nearing v. Weaver*, 9 WOMEN’S RTS. L. REP. 259, 262 (1986) (citing a 1979 study by the Oregon Governor’s Commission for Women which found that many police departments did not change their discretionary policies to reflect the mandatory law); Sue Ellen Schuerman, Note, *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. L. REV. 355, 360 n.38, 369 n.117 (1992). This prompted the litigation by the Oregon Coalition Against Domestic and Sexual Violence on behalf of Ms. Nearing in the hopes that a successful tort action would force compliance with the law. Gundle, *supra*, at 262–63; Schuerman, *supra*, at 369 n.117. Schuerman also notes a similar problem in compliance following the enactment of legislation in Minnesota. Schuerman, *supra*, at 360 n.38.

134. *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983) (en banc).

135. *Id.* at 142. The court also noted that like the provisions of the Colorado statute, “Subsection (3) appears after two subsections that state when an officer ‘may’ arrest a person without a warrant, and the contrasting use of ‘shall’ in subsection (3) is no accident.” *Id.* In light of the public nature of the litigation in this case, it is difficult to imagine that the drafters of the Colorado statute were ignorant of how the language they chose would be interpreted by the courts.

Oregon legislation was “unique among statutory arrest provisions because the legislature chose mandatory arrest as the best means to reduce recurring domestic violence” in order “to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity.”¹³⁶ Thus, the point of the legislation was to create the specific duty of enforcement embodied in a special relationship between the police and the protected person that generates an entitlement on the part of the protected person. This is accomplished through the protection order, which “identif[ies] with precision when, to whom, and under what circumstances police protection must be afforded.”¹³⁷

2. *Tennessee*

The Tennessee Code provides the following:

36-3-611. Arrest for violation of protection order

(a) An arrest for violation of an order of protection issued pursuant to this part may be with or without warrant. Any law enforcement officer *shall arrest* the respondent without a warrant if:

(1) The officer has proper jurisdiction over the area in which the violation occurred;

(2) *The officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection; and*

(3) The officer has verified whether an order of protection is in effect against the respondent. If necessary, the police officer may verify the existence of an order for protection by telephone or radio communication with the appropriate law enforcement department.

(b) No ex parte order of protection can be enforced by arrest under this section until the respondent has been served with the order of protection or otherwise has acquired actual knowledge of such order.¹³⁸

136. *Id.* at 143.

137. *Id.*

138. TENN. CODE ANN. § 36-3-611 (2001) (emphases added).

The Supreme Court of Tennessee, in *Matthews v. Pickett County*,¹³⁹ was asked by the Sixth Circuit to answer the certified question of whether a protection order could “give rise to a ‘special duty’ to protect” that would override the public duty doctrine.¹⁴⁰ The court found that the respondents could be held liable under the Governmental Tort Liability Act.¹⁴¹

The court held the following:

Both the order of protection in this case and Tenn. Code Ann. § 36-3-611 mandated that the deputies arrest Winningham upon “reasonable cause to believe that [Winningham] ha[d] violated the order of protection.” The record supports a finding that the deputies’ failure to arrest Winningham was a deviation from a policy as expressed by statutory mandate and was operational in nature.¹⁴²

The finding that the deviation was operational in nature meant that it was about failing to carry out the established policy. While there still may be discretion in such cases, the discretion is in connection with how to carry out the policy rather than about full discretion to set or change the policy.¹⁴³

3. *New Jersey*

The relevant New Jersey statute reads as follows:

§ 2C:25–31. Contempt of order; arrest and custody of defendant

Where a law enforcement officer finds that there is probable cause

139. *Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999).

140. *Id.* at 163.

141. *Id.*

142. *Id.* at 164 (alterations in original).

143. It is common for immunity statutes to recognize this distinction—providing immunity for policy decisions but not for implementation decisions. See 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 78 (2001). Section 78 states the following:

In administering the test distinguishing between discretionary acts and ministerial functions, the key factor is the presence of basic policy formulation, planning or policy decisions, which are characterized by an exercise of a high degree of official judgment or discretion, because most states’ laws provide for immunity if the government was acting in that manner at the time of the injury.

Id. (footnotes omitted).

that a defendant has committed contempt of an order entered pursuant to the provisions of P.L.1981, c. 426 (C. 2C:25-1 et seq.) or P.L.1991, c. 261 (C. 2C:25-17 et seq.), the defendant *shall be arrested and taken into custody by a law enforcement officer*.¹⁴⁴

The court in *Campbell v. Campbell*¹⁴⁵ held that the police officers did not have discretion to arrest the plaintiff's husband under New Jersey's statute, and therefore they were not immune under section 59:3-2(a), which provides immunity for injury resulting from the exercise of judgment or discretion.¹⁴⁶

4. *Washington*

The Revised Code of Washington section 10.31.100 reads as follows:

§ 10.31.100. Arrest without warrant

....

(2) A police officer *shall arrest and take into custody*, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person¹⁴⁷

The statute was noted in dicta in *Donaldson v. City of Seattle*,¹⁴⁸ where the Washington Court of Appeals stated, "Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In

144. N.J. STAT. ANN. § 2C:25-31 (West Supp. 2005) (emphasis added).

145. *Campbell v. Campbell*, 682 A.2d 272 (N.J. Super. Ct. Law Div. 1996).

146. *Id.* at 274-75.

147. WASH. REV. CODE ANN. § 10.31.100 (West 2002) (emphasis added).

148. *Donaldson v. City of Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992).

regard to domestic violence, the rule is the reverse. If the officer has legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest.”¹⁴⁹

5. *Louisiana*

Louisiana Revised Statutes section 14:79(E) states the following: “Law enforcement officers shall use every reasonable means, including *but not limited to* immediate arrest of the violator, to enforce a preliminary or permanent injunction or protective order . . . or to enforce a temporary restraining order or ex parte protective order.”¹⁵⁰

The district court in *Conerly* stated the following:

The significant distinction between the Colorado restraining order and statute and the Louisiana restraining order and statute is that a Louisiana police officer’s discretion is notably broader. Even when there is probable cause that the restrained person is in violation of the order, Louisiana police officers are not required to arrest the person. In Colorado, “if the officer has probable cause to believe the terms of the court order are being violated, the officer is required to arrest or to seek a warrant to arrest the offending party.”¹⁵¹

The court went on to state: “While the statute authorizes arrest of the violator, it does not mandate arrest unless arrest is required to enforce the statute.”¹⁵² “Indeed, ‘the word “may” is not mandatory, but rather implies that a peace officer’s power to arrest without a warrant is discretionary.’”¹⁵³

6. *Montana*

Finally, if the Colorado General Assembly had wanted to create discretionary language, it could have chosen to use the word “may” or it could have stated that “arrest is the preferred response,” as Montana did in

149. *Id.* at 1103.

150. LA. REV. STAT. ANN. § 14:79(E) (2004) (emphasis added) (citations omitted).

151. *Conerly v. Town of Franklinton*, No. Civ.A. 03-1507, 2005 WL 1501421, *7 (E.D. La. June 20, 2005) (quoting *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1106 (10th Cir. 2004) (en banc), *rev’d*, 125 S. Ct. 2796 (2005)).

152. *Id.* (quoting *Gonzales*, 366 F.3d at 1106).

153. *Id.* (quoting *Ardoin v. City of Mamou*, 685 So. 2d 294, 299 (La. Ct. App. 1996)).

Montana Code section 46-6-311, which states the following:

(1) A peace officer *may* arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

(2) (a) The summoning of a peace officer to a place of residence by a partner or family member constitutes an exigent circumstance for making an arrest. *Arrest is the preferred response* in partner or family member assault cases involving injury to the victim, use or threatened use of a weapon, *violation of a restraining order*, or other imminent danger to the victim.¹⁵⁴

As these cases and legislation demonstrate, it was reasonable for Colorado to adopt the language that it did in order to make enforcement of restraining orders mandatory. In fact, Colorado had the advantage of both the existing Oregon legislation and case law interpreting the language to mean “mandatory.”¹⁵⁵ The *Castle Rock* majority does not point to a single case in which the courts have interpreted a statute purporting to mandate arrest for the violation of a restraining order as nonmandatory.¹⁵⁶

B. *The Options of “Arrest” or “Seek an Arrest Warrant”*

Although in *Castle Rock* the Court does not squarely address either of these cases or the statutes they are based on, its second set of arguments provides a response. None of these statutes includes the option of seeking an arrest warrant should an arrest be impractical.¹⁵⁷ The Court’s response is that even if the statute was mandatory, it mandates one of two options—arrest or seek an arrest warrant—and, because the second option is a

154. MONT. CODE ANN. § 46-6-311 (2005) (emphases added).

155. See discussion *supra* Part III.A.1.

156. The Court, however, does refer to case law illustrating “[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands.” *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005) (citing *Chicago v. Morales*, 527 U.S. 41 (1999)). In *Morales*, the Court rejected a “mandatory” reading of an ordinance stating an officer “‘shall order’ persons to disperse in certain circumstances.” *Morales*, 527 U.S. at 47, *quoted in Castle Rock*, 125 S. Ct. at 2806.

157. A few other states have adopted the optional language. See, e.g., IOWA CODE § 236.11 (2005); R.I. GEN. LAWS § 12-29-3(b)(4) (2004). As of yet, however, there is no case interpreting whether they are mandatory.

procedure and not an end in itself, this cannot give rise to an entitlement.¹⁵⁸

It may be noted at the outset that the district court in *Conerly* did not find that this part of the Colorado statute distracted from the mandatory nature of the statute.¹⁵⁹ The mere fact that the police have an option does not mean that the police can choose to do nothing.¹⁶⁰ Further, the choice between the two options is not discretionary, as an officer is only permitted to seek an arrest warrant if an arrest is impractical.¹⁶¹ The option to seek an arrest warrant is an improvement on those statutes that merely make the arrest mandatory, for if the arrest is impractical it simply will not be done, mandatory language or not. Those statutes that do not fill the gap by requiring that the officer seek an arrest warrant actually provide more discretion to the police officer to do nothing in the face of the impracticality of arrest. Thus, it makes perfect sense to require that the officer seek a warrant as a means of enforcing the order under such circumstances. It gives further clarity and direction to an officer who is to “use every reasonable means to enforce [the] protection order.”¹⁶²

Nonetheless, it can still be maintained that the second option is no more than an entitlement to a procedure, which the Supreme Court has held is not enough for the attachment of a due process right.¹⁶³ The majority argues the following:

The problem with this is that the seeking of an arrest warrant would be an entitlement to nothing but procedure—which we have held inadequate even to support standing, much less can it be the basis for a property interest. After the warrant is sought, it remains within the discretion of a judge whether to grant it, and after it is granted, it remains within the discretion of the police whether and when to execute it. Respondent would have been assured nothing but the seeking of a warrant. This is not the sort of “entitlement” out of which a property interest is created.¹⁶⁴

As noted by Justice Scalia, this argument is supported by the

158. *Castle Rock*, 125 S. Ct. at 2807–08. Justices Souter and Breyer, in their concurring opinion, rest on this argument. *See id.* at 2812 (Souter, J., concurring).

159. *Conerly v. Town of Franklinton*, No. Civ.A. 03-1507, 2005 WL 1501421, at *7 (E.D. La. June 20, 2005).

160. *Castle Rock*, 125 S. Ct. at 2819–20 (Stevens, J., dissenting).

161. COLO. REV. STAT. § 18-6-803.5(3)(b) (2004).

162. *Id.* § 18-6-803.5(3)(a).

163. *See supra* note 158 and accompanying text.

164. *Castle Rock*, 125 S. Ct. at 2808 (footnote and citations omitted).

concurring opinion of Justice Souter.¹⁶⁵ Souter bases his opinion at least in part on Ms. Gonzales's brief, as follows:

Ms. Gonzales alleges that . . . she was denied the process laid out in the statute. The police did not consider her request in a timely fashion, but instead repeatedly required her to call the station over several hours. The statute promised a process by which her restraining order would be given vitality through careful and prompt consideration of an enforcement request Denial of that process drained all of the value from her property interest in the restraining order.¹⁶⁶

He concludes from this that

[t]he argument is unconventional because the state-law benefit for which it claims federal procedural protection is itself a variety of procedural regulation, a set of rules to be followed by officers exercising the State's executive power: use all reasonable means to enforce, arrest upon demonstrable probable cause, get a warrant, and so on.¹⁶⁷

Justice Souter errs in two respects. First, he errs in reducing her claim to a claim to procedure, which is not supported in the language he quotes. Ms. Gonzales was not claiming the process in the statute as her state law entitlement. She argued that the failure to follow the process in the statute drained the value from her property interest in the restraining order.¹⁶⁸ Thus, her claim was a right to the enforcement of the order.

The second error was to characterize enforcement of the order as a procedure. The move mirrors the majority's collapse of the duty-discretion distinction by collapsing every command that requires some modicum of judgment into a discretionary one, thereby defeating any claim that the command creates a mandatory duty. If "all reasonable means to enforce, arrest upon demonstrable probable cause, get a warrant, and so on"¹⁶⁹ are

165. *Id.* Justice Souter also makes a few other arguments against an entitlement, including the inability of the plaintiff to stop the police from arresting or to stop the court from issuing a contempt order. *Id.* at 2811 (Souter, J., concurring). As Justice Stevens persuasively points out, an entitlement to go to school does not mean that one is entitled to refuse to go to school. *Id.* at 2824 n.20 (Stevens, J., dissenting). Mandatory attendance laws do not defeat the entitlement. *Id.*

166. *Id.* at 2811 (Souter, J., concurring) (quotation omitted).

167. *Id.*

168. *Id.*

169. *Id.*

categorized as merely procedural, and thus incapable of giving rise to an entitlement, then virtually no obligation to provide a service can give rise to an entitlement. Unlike entitlements to goods, entitlements to services all require process and are arguably reducible to a process in the same way that making an arrest, getting a warrant, and “so on” are processes. The court order reads like the terms of one side of a contract that tells us what services the police are required to render to the beneficiary.¹⁷⁰ The officer is obliged to enforce the warrant and is told to do so by all reasonable means, which include the duties of either arresting or seeking an arrest warrant should the arrest be impractical.¹⁷¹ There is nothing mysterious or “unconventional” about the entitlement.

Justice Souter also argues that when property rights have been recognized by the Court, there has always been a clear distinction between the right and the procedural obligations required to protect the right.¹⁷² If this is all that is required, then contrary to Justice Souter’s opinion, Ms. Gonzales’s claims satisfy the requirement. If what is required is that the procedure be separate from the right in question, there is no doubt that the procedure for determining if there is probable cause to either arrest or seek an arrest warrant is separate from either arresting or seeking an arrest warrant.

The circuit court in this case identified three simple and discrete steps in the process that it held was due to Ms. Gonzales.¹⁷³ These were identified in the statute and were distinct from the entitlement the process was designed to provide for those whose claim to the entitlement had merit.¹⁷⁴ As the Tenth Circuit Court of Appeals stated the following:

The statute . . . guides officers as to the process they should provide a holder of a restraining order before depriving that individual of his or her enforcement rights.

The statute directs police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order and whether probable cause exists that the restrained party has notice of the order. If, after completing these

170. *See id.* at 2801 (majority opinion).

171. *Id.* at 2805.

172. *See id.* at 2812 (Souter, J., concurring).

173. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1115 (10th Cir. 2004) (en banc) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), *rev’d*, 125 S. Ct. 2796.

174. *Id.* at 1116.

three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.¹⁷⁵

This rather simple and straightforward process arguably is what is due under the Due Process Clause of the U.S. Constitution.¹⁷⁶ It is completely separate from that which the process is meant to deliver. It is meant to deliver a nonarbitrary decision as to whether Ms. Gonzales's right to the enforcement of the restraining order has merit and will be carried out or denied.

C. *Serving Both Public and Private Ends*

At first glance, the Court's third set of arguments appears to be the most compelling. The public is quite comfortable with the distinction between criminal law and civil law, with the former serving public ends and the latter serving private ends.¹⁷⁷ As the majority states, the "serving of public rather than private ends is the normal course of the criminal law."¹⁷⁸ Thus, it is plausible to contend that a statute placing duties on the police to enforce the law is designed to serve public ends rather than private ends.¹⁷⁹

175. *Id.* (citations and footnote omitted). Determining whether a valid order is present can be achieved "by either examining the order in person, or by checking to see if the order has been entered in the statewide registry of protective orders." *Id.* at 1116 n.17 (citing COLO. REV. STAT. § 18-6-803.7). In determining whether there is probable cause that notice has been given to the restrained party, "the statute states 'a peace officer shall assume that the information received from the registry is accurate.'" *Id.* at 1116 n.18 (quoting COLO. REV. STAT. § 18-6-803.5(3)(c)). Regardless of whether a record of the order is in the registry, "[a] peace officer shall enforce a valid restraining order." *Id.* (quoting COLO. REV. STAT. § 18-6-803.5(3)(c)).

176. This appears to be a good minimal place to start, given that the process is laid out in the statute. It does not follow, however, that this is a sufficient process, particularly when the result is a refusal to enforce the order.

177. Justice Scalia reaches back to the eighteenth and nineteenth centuries to support this view. *Castle Rock*, 125 S. Ct. at 2808 (citing *Huntington v. Attrill*, 146 U.S. 657, 668 (1892); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

178. *Id.*

179. Although not recognized by Justice Scalia, his argument is superficially bolstered by section 2-4-201(1)(e) of the Colorado Revised Statutes, which states: "(1) In enacting a statute, it is presumed that: . . . (e) Public interest is favored over any private interest." COLO. REV. STAT. § 2-4-201(e) (2004). This in no way defeats the private interest when it is compatible with the public interest. Further, "[w]here the meaning is clear and no injustice would result, the statute must be interpreted as written without resort to other rules of statutory construction." *In re R.C.*, 775 P.2d 27, 29 (Colo. 1989) (en banc) (citing *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986)).

However, the two are not mutually exclusive. There is no question that the Colorado statute was designed to serve public ends. It does not follow, however, that it was not also designed to serve private ends or even that it helped to serve public ends by giving a private entitlement.¹⁸⁰

The Court's argument would be more compelling if the Colorado statute provided a general mandate to enforce all laws diligently and without undue delay. It becomes much less plausible when one thinks of the mischief the legislation was designed to correct. The legislation was designed to protect the shocking numbers of women and children harmed in the domestic context.¹⁸¹ It aimed to protect this class of persons by correcting two problems in the approach to domestic violence: (1) the ineffectiveness of counseling and mediation; and (2) police indifference or inaction.¹⁸² It did so by both shifting intervention in this area from mediation and counseling to arrests and by making enforcement of restraining orders mandatory. As noted above, the Colorado legislation was not created in isolation, but in accord with a trend across the country to create mandatory enforcement laws for domestic violence and restraining order violations.¹⁸³ The victims, survivors, and their advocacy groups have pushed for these rights and duties.¹⁸⁴ As Professor Miccio points out,

In some jurisdictions, such as Colorado, advocates were approached by key legislators to incorporate mandatory state intervention into arrest provisions. This was the culmination of years of working within the law enforcement establishment as advocates attempted to change police practices through the institution of pro-arrest policies as the preferred course of action.¹⁸⁵

180. Both common law and statutory law regularly serve public ends by providing private rights of action. Punitive damages are the clearest common law example while the § 1983 legislation provides a right to sue for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000).

181. See *supra* notes 5 and 6 and accompanying text.

182. See *supra* note 6 and accompanying text.

183. See *supra* notes 5 and 6 and accompanying text.

184. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 248–82 (2005) (tracing the histories of both the battered women's movement as well as the mandatory arrest movement); Wanless, *supra* note 6, at 539–40 (crediting the efforts of several advocacy organizations as the "driving force behind the enactment of mandatory arrest laws").

185. Miccio, *supra* note 184, at 279 (footnote omitted).

Finally, given that advocacy groups were involved in the drafting of the legislation, it is a stretch to think that the drafters of the legislation were not aware of the Oregon legislation and the *Nearing* case holding that the provisions of the legislation did give rise to an entitlement to enforcement on the part of the plaintiff.¹⁸⁶

D. *Worthy of Due Process Protection*

The majority of the Court still would not refer to this as a property interest under the Due Process Clause, as it does not believe it resembles traditional conceptions of property,¹⁸⁷ it does not have monetary value, and, according to the Court, “the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but 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.”¹⁸⁸

This last set of arguments is perhaps the least convincing of all. *Roth* changed the focus from traditional wooden and naive notions of property to a view of property rights and entitlement that looked to the function of property.¹⁸⁹ By looking at the function of property from the past to the present, the Court was able to formulate the rule that “[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”¹⁹⁰

On the one hand, the Court wants to paint the entitlement in question as something novel that “cannot ‘simply g[o] without saying.’”¹⁹¹ It is not

186. The plaintiff in *Nearing* sued under the Oregon Tort Claims Act. *Nearing v. Weaver*, 670 P.2d 137, 144 (Or. 1983) (en banc). As the court held, “If a private defendant would be liable for harm caused by failure to carry out a mandatory duty for the benefit of a specific person protected by a court order, . . . the Tort Claims Act makes a public defendant liable in the same manner.” *Id.* (citation omitted). As noted, Ms. Gonzales brought her case under § 1983, alleging a due process violation of the state entitlement. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2802 (2005). It could also have been brought under a Colorado state statute allowing suits against public employees for injuries caused by willful and wanton conduct. See COLO. REV. STAT. § 24-10-118 (2004). The facts alleged arguably satisfy the requirement.

187. The Court acknowledges that this is no bar to the claim. *Castle Rock*, 125 S. Ct. at 2809.

188. *Id.*

189. See discussion *supra* notes 27–36 and accompanying text.

190. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

191. *Castle Rock*, 125 S. Ct. at 2809 (quoting *id.* at 2821 n.16 (Stevens, J.,

traditional. On the other hand, the Court wants to say that it is incidental to something that has been happening all along—namely, “arresting people.”¹⁹² Unfortunately, the Court has it backwards. Entitlements to mandatory arrest for the violation of restraining orders are not novel; they have been around since 1977—nearly thirty years.¹⁹³ Oregon’s 1977 statute was interpreted to create a new property-like entitlement in 1983, over twenty years ago.¹⁹⁴ What has not been happening all along, however, is police enforcement of restraining orders. If the police had in fact been arresting people all along for these violations, there would not have been a need for (what is now) a majority of the states in the United States to pass legislation mandating arrest for the violation of restraining orders. It is precisely a “new species of government benefit or service”¹⁹⁵ that was created by the legislation, rather than an incidental benefit gained by a general mandate of the police to enforce the law. That benefit was further narrowed to the specific protected person named in the restraining order issued by the court. As Justice Stevens states: “A concern for the protected person pervades the statute.”¹⁹⁶

The assertion that a right to the mandatory enforcement of the restraining order had no monetary value is an odd claim in today’s world where private security companies, private investigators, and bounty hunters routinely conduct police functions for money.¹⁹⁷ The argument

dissenting)).

192. *Id.*

193. *See* discussion *supra* note 132 and accompanying text.

194. *See* *Nearing v. Weaver*, 670 P.2d 137, 144 (Or. 1983) (en banc) (“This statute demands more of officers than the exercise of reasonable judgment whether to respond to requests to enforce known court orders; it mandates that they respond. That is the point of the statute.”).

195. *Castle Rock*, 125 S. Ct. at 2799.

196. *Id.* at 2821 n.15 (Stevens, J., dissenting) (internal quotation marks omitted).

197. One wonders if Justice Scalia and the rest of the majority think that the protection given by the U.S. Marshals to members of the judiciary is without monetary value. The U.S. Marshals website boasts that it “coordinated and provided 187 instances of personal protective services to U.S. Supreme Court [J]ustices” in 2004. United States Marshals Service, Judicial and Court Security, <http://www.usmarshals.gov/judicial/> (last visited Feb. 28, 2006). The federal judiciary has, in fact, been mobilizing for better protection since the killing of the family members of Justice Lefkowitz in February of 2005. *See* *Judges Plead for Improved Judicial Security*, THE THIRD BRANCH, June 2005, at 1, 1–2, 9; *U.S. Marshals Service Resources Faulted by Federal Judiciary*, THE THIRD BRANCH, May 2005, at 1, 1–3. The concerns surrounding this event have resulted in the proposed Secure Access to Justice and Court Protection Act of 2005. H.R. 1751, 109th Cong. (2005). The ABA Justice

against Justice Stevens's claim that one could have a contract for such services furthers the point that the order had monetary value, rather than detracts from the point. Justice Scalia, writing for the Court, responded in a note:

Respondent probably could have hired a private firm to guard her house, to prevent her husband from coming onto the property, and perhaps even to search for her husband after she discovered that her children were missing. Her alleged entitlement here, however, does not consist in an abstract right to "protection," but (according to the dissent) in enforcement of her restraining order through the arrest of her husband, or the seeking of a warrant for his arrest, after she gave the police probable cause to believe the restraining order had been violated. A private person would not have the power to arrest under those circumstances because the crime would not have occurred in his presence. And, needless to say, a private person would not have the power to obtain an arrest warrant.¹⁹⁸

First, a private person would have had the power to arrest because the continued abduction of the children was a continuing breach of the terms of the restraining order.¹⁹⁹ Second, it does not follow that monetary value cannot be placed on the enforcement of the order simply because a private person does not have the power to obtain an arrest warrant.²⁰⁰ It means that the entitlement given is worth more than what one can buy in the market. In the present case, it would not necessarily have been worth much more since a citizen's arrest could have been made. In those cases in which a citizen's arrest cannot be made, due to the fact that the violation of the order is not ongoing, the warrant is worth considerably more since it

Center Coordinating Council for the Judicial Division, in its Report to the House of Delegates, states: "In the federal court system, for example, three federal judges have been killed in the past 25 years. It is believed that previously no family members had ever been killed." STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS & STANDING COMM. ON JUDICIAL INDEPENDENCE, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 3 n.1 (2005), <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/106C.doc>.

198. *Castle Rock*, 125 S. Ct. at 2809 n.12 (citation omitted).

199. The restraining order required that the husband not "molest or disturb the peace" of Ms. Gonzales and the children. *Gonzales v. City of Castle Rock*, 366 F.3d 1093 app. at 1144 (10th Cir. 2004) (en banc), *rev'd*, 125 S. Ct. 2796.

200. This is also questionable. According to Professor Miccio, "Rather than investigate and arrest, police in the eight jurisdictions have passed this responsibility on to the survivor. If an arrest is to be made, it is her responsibility to file for and secure either a warrant or a summons." Miccio, *supra* note 184, at 300.

puts more resources towards fulfillment of the requirement and substantially increases protection and the likelihood of an arrest.

IV. CONCLUSION: ANOTHER CASE IN *LOCHNER*'S LEGACY

The Court ends its opinion by stating the following:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as "a font of tort law," but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 . . . 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.²⁰¹

This appears to say that states cannot create property rights or entitlements in the mandatory enforcement of restraining orders that are worthy of Fourteenth Amendment Due Process protection. It seems to say that states can only make state enforceable rights of this nature. It tells the people that have fought for those rights, which are central to the protection of life, liberty, and property, that they are not worthy of even procedural due process protection. The last statement regarding what the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 did or did not create completely mischaracterizes the law. The framers of the Fourteenth Amendment wrote in plain language, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."²⁰² Likewise, § 1983's plain language states the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

201. *Castle Rock*, 125 S. Ct. at 2810 (citations omitted).

202. U.S. CONST. amend. XIV, § 1.

equity, or other proper proceeding for redress²⁰³

Thus, it is irrelevant that the framers of these two provisions “did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented.”²⁰⁴ They created a mechanism for holding accountable those acting under color of state authority for the deprivation of a right or privilege—namely, in this context, the right to simple due process.²⁰⁵ The due process right attaches to the right or entitlement to property.²⁰⁶ At the beginning of its opinion the Court stated: “Such entitlements are of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”²⁰⁷ Thus, while the majority begins its judgment with the view that it is up to the states to determine the rights that are to be protected by the Fourteenth Amendment, by the end of the judgment it takes that determination into its own hands and decides that an entitlement to a mandatory arrest is not good enough to be counted as a property right and afforded Fourteenth Amendment protection.

The *Castle Rock* decision has the ring of Justice Peckham’s opinion in *Lochner* just over one hundred years ago.²⁰⁸ Justice Peckham and a majority of the Court decided that it was up to them to decide what the Fourteenth Amendment meant by “liberty,”²⁰⁹ striking down a New York statute designed to limit the working hours of bakers in New York to under

203. 42 U.S.C. § 1983 (2000).

204. *Castle Rock*, 125 S. Ct. at 2810.

205. See generally COLO. REV. STAT. § 18-6-803.5(3) (2004) (granting a protected person arguable rights to have a protection order enforced and to have the offending person arrested upon a showing of probable cause that a protection order has been, or has attempted to be, violated).

206. See, e.g., *Castle Rock*, 125 S. Ct. at 2803 (recognizing that procedural due process protection attaches only to legitimate claims of entitlement).

207. *Id.* (internal quotation marks omitted) (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)).

208. Justice Scalia invoked *Lochner* to criticize Justice Breyer’s dissent in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 690–91 (1999). Justice Scalia has also been criticized for his “Lochnering.” See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 68 (1995).

209. See *Lochner v. New York*, 198 U.S. 45, 56–57 (1905) (holding that it is the Court’s task to determine whether legislation passed by a state under its police power violates the Fourteenth Amendment as an unreasonable interference with individuals’ personal liberty).

sixty per week for the workers' health and safety.²¹⁰ Justice Peckham chose the liberty of employers to exploit their workers over the health and safety of the workers, contrary to the views of the legislature.²¹¹ Today, Justice Scalia and the majority of the Court have taken it upon themselves to decide what the Fourteenth Amendment means by property by rewriting a statute designed to make enforcement of restraining orders mandatory for the health and welfare of protected persons. The Court has chosen the liberty of police officers to ignore their duties to enforce court ordered restraining orders over the safety and security of the victims of domestic violence.

Justice Holmes said of the *Lochner* decision, "This case is decided upon an economic theory which a large part of the country does not entertain."²¹² The same is true of the view of "discretionary" enforcement of restraining orders that grounds this decision.²¹³ The Supreme Court may not like the fact that Colorado created a right that the police enforce such orders because it imposes a duty on the police to actually do something—a positive entitlement rather than a mere negative right—but was it for the Court to second guess Colorado's creation of the right? Again, the Court may have benefited from Justice Holmes, who stated the following:

. . . I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . Some of these laws embody convictions or prejudices which judges are likely to share.

210. *Id.* at 64. The problem addressed by the statute was respiratory ailments, which caused substantial health issues for bakers who were working very long hours. *Id.* at 58.

211. In *Lochner* the Court stated the following:

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid.

Id. at 57.

212. *Id.* at 75 (Holmes, J., dissenting).

213. This is evidenced by the fact that more than fifty percent of states have passed mandatory arrest statutes for the violation of a protection order. *See infra* Appendix.

Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.²¹⁴

Although the common view of *Lochner* is that it was the decision of an activist court,²¹⁵ Professor Cass Sunstein has characterized the Court as holding the view that neutrality was constitutionally required.²¹⁶ Its approach to “neutrality,” however, was problematic at best.²¹⁷ Professor Sunstein has described the *Lochner* Court’s approach to neutrality as embracing three key concepts: “government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law.”²¹⁸ As he stated:

Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements. Market ordering under the common

214. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting). The Court in *Castle Rock* effectively struck down the Colorado mandatory arrest provisions for purposes of the Fourteenth Amendment Due Process Clause by holding that Colorado’s notion of a property right conflicts with the Supreme Court’s conception of a property right. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005) (holding the “respondent did not . . . have a property interest in police enforcement of the restraining order against her husband”).

215. Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

216. *Id.*

217. Professor Sunstein states that

The purpose of this Article is to suggest that the case should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law. Thus understood, *Lochner* has hardly been overruled.

Id. at 875.

218. *Id.* at 874.

law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.²¹⁹

It is not a stretch to place the Colorado legislation under this scheme. One need only substitute “police discretion” for “market ordering,” and the rest follows. Colorado attempted to change the existing distribution of entitlements by altering the “natural” common law public duty rule through legislation that imposed a special relationship between the police and persons holding restraining orders. It attempted to impose specific duties where there were none and create rights that had not previously existed. This move by the Colorado legislature, which was endorsed by the Tenth Circuit, was seen as “activist” by the United States Supreme Court.²²⁰

The attempt by Colorado to create an entitlement to the enforcement of protection orders is no more activist than the attempt by New York to limit the working hours of bakers. The need for the legislation in this case was no less pressing than that in *Lochner*. In this case, as in the case of *Lochner*, the common law status quo was not capable of correcting the systemic problem. New York workers did not have leverage in the market to negotiate safer conditions and more reasonable hours, so the legislature stepped in. In Colorado, attempts by victim advocacy groups to get the police to change from within had failed, and so once again, the legislature stepped in to correct the problem. In both cases, the United States Supreme Court undermined these efforts.

219. *Id.*

220. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005) (expressing “reluctance to treat the Fourteenth Amendment as ‘a font of tort law’” (quoting *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (internal quotation marks omitted))).

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Another Case in Lochner's Legacy

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APPENDIX

Legislation Pertaining to Arrests for the Violation of Restraining Orders or Protection Orders

| State | <i>May</i> Arrest | <i>Shall</i> Arrest | No Legislation on Point |
|--------------------------------|-------------------|---------------------|-------------------------|
| Alabama ⁱ | • | | |
| Alaska ⁱⁱ | | • | |
| Arizona ⁱⁱⁱ | • | | |
| Arkansas ^{iv} | • | | |
| California ^v | • | | |
| Colorado ^{vi} | | • | |
| Connecticut | | | • |
| Delaware ^{vii} | | • | |
| District of Columbia | | | • |
| Florida ^{viii} | • | | |
| Georgia | | | • |
| Hawaii | | | • |
| Idaho ^{ix} | • | | |
| Illinois ^x | • | | |
| Indiana ^{xi} | | • | |
| Iowa ^{xii} | | • | |
| Kansas ^{xiii} | | • | |
| Kentucky ^{xiv} | | • | |
| Louisiana ^{xv} | | • | |
| Maine ^{xvi} | | • | |
| Maryland ^{xvii} | | • | |
| Massachusetts ^{xviii} | | • | |
| Michigan ^{xix} | • | | |
| Minnesota ^{xx} | | • | |
| Mississippi ^{xxi} | | • | |
| Missouri ^{xxii} | | • | |
| Montana ^{xxiii} | • | | |
| Nebraska ^{xxiv} | | • | |

| | | | |
|----------------------------------|----|----|---|
| Nevada ^{xxv} | | • | |
| New Hampshire | | | • |
| New Jersey ^{xxvi} | | • | |
| New Mexico ^{xxvii} | | • | |
| New York ^{xxviii} | | • | |
| North Carolina ^{xxix} | | • | |
| North Dakota ^{xxx} | | • | |
| Ohio ^{xxxi} | | • | |
| Oklahoma ^{xxxii} | • | | |
| Oregon ^{xxxiii} | | • | |
| Pennsylvania ^{xxxiv} | | • | |
| Puerto Rico ^{xxxv} | | • | |
| Rhode Island ^{xxxvi} | | • | |
| South Carolina ^{xxxvii} | | • | |
| South Dakota ^{xxxviii} | | • | |
| Tennessee ^{xxxix} | | • | |
| Texas ^{xl} | • | | |
| Utah ^{xli} | | • | |
| Vermont ^{xlii} | • | | |
| Virgin Islands ^{xliii} | | • | |
| Virginia ^{xliv} | • | | |
| Washington ^{xlv} | | • | |
| West Virginia ^{xlvi} | | • | |
| Wisconsin ^{xlvii} | | • | |
| Wyoming ^{xlviii} | | • | |
| TOTAL | 13 | 35 | 5 |

ⁱ ALA. CODE § 30-5A-4 (LexisNexis 2005) (“may arrest”).

ⁱⁱ ALASKA STAT. § 18.65.530(a) (2004) (“with or without a warrant, shall arrest”).

ⁱⁱⁱ ARIZ. REV. STAT. ANN. § 13-3602(M) (Supp. 2005) (“with or without a warrant may arrest”).

^{iv} ARK. CODE ANN. § 5-53-134(c)(1) (Supp. 2005) (“may arrest and take into custody without a warrant”).

^v CAL. PENAL CODE § 836(d) (West Supp. 2005) (stating that an officer “may arrest . . . with or without a warrant” if certain circumstances apply).

^{vi} COLO. REV. STAT. § 18-6-803.5(3)(B) (2004) (“shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest”); *see id.* § 13-

14-103(11) (“duties of peace officers enforcing orders . . . shall be in accordance with section 18-6-303.5, C.R.S., and any rules adopted by the Colorado supreme court”).

^{vii} DEL. CODE ANN. tit. 10 § 1046(c) (Supp. 2004) (“shall arrest, with or without a warrant”).

^{viii} FLA. STAT. ANN. § 901.15 (West 2001) (“may arrest a person without a warrant”).

^{ix} IDAHO CODE ANN. § 39-6312(2) (2002) (“may arrest without a warrant and take into custody”).

^x 725 ILL. COMP. STAT. 5/112A-26(a) (Supp. 2005) (“may make an arrest without warrant”).

^{xi} IND. CODE ANN. § 34-26-1-15 (LexisNexis 1998) (“The attachment for contempt shall be immediately served by arresting the party charged, and bringing the party into court, if in session, to be dealt with as in other cases of contempt. The court shall also take all necessary measures to secure and indemnify the plaintiff against damages in the premises.”).

^{xii} IOWA CODE § 236.11 (2005) (“A peace officer shall use every reasonable means to enforce an order [If] unable to take the person into custody within twenty-four hours[,] . . . the peace officer shall either request a magistrate to make a determination as to whether a rule to show cause or arrest warrant should be issued, or refer the matter to the county attorney.”).

^{xiii} KAN. STAT. ANN. § 22-2307(a)–(b)(1) (1995) (“All law enforcement agencies in this state shall adopt written policies regarding domestic violence calls Such written policies shall include . . . [a] statement directing that officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed.”).

^{xiv} KY. REV. STAT. ANN. § 403.760(2) (LexisNexis 1999) (“shall arrest . . . without a warrant”).

^{xv} LA. REV. STAT. ANN. § 14:79(E) (2004) (“shall use every reasonable means, including but not limited to immediate arrest”).

^{xvi} ME. REV. STAT. ANN. tit. 19-A, § 4012(5) (1998) (“shall arrest and take into custody”).

^{xvii} MD. CODE ANN., FAM. LAW § 4-509(b) (LexisNexis 2004) (“shall arrest with or without a warrant and take into custody”).

^{xviii} MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998) (stating an officer shall arrest).

^{xix} MICH. COMP. LAWS ANN. § 764.15b(1) (West Supp. 2005) (“without a warrant, may arrest”).

^{xx} MINN. STAT. ANN. § 518B.01(14)(b) (West 1990) (“shall arrest without a warrant”).

^{xxi} MISS. CODE ANN. § 99-3-7(3) (West 1999) (“shall arrest a person with or without a warrant”).

^{xxii} MO. ANN. STAT. § 455.085(2) (West 2003) (“shall arrest”).

^{xxiii} MONT. CODE ANN. § 46-6-210 (2005) (“may arrest a person when the officer has a warrant”); *see id.* § 46-6-311 (“[m]ay arrest a person when a warrant has not been issued Arrest is the preferred response . . .”); *see id.* § 46-6-601 (“When a peace officer is called to the scene of a reported incident of domestic violence but

does not make an arrest, the peace officer shall file a written report with the officer commanding the law enforcement agency employing the peace officer, setting forth the reason or reasons for the decision.”).

^{xxiv} NEB. REV. STAT. ANN. § 42-928 (LexisNexis 2005) (“shall with or without a warrant arrest”); *id.* § 28-311.09(9) (“may with or without a warrant arrest”).

^{xxv} NEV. REV. STAT. Adv. Sh. § 33.070(1) (2003) (“Every . . . order must include a provision ordering any law enforcement officer to arrest. . . . *The law enforcement officer may make an arrest with or without a warrant.*” (emphasis added)).

^{xxvi} N.J. STAT. ANN. § 2C:25-21(a) (West Supp. 2005) (“shall arrest”).

^{xxvii} N.M. STAT. ANN. § 40-13-6(C) (LexisNexis 1978) (“shall arrest without a warrant and take into custody”).

^{xxviii} N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney Supp. 2005) (“shall arrest . . . and shall not attempt to reconcile the parties or mediate under certain circumstances”).

^{xxix} N.C. GEN. STAT. § 50B-4.1(b) (2003) (“shall arrest and take a person into custody without a warrant or other process”).

^{xxx} N.D. CENT. CODE § 14-07.1-11(1) (2004) (“shall arrest a person without a warrant”).

[M]ay arrest a person without a warrant if the arrest is made within twelve hours from the time the officer determines there is probable cause to arrest for an assault of a family or household member as defined in section 14-07.1-01, whether or not the assault took place in the presence of the officer. After twelve hours has elapsed, the officer must secure an arrest warrant before making an arrest.

Id. § 14-07.1-11(2). Section 14-07.1-11(2) also requires physical injury. *Id.*

^{xxxi} OHIO REV. CODE ANN. § 2935.03(A)(1) (LexisNexis 2003) (“shall arrest and detain, until a warrant can be obtained”).

^{xxxii} OKLA. STAT. ANN. tit. 22, § 196 (West 2003) (“may, without a warrant, arrest a person”).

^{xxxiii} OR. REV. STAT. ANN. § 133.310(3) (West 2003) (“shall arrest and take into custody”).

^{xxxiv} 23 PA. CONS. STAT. ANN. § 6113(a) (West 2001) (“shall arrest”).

^{xxxv} P.R. LAWS ANN. tit. 8 § 628 (2003) (“shall proceed to make an arrest even if there were no warrant to such effect”).

^{xxxvi} R.I. GEN. LAWS § 12-29-3(b)(1)(iv), (b)(4) (2002) (“shall arrest If an arrest without warrant cannot be made[,] . . . shall advise victim of the right to file a criminal complaint and shall seek a warrant for arrest if there is probable cause to do so.”).

^{xxxvii} S.C. CODE ANN. § 16-25-70(B) (Supp. 2004) (“must arrest, with or without a warrant . . . if physical manifestations of injury to the alleged victim are present”).

^{xxxviii} S.D. CODIFIED LAWS § 23A-3-2.1 (2004) (“shall arrest and take into custody”).

^{xxxix} TENN. CODE ANN. § 36-3-611(a) (2001) (“shall arrest the respondent without a warrant”).

^{xl} TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3) (Vernon Supp. 2005). The provision states the following:

(a) Any peace officer may arrest, without warrant:

(3) persons who the peace officer has probable cause to believe have committed an offense defined by Section 25.07, Penal Code (violation of Protective Order), or by Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is not committed in the presence of the peace officer

Id.

^{xli} UTAH CODE ANN. § 77-36-2.4(1) (2003) (“shall, without a warrant, arrest”). *See id.* § 30-6-8(1)(a) (“shall use every reasonable means to enforce the court’s order”).

^{xlii} VT. R. CRIM. P. 3(a) (LexisNexis 2003) (“may arrest without warrant”).

^{xliii} V.I. CODE ANN. tit. 16, § 94(a) (1996) (“shall make an arrest without a warrant”).

^{xliv} VA. CODE ANN. § 19.2-81.3(A) (2004) (“may arrest without a warrant”).

^{xlv} WASH. REV. CODE ANN. § 26.50.110(2) (West 2005) (“shall arrest without a warrant and take into custody”); *id.* § 10.31.100(2) (“shall arrest and take into custody . . .”).

^{xlvi} W. VA. CODE ANN. § 48-27-1001(a) (LexisNexis 2004) (“shall immediately arrest”); *id.* § 48-27-1001(b) (“may arrest”).

^{xlvii} WIS. STAT. ANN. § 813.12(7) (West Supp. 2004) (“shall arrest and take a person into custody”).

^{xlviii} WYO. STAT. ANN. § 35-21-104(b) (2005) (“An order of protection issued under this section shall contain a notice that willful violation of any provision of the order constitutes a crime as defined by W.S. 6-4-404, can result in immediate arrest and may result in further punishment.”).