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Comparing Supreme Court Jurisprudence in *Obergefell v. Hodges* and *Town of Castle Rock v. Gonzales*: A Watershed Moment for Due Process Liberty

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COMPARING SUPREME COURT JURISPRUDENCE IN *OBERGEFELL V. HODGES* AND *TOWN OF CASTLE ROCK V. GONZALES*: A WATERSHED MOMENT FOR DUE PROCESS LIBERTY

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> *"The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals* discord *between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."*[1]

* Professor of Clinical Law, Penn State Law. The author gratefully acknowledges the research assistance of Kate Hynes, Courtney Kiehl, and Samantha Link in the drafting of this article. The author also thanks trusted colleagues Caroline Bettinger-Lopez, Leigh Goodmark, and Kit Kinports for their extensive insight on the intersections of domestic violence and Constitutional law.

1. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (emphasis added).

I. INTRODUCTION

The Supreme Court described a troubling "discord between the Constitution's central protections and a received legal stricture" in its 2015 decision in *Obergefell v. Hodges.*[2] Its decision in *Obergefell* resolved that discord in the context of the right to same-sex marriage. Unfortunately, that same discord remains in the context of marriages and other intimate relationships fraught with domestic violence because police protection for victims in these relationships is still not recognized as a due process interest. The Supreme Court faced this issue in its 2005 decision *Town of Castle Rock v. Gonzales,* but it declined to recognize due process property rights for domestic violence victims based on police inaction.[3] The right to police protection, as Justice Kennedy explains in *Obergefell*, is a right inextricably linked with the other fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Freedom from domestic violence is a fundamental human right,[4] and the Supreme Court should recognize it as an aspect of due process liberty, just as it does the right to marry. The due process analysis in *Obergefell* enables the Supreme Court to overturn its decision in *Castle Rock*.

The Supreme Court held in *Castle Rock* that there was no due process violation by the Colorado town's police force for its failure to enforce a domestic violence restraining order against Jessica (Ms. Lenahan) Gonzales's estranged husband, Simon Gonzales.[5] The Court declined to recognize the individual rights arguments advanced by Ms. Lenahan in her due process claim.[6] After Ms. Lenahan took her case to the Inter-American Commission on Human Rights ("IACHR"), however, the tribunal granted her claim of relief against the United States in 2011.[7] The resulting decision repeatedly stressed the concept that freedom from domestic violence, in numerous iterations, is a basic human right.[8] Still, claimants who approach federal courts seeking redress for harms that arise

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2. *Id*.

3. 125 S. Ct. 2796, 2802–03, 2810 (2005) (explaining that "[t]he 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.' Amdt. 14, § 1. 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.' [The victim] claims the benefit of this provision on the ground 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" and holding that the victim "did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband.").

4. *See, e.g.*, City of Baltimore resolution, http://www.lawschool.cornell.edu/womenandjustice/upload/2b-Baltimore-MD.pdf; Pres. Barack Obama, *Presidential Proclamation: National Domestic Violence Awareness Month, 2014*, THE WHITE HOUSE, (Sept. 30, 2014), https://www.whitehouse.gov/the-press-office/2014/09/30/presidential-proclamation-national-domestic-violence-awareness-month-201.

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

6. *Id.*

7. Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

8. *Id.*

from domestic violence have not been able to rely on the IACHR decision because *Castle Rock*[9] was a United States Supreme Court decision and thus controlling authority.

In this article, I argue that the legal landscape is now entirely different as a result of the reasoning in the Court's 2015 decision in *Obergefell.*[10] The decision struck down the Kentucky, Michigan, Ohio and Tennessee laws[11] defining marriage as being between one woman and one man. The Court's reasoning in *Obergefell* clarifies that the freedom to marry regardless of gender, and its status as part of the more comprehensive right to privacy, is inextricably linked with the other fundamental rights protected by the Due Process Clause. The following sections will explain that these legal findings articulated in *Obergefell* now provide the infrastructure upon which domestic violence victims can frame causes of action as due process liberty violations. The IACHR framed the violations in the *Castle Rock* case as failures by the government to meet its obligations with due diligence to protect Ms. Lenahan and her children from discrimination and harm.[12] Ms. Lenahan's action in the *Castle Rock* litigation was an entitlement-based due process property claim.[13] The Supreme Court now has the authority to overturn, or at least decline to follow, not only *Castle Rock*'s finding regarding Due Process but also the precedent relied on by its majority.[14]

Section II of this article examines the facts and findings in the 2005 *Castle Rock* decision, including the Court's refusal to recognize a Due Process-based entitlement claim to police protection in domestic violence cases. It also introduces *DeShaney v. Winnebago*, a key precedent the Court relied on when

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

10. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

11. *See id.* at 2584 (citing the laws in question which were an Ohio statute, and state constitutional provisions in the other three states, *e.g.*, Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Mich. Const., art. I, §25; Ky. Const. §233A; Tenn. Const., art. XI, §18).

12. *See* Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, Sections IV(6)(B)(1)(c)(iii) and V (2011) (concluding that "even though the [United States government] recognized the necessity to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, it failed to meet this duty with due diligence . . . which constituted a form of discrimination in violation of Article II of the American Declaration [on the Rights and Duties of Man, which guarantees freedom from discrimination], and that "the [United States government] also failed to undertake reasonable measures to prevent the death of Leslie, Katheryn and Rebecca Gonzales in violation of their right to life under Article I of the American Declaration, in conjunction with their right to special protection as girl-children under Article VII of the American Declaration. Finally, the Commission concludes that the State violated the right to judicial protection of Jessica Lenahan and her next-of-kin, under Article XVIII of the American Declaration.").

13. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 (2005) (stating that "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit'. 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

14. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005) (declining to find a due process liberty violation and citing DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989), which held that nothing in the Due Process Clause requires the state to protect the life, liberty, and property of its citizens against invasion by private actors).

declining to find liability based on a due process liberty interest. Section III explains the 2011 decision by the IACHR, which found that the U.S. government had committed numerous human rights violations against Ms. Lenahan. Section IV looks at the *Obergefell* decision and explains how it is consistent with Supreme Court jurisprudence on due process liberty, with the IACHR's *Lenahan* decision, and with other international human rights laws. Finally, Section V lays out the specific reasons why both *Castle Rock* and *DeShaney* can be overturned.

II. THE SUPREME COURT, DUE PROCESS, AND HUMAN RIGHTS IN 2005: *TOWN OF CASTLE ROCK V. GONZALES*

In 2005, the Supreme Court held in *Castle Rock* that a police department's refusal to enforce a domestic violence restraining order against Jessica Lenahan's husband, Simon Gonzales, did not constitute a due process violation.[15] The underlying incident resulted in the deaths of Ms. Lenahan's three young daughters[16] after their father abducted them from the yard at the mother's residence, drove them around for several hours, and eventually showed up with their bodies at the Castle Rock police department.[17] Despite numerous calls from Ms. Lenahan during the ten hours between the abduction and the shoot-out, the Castle Rock Police Department took no action and repeatedly told Ms. Lenahan to wait to see if Gonzales brought the children home, even after one of her reports provided the department with Gonzales's whereabouts based on his own phone call to her.[18]

The Court declined to recognize the Due Process arguments Ms. Lenahan made in her claim.[19] As explained in more detail below, the due process claim was limited to a property-based entitlement claim because Supreme Court precedent disallowed due process liberty claims in cases against governments

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

16. *See* Declaration of Jessica Ruth Lenahan (Gonzales), Exhibit E in Observations Concerning the September 22, 2006 Response of the United States Government at 5–34, *Gonzales v. United States*, Petition No. 1490-05, Inter. Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007) (Dec.11, 2006) (explaining that "[a]fter nine years of marriage, Jessica and Simon Gonzales separated in January of 1999. Remaining in the custody of their mother were their three young daughters; Rebecca (age 9), Katheryn (age 8) and Leslie (age 6)"), https://www.aclu.org/sites/default/files/pdfs/gonzales_finalbrief.pdf.

17. *Town of Castle Rock v. Gonzales* at 755–56.

18. *See Town of Castle Rock v. Gonzales* at 753–54*; see also*, Petition Alleging Violations of the Human Rights of Jessica Gonzales, by the United States of America and the State of Colorado, with Request for an Investigation and Hearing of the Merits at 7–20, *Gonzales v. United States,* Petition No. 1490-05, Inter. Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), https://www.aclu.org/sites/default/files/field_document/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf [hereinafter Gonzales Petition]. For a full factual description, see Observations Concerning the September 22, 2006 Response of the United States Government at 5–34, *Gonzales v. United States*, Petition No. 1490-05, Inter. Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), https://www.aclu.org/sites/default/files/pdfs/gonzales_finalbrief.pdf.

19. *Id.* at 768–69.

where private actors also caused harm.[20] Ms. Lenahan's lawsuit claimed the mandatory arrest language in the restraining order entitled her to law enforcement protection, but the Supreme Court disagreed; it reasoned, "[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders *mandatory*."[21]

The Castle Rock Police Department could have enforced the restraining order based on Gonzales's violation of the stay-away provisions in coming to Ms. Lenahan's home, as well as the restricted child visitation aspect he violated by abducting the girls on a day he did not have visitation.[22] Gonzales was abusive toward, and dangerous to, his estranged wife and their children for years prior to his separation from them, and he attempted suicide at least once in front of the children.[23] Further, Gonzales fired a gun numerous times during the incident, eventually killing himself at the police station.[24] There was gunfire by the police as well, and the precise causes and times of death of Ms. Lenahan's daughters remain unknown—raising further questions about the police conduct that night that may never be fully answered.[25]

Despite the compelling facts of this case, which Justice Scalia's majority opinion acknowledged are "horrible,"[26] the Supreme Court held that there was no obligation on the part of the police to respond in a manner that could have

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20. *Id.* at 755–56, 767–68 (citing DeShaney v. Winnebago, 489 U.S. 189, 196 (1989), which held that the Fourteenth Amendment does not guarantee due process liberty to the extent of creating an entitlement of government assistance to accessing all aspects of freedom, in a case where a family claimed child protective services workers failed to keep a child they were involved with from being beaten nearly to death by his father).

21. *See* Caroline Bettinger-Lopez, *Gonzales v. U.S.: An Emerging Model for Domestic Violence and Human Rights Advocacy in the U.S.*, 21 HARV. HUM. RTS. J. 183, 184 (2008) [hereinafter Bettinger-Lopez] (explaining that "Jessica Gonzales [Lenahan] filed a Section 1983 lawsuit against the police in federal court, alleging due process violations of the Fourteenth Amendment of the U.S. Constitution. Before reaching discovery, her case was dismissed. The case wound its way up to the Supreme Court, where Justice Scalia, writing for the majority, held that Ms. Gonzales [Lenahan] had no personal entitlement under the Due Process Clause to police enforcement of her restraining order . . . . [d]espite the Colorado legislature's repeated use of the word 'shall' in the mandatory arrest law . . . .") (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 760 (2005)) (emphasis in original).

22. *See* Gonzales Petition, *supra* note 18, at 8 (explaining that [o]n May 21, 1999, Ms. Gonzales applied for and obtained from the Douglas County, Colorado District Court a temporary restraining order [("TRO")] against Mr. Gonzales").

23. *Id.* at 9 (noting that a state court "made permanent the temporary restraining order" and solidified visitation terms for Simon, on June 4, 1999, which was just two weeks prior to the incident when the children died).

24. *See* Gonzales Petition, *supra* note 18 at 7–20.

25. *See* Bettinger-Lopez, *supra* note 21, at 184 (explaining that the precise causes of death of Ms. Lenahan's daughters is unknown, because the local authorities failed to investigate it—a point stressed by the IACHR opinion—and that Simon Gonzales initiated the exchange of gunfire with the Castle Rock police after stopping his truck—with the girls inside—at the police station)*; see also*, Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 470 (2006) (explaining that "suicide by cop" and self-inflicted fatal wounds are not unheard of in domestic violence cases, particularly in the case of the family annihilator.").

26. Town of Castle Rock v. Gonzales, 545 U.S. 748, 751 (2005).

prevented the girls' deaths. This holding precluded any relief for Ms. Lenahan, whose claim framed the police inaction as impinging on her entitlement to protection from harm.[27] The entitlement claim was articulated as a due process property rights violation. As a consequence of the Court's 1989 decision in *DeShaney v. Winnebago,* due process property claims are the only relief available to redress harm by state actors under similar facts where third party acts were also involved.[28] The Court in *DeShaney* held that the Fourteenth Amendment does not create an entitlement of government aid in order to realize all the advantages of freedom.[29] The Court also opined that the Due Process Clause is intended to prevent government from abusing its power or employing it as an instrument of oppression.[30]

DeShaney, as interpreted by *Castle Rock* to include domestic violence harms involving police*,* rendered due process liberty claims based on domestic violence facts, such as those in *Castle Rock*, impossible. *Castle Rock* held that due process property claims for such domestic violence deaths were also not permitted. In light of *Obergefell*'s extensive analysis on the nature of liberty, however, claims with similar facts became legally viable under the more appropriate due process liberty analysis. The subsequent legal history of the *Castle Rock* case at the IACHR provided further legal authority that, while not binding, should be deemed persuasive in concert with *Obergefell*. The points made regarding due process liberty in the IACHR decision and in *Obergefell* are strikingly similar.

III. *CASTLE ROCK* REVISITED: THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON DUE PROCESS

In 2011, the IACHR in *Jessica Lenahan (Gonzales) v. United States of America*, found that the United States government had violated Ms. Lenahan's human rights.[31] The decision arose from litigation Ms. Lenahan filed with the Inter-American Commission several years after the Supreme Court's *Castle Rock* decision.[32] The human rights clinics at the University of Miami and Columbia University law schools as well as the American Civil Liberties Union, represented Ms. Lenahan, who claimed that the Castle Rock police and the federal courts had violated her human rights to police protection from domestic violence.[33] Her petition alleged that the Castle Rock Police Department's failure

27. *Id.* at 768.

28. *Id.* at 755 (citing DeShaney v. Winnebago*,* 489 U.S. 189 (1989)).

29. 489 U.S. 189, 196 (1989).

30. *Id.*

31. Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

32. Gonzales Petition, *supra* note 18.

33. *See Human Rights Clinic Victory for Gonzales, University of Miami School of Law Human Rights Clinic*, University of Miami School of Law, LAW.MIAMI.EDU, http://www.law.miami.edu/hrc/hrc_gonzalez_usa.php (last visited Feb. 28, 2016) (explaining the law school clinics' representation of Gonzales-Lenahan before the Inter-American Commission on Human Rights).

to protect Ms. Lenahan and her children and the federal courts' subsequent refusal to provide her with a remedy, constituted human rights violations.[34]

The IACHR holding was starkly different from the Supreme Court's 2005 decision, which denied Ms. Lenahan's procedural due process claim against the town of Castle Rock.[35] The IACHR decision repeatedly stressed the concept that freedom from domestic violence, in numerous iterations, was a basic human right.[36] Ms. Lenahan's counsel specified that the IACHR decision was a "challenge" to the doctrine established in *DeShaney* that state actors bear no legal duty to shield citizens from third party harms.[37] Ms. Lenahan urged the IACHR to "hold the United States to well-established international standards on state responsibility to exercise due diligence to prevent, investigate, and punish human rights violations and protect and compensate victims."[38] The IACHR agreed that Ms. Lenahan's human rights to be free from discrimination, to equal protection before the law, to police protection against domestic violence, and to judicial remedies were violated. The commission chastised the United States for gaps in its domestic violence policies and laws and discussed extensive recommendations for change.[39]

In the IACHR's *Lenahan* decision, the Commission outlined recommendations for U.S. legal reform, which included legislative measures to enforce the mandatory character of restraining orders.[40] The *Lenahan* decision should increase the already growing influence of international law in American courts, and as the Commission noted with admonishment, the United States needs to provide legal remedies for domestic violence victims in order to comply with global standards.[41] The United States would risk compromising our status as an international leader on social and economic policy if it ignored the clear directives in *Lenahan*. The IACHR decision is an opportunity to help United

34. Gonzales petition, *supra* note 18, at 46, 65.

35. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005); *see also Int'l Comm'n Finds U.S. Denied Justice to Domestic Violence Survivor*, ACLU, http://www.aclu.org/womens-rights/international-commission-finds-united-states-denied-justice-domestic-violence-survivor (explaining that "the commission's decision stands in stark contrast to the U.S. Supreme Court's decision in *Town of Castle Rock v. Jessica Gonzales* (2005), where the justices ruled that Ms. Lenahan (then Gonzales) had no constitutional right to police protection, and that the failure of the police to enforce Ms. Lenahan's order of protection was not unconstitutional. Lenahan then filed a petition against the U.S. before the IACHR, alleging violations of international human rights.").

36. Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

37. *See Human Rights Clinic Victory*, *supra* note 33 (stating that "the case before Commission challenged the core principle of US law (embodied in *DeShaney v. Winnebago County*) that government generally has no duty to protect individuals from private acts of violence.").

38. *Id.* (also noting that amicus briefs were submitted for petitioner signed by "over 70 individuals and organizations, and Professor Jeffrey Fagan submitted an expert report about the appropriate standards for police response to domestic violence in the U.S.").

39. Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, Sections IV and VI (2011).

40. *Id.* at ¶ 201 (4) (2011).

41. *Id.* at 181–84 (2011).

States courts better account for international standards in future analyses, particularly in the area of human rights.[42]

The United States Supreme Court has increasingly relied on international sources as part of its analyses.[43] Although the Court's reliance on foreign and international law has been criticized by advocates, scholars, and even some justices, its efficacy is clear. The U.S. legal system, especially as a framework for remedies for victims of domestic violence, should recognize freedom from domestic violence as a human right in the context of due process liberty.[44]

IV. THE SUPREME COURT, DUE PROCESS, AND HUMAN RIGHTS IN 2015: *OBERGEFELL V. HODGES*

The extensive holdings and commentary in the IACHR's *Lenahan* decision provided important supplemental legal authority but were not binding precedent on United States federal and state courts. *Obergefell*, however, is binding precedent, making it a game-changer for domestic violence plaintiffs who seek redress against state actors. *Obergefell* expands the Supreme Court's Due Process Liberty interpretation. As I explain in this section, the Court's findings in *Obergefell* were in line with its evolving body of law on due process liberty and with the IACHR's decision in the *Lenahan* case. Furthermore, the Court has relied on international legal authority in previous cases, and by using the IACHR's *Lenahan* findings to overturn *Castle Rock*, the Court could restore

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42. *See, e.g.*, KSM Carlson, *International Commission Decision Brings New Hope to Native Women Facing Domestic Violence in the U.S.*, TURTLE TALK (Aug. 18, 2011) (quoting Juana Majel Dixon, National Congress of American Indians 1st Vice President and Co-Chair of its Task Force on Violence Against Women) (explaining that "The recommendations to the United States send a strong message that immediate action is needed to fix systemic failures in the way protection orders are enforced in the U.S. and to reform federal law to protect all women, including Native women, from violence."); *see also*, Leigh Goodmark, *The Economics of Violence: Why Freedom from Domestic Violence must be Treated as a Developmental Right in International Law* in Kelsey S. Barnes 6 YEARBOOK OF INT'L LAW 97 (1997–98) (arguing that "domestic violence is [ ] a public health concern that imposes a great economic burden on communities . . . . [T]o truly affect policy and gain governmental support, activists must show the enormous economic and business loss that domestic abuse engenders. Only then can the human rights argument be argued successfully . . . . While no treaty—the foundation of international law—specifically singles out freedom from domestic violence as a right, many scholars make cogent arguments that existing treaty language implicitly includes such a right. In addition, mainstream discussions occurring in organizations around the globe acknowledge the horrors of domestic violence. For example, a 1995 United Nations publication noted that, contrary to previous reviews, most countries now include reports about violence against women in their communications with the United Nations. As a result, many countries view this problem as having been 'largely recognized.' Even the World Bank, for the first time ever in 1993, assessed the health consequences of gender-based violence.").

43. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (outlawing the death penalty for juveniles and noting that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *see also* Section V(B) *infra*.

44. *See, e.g.*, Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture,* 89 MINN. L. REV. 71, 76–77 (2004) (explaining that "the United States' interpretation of the [United Nations Convention Against Torture] through the lens of the more public male experience, too often leaves refugee women unprotected from less public harms such as domestic violence.").

consistency with the United States' domestic and international policy goals. As a result, the Supreme Court has the legal authority to overturn *Castle Rock* when faced with an appropriate claim against a state actor in a domestic violence case.

The United States Supreme Court clarified more than just the right to marry in *Obergefell*, a landmark 2015 decision on state same-sex marriage laws.[45] *Obergefell* recognized a due process liberty right in freedom to marry those of the same sex.[46] The majority opinion by Justice Kennedy also clarified the modern understanding of due process liberty as an enforceable legal right necessary for social justice. Kennedy's opinion included an impassioned description of due process liberty rights as an intrinsic aspect of our very existence as humans.[47] The Court recounted the history of marriage and the laws governing it, noting not just how marriage has evolved but that its very evolution is emblematic of our strength as a society.[48] After reviewing the death of the coverture doctrine and the now defunct role of parents in arranging U.S. marriages, the Court stated:

> These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.[49]

The Court then immediately drew a parallel between the transformation of marriage laws and the evolving social status of gays and lesbians to make the point that such an evolution necessitated legal change.[50] The Court went on to state: "This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians."[51] The Court's reasoning laid the jurisprudential groundwork for ensuing legal developments in rights for LGBT individuals as well as married couples.[52]

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45. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

46. *Id.*

47. *See id.* at 2598–99 (citing Zablocki v. Redhail, 434 U.S. 374, 384, 386 (1978) to describe the right to marriage, stemming from due process liberty, as "'one of the vital personal rights essential to the orderly pursuit of happiness by free men'"; and noting that the Court said it "would be contradictory 'to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.'").

48. *Id.* at 2595.

49. *Id.* at 2596.

50. *Id.* at 2596–97.

51. *Id.* at 2596.

52. *See, e.g.*, Jeremiah Ho, *Animus and Dignity: Justice Kennedy's Anti-Stereotyping Principle in Obergefell v. Hodges*, JURIST (July 22, 2015), http://jurist.org/forum/2015/07/Jeremiah-Ho-Obergefell-Hodges.php (explaining that "the animus-dignity propagated in these gay rights cases has established a correlative effect between the two concepts that elevates the connection into an anti-stereotyping principle or channeling device. The connection shows us what is wrong with the way the law has been used to marginalize a sub-group in society based on disapproval for a characteristic that members of this

The *Obergefell* majority described the due process liberty implications of the right of intimate association—which was found in the Supreme Court's 2003 decision, *Lawrence v. Texas*,[53] to include same-gender sexual partners—as distinct from, but linked to, the right to marriage freedom.[54] The Court stressed that both interests—the right to marry and the right of intimate association—are inherent in due process liberty and must be protected.[55] As the Court explained, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[56] Although the Court was referring specifically to the right of marriage as an expansion of the right to intimate association, it is noteworthy that the Court discussed this separate liberty interest within its discussion of marriage freedom as a liberty interest.[57] Ultimately, liberty interests in the family context are understood to be related to the right to privacy.[58] Those Due Process rights embody the human right of freedom to bodily and psychological integrity in our personal lives. The Court has repeatedly stressed these concepts in the line of cases running from *Meyer v. Nebraska*[59] and *Pierce v. Society of Sisters*,[60] which dealt with parental decision-making for educating their children, *Griswold v. Connecticut*[61] and *Eisenstadt v. Baird*,[62] which recognized contraceptive freedom, to *Roe v. Wade*'s reproductive choice decision[63]—all of which are cited by the *Lawrence* Court in its discussion of due process liberty jurisprudence.[64]

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sub-group possess. The connection then highlights how that marginalization pervasively hinders members of the sub-group's ability to lead their lives according to our collective beliefs of self-determinism, freedom and individuality. That correlative effect offers potential furthering advances in sexual orientation antidiscrimination, the next realm for gay rights advocacy.").

53. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

54. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

55. *See id.* at 2600 (insisting that marriage freedom includes the right to marry the partner of one's choosing, regardless of gender, partly because our understanding of the nature of liberty described in *Lawrence* confirmed the right to sexual activity with partners of one's choosing without risk of criminal sanctions, stating that: "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

56. *Id.*

57. *See, e.g.*, Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges',* THE NATION (June 29, 2015) http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ (explaining that "[t]he single most important theme in the opinion is that the Constitution provides not merely space but also support for expanding the perimeters of human rights. *Obergefell* recommits the Court to an understanding that 'the nature of injustice is that we may not always see it in our own times' and that the framers 'entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.' Its grace note is the reminder to evolve.").

58. *See* Lawrence v. Texas, 539 U.S. at 575 (explaining the rights to privacy and liberty established in *Griswold*, *Eisenstadt* and *Roe*).

59. 262 U.S. 390 (1923).

60. 268 U.S. 510 (1925).

61. 381 U.S. 479 (1965).

62. 405 U.S. 438 (1972).

63. 410 U.S. 113 (1973).

64. *See* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003).

As the Court explained in *Lawrence*:

> [H]ad those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

Castle Rock sets a precedent of absolving police forces of virtually all liability. This oppresses domestic violence victims who have relied on police protection to their detriment. Future petitioners/plaintiffs could challenge *Castle Rock*'s holding by basing their claims on the more palatable—and sensible—legal framework of due process liberty.

A. *OBERGEFELL* IS CONSISTENT WITH SUPREME COURT JURISPRUDENCE ON DUE PROCESS LIBERTY

Since the 1930's the Court's jurisprudence on due process liberty evolved and eventually acknowledged that Due Process must recognize our humanistic obligations to each other. This is particularly profound in the context of state involvement in intimate relationships, generally understood as family and individual privacy cases.[65] One example is *Stanley v. Illinois*[66] Mr. Stanley's children were automatically placed into foster care by Illinois state authorities after their mother died, simply because Mr. Stanley—their biological father with whom they had lived along with their mother—had not been married to her.[67] The Court held that Illinois deprived Mr. Stanley of Due Process on liberty grounds and that states could not separate unmarried fathers from their children without parental fitness hearings.[68]

The right to family privacy as a liberty interest, as explained in *Stanley* and the Court's related Due Process cases should be recognized in domestic violence redress claims. Ms. Lenahan was deprived of a due process liberty interest, similar to the deprivation that Mr. Stanley suffered. Furthermore, the Gonzales children were deprived of their right to life. The IACHR extensively discussed in *Lenahan* that this deprivation was a human rights violation.[69] The IACHR in *Lenahan* found unequivocally that the Supreme Court of the United States erred

65. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), Stanley v. Illinois, 405 U.S. 645 (1972), and Lawrence v. Texas, 539 U.S. 558 (2003).

66. 405 U.S. 645 (1972).

67. *Id.* at 646–47.

68. *Id.* at 657–58.

69. Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 164 (2011).

in *Castle Rock* and that the mother was entitled to a remedy through the courts.[70] The *Obergefell* decision is a potent explanation of the Court's modern jurisprudence on due process liberty and privacy.[71] A modern understanding of due process liberty must be deferential to the right to freedom from domestic violence and state protection from it when court-ordered. This is also consistent with the legal doctrine of human rights, which is increasingly recognizing state obligations to act with due diligence.[72]

B. *OBERGEFELL* IS CONSISTENT WITH THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS' *LENAHAN* DECISION AND OTHER INTERNATIONAL HUMAN RIGHTS LAWS

In future cases of police failure to protect victims from domestic violence, the Court's family privacy jurisprudence must be considered alongside *Obergefell*. Simultaneously, though, the Court should consider the findings in *Lenahan* concerning the United States' duties under the American Declaration on the Rights and Duties of Man[73] and other iterations of international human rights law, such as the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[74] The Court could also draw from scholarship on the issue of human rights and fundamental liberties in domestic violence cases[75] as supplemental authority. The IACHR in the *Lenahan* decision provides a roadmap for the United States legal system's approach to redress for domestic violence victims. The *Obergefell* analysis of due process liberty is resonant with

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70. *See* Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, Section VII ¶ 209 *et seq.* (2011).

71. *See* Section IV(A) *infra*, explaining the evolution of the Court's due process liberty jurisprudence as rooted in the right to privacy, and discussing the line of family privacy cases including Meyer, Pierce, Griswold, Eisenstadt, and Roe.

72. *See, e.g.*, Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INT'L L. J. 301, 302 (2015) (stating that "[i]nternational human rights bodies and some States' national courts now recognize the due diligence principle in their decisions and policy discourse"); Sarah Rogerson, *Domesticating Due Diligence: Municipal Tort Litigation's Potential to Address Failed Enforcement of Orders of Protection*, 21 AM. U. J. GENDER & SOC. POL'Y & L. 289, 296 (2012–13).

73. Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, Section V ¶ 199 *et seq.* (2011).

74. *See* Bettinger-Lopez, *supra* note 21 at 188, 190 (explaining that although the United States has declined to ratify CEDAW and "most international human rights treaties," the Lenahan "case has presented new approaches to human rights, civil rights, and domestic violence advocacy in the United States").

75. *See, e.g.*, Nancy Chi Cantalupo, *Jessica Lenahan (Gonzales) v. United States & Collective Entity Responsibility for Gender-Based Violence*, 21:2 AMER. UNIV. J. GENDER & SOC. POL'Y & L. 231, 244–45 (2012) (discussing the European Court of Human Rights' treatment of state actors as responsible in certain domestic violence cases if they should have known harm could result); Martha Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, CLEARINGHOUSE REV. J. L. POL'Y 414, 414 (2007) (explaining that "international human rights law is increasingly used in domestic advocacy."); Alma Luz Betran y Puga et al., *Foreword: Gender Justice in the Americas: A Transnational Dialogue on Violence, Sexuality, Reproduction and Human Rights*, 65 U. MIAMI L. REV. 751 (2011).

the international human rights theory articulated persuasively in *Lenahan*. The Supreme Court could play a critical role by using *Obergefell* and *Lenahan* in concert to overturn *Castle Rock*. In the meantime, lower federal courts could tee up the issue by recognizing that freedom from domestic violence is a fundamental human right[76] guaranteed by our Constitution's promise of due process liberty.

The human rights law upon which the IACHR relies in *Lenahan* has the same theoretical framework as our domestic due process liberty principles. However, it is promulgated in the international treaty as the American Declaration on Rights and Duties of Man. The provisions of this Declaration apply to countries, including the United States, that are signatories to the Charter of the Organization of American States.[77] It is well settled in the cases decided by the IACHR, and the closely related Inter-American Court of Human Rights, that the Declaration contains binding international obligations for the countries belonging to the Organization of American States ("OAS").[78] This is true even if a nation has not ratified the OAS's more detailed 1978 treaty, the "American Convention on Human Rights," which the United States has not.[79]

United States law has historically declined to acknowledge legal rights and liberties as human rights issues, as contrasted with international law, particularly in the domestic violence context.[80] However, a growing body of domestic and

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76. In the wake of the *Lenahan* decision, domestic violence legal advocates lobbied city councils across the country to pass resolutions declaring freedom from domestic violence is a fundamental human right, and achieved results in numerous cities. *See* JoAnn Kamuf Ward and Erin Foley Smith, *Freedom From Violence: A Fundamental Human Right*, CITIESFORCEDAW.ORG (Oct. 3, 2014), http://citiesforcedaw.org/freedom-from-violence-a-fundamental-human-right/. For example, on Monday, March 19, 2012, the Baltimore City Council passed a resolution finding that freedom from domestic violence is a fundamental human right and pledging to continue to secure that right on behalf of Baltimore's citizens. MIAMI LAW HUMAN RIGHTS CLINIC & COLUMBIA LAW HUMAN RIGHTS CLINIC, RECOGNIZING FREEDOM FROM DOMESTIC VIOLENCE AS A FUNDAMENTAL HUMAN RIGHT: LOCAL RESOLUTIONS ACROSS THE UNITED STATES, BWJP.ORG 14, http://www.bwjp.org/assets/documents/pdfs/recognizing_freedom_from_domestic_violence_as_a_fundamental_human_right.pdf (last updated Jan. 24, 2013).

77. *See* Bettinger-Lopez, *supra* note 21, at 186 (explaining that although the United States has not ratified the American Declaration it has signed the Organization of American States (OAS) Charter, and "signatories to the Charter (including the U.S.) are legally bound by the Declaration's provisions, and the Commission has consistently applied 'general obligations' principles when interpreting the wide spectrum of civil, political, economic, social and cultural rights set forth in the Declaration."); *see also*, Gonzales petition, *supra* note 18 at § I(D) (asserting that the American Declaration is binding on the United States because it is an OAS member state).

78. *Id*. *But see* Rogerson, *supra* note 72, at 297 (stating that "the [United States] government has a history of ignoring [Inter-American] Commission [on Human Rights] decisions, 'arguing that it is not bound to comply with the decisions of such international human rights bodies,' which indicates that none of the traditional compliance incentives are appealing to the United States government.").

79. *See* Bettinger-Lopez, *supra* note 21, at 185, 188 (explaining that "the U.S. has not ratified any Inter-American human rights treaties," including but not limited to, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and that the U.S. government uses the strategy of attaching condition-laden RUD's to the "few [human rights] treaties it has ratified."). The United States has also declined to ratify major human rights treaties such as the United Nations Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention on the Rights of the Child. *See* Davis, *supra* note 75, at 423–24.

80. Cantalupo, *supra* note 75, at 237–38.

international law recognizes the abuse of women as a human rights violation.[81] One of most important legal developments was the international jurisprudence recognizing that positive obligations can flow from negative rights.[82] Kenneth Roth, Director of Human Rights Watch, explained, "when a state makes little or no effort to stop a certain form of private violence, it tacitly condones the violence. This complicity transforms what would otherwise be wholly private conduct into a constructive act of the state."[83] The concept expressed by Roth is grounded in the doctrine of due diligence.[84]

The concept of a state's due diligence in domestic violence situations began to emerge in international domestic violence cases in 1988. It recognizes the governmental responsibility to protect its citizens from gender-based violence, including domestic abuse.[85] This view was first seen in *Velazquez Rodriguez v. Honduras*,[86] which involved the abduction and disappearance of a female graduate student. The court held that "[t]he failure of the state apparatus to act is a failure on the part of Honduras to fulfill the duties it assumed under the American Convention on Human Rights."[87] The court further explained that an illegal act "which violates human rights and which is initially not directly imputable to the state can lead to international responsibility of the state, not because of the act, but because of the lack of due diligence."[88] The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights and other international tribunals continued to develop the due diligence standard in domestic violence cases.[89] Notably, the United Nations' Special Rapporteur on Violence Against Women stressed that due diligence by state actors against

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81. *See, e.g.*, Goldscheid & Liebowitz, *supra* note 72, at 306 (asserting that "[t]he focus on implementation of human rights norms is the result of a maturing international system, one that is increasingly attentive to the gap between de jure and de facto human rights protections as well as the role of the international system in ensuring the fulfilment of human rights."); ZOE CRAVEN, *Human Rights and Domestic Violence,* AUSTRALIAN DOMESTIC AND FAMILY VIOLENCE CLEARINGHOUSE, http://www.adfvc.unsw.edu.au/PDF%20files/human_rights.pdf.

82. Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. J. INT'L HUM. RTS. 190, 192 (2010); *see also* Joel A. Hugenberger, *Redefining Property in Due Process: Town of Castle Rock v. Gonzales and the Demise of the Positive Law Approach*, 47 U.B.C. L. REV. 773 (2006).

83. *See* Hasselbacher, *supra* note 82, at 192 (citing KENNETH ROTH, *Domestic Violence as an International Human Rights Issue*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 330 (Rebecca J. Cook ed., 1994)).

84. *Id.*

85. *See* Goldscheid & Liebowitz, *supra* note 72 at 304–05 (explaining that due diligence includes an "amplified notion of State obligation in cases where a 'State's indifference provides a form of encouragement and/or de facto permission' for gender violence. The 'due diligence' principle is now generally understood to include an obligation on the State to prevent, protect against, prosecute, punish, and provide redress for acts of violence against women.").

86. Velasquez-Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

87. *Id*. at ¶ 182.

88. *Id*. at ¶ 172.

89. *See* Cantalupo, *supra* note 75, at 238.

domestic violence was a necessary part of customary international law.[90]

The Court should consider these human rights principles of international law—and the *Lenahan* decision specifically—when it has the opportunity to revisit the *Castle Rock* decision. In previous cases, the Court has relied on foreign legal authority and international law in several different ways. For example, turning our attention again to the *Lawrence* decision, which overturned the Texas anti-sodomy statute outlawing homosexual (but not heterosexual) acts of sodomy, the Court used foreign legal authority to help disprove the state of Texas's case theory.[91] The Court used a due process liberty analysis, and in finding that the alleged state interest was invalid, relied in part on English law for the proposition that sodomy has not actually been legally proscribed, as Texas state officials claimed it had been throughout modern civilization.[92] In *Roper v. Simmons*, decided two years after *Lawrence*, the Court outlawed the juvenile death penalty, noting that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[93] Further, in 2010, *Graham v. Florida*[94] found life-without-parole sentences for juveniles in non-homicide cases to be unconstitutional. The Court, in this case, chastised the states for being out of step with the vast majority of foreign nations which long ago rejected such criminal penalties. The Court explained:

> There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "'*[t]he climate of international opinion* concerning the acceptability of a particular punishment'" *is also "'not irrelevant.'" . . . The Court has looked beyond our Nation's borders for support* for its independent conclusion that a particular punishment is cruel and unusual . . . . The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the

90. *See* Special Rapporteur, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, ¶¶ 49, 59, U.N. Doc. A/HRC/29/27 (June 10, 2005) (by Rashida Manjoo), http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/AnnualReports.aspx (explaining that "[s]tate obligations regarding the problem of violence against women include the duty to act with due diligence in responding to this human rights violation, and the obligation to ensure adequate and effective access to justice" and discussing "the link between the duty to act with due diligence and the obligations of States to guarantee access to adequate and effective judicial remedies for victims and their family members.").

91. Lawrence v. Texas, 539 U.S. 558, 572–73 (2003).

92. *Id.*

93. 543 U.S. 551, 578 (2005).

94. 560 U.S. 48 (2010).

> overwhelming weight of international opinion against" life without parole for nonhomicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." . . . *The Court has treated the laws and practices of other nations and international agreements as relevant* to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.[95]

Similarly to its analysis in *Graham v. Florida*, the Court could use the international consensus of what constitutes a human rights violation as a tool in its own reexamination of due process liberty claims against state actors. Using the *Lenahan* case and international human rights law principles to overturn *Castle Rock* would not just be sound jurisprudence, it would also be consistent with the United States' domestic and international policy goals.

For example, in 2012, the Obama Administration issued an executive order describing the nation's strategy to end violence against women globally and denounced gender-based violence as "a human rights violation or abuse."[96] The United States Department of State and the United States Agency for International Development articulated a comprehensive "global strategy" to address violence against women.[97] The global strategy document focused mainly on bad acts committed by non-U.S. individuals and groups, including state actors, outside the U.S. borders, but also clearly acknowledged that "regardless of the form that gender-based violence takes, it is a *human rights violation* or abuse, a public health challenge, and a barrier to civic, social, political, and economic participation."[98] The State Department's strategy document recommended the devotion of significant intellectual, legal, and economic resources to attack gender-based violence outside U.S. borders, but the federal government has continued to denounce domestic violence stateside. On September 9, 2014, the twentieth anniversary of the passage of the Violence Against Women Act,[99] President Obama released a Presidential Proclamation, which "reaffirm[ed] the basic human right to be free from violence and abuse."[100] Whether or not the United

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95. *Id*. at 80–82 (emphasis added); *see* Ken I. Kirsch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. 771 (2006) (discussing ways that international currents have influenced the Supreme Court).

96. Exec. Order No. 13,653, 77 Fed. Reg. 49345 (2012).

97. USAID, U.S. DEP'T OF STATE, UNITED STATES STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY, 3 (Aug. 2012), http://www.state.gov/documents/organization/196468.pdf.

98. *Id.* at 7 (emphasis added).

99. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

100. Pres. Barack Obama, *Presidential Proclamation: 20th Anniversary of the Violence Against Women Act,* THE WHITE HOUSE, (Sept. 9, 2014), https://www.whitehouse.gov/the-press-office/2014/09/09/presidential-proclamation-twentieth-anniversary-violence-against-women-a.

States government took such actions in response to the *Lenahan* decision is impossible to discern with certainty, but the *Lenahan* legal team's goals of recalibrating "norms, standards and policies" that proclaim intolerance of violence against women are closer as a result.[101]

V. THE SUPREME COURT'S *CASTLE ROCK* AND *DESHANEY* DECISIONS CAN BE OVERTURNED

The Court overruled itself in *Lawrence v. Texas*,[102] overturning the decision in *Bowers v. Hardwick*.[103] The *Obergefell* Court acknowledged this reversal by the Court and used it as an example of the Court's evolving jurisprudence, which appropriately recognizes social changes as well as decisions by the Court that permit discrimination.[104] The IACHR in *Lenahan*[105] directly criticized the Supreme Court's *DeShaney*[106] decision, which is the most relevant authority the Supreme Court relied on in *Castle Rock*.[107] The Court could reverse itself by recognizing a claim for relief under similar facts based on a due process liberty argument. It is important to review the analysis in *DeShaney,* which the *Castle Rock* Court deemed a total bar to claims for domestic violence victims against police where third parties have contributed to the harm.[108]

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101. *See* Bettinger-Lopez, *supra* note 21, at 192–93 (discussing "The Case as a Tool for Political Pressure" and specifying advocacy strategies to reframe "norms, standards and policies" about gender-based violence in the United States after the *Lenahan* case in which she represented the petitioner).

102. Lawrence v. Texas, 539 U.S. 558, 575–77 (2003).

103. Bowers v. Hardwick, 478 U.S. 186 (1986).

104. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (explaining that the "Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* . . . [when] it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime 'demea[n] the lives of homosexual persons.' *Lawrence v. Texas*, 539 U.S. 558, 575.").

105. Jessica Lenahan (Gonzales) v. United States*,* Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

106. 489 U.S. 189 (1989).

107. *See* 545 U.S. 748, 755, 768–69 (2005) (relying on DeShaney in its holding).

108. *See* Joel Teitlbaum, et al., *Town of Castle Rock, Colorado v. Gonzales*: *Implications for Public Health Policy and Practice*, 121 PUB. HEALTH REP. 337, 338 (2006) (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525280/ (explaining that "[a]s Chief Justice Rehnquist wrote in the *DeShaney* decision, '[n]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State' . . . . Even more than *DeShaney* perhaps, *Castle Rock* involved a law whose express purpose was to protect a specified class of persons—women and their children who were the victims of violence. But the Court followed the *DeShaney* lead, despite the differences in the underlying legal protections at issue . . . . The policy and practice lesson to be drawn from all of this is that if a legislature expects unconditional government protections—be it law

A. THE *DESHANEY* ANALYSIS: NO LIBERTY INTEREST IN STATE PROTECTION AGAINST PRIVATE HARMS

In *Deshaney*[109] a father beat his child nearly to death after a child protective services investigation. The U.S. Supreme Court held that nothing in the Due Process Clause required the state to protect the life, liberty, and property of its citizens against invasion by private actors.[110] The majority opinion reasoned that the Fourteenth Amendment does not create an entitlement of government aid in order to realize all the advantages of freedom.[111] The Court conceded, however, that the Fourteenth Amendment was intended to prevent abuse of state power or the use of that power as an instrument of oppression.[112] The state actors—in this case, police and child social workers with prior knowledge of the father's abuse—were not deemed liable because the father himself was not a state actor, and the child was not in the custody of the state.[113]

1. *DeShaney's* Factual History

The facts in *DeShaney* bear many similarities to those in *Castle Rock*. Both cases involve extreme physical harm—death in the *Castle Rock* case—resulting from inaction by a state actor, as well as lawsuits seeking redress for that harm by the family members of the injured persons.[114] Both cases also involve a family history of physical abuse by third parties, whose acts ultimately caused the death of or physical harm to the claimants' family member(s). In *DeShaney*, the father gained custody of his child after a divorce in Wyoming and then moved to Wisconsin.[115] In 1982, the father's second wife complained to police that the father was abusing the child, and although the father was questioned, the state took no further action.[116] In 1983, the child was admitted to the hospital with bruises and abrasions, resulting in the formation of a "Child Protection Team," (hereinafter, "team") which found insufficient evidence to retain the child in the custody of the court.[117] The team recommended enrolling the child in a pre-school program, counseling for the father, and encouraging the father's girlfriend to move out.[118] One month later, the child was again treated at the hospital, after which the hospital notified the team.[119] The caseworker decided

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enforcement or medical care rights—it must write laws that express this unambiguously and it must also unambiguously imbue protected persons with the legal right to seek redress when these protections are not accorded.").

109. 489 U.S. 189.
110. *Id*. at 195.
111. *Id.* at 196.
112. *Id.*
113. *Id.* at 190.
114. *See id*. at 189; Town of Castle Rock v. Gonzales, 545 U.S. 748, 767 (2005).
115. *Id.* at 191.
116. *Id.* at 192.
117. *Id.*
118. *Id.*
119. *Id.*

not to take action.[120] In subsequent visits over the next several months, the caseworker noticed many issues such as a suspicious injuries on Joshua's head and that Joshua had not been enrolled in school.[121] She documented these issues along with the fact that father's girlfriend had not moved out.[122] After noting these issues, the caseworker again did not take action to inform the Department of Social Services that the father was in breach of the voluntary agreement to fulfill the recommendations of the team.[123] Ultimately, in March 1984, the father beat the child into a life-threatening coma, causing injuries necessitating the child's permanent institutionalization.[124] The facts of *DeShaney* and *Castle Rock* are similar in their results: death or extreme physical harm, and in the causation of that harm, inaction of state employees who were being relied upon for protection.

2. *DeShaney's* Legal Analysis

The petitioner in *DeShaney* claimed a breach of substantive, rather than procedural, Due Process rights.[125] The petitioner argued that the state had an affirmative duty to act under the Due Process Clause because the police actually undertook to protect the child from danger and, therefore, there existed a special relationship between the child and the state.[126] The Court analyzed several precedential cases, including *Youngberg v. Romeo,* which held that when a person is institutionalized and wholly dependent on the state, there is an affirmative duty to provide certain services and care, and *Estelle v. Gamble*, which confirmed the state's affirmative duty to provide basic needs to prison inmates in state custody.[127]

The *DeShaney* Court explained that a state violates the Due Process Clause when it affirmatively restricts an individual's freedom of physical movement and fails to provide him basic needs.[128] The Court ultimately concluded, however, that the duties in *Youngberg* and *Estelle* were not present in *DeShaney* because the father was not a state actor, and the child was not in the custody of the state.[129] It conceded the possibility that the state was liable under state tort law but not under the Due Process Clause.[130] As Justice Brennan explained in a vigorous dissent, however, the focus of the Court should be on the actions that the state of Wisconsin took, not the actions they failed to take.[131] Brennan argued that the

120. *Id.*
121. *Id.* at 192–93.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 195.
126. *Id.*
127. *Id.* at 198–99 (citing Youngberg v. Romeo, 457 U.S. 307, 309 (1982); Estelle v. Gamble, 429 U.S. 97 (1976)).
128. *Id.* at 189–90.
129. *Id.* at 190;.
130. *Id.*
131. *Id.* at 205.

Estelle and *Youngberg* precedents demonstrated that a state does have an affirmative duty to provide aid in some cases.[132]

In *Youngberg,* for example*,* a man with an IQ of between eight and ten was hospitalized.[133] The fact of hospitalization was essential, not because it rendered Youngberg helpless, but because it separated him from other sources of aid that the Court held the state was obligated to replace.[134] Justice Brennan explained in his *DeShaney* dissent that the Court should not limit the protections in *Youngberg* to individuals under the direct physical control of state actors.[135] Rather, Brennan opined, these protections should extend to "[t]he State's knowledge of an individual's predicament and its expression of intent to help him [, which] can amount to a limitation on his freedom to act on his own behalf."[136] Justice Blackmun agreed. Joining Brennan's dissent and adding his own, Blackmun argued that the state's intervention triggered a fundamental duty to aid the boy once the state learned of his predicament.[137] Notably, Blackmun called for a "sympathetic" reading of the Fourteenth Amendment, and in language seeming prescient of Justice Kennedy's in *Obergefell*, he urged reasoning which "comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[138]

B. EXCEPTIONS TO THE "NO DUTY" RULE: CASES ALLOWING RECOVERY AGAINST STATE ACTORS UNDER THE STATE-CREATED-DANGER DOCTRINE

The federal circuit courts seem to follow Blackmun's and Kennedy's principles of justice with compassion, even with *DeShaney* and *Castle Rock* intact. Those courts have allowed two very narrow exceptions to the general principle that a state has no affirmative duty to provide aid and have found the state to be liable in some cases.[139] The first exception is recognized, but not followed, in *DeShaney*: "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[140] The second is known as the "State-created-danger" exception, which the Sixth Circuit described as follows: when the State "cause[s] or greatly increase[s] the risk of harm to its citizens . . . through its own affirmative acts," it has established a "special danger" and a corresponding duty to protect its citizens from that risk.[141]

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132. *Id.*
133. *Id.* at 206.
134. *Id.*
135. *Id.*
136. *Id.* at 207.
137. *Id.* at 212.
138. *Id.* at 213.
139. *See generally id.* at 194–99.
140. *Id.* at 199–200.
141. Koulta v. Merciez, 477 F.3d 442, 445 (6th Cir. 2007) (finding no due process violation in a case where police officers had asked a drunk woman to leave the premises without performing a field sobriety

In order for the state to be liable a plaintiff must show: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff. [142]

Other circuits have similar variations of the State-created-danger doctrine.[143] In cases decided after *Castle Rock*, circuit courts found liability for state actors' roles in harm resulting from intimate partner violence.[144] In a Third Circuit case, *Phillips v. County of Allegheny*, a 911 operator (and co-workers) used the 911 call system to gain unauthorized information about the 911 operator's ex-girlfriend and her new boyfriend.[145] The operator, who appeared to be in a volatile state, was fired.[146] The operator's boss contacted the police about a possible threat, but he failed to contact the police in the town of the operator's ex-girlfriend.[147] The operator ultimately killed his ex-girlfriend and her new boyfriend.[148] The Third Circuit held that only a misuse of state authority, rather than a failure to use authority, amounts to a Due Process violation.[149] Thus, inaction was not enough to constitute a violation of the Due Process Clause. The court found that there was no sufficient "affirmative act" by the 911 operator's boss in order to create state liability.[150] However, the acts of the co-workers that helped the operator obtain the unauthorized information were different. Their behavior, the court found, satisfied all of the following elements of the Third Circuit's State-created-danger test: (1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state actor acted in willful disregard to the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state actor used his authority to create an opportunity for danger that otherwise

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test. The woman drove her car while intoxicated, killing another driver). The court first said there was no affirmative act by the state, which created or increased the risk. The court then focused on the question of "whether the victim was safer before the state action than he was after it." The failure to do a field sobriety or Breathalyzer test may have been negligent, but it did not create or increase the risk of harm. Further there was not a risk of harm to an identifiable victim; rather the harm was to the public at large. The court found there was no substantive due process violation. *Id*.

142. Jones v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006) (quoting Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003)).

143. *See, e.g.*, Munger v. City of Glasgow Police Dept., 227 F.3d 1082, 1086 (9th Cir. 2000) (affirming the state created danger doctrine in a case where a drunk man froze to death after officers kicked him out of a bar on a cold night without a jacket. The court found that the district court erred in finding that the officers did not affirmatively place the drunk man in a position of danger).

144. Phillips v. Cnty of Allegheny, 515 F.3d 224, 240 (3d Cir. 2008).

145. *Id.*at 228–229.

146. *Id.* at 229.

147. *Id.*

148. *Id.*

149. *Id.* at 235.

150. *Id.* at 239.

would not have existed.[151] As a result, the court found that the district court erred in dismissing the state created danger claims against the co-workers.[152]

In *Okin v. Village of Cornwall-On-Hudson Police Department*,[153] the Second Circuit examined the State-created-danger doctrine. The underlying facts involved a woman who consistently reported her husband's abuse to police. The police officers, however, were rude to her and overtly friendly with her alleged abuser.[154] The trial evidence included several documented notes showing annoyance, mocking, and hostility by the police toward the complaining woman.[155] She claimed that the police behavior violated her substantive due process rights.[156]

The Second Circuit reviewed precedent which had held that it is a violation of substantive due process rights when officers condone the illegal behavior of the private actors.[157] However, that earlier holding had since been limited to include only affirmative conduct, rather than passive failures to act to stop illegal activity.[158] The circuit court in *Okin* therefore found that the officers' being friendly with the husband and talking sports with him did not amount to "explicit assurances" that the aggressor would not be arrested for any abuse.[159] The court did, however, reverse the district court for failing to consider whether the trier of fact could find the officers' conduct to be implicit but still affirmatively encouraging the aggressor's domestic violence.[160] The court found that a reasonable fact finder could find that the police officers acted implicitly and affirmatively encouraged the aggressor's behavior.[161] The willingness of the circuit courts to uphold the State-created-danger doctrine in police-involved domestic violence cases showed the federal courts' general propensity to hold state actors to a standard of responsibility for protecting victims.

DeShaney has not been a bar to recovery in those circuit court cases, and it should not be a bar to recovery for any domestic violence victim seeking redress in federal court for harm caused by police failure to protect. Because *Obergefell* clarifies the right to due process liberty, *DeShaney*'s and therefore *Castle Rock*'s narrow reading of it should be overturned.

IV. CONCLUSION

The reasoning used in the circuit court cases under the State-created-danger doctrine is the same reasoning urged by the dissents in *DeShaney* and *Castle*

151. *See id.* at 235.
152. *Id.* at 243.
153. 577 F.3d 415 (2d Cir. 2009).
154. *Id.* at 420–21.
155. *Id.* at 425.
156. *Id.* at 434.
157. Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993).
158. Hemphill v. Schott, 141 F.3d 412, 418–19 (2d Cir. 1998).
159. 577 F.3d at 429.
160. *Id.* at 429–30.
161. *Id.* at 430–31.

Rock, as well as the IACHR in *Lenahan*. It is also the same reasoning used by Justice Kennedy in *Obergefell* to explain the necessity of preserving liberty in marriage and other intimate matters.

In each of these decisions, the legal analysis is built upon the same foundation: the principles embodied in the Due Process Clause of the Fourteenth Amendment. The Court's reasoning in *Castle Rock* ignored those principles to an extent that defies logic. It is remarkable that a victim like Jessica Lenahan was forced to seek recourse in an international tribunal for the blatant refusal of her local police force to protect her from the violent loss of life that she suffered. The next federal claim by a victim whose suffering is ignored or increased by police inaction should be fast-tracked to the Supreme Court, which should stand ready to reverse its decision in *Castle Rock* and hold police accountable.

The appropriate inquiry in such cases must be whether the fundamental liberty interest in freedom from domestic violence has been compromised by law enforcement. As the Court clarified in *Obergefell*, ours is "a Nation where *new dimensions of freedom* become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[162] The Court should ensconce in Supreme Court jurisprudence the dimension of freedom from domestic violence as a liberty interest protected by the Due Process Clause. Our legal system was significantly influenced by Blackstonian precepts, such as the "moderate correction" and "coverture."[163] In this concept Blackstone urged husbands to visit upon their wives.[164] Blackstone emphasized the concept of "coverture" which devalued women as mere chattel.[165] In a nation where just a few decades ago marital rape remained legal in several states,[166] surely we can quiet the pleas and protests for good.[167] The Supreme Court should crystallize a new dimension of freedom, as clarified so eloquently in *Obergefell*,[168] for victims of domestic violence by overturning *Castle Rock* and guaranteeing them the protections from law enforcement that due process liberty demands.

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162. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (emphasis added).

163. William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Vol., 1 at 442–45 (1765).

164. *Id.*

165. *See id.*

166. *See, e.g., People v. Liberta,* 62 N.Y.2d 251 (1984) (outlawing marital rape in New York, one of the last states to do so).

167. *See, e.g.,* Deborah Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local"* 42 B.C. L. REV. 1081, 1092 (Sept. 2001) (describing "the insidious effects of informal but ingrained responses to gender-based violence" in state courts as described in Congressional testimony during the Violence Against Women Act authorization, and quoting "witness Sarah Buel, a formerly battered woman, who at that time was an attorney with the Harvard Legal Aid Bureau, [who] testified: 'What terrifies me is that I don't think things have changed very much in spite of the fact that we do have laws and shelters.' Her prepared testimony indicated that despite the laws that have been passed, courts were not providing statutory relief in civil protection orders.").

168. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).