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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”

CHRISTOPHER J. ROEDERER*

ABSTRACT

This article provides a thorough critique of the Supreme Court decision of *Castle Rock v. Gonzales* 125 S. Ct. 2796 (2005) which dismissed respondent’s case for failing to establish that she had a property right in the enforcement of a restraining order that was worthy of procedural due process protection. The article critiques the Court’s methodology and substantive arguments. The article concludes by situating the decision in “*Lochner’s* legacy,” a legacy of decisions that Cass Sunstein has identified as privileging “government inaction,” and “the existing distribution of entitlements” as set by the common law. Just as the *Lochner* Court decided that it was for it to determine the meaning of “liberty” when it struck down a New York statute designed to limit the hours of bakers for their health, the Court in *Castle Rock* has decided it is for it to determine the meaning of “property,” by rewriting a statute designed to make enforcement of restraining orders mandatory for the safety of those granted orders. Just as the *Lochner* Court chose the liberty of employers over the health of workers, the Court in *Castle Rock* has chosen the liberty of police officers over the safety of victims of domestic violence.

OUTLINE

- I INTRODUCTION
- II THE MAJORITY’S APPROACH TO THE CASE
 - 1) *Disregard for the plain language of the statute and restraining order, and disregard for the legislative history*
 - 2) *Refusal to certify the question to the State Supreme Court or to defer to the Circuit Court*
- III THE COURT’S ASSAULT ON THE PROPERTY ENTITLEMENT TO THE MANDATORY ENFORCEMENT OF A RESTRAINING ORDER
 - 1) *The enforcement statute is mandatory because it does not allow for the type of discretion that undermines the duty of enforcement*
 - 2) *The options, of arrest or seek an arrest warrant are not discretionary options and they are not merely procedures but are ends that give rise to an entitlement*
 - 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 enforcement*
 - 4) *Because the entitlement was created by the democratically elected and accountable representatives of the people of Colorado, and because it does have monetary value and 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 14th Amendment.*
- IV CONCLUSION: ANOTHER CASE IN *LOCHNER’S* LEGACY

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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.”

Justice Seymour, Circuit Court at 1117

I. INTRODUCTION

Section I of the majority opinion in *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, her estranged husband killed their three daughters and drove with their bodies in the cab of his pickup truck to the police station where he open fired on the police who returned fire, killing him.³ Sadly, incidents such as these are not uncommon.

In 1994 Colorado joined a wave of states that enacted legislation to address this very problem:⁴ the problem of death and injury to victims of domestic violence caused in part by the custom of police to avoid the enforcement of restraining orders.⁵ The Colorado General

¹ 125 S. Ct. 2796 (2005).

² *Id.* at 2800.

³ *Id.* at 2802.

⁴ Justice Stevens notes that nineteen states mandate arrest for domestic restraining order violations. *Castle Rock*, 125 S. Ct. at 2818 (Stevens, J., dissenting). Arthur L. Rizer III puts the 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). Ned Millerin, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers*, INST. L. & JUST. 31 (2004) (inclusive of legislation up to 2003) puts the number at thirty-one. There are currently thirty-five states and territories that mandate enforcement, and thirteen states that make enforcement discretionary. *See* Appendix A, Table of legislation pertaining to arrests for the violation of restraining orders or protection orders. Five states do not have clear legislation on the issue. *See id.*

⁵ One of the most important factors leading to the development of mandatory arrest laws has been the consistent dismissive attitude that police have displayed toward domestic violence. Marion Wanless, *Mandatory Arrest: A Step Toward Eradication of Domestic Violence But is it Enough?*, 1996 U. ILL. L. REV. 533, 542 (1996). Almost 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. *Id.* at 542. "However, police officers have made little use of their

Assembly passed legislation targeting domestic violence in general,⁶ and the mandatory enforcement of restraining orders in particular. Section 18-6-803.5. of the Colorado Revised Statutes Annotated (“Crime of violation of a protection order--penalty--peace officers' duties”) states, “... A peace officer shall use every reasonable means to enforce a protection order,”⁷ and further clarifies the duty by stating:

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)(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.”

In effect, the Colorado General Assembly forged a “special relationship” between the police and those who have obtained restraining orders, creating duties on the police to enforce restraining orders, and the right or entitlement of those who have obtained orders to have them enforced. This altered the common law distribution of entitlements and duties, for under the

expanded arrest power ... even when probable cause is clearly present, police officers frequently try to calm the parties and act as mediators.” *Id.* 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.* These studies found that when the decision was left to the police the arrest rate ranged between three percent and ten percent. *Id.* In one of the studies police made arrests in only thirteen percent of the cases where the victim had visible injuries and in only fourteen percent of the cases where the victim requested an arrest. *Id.* at 542-43. Another study put the latter figure at thirty-nine percent. *Id.* at 543. The more fundamental reason for the laws is the tragic numbers of deaths and injuries to women and children (see, e.g., The American Bar Association Commission on Domestic Violence statistics on women and children, at <http://www.abanet.org/domviol/stats.html> (last visited Aug. 14, 2005)) which were due in part to the ineffectiveness of prior forms of intervention and to the dismissive attitudes of the police. Wanless, *supra*, at 540-42.

⁶ See *Castle Rock*, 125 S. Ct. at 2817 (Stevens, J., dissenting).

⁷ COLO. REV. STAT. ANN. § 18-6-803.5(3)(a) (LEXIS through 2004 Supplement (2004 Sess.)).

⁸ *Id.* at § 18-6-803.5(3)(b) (emphasis added).

common law, the State does not have a duty to come to one's aid and one does not have a right for the State to come to her or his assistance to protect her or him from harm caused by other people.⁹ Under the common law, the police have no duty to come to one's aid unless there is this "special relationship."¹⁰ The rule is that the police owe a general duty to everybody, and with a few exceptions, they owe it to nobody.¹¹ As paradoxical as this sounds, the public duty rule works to defeat claims by specific individuals absent a "special relationship" establishing a specific duty to the plaintiff or her class.¹² Traditionally, "special relationships" are limited to those cases in which the police have committed to taking action on behalf of the particular plaintiff,¹³ or those in her class.¹⁴ 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.¹⁵

⁹ The Supreme Court made this clear in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), except in the narrow case where the State has created the danger. See also RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005).

¹⁰ See, e.g., 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); RESTATEMENT (SECOND) OF TORTS §§ 314A, 323 (1965).

¹¹ See *Riss v. City of New York*, 240 N.E.2d 860, 862 (N.Y. 1968) (Keating, J., dissenting).

¹² The public duty doctrine extends beyond police duties to all public entities. 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 when the entity is guilty of a misfeasance (negligent action), rather than a nonfeasance (negligent omission). See D. DOBBS, *THE LAW OF TORTS* § 271 pp. 723-27 (2000). 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.*

¹³ "...[W]hen the State, through its agents, voluntarily assumes a protective duty toward a particular member of the public, and undertakes action on behalf of that individual, reliance is induced and the State is held to the same standard of care as a private person or organization." *Williams v. State*, 34 Cal. 3d 18, 24 (Cal.) (1983). See, e.g., *Morgan v. County of Yuba*, 41 Cal. Rptr. 508 (Cal. Ct. App. 1964) (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*, 32 Cal. 3d 197, 208 (Cal. 1982). Note, however, that the argument for holding the police liable under such conditions is stronger given that they have a general duty to the public while the average citizen who volunteers aid does not.

¹⁴ *Florence v. Goldberg*, 375 N.E.2d 763 (N.Y. 1978) (the police department voluntarily assumed the specific duty to guard a school crossing and without notice failed in that duty).

¹⁵ Dobbs, *supra* note 12 at 724. Dobbs also refers to statutes creating a duty to investigate and report child abuse. See *id.*

This is what the Colorado legislation did. The point was to take away the discretion of the police to either enforce or to ignore the court orders and to make the order worth something more than just a sham or “a cruel deception.”¹⁶ The legislation and the court order were designed to make it clear to the police that in addition to their general public duties that they have specific duties to a certain class of individuals covered by the legislation and to the particular person specified in the court order. The idea was to forge a special relationship with a class of people that the police had wanted to avoid.¹⁷ 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 U.S. 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 decision to violate the law by not enforcing restraining orders.

Ms. Gonzales sued under 24 U.S.C. § 1983 and the Fourteenth Amendment procedural due process clause, arguing that the City of Castle Rock and its police department not be allowed to arbitrarily deprive her of the rights the legislation gave to people in her class and to her

¹⁶ *Gonzales*, 366 F.3d at 1104. The circuit court made the following remark about the conduct of the police in this case: “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.” *Id.* at 1117. As noted by the circuit court, the property right held by this particular plaintiff 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.” *Id.* at 1104.

¹⁷ As Heather Melton states, “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.” Heather C. Melton, *Police Response to Domestic Violence*, 29 JOURNAL OF OFFENDER REHABILITATION 1, 1 (1999), available at <http://www.crab.rutgers.edu/~goertzel/CJreadings/PoliceDomesticViolence.pdf> (last visited Aug. 18, 2005). The reasons for the avoidance include sexist views, the view that these are purely private matters, the resistance the police encounter from perpetrators and victims, the danger for the police responding to domestic calls, and the fact that the police they are often ill- equipped to mediate or counsel perpetrators and victims. *See, e.g.* Melton, *supra*, at 3. An influential study in Minneapolis indicated that arrests were more effective at addressing the problem. Melton, *supra*, at 2. Marion Wanless argues that mandatory arrest statutes aid the police as they take the domestic violence scenario out of the quasi police function of mediation and put it squarely into the arrest function, which police are better trained to perform and more comfortable performing. Wanless, *supra* note 5, at 547.

personally, namely, the right to the enforcement of a restraining order when both the legislation and the court order state that enforcement is mandatory.¹⁸ In other words, this case was not about whether the police were required to either arrest or obtain an arrest warrant for Ms. Gonzalez'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.¹⁹ 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."²⁰

The alleged facts, which, given the posture of the case, were required to be accepted as true by the Court, 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."²¹ Ms. Gonzales alleged that "the 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..."²²

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

¹⁸ As the Court explained, "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.' 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.'" *Id.* at 2802-03.

¹⁹ As the circuit court noted, "Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties." *Gonzales v. Castle Rock*, 366 F.3d 1093, 1116 (10th Cir. 2004).

²⁰ *Castle Rock*, 125 S. Ct. at 2803.

²¹ *Gonzales*, 366 F.3d at 1112-13.

²² *Id.* at 1113 (quoting *Aplt. Appx.* at 12).

court order enforced, notwithstanding that the legislature had required that such enforcement was mandatory in all cases. Although the property right in this case is not the typical right to not have government take one's land, the Court in *Goldberg v. Kelly*²³ abandoned the strict distinction between rights and mere privileges when it recognized that welfare benefits could be considered property for the purposes of the clause.²⁴ This was solidified in *Roth v. Board of Regents*,²⁵ 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."²⁶ In *Roth* the Court stated:

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.²⁷

But the existence of an entitlement is determined by an "independent source such as state law" and the "rules or understandings" that it creates.²⁸

The majority opinion in *Castle Rock* began its analysis by quoting much of this language from *Roth*.²⁹ It did not spend any time on the question of whether Ms. Gonzales had "more than

²³ 397 U.S. 254 (1970).

²⁴ As Charles R. 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 R. Reich, *Beyond the New Property: An Ecological view of Due Process*, 56 BROOK. L. REV. 731, 731 (1990).

²⁵ 408 U.S. 564 (1972).

²⁶ *Id.* at 571.

²⁷ *Id.* at 577.

²⁸ *Id.* Charles 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" included: income and benefits, jobs, occupational licenses, franchises, contracts, subsidies, public resources, and services, include postal service, police and fire services and education among others. *Id.* at 733-37. The issue of the property right in question is addressed *infra* throughout Part III.

an abstract need or desire for it” or “more than a unilateral expectation of it,” a claim upon which she relied in her daily life, which “must not be arbitrarily undermined;” for she unquestionably did expect and rely, and that reliance was arbitrarily undermined on the accepted facts. Rather, the Court turned to the second prong of the test to determine if in fact the State had created such an entitlement.

In doing so, the Court was relatively thorough in its attempt to nail down the lid of the coffin of § 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;³⁰
- 2) Even if the statute was mandatory, it mandates one of two options: arrest or seek an arrest warrant; and since the second option is a procedure and not an end in itself, this cannot give rise to an entitlement;³¹
- 3) Even if the statute mandated a non-discretionary 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;³²and
- 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.³³

²⁹ *Castle Rock*, 125 S. Ct. at 2803.

³⁰ *Id.* at 2806-07. As will be demonstrated below, 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.

³¹ *Id.* at 2807-08. Justices Souter and Breyer, in their concurring opinion, rest on this argument.

³² *Id.* at 2808-09.

³³ *Id.* at 2809-10

In the process of making these arguments, the Court ignored the plain language of the statute³⁴ and the restraining order, as well as the legislative history of the statute. It refused to certify the question to the Colorado Supreme Court so it could decide whether its “mandatory arrest” statute, along with the court order, create the state right or entitlement in issue. And finally, it 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.³⁵

These issues of method or approach to the case are addressed in a preliminary fashion by the Court before the four sets of arguments mentioned above. Thus, these issues of methodology will be addressed first, in Part II below. 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 to the merits. Part III will address each set of arguments in turn, demonstrating that:

- 5) The enforcement statute is mandatory because it does not allow for the type of discretion that undermines the duty of enforcement;
- 6) The options of arrest or seek an arrest warrant are not discretionary options and they are not merely procedures, but are ends that give rise to an entitlement;

³⁴ 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 Bradford C. Mank, “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.” *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 551 (1997-98). As will be demonstrated below, in *Castle Rock*, Justice Scalia and the Majority avoid the textualist approach here because it would require the recognition of new entitlements.

³⁵ See *infra* notes 66-72 and accompanying text.

- 7) 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 enforcement; and
- 8) 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.

In the end it is argued that the majority of the Court has rewritten the Colorado statute, or effectively struck down its mandatory arrest provisions for the purposes of § 1983 procedural due process claims because they disagree with the state-based positive property right purportedly created by the statute. The Court has done the functional equivalent to property rights that the *Lochner* Court did to liberty rights one hundred years ago in *Lochner v. New York*,³⁶ which similarly – and 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. Here, 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 that the state has made it mandatory for municipalities to protect. 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.

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

³⁶ 198 U.S. 45 (1905).

alive today if the police had carried out their duties, nor even to 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 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 what law to enforce and what law to ignore transfers the law making and interpreting 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 not arbitrarily dole out rights and entitlement to some and deny them to others. Section 1983 gave victims a right to redress for these types of violations, thus giving teeth to the requirement of due process. The Court's decision renders toothless the due process clause of the Fourteenth Amendment, the § 1983 legislation, as well as the state legislation and the court order.³⁷

II THE MAJORITY'S APPROACH TO THE CASE

1) *The plain language of the statute and restraining order, and legislative history*

As noted above, section 18-6-803.5. of the Colorado Revised Statutes Annotated, "Crime of violation of a protection order--penalty--peace officers' duties," in subsection (3)(a) states that

³⁷ 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, as the Court stated in *Santosky v. Kramer*, 455 U.S. 745 (1982), the "desire for and the right to the companionship, care, custody and management of his or her children is ... far more precious than any property right." *Id.* at 758-59. The plaintiff did not make the deprivation of life or liberty claim in this case, presumably because that would have been more awkward than pigeon holing the deprivation as one of property. (Justice Souter refers to her property claim as "unconventional." 125 S. Ct. at 2811 (concurring)). 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 pigeon hole 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 TRO and requested that it be enforced and the three children be returned to her immediately." *Castle Rock*, 125 S. Ct. at 2800. The problem is that the rights to life and liberty are considered negative rights or liberties, and not positive rights. 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).

“... A peace officer shall use every reasonable means to enforce a protection order” and in subsection 3(b) it reads in part 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 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;

The Statute also identifies the beneficiary of the order in subsection (1)(a) “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.” 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 circuit court 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.”³⁸ The circuit court pointed to the specific language of the court order in this case:

[y]ou *shall* use every reasonable means to enforce this restraining order." *Id.* It further dictated that an 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.³⁹

While it is conceded that the repeated use of the word “shall” is not the same word as the word “mandatory,” there are few words with a clearer meaning.⁴⁰ “You shall” means that one is required to, or one has a duty to, do that which follows the verb.⁴¹ On a plain textualist reading

³⁸ *Gonzales*, 366 F.3d at 1104.

³⁹ *Id.* at 1103-04.

⁴⁰ “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.” *DiMarco v. Department of Revenue, MVD*, 857 P.2d 1349, 1352 (Colo. Ct. App. 1993) (citing *People v. District Court*, 713 P.2d 918 (Colo. 1986)).

⁴¹ BLACK’S LAW DICTIONARY (8th ed. 2004), reads:

of the statute it is hard to explain what other meaning “shall” could have, given that neighboring provisions use the word “may.”⁴² The majority of the Court reads them to mean the same thing,⁴³ but to do so violates one of the most basic canons of statutory construction.⁴⁴ It effectively voids the word “shall” in the text, rendering it superfluous. Although ignored by the Court, Colorado legislation provides guidance as to how its provisions are to be read. Colorado Revised Statutes section 2-4-101 (*Common and technical usage*) reads in part, “Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”⁴⁵

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 has coexisted with other mandatory arrest statutes in the past.⁴⁶

Justice Scalia quotes from the commentary to the ABA Standards for Criminal Justice for this

shall, *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.* (emphasis added).

⁴² For instance, section 18-6-803.5(6)(a) of Colorado Revised Statutes Annotated (LEXIS through 2004 Supplement (2004 Sess.)) states that “Such peace officer *may* transport, or obtain transportation for, the alleged victim to shelter.” (emphasis added).

⁴³ This immediately brings the question to mind: How does the majority interpret all the “Thou shalt’s” in the Ten Commandments?

⁴⁴ As the Court stated in *Alaska Department of Environmental Conservation v. E.P.A.*, “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.’” 540 U.S. 461, 489 n.13 (2004) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). Colorado Revised Statutes section 2-4-201 (*Intentions in the enactment of statutes*) states, “(1) In enacting a statute, it is presumed that: ... (b) The entire statute is intended to be effective.”

⁴⁵ COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)). “If the language of a statute is plain and its meaning clear, it must be applied as written.” *Interest of A.R.W.*, 903 P.2d 10, 14 (Colo. Ct. App. 1994) (citing *Heagney v. Schneider*, 677 P.2d 446 (Colo. Ct. App. 1984)).

⁴⁶ *Castle Rock*, 125 S. Ct. at 2806.

view,⁴⁷ but the language he quotes does not actually further the view. The reasons he gives for why “mandatory arrest statutes” do not mean “mandatory” include, “...legislative history, insufficient resources and sheer impossibility.”⁴⁸

In his scholarly work, Justice Scalia rejects the use of legislative history as a means of determining the meaning of a statute and in fact claims that use of legislative history is undemocratic.⁴⁹ Yet here 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 legislation and legislation of its type (i.e., mandatory arrest statutes in the restraining order or protection order context, rather than mandatory arrest statutes generally) do reinforce the “mandatory” reading of the legislation. The majority of the Court cannot point to any evidence that the drafters of the Colorado statute meant “may” when they used the term “shall.” This is not a case of the circuit court looking out into the crowd at a cocktail party and picking out its friends.⁵⁰ At this particular party, there simply were no guests who disagreed with the view that this legislation was designed to make enforcement of restraining orders mandatory.⁵¹ In such instances where the language is clear

⁴⁷ *Id.* (quoting 1 ABA Standards for Criminal Justice § 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980) (footnotes omitted)).

⁴⁸ *Id.*

⁴⁹ "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." 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* 36 (Amy Gutmann ed. 1996). 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 what the lawgiver promulgated." *Id.* at 17.

⁵⁰ Justice Scalia quotes Justice 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 id.* at 36.

⁵¹ Scalia notes that the Court of Appeals quoted a lawmaker's description of how the bill ‘would really attack the domestic violence problems:’

and there is no evidence of a contrary view in the legislative history, the interpretation appears well grounded.⁵² 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.⁵³ Having been unable to find a friend at this party, and at any other party dealing with restraining orders, the Court has gone party hopping in order to find friendly support for its views.⁵⁴

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. If "insufficient resources" or "sheer impossibility" turned mandatory requirements

The entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.

The entire system must send the same message . . . [that] violence is criminal. And so we hope that House Bill 1253 starts us down this road. 366 F.3d at 1107 (quoting Tr. of Colorado House Judiciary Hearings on House Bill 1253, Feb. 15, 1994) (emphases omitted).

Castle Rock, 125 S. Ct. at 2805 n.6 (internal quotations omitted).

He 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. Similarly the petitioner could 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 Br. and Petitioner Reply Br. The Reply Brief, like Justice Scalia's opinion, addresses other types of mandatory arrest statutes.

⁵² There really can be no worry of an undemocratic interpretation in such cases, at least not on Justice Scalia's own views.

⁵³ The legislature of Colorado must have been aware of the existing legislation in other jurisdictions (at least fifteen others), and the fact that in the first jurisdiction to implement such legislation, Oregon, its courts had decided that the legislation meant what it said when it used the term "shall," i.e., that enforcement was mandatory. See *Nearing v. Weaver*, 670 P.2d 137 (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 93 and accompanying text.

⁵⁴ Justice Stevens alludes to this fact when he states, "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 (dissenting). See also *id.* at 2817 n.7 (referring the reader to "Fuller & Stansberry, 1994 *Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327 (1994) ('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'); *Id.* at 2329 ('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 violaters [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' (footnotes omitted))).

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 th[e] restraining order.” The drafters of the statute presumably understood that *ought* implies *can* and did not mandate the impossible.⁵⁵ The fact that impossibility might excuse performance of a duty once the 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 the Court’s decision in *Chicago v. Morales*,⁵⁶ to justify the view. The reasoning here is further addressed below, but let it suffice to say that the case is off point. The case involved an ordinance that included the phrase “‘shall order’ persons to disperse in certain circumstances.”⁵⁷ The Court found that the police still had discretion in the face of this language.⁵⁸ The Court fails to mention that the ordinance was found to be unconstitutionally vague because it did not set minimal guidelines for law enforcement or provide adequate notice to the public of what was proscribed.⁵⁹ Specifically, the “in certain circumstances” part of the phrase, rather than the

⁵⁵ 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* (T.K. Abbot trans., Prometheus Books 1996) (1788). It is also found in the Colorado Revised Statutes section 2-4-201 (d) (*Intentions in the enactment of statutes*) which states, “(1) In enacting a statute, it is presumed that: ... (d) A result feasible of execution is intended.”

⁵⁶ 527 U.S. 41 (1999).

⁵⁷ *Castle Rock*, 125 S. Ct. at 2806 (citing *Morales*, 527 U.S. at 47 n.2).

⁵⁸ *Id.* (citing *Morales*, 527 U.S. at 62 n.32).

⁵⁹ *Morales*, 527 U.S. at 56-115.

“shall order” part, was held to be unconstitutionally vague in that case,⁶⁰ and was the reason for the finding that there was police discretion. The mandatory nature of “shall order” was not in issue. 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.

2) *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 this case the state law question regarding the establishment of an entitlement in favor of Ms. Gonzales,⁶¹ the majority of the Supreme Court did not find it prudent to certify the question to the Colorado Supreme Court. The Court rejected the idea that the it should certify the case on the basis that the parties did not desire to have the question certified.⁶²

Justice Stevens, in his dissent, put forth 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.”⁶³ 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 U.S. Supreme Court and the circuit court than the Colorado Supreme Court.⁶⁴ Although not democratically elected, judges in Colorado are subjected to

⁶⁰ The circumstances in which the police were to order people to disperse was when they determined that people were “loitering,” and the definition for this was found to be vague. *Id.* at 56-59.

⁶¹ 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 “This result reflects our continuing reluctance to treat the Fourteenth Amendment as ‘a font of tort law.’ *Castle Rock*, 125 S. Ct. at 2810 (internal citations 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.

⁶² *Id.* at 2804 n.4.

⁶³ *Id.* at 2816 n.6 (Stevens, J., dissenting); *see also id.* at 2815-16.

⁶⁴ For Justice Scalia’s views on judicial activism and principles of interpretation see, e.g. Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989); *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

periodic votes on their retention by the citizens of the state.⁶⁵ Thus, there is a further check on any tendency to be activist 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."⁶⁶ The reasons for the rule of deference are based on both efficiency and local knowledge of law and practice.⁶⁷ It is an activist move to take the state law question out of the hands of both the state court and of the circuit court sitting in the relevant state, absent some compelling reason. In response to Respondent'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."⁶⁸ 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." *Phillips*, supra, at 167. That presumption can be overcome, however, see *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (per curiam), 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 transcripts. See 366 F.3d, at 1103-1109.⁶⁹

⁶⁵ See Colorado Bar Association, *Where Do (Colorado) Judges Come From?*, at <http://www.cobar.org/group/display.cfm?GenID=429> (last visited Aug. 13, 2005)

⁶⁶ The Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), stated:

The Court has stated that it will defer to lower courts on state-law issues unless there is "plain" error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); the view of the lower court is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or the construction is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). 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*, 405 U.S. 676, 683-84 (1972), *e. g.*, 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.

Id. at 500 n.9.

⁶⁷ As Stevens states, "[t]his 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.' *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500-501, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985); *Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 90 L. Ed. 358, 66 S. Ct. 445 (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'"). *Leavitt v. Jane L.*, 518 U.S. 137, 145, 135 L. Ed. 2d 443, 116 S. Ct. 2068 (1996) (*per curiam*)."⁶⁸ *Castle Rock*, 125 S. Ct. at 2814 (dissenting).

⁶⁸ *Id.* at 2803.

⁶⁹ *Id.* at 2804.

None of this helps the Court’s argument. The per curiam decision in *Leavitt* was based on the finding that the circuit court was clearly wrong in failing to give effect to the plain language of the statute.⁷⁰ Perhaps more importantly, whereas the circuit court in *Gonzales* did not reverse the district court on the issue before the Supreme Court (the issue of establishing an entitlement), the “Court of 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.⁷¹ Thus, unlike in *Leavitt*, there are 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 transcripts, was solidly grounded and by no means could it be labeled “clearly wrong.” The Court does not even attempt to label it as such, but merely states that “we think deference inappropriate here.”⁷² 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

- 1) *The enforcement statute is mandatory because it does not allow for the type of discretion that undermines the duty of enforcement*

⁷⁰ 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.” 518 U.S. at 140. It went on to state, 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.

⁷¹ *Id.* at 145. As Justice Stevens points out, “... those courts disagreed only over the extent to which a probable-cause determination requires the exercise of discretion. Compare 366 F.3d at 1105-1110, with App. to Pet. for Cert. 122a (District Court opinion).” *Castle Rock*, 125 S. Ct. at 2815 n.2 (dissenting).

⁷² See *supra* note 69.

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.⁷³ As noted above, 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.⁷⁴ 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."⁷⁵ The Court seems to indicate that it is impossible to create a true mandatory enforcement statute, *i.e.* a statute that gets rid of all police discretion. In fact the Court quotes *Chicago v. Morales* to the effect that it is "common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances."⁷⁶ The very next sentence appears to provide hope for in it the majority states, "...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'), §§ 18—6—803.5(3)(a), (b)."⁷⁷

If this last sentence is the holding then there is hope that if states made the language more clearly mandatory, by perhaps adding such language as "really mandatory," "absolutely must," or "no discretion," then perhaps this would give rise to a right or entitlement to mandatory action. Clearer language may at least convince some members of the Court that the state in question intended to create a right to mandatory enforcement. However, this does not necessarily follow, for if the prior sentence is the real holding, then no matter how strong the language is, it is in fact not humanly possible to squeeze out all of the discretion. If all you need

⁷³ *Id.* at 2802.

⁷⁴ *Id.* (referring also to 1 ABA Standards for Criminal Justice 1-4.5, commentary, at 1-124 --1-125 (2d ed. 1980)).

⁷⁵ *Castle Rock*, 125 S. Ct. at 2803 (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989)).

⁷⁶ *Castle Rock*, 125 S. Ct. at 2806 (quoting *Morales*, 527 U.S. at 62 n.32) (emphasis in *Castle Rock*).

⁷⁷ *Id.*

is an iota or modicum of discretion to defeat the entitlement claim, then the claim will always be defeated.

But this proves too much. 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 is directed at 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.⁷⁸ This would defeat almost every entitlement claim that has arisen, be it health care, as pointed out by Justice Stevens,⁷⁹ or any of a number of other entitlements that the courts have found to give rise to due process protection including: continued public employment in *Perry v. Sindermann*,⁸⁰ free education in *Goss v. Lopez*,⁸¹ garnished wages in *Sniadach v. Family Finance Corp.*,⁸² professional licenses in *Barry v. Barchi*,⁸³ drivers' licenses in *Bell v. Burson*,⁸⁴ causes of action in *Logan v. Zimmerman Brush Co.*,⁸⁵ and the receipt of government services, including: utility services in *Memphis Light, Gas & Water Div. v. Craft*,⁸⁶ disability benefits in *Mathews v. Eldridge*,⁸⁷ and welfare benefits in *Goldberg v. Kelly*.⁸⁸

⁷⁸ 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.'" *Bd. of Pardons v. Allen*, 482 U.S. 369, 375, 107 S. Ct. 2415 (1987) (citing R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 32 (Gerald Duckworth & Co. Ltd. 1996) (1977)). 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.'" *Id.* (citing DWORKIN, *supra* at 31, 32). *See also* *Watson v. City of Kansas City*, 857 F.2d 690, 695 (10th Cir.1988).

Gonzales, 366 F.3d at 1105-06. 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.

⁷⁹ *Id.* at 2820 (Stevens, J., dissenting).

⁸⁰ 408 U.S. 593, 602-03 (1972).

⁸¹ 419 U.S. 565, 574 (1975).

⁸² 395 U.S. 337, 339 (1969).

⁸³ 443 U.S. 55, 64 (1979).

⁸⁴ 402 U.S. 535, 539 (1971).

⁸⁵ 455 U.S. 422, 428 (1982).

⁸⁶ 436 U.S. 1, 11-12 (1978).

⁸⁷ 424 U.S. 319, 332 (1976).

⁸⁸ 397 U.S. 254, 262 (1970).

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, 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 that she or he would be required to drop everything immediately and arrest or hunt down and arrest someone for whom there is cause to suspect that a restraining order has been violated. This would lead to absurd results; she or he 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 it choose language that is appropriate to the task given the conditions. While the use of “all deliberate speed” has proven too flexible,⁸⁹ the use of “[s]hall use every reasonable means to enforce a restraining order” along with “shall arrest... or seek a warrant,”⁹⁰ 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. Justice Stevens, in his dissent, refers to four cases from four

⁸⁹ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). The relief granted in *Brown II* was flawed in that it did not actually provide a remedy for the plaintiffs, as Paul Gewirtz states, in *Brown II* “[a]ll 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.” *Remedies and Resistance*, 92 *YALE L.J.* 585, 612 (1983) (notes omitted). See also the very slow history of desegregation post-*Brown*. See, e.g., CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004).

⁹⁰ COLO. REV. STAT. ANN. §§ 18-6-803.5(3)(a), (b) (LEXIS through 2004 Supplement (2004 Sess.)).

different states that have interpreted their mandatory arrest statutes to mean what they say, i.e. that an arrest is mandatory.⁹¹ The majority largely ignores these decisions and the statutes that they are based on. 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.⁹² Nonetheless their authority is dubious given that Stevens does not address the exact language of the statutes in question.

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. If we look to the recent case of *Conerly v. Town of Franlinton*,⁹³ based on Louisiana legislation, it is apparent the language there was less mandatory than that in the Colorado statute addressed in *Castle Rock*. Further, if the Colorado General Assembly wished to make enforcement optional or discretionary it could have used language clearly indicating so as found in other jurisdictions.

*Oregon*⁹⁴

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

133.310. Authority of peace officer to arrest without warrant.

...

⁹¹ *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983); *Matthews v. Pickett*, 996 S.W.2d 162 (Tenn. 1999); *Campbell v. Campbell*, 682 A.2d 272 (N.J. Super. Ct. App. Div. 1996); *Donaldson v. Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992).

⁹² *Castle Rock*, 125 S. Ct. at 2818 (Stevens, J., dissenting). *See supra* note 4.

⁹³ No. 03-1507, 2005 U.S. Dist. LEXIS 12395 (E.D. La. Jun. 28, 2004).

⁹⁴ Note that Oregon, in 1977, was the first state to enact mandatory arrest laws in domestic violence cases. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY. 46, 63 (1992).

- (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:
- (a) There exists an order issued pursuant to ORS 107.095(1)(c) or (d), 107.716 or 107.718 restraining the person; and
 - (b) A true copy of the order and proof of service on the person has been filed as required in ORS 107.720; and
 - (c) The peace officer has probable cause to believe that the person to be arrested has violated the terms of that order.⁹⁵

When analyzing the provision the court in *Nearing* stated:

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.⁹⁶

The court went on to point out that the mandatory language in the 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.”⁹⁷ 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 which generates an entitlement on the part of the protected person. This is accomplished through

⁹⁵ OR. REV. STAT. § 133.310(3) (1977). Note that the mandatory arrest statute did not immediately result in more arrests by the police. As is pointed out by both Ruth Gundle in *Civil Liability for Police Failure to Arrest: Nearing v. Weaver*, 9 WOMEN’S RTS. L. REP. 259, 262 (1986), and Sue Ellen Schuerman in *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARZ. LAW. REV. 355 n.38, n.117, the arrest rates remained low (citing a 1979 study by the Oregon Governor’s Commission for Women). 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; Schuerman, *supra*, at n.117). Schuerman also notes a similar problem in compliance following the enactment of legislation in Minnesota. Schuerman, *supra*, at n.38.

⁹⁶ 670 P.2d 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 hard to imagine that the drafters of the Colorado statute were ignorant of how the language they chose would be interpreted by the courts.

⁹⁷ *Id.* at 143.

the protection order which "...identif[ies] with precision when, to whom, and under what circumstances police protection must be afforded."⁹⁸

Tennessee

The Tennessee code provides:

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.⁹⁹

The Supreme Court of Tennessee, in *Matthews v. Pickett*,¹⁰⁰ certified the case from the Sixth Circuit to answer the question as to whether a protection order could give rise to a "special duty" to protect that would override the public duty doctrine.¹⁰¹ The court found that it could and that the respondents could be held liable under the Governmental Tort Liability Act.¹⁰²

The court held that:

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] had 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. See generally *Watts v. Robertson County*, 849

⁹⁸ *Id.*

⁹⁹ TENN. CODE ANN. § 36-3-611 (LEXIS through 2004 Sess.) (emphasis added).

¹⁰⁰ 996 S.W.2d 162 (Tenn. 1999).

¹⁰¹ *Id.* at 163.

¹⁰² *Id.*

S.W.2d 798 (Tenn. App. 1992); *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899 (Tenn. App. 1992).¹⁰³

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.¹⁰⁴

New Jersey

The relevant New Jersey statute reads:

§ 2C:25-31. Contempt, law enforcement procedures

Where a law enforcement officer finds that there is probable cause 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...*¹⁰⁵

The court in *Campbell v. Campbell* held that the police officers did not have discretion to arrest the plaintiff's husband under this New Jersey statute and therefore they were not immune under N.J.S.A. 59:3-2(a) which provides immunity for injury resulting from the exercise of judgment or discretion.¹⁰⁶

Washington

Washington Revised Code 10.31.100 reads:

¹⁰³ *Id.* at 164.

¹⁰⁴ 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 of volume 57 n.1 states:

[i]n 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.

¹⁰⁵ N.J. STAT. ANN. § 2C:25-31 (LEXIS through the 211th Legis. 2d Ann. Sess. (2005), through P.L. 2005 Ch. 114) (emphasis added).

¹⁰⁶ *Campbell*, 682 A.2d at 274-75.

§ 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 person;¹⁰⁷

The statute was noted in dicta in *Donaldson v Seattle* where it stated, “Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In 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. RCW 10.31.000.”¹⁰⁸

Louisiana

Louisiana Revised Statutes 14:79(E) states,

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.”¹⁰⁹

The district court in *Conerly* stated:

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

¹⁰⁷ WASH. REV. CODE ANN. § 10.31.100 (LEXIS through 2004 Gen. Election (2005 c 2)).

¹⁰⁸ *Donaldson*, 831 P.2d at 1103.

¹⁰⁹ LA. REV. STAT. ANN. § 14:79(E) (WESTLAW through all 2004 First Extraordinary and Reg. Sess. Acts) (emphasis added).

party." *Castle Rock*, 366 F.3d at 1106.¹¹⁰

The court went on to quote from *Ardoin v. City of Mamou*,¹¹¹ stating, “‘While the statute authorizes arrest of the violator, it does not mandate arrest unless arrest is required to enforce the statute.’ Indeed, ‘the word ‘may’ is not mandatory, but rather implies that a peace officer’s power to arrest without a warrant is discretionary.’”¹¹²

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 Montana Code Annotated section 46-6-311 (“Basis for arrest without warrant -- arrest of predominant aggressor”) which states:

(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.¹¹³

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. The 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 non-mandatory.

¹¹⁰ *Conerly*, 2005 U.S. Dist. LEXIS 12395, at *20-21.

¹¹¹ 685 So. 2d 294 (La. Ct. App. 1996).

¹¹² *Id.* (quoting *Ardoin*, 685 So. 2d at 299).

¹¹³ MONT. CODE ANN. § 46-6-311 (LEXIS through all 2003 legislation. No legislation enacted in 2004) (emphasis added).

2) *The options of arrest or seek an arrest warrant are not discretionary options and they are not merely procedures, but are ends that give rise to an entitlement*

Although the Court does not squarely address these cases and the statutes they are based on, its second set of arguments provides a response. None of these statutes include the option of seeking an arrest warrant should an arrest be impractical.¹¹⁴ The Court's second argument is that even if the statute was mandatory it mandates one of two options, arrest or seek an arrest warrant, and since the second option is a procedure and not an end in itself, this cannot give rise to an entitlement.¹¹⁵

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.¹¹⁶ The mere fact that the police have an option does not mean that the police can choose to do nothing. Further, in the case of Colorado, the choice between the two options is not discretionary, as the officer is only permitted to seek an arrest warrant if an arrest is impractical. The option 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 order."

¹¹⁴ Note that a few other states have adopted the optional language (*see, e.g.*, IOWA CODE ANN. § 236.11 (LEXIS through 2005 Edition (2004 legis.)); R.I. GEN. LAWS § 12-29-3 (b)(IV) (LEXIS THROUGH JAN. 2004 SESS.); but as of yet there is no case interpreting whether they are mandatory.

¹¹⁵ *Castle Rock*, 125 S. Ct. at 2807-08. As noted *supra* note 31, Justices Souter and Breyer, in their concurring opinion, rest on this argument.

¹¹⁶ *Conerly*, 2005 U.S. Dist. LEXIS 12395, at *20-21.

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. As the majority argues:

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, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); much less can it be the basis for a property interest. See *post*, at 3-4 (SOUTER, J., concurring). 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.¹¹⁷

As noted by Justice Scalia, his argument is supported by the concurring opinion of Justice Souter.¹¹⁸ 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." Brief for Respondent 10.¹¹⁹

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, *see ante*, at 2-3."¹²⁰

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

¹¹⁷ *Id.* at 2808 (n.11 omitted).

¹¹⁸ 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. As Justice Steven's persuasively points out, an entitlement to go to school does not mean that one is entitled to refuse to go to school. Mandatory attendance laws do not defeat the entitlement. *Id.* at 2824 n.20.

¹¹⁹ *Id.* at 2811. (Souter, J., concurring).

¹²⁰ *Id.*

process in the statute as her state law entitlement. She stated that the failure to follow the process in the statute drained the value from her property interest in the restraining order. Her claim was a right to the enforcement of the order. The second error is 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 discretion, thereby defeating any claim that the command creates a mandatory duty. If “use all reasonable means to enforce, arrest upon demonstrable probable cause, get a warrant, and so on,” are 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 is a process, 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. They are obliged to enforce the warrant, and they are told to do so by all reasonable means, which includes the duties of either arresting or seeking an arrest warrant should the arrest be impractical. 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.¹²¹ 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.

¹²¹ *Id.* at 2812.

The circuit court in this case identified three simple and discrete steps in the process that it held was due to Ms. Gonzales. These were identified in the statute and they were distinct from the entitlement the process was designed to provide for those whose claim to the entitlement had merit. As the circuit court stated,

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, [FN17] whether probable cause exists that the restrained party is violating the order, *see* Colo.Rev.Stat. § 18-6-803.5(3)(b)(I), and whether probable cause exists that the restrained party has notice of the order. *See* Colo.Rev.Stat. § 18-6-803.5(3)(b)(II). [FN18] If, after completing these 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.¹²²

This rather simple and straight forward process arguably is what is due under the due process clause of the U.S. Constitution.¹²³ It is completely separate from that which the process is meant to deliver. It is meant to deliver a non-arbitrary decision as to whether Ms. Gonzales's right to the enforcement of the restraining order has merit and will be carried out or denied.

- 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 enforcement*

At first glance, the Court's third set of arguments appears to be the most compelling. We are very comfortable with the distinction between criminal law and civil law, with the former

¹²² *Gonzales*, 366 F.3d at 1116. Notes 17 and 18 state:

[17] This task can be accomplished 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. *See* COLO.REV.STAT. § 18-6- 803.7 (creating central registry of protective orders issued in Colorado).

[18] In making these determinations, the statute states "a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry." COLO.REV.STAT. § 18-6-803.5(3)(c).

Id.

¹²³ 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.

serving public ends and the latter serving private ends.¹²⁴ As the majority states, "serving of public rather than private ends is the normal course of the criminal law."¹²⁵ Thus, it is plausible to contend that a statute placing duties on the police to enforce the law are designed to serve public ends, rather than private ends.¹²⁶ 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 the public end by giving a private entitlement.¹²⁷

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. 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 in these cases and 2) police indifference or inaction in these cases. It did so by both shifting intervention in this area from mediation and counseling to arrests, and by making enforcement of restraining orders mandatory.¹²⁸ 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

¹²⁴ Justice Scalia reaches back to the eighteenth and nineteenth centuries to support this view. *Id.* at 2808 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769) and *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

¹²⁵ *Id.* at 2808.

¹²⁶ Although not recognized by Justice Scalia, his argument is superficially bolstered by Colorado Revised Statutes section 2-4-201(e) (*Intentions in the enactment of statutes*), which states "(1) In enacting a statute, it is presumed that: . . . (e) Public interest is favored over any private interest." This in no way defeats the private interest when it is compatible with the public interest. Further, "Where 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 *Interest of R.C.*, 775 P.2d 27, 29 (Colo. 1989) (citing *People v. District Court*, 713 P.2d 918, 921 (Colo. 1986)).

¹²⁷ Both our common law and statutory law regularly serve public ends by providing private rights of action. Punitive damages is 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."

¹²⁸ *See Wanless*, *supra* note 5.

violence and restraining order violations. It has been the victims and/or survivors and their advocacy groups that have pushed for these rights and duties.¹²⁹ As Kristian 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.¹³⁰

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 in that case.¹³¹

- 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*

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,¹³² 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

¹²⁹ Kristian Miccio traces the histories of both the battered women’s movement as well as the mandatory arrest movement in *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 248-264, 264-282 (2005). See also Wanless, *supra* note 5 at 539-540.

¹³⁰ *Id.* at 279 (n. 175 omitted) (referring to her interviews with advocates in Colorado in 2003).

¹³¹ The plaintiff in *Nearing* sued under the Oregon Tort Claims Act. 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.” *Nearing*, 670 P.2d at 144. As noted, this case was brought under § 1983 based on the alleged due process violation of the state entitlement. It also may have been brought under Colorado state law; Colorado Revised Statutes section 24-10-118 allows for suits against public employees for injuries caused by willful and wanton conduct. COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)). The facts alleged arguably satisfy the requirement.

¹³² He acknowledges that this is no bar to the claim. *Castle Rock*, 125 S. Ct. at 2809.

that government actors have always performed -- to wit, arresting people who they have probable cause to believe have committed a criminal offense.”¹³³

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. By looking at the function of property from the past to the present, the Court was able to formulate the rule that, “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.”¹³⁴

On the one hand, the Court wants to paint the entitlement in question as something “novel,” that “cannot ‘simply go without saying.’”¹³⁵ It is not traditional. On the other hand, it wants to say that it is incidental to something that has been happening all along, namely “arresting people.”¹³⁶ 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—and the Oregon statute was interpreted to create a new property-like entitlement in 1983, over twenty years ago. However, what has not been happening “all along” 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 U.S. to pass legislation mandating arrest for the violation of restraining orders. It is precisely a “new species of government benefit or service” 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

¹³³ *Id.*

¹³⁴ *Roth*, 408 U.S. at 577.

¹³⁵ *Castle Rock*, 125 S. Ct. at 2809.

¹³⁶ *Id.*

issued by the court. As Justice Stevens states, “A concern for the “protected person” pervades the statute.”¹³⁷

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.¹³⁸ The argument against Justice Steven’s claim that one could have a contract for such services furthers the point that the order had monetary value rather than detracting from the point. Justice Scalia, writing for the Court, responded in a note that:

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. Colo. Rev. Stat. § 16-3-201 (Lexis 1999). And, needless to say, a private person would not have the power to obtain an arrest warrant.¹³⁹

¹³⁷ *Id.* at 2821 n.14 (Stevens, J., dissenting).

¹³⁸ 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 justices” in 2004. [Http://www.usmarshals.gov/judicial/](http://www.usmarshals.gov/judicial/) (last visited Aug. 15, 2005). The federal judiciary has in fact been mobilizing for better protection since the killing of the family members of Justice Lefkowitz in February of this year. *See U.S. Marshals Service Resources Faulted by Federal Judiciary*, 37(5) THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS (May 2005); *Judges Plead for Improved Judicial Security* 37(6) THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS (Jun. 2005). It has resulted in the proposed Secure Access to Justice and Court Protection Act of 2005. H.R. 1751. Although I do not wish to diminish the problem here, The ABA Justice Center Coordinating Council, Judicial Division, Standing Committee on Federal Judicial Improvements, Standing Committee on Judicial Independence, 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.” *Available at:* <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/106C.doc> (last visited Aug. 15, 2005).

¹³⁹ *Castle Rock*, 125 S. Ct. at 2809 n.13.

First, a private person would have had the power to arrest since the continued abduction of the children was a continuing breach of the terms of the restraining order.¹⁴⁰ Secondly, it does not follow that there is no monetary value that can be placed on the enforcement of the order simply because a private person does not have the power to obtain an arrest warrant.¹⁴¹ 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 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 that:

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," *Parratt v. Taylor*, 451 U.S. 527, 544, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981) (quoting *Paul v. Davis*, 424 U.S., at 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155), 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, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a

¹⁴⁰ The restraining order required that the husband not "molest or disturb" the peace of Ms. Gonzales and the children. *Gonzales*, 366 F.3d at 1144 (Appendix) (O'Brien, J., dissenting).

¹⁴¹ This is also questionable. According to 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 129, at 299 (citing N.Y. State Div. of Criminal Justice Servs. & N.Y. State Office for the Prevention of Domestic Violence, Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Final Report to the Governor and Legislature 2 (2001)).

system under state law. Cf. *DeShaney*, 489 U.S., at 203, 103 L. Ed. 2d 249, 109 S. Ct. 998. n15.

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." Likewise § 1983's plain language states,

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 equity, or other proper proceeding for redress...

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."¹⁴² 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. The due process right attaches to the right or entitlement to property. 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

¹⁴² *Castle Rock*, 125 S. Ct. at 2810.

understandings that stem from an independent source such as state law.”¹⁴³ Thus, while the majority begins its judgment with the view that it is for 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 in *Lochner* just over one hundred years ago.¹⁴⁴ Justice Peckham and a majority of the court decided that it was for them to decide what the Fourteenth Amendment meant by liberty, striking down a New York statute designed to limit the working hours of bakers in New York to under sixty a week for the workers’ health and safety.¹⁴⁵ Peckham and his Court chose the liberty of employers to exploit their workers over the health and safety of workers, contrary to the views of the legislature.¹⁴⁶ 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.

Holmes said of the *Lochner* decision, “This case is decided upon an economic theory which a large part of the country does not entertain.”¹⁴⁷ The same is true of the view of

¹⁴³ 125 S. Ct. at 2803 (citations omitted).

¹⁴⁴ Justice Scalia has invoked *Lochner* to criticize the majority of the Court in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999) (Scalia, J., dissenting). He has also been criticized for his “*Lochner*-izing.” See, e.g., Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. U. L. REV. 469, 471 (1993).

¹⁴⁵ The problem addressed by the legislature was the white lung problem, which caused substantial health issues for bakers who were working very long hours.

¹⁴⁶ “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.” *Lochner*, 198 U.S. at 57.

¹⁴⁷ *Id.* at 75 (Holmes, J., dissenting).

“discretionary” enforcement of restraining orders that grounds this decision.¹⁴⁸ The Supreme Court may not like the fact that Colorado attempted to create a right that the police enforce such orders, since it imposes a duty for the police to actually do something, a positive entitlement, rather than a mere negative right. But was it for the Court to second guess the Colorado’s creation of the right? Again the Court may have benefited from Justice Holmes, who stated,

... 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...Some of these laws embody convictions or prejudices which judges are likely to share. 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.¹⁴⁹

Although the common view of *Lochner* is that it was the decision of an activist court,¹⁵⁰ Cass Sunstein has characterized the Court as holding the view that neutrality was constitutionally required.¹⁵¹ However, its approach to “neutrality” was problematic at best.¹⁵² Sunstein has described the *Lochner* Court’s approach to “neutrality” as embracing three key concepts:

¹⁴⁸ This is evidenced by the fact that more than fifty percent of states have passed mandatory arrest statutes for the violation of protection order.

¹⁴⁹ *Id.* The Court here 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.

¹⁵⁰ Cass Sunstein, *Lochner’s Legacy*, 87 COLUMBIA L. REV. 873, 874 n.6 (1987) (referring to J. CHOPER, THE SUPREME COURT AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)).

¹⁵¹ *Id.* at 874.

¹⁵² As Sunstein states, “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.

“government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law.”¹⁵³ 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 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.¹⁵⁴

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 on the police and persons holding restraining order. 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 U.S. Supreme Court.¹⁵⁵

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

¹⁵³ *Id.* at 874.

¹⁵⁴ *Id.*

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 U.S. Supreme Court has undermined these efforts.

APPENDIX A

Legislation pertaining to arrests for the violation of restraining orders or protection orders

State	May Arrest	Shall 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 (Michie, LEXIS through 2004 1st Special Sess.) (may arrest).

ⁱⁱ ALASKA. STAT. § 18.65.530(a) (LEXIS through 2004 legislation) (with or without a warrant, shall arrest).

ⁱⁱⁱ ARIZ. REV. STAT. § 13-3602(M) (LEXIS through 2004 legislation) (with or without a warrant, may arrest).

^{iv} ARK. CODE ANN. § 5-53-134(c)(1) (LEXIS through 2005 Reg. Sess.) (May arrest and take into custody without a warrant).

^v CAL. PENAL CODE § 836(d) (Deering, LEXIS, includes all urgency legislation through 7/27/05) (may arrest).

^{vi} COLO. REV. STAT. ANN. § 18-6-308.5(3)(B) (LEXIS through 2004 Supplement (2004 Sess.)) (Shall arrest or if an arrest would be impractical under the circumstances, seek a warrant for the arrest). *See id.* at § 13-14-103(11) (Duties of police officer enforcing orders...shall be in accordance with § 18-6-303.5 and any rules adopted by Colorado supreme court).

^{vii} DEL. CODE ANN. tit. 10 § 1046 (c) (LEXIS through 75 Del Laws, Ch 60) (shall arrest with or without a warrant).

^{viii} FLA. STAT. ANN. § 901.15 (WESTLAW through Chapter 352 and H.J.R. No. 1723, H.J.R. 1177 and S.J.R. No. 2144 (End) of the 2005 First Regular Session of the Nineteenth Legislature) (may arrest a person without a warrant).

^{ix} IDAHO CODE § 39-6312(2) (LEXIS through 2005 Sess.) (“May arrest without a warrant and take into custody”).

^x 725 ILL. COMP. STAT. 5/112A-26(a) (LEXIS through Pub. Act 94-69) (“May make an arrest without warrant”).

^{xi} IND. CODE ANN. § 34-26-1-15 (Michie, LEXIS through 2004 Reg. Sess.) (“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 ANN. § 236.11 (LEXIS through 2005 Edition (2004 legis.)) (“Shall use every reasonable means to enforce an order . . . if unable to take the person into custody within twenty-four hours . . . 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) (LEXIS through 2004 Supp.) (“(a) All law enforcement agencies shall adopt written policies regarding domestic violence calls . . . (b) such written policies shall include (1) a statement directing that officers shall make an arrest when they have probable cause to believe a crime is being committed or has been committed”).

^{xiv} KY. REV. STAT. ANN. § 403.760(2) (LEXIS through 2004 Extraordinary Sess.) (“Shall arrest without a warrant”).

^{xv} LA. REV. STAT. ANN. § 14:79(E) (WESTLAW through all 2004 First Extraordinary and Reg. Sess. Acts) (“Shall use every reasonable means, including but not limited to immediate arrest”).

^{xvi} ME. REV. STAT. ANN. tit. 19-A, § 4012(5) (WESTLAW 2005 First Reg. Sess. of the 122nd Legis. & with Emergency Legislation through the 2005 First Special Sess. of the 122nd Legis.) (“Shall arrest and take into custody”).

^{xvii} MD. CODE ANN., FAM. LAW § 4-509(b) (LEXIS through 2004 Reg. & Special Sess., with changes) (“Shall arrest with or without a warrant and take into custody”).

^{xviii} MASS. GEN. LAWS. ANN. ch. 209A, § 6(7) (WESTLAW through Ch. 71 of the 2005 1st Annual Sess.) (“Shall arrest any person”).

^{xix} MICH. COMP. LAWS § 764. 15b(1) (WESTLAW through P.A. 2005, No. 1-103) (“Without a warrant, may arrest”).

^{xx} MINN. STAT. ANN. § 518B.01 (14)(e) (WESTLAW through laws of the 2005 Reg. Sess. effective through June 1, 2005) (“Shall arrest without a warrant”).

^{xxi} MISS. CODE ANN. § 99-3-7(3)(a) (LEXIS through 2004 Reg. Sess.) (“Shall arrest without or without a warrant”).

^{xxii} MO. REV. STAT. § 455.085(2) (LEXIS through all 2004 legislation) (“Shall arrest”).

^{xxiii} MONT. CODE ANN. §§ 46-6-210, 46-6-311 (LEXIS through all 2003 legislation. No legislation enacted in 2004) (“May arrest a person when the officer has a warrant; (1) may arrest a person when a warrant has not been issued . . . (2) Arrest is the preferred response). *See id.* at § 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. § 42-928 (LEXIS through 2004 2d Sess.) (“Shall with or without a warrant arrest”). *See id.* § 28-311.09(9) (“may with or without a warrant arrest”).

^{xxv} NEV. REV. STAT. 33.070(1) (LEXIS through 21st Special Sess. (2004)) (“Every . . . order must include a provision ordering any law enforcement officer to arrest . . . with or without a warrant”).

^{xxvi} N.J. REV. STAT. § 2C:25-21(a)(3) (LEXIS through the 211th Legis. 2d Ann. Sess. (2005), through P.L. 2005 Ch. 114) (“Shall arrest”).

^{xxvii} N.M. STAT. ANN. § 40-13-6(C) (Michie 2005) (“Shall arrest without a warrant and take into custody”).

^{xxviii} N.Y. CRIM. PROC. LAW § 140.10(4)(b) (Consol., LEXIS through Ch. 185, 07/12/2005, with the exception of Chs. 1-3, 105, 149, 150 & 161) (“Shall arrest and shall not attempt to reconcile or mediate”).

^{xxix} N.C. GEN. STAT. § 50B-4.1(b) (LEXIS through all 2004 legislation) (“Shall arrest and take into custody without a warrant or other process”).

^{xxx} N.D. CENT. CODE § 14-07.1-11(1) (LEXIS through 2003 Sess. No legislation enacted in 2004) (“Shall arrest”). *See id.* § 14-07.1-11(2) (“may 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” (requires physical injury)).

^{xxxi} OHIO REV. CODE ANN. § 2935.03(A)(1) (Anderson, LEXIS through legislation passed by the 126th General Assembly and filed with the Sec. of State through Jun. 29, 2005) (“Shall arrest and detain, until a warrant can be obtained”).

^{xxxii} OKLA. STAT. ANN. tit. 22 § 196(7)(WESTLAW through chs. of the first 2005 First Reg. Sess. effective through Jul. 1, 2005) (“May, without a warrant, arrest”).

^{xxxiii} OR. REV. STAT § 133.310(3) (LEXIS through 2003 Reg. Sess. Of 72nd Legis. Assembly) (“Shall arrest and take into custody”).

^{xxxiv} 23 PA. CONS. STAT. § 6113(a) (LEXIS through Act 2 of 2005 Legis. Sess.) (“Shall arrest”).

^{xxxv} 8 P.R. LAWS ANN. § 628 (LEXIS through Dec. 2002) (“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) (LEXIS through Jan. 2004 Sess.) (“Shall arrest . . . (4) 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.” (if within twenty-four hours)).

^{xxxvii} S.C. CODE ANN. § 16-25-70(B) (LEXIS through all legislation enacted in 2004) (“must arrest, with or without a warrant” (if physical injury manifest)). *See id.* § 16-25-70(B) (“may arrest, with or without a warrant”).

^{xxxviii} S.D. CODIFIED LAWS § 23A-3-2.1(1) (LEXIS through all 2005 legislation) (“Shall arrest and take into custody”).

^{xxxix} TENN. CODE ANN. § 36-3-611(a)(2) (LEXIS through 2004 Sess.) (“Shall arrest without a warrant”).

^{xl} TEX. CRIM. PROC. CODE ANN. § 1403(a)(3) (LEXIS through 2003 legislation. No legislation enacted in 2004.) The provision states:

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; or

NOTICE: SECOND OF TWO VERSIONS OF SUBD. (a)(3)
As amended by Acts 2003, ch. 460, § 2 and ch. 1164, § 2

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

^{xli} UTAH CODE ANN. § 77-36-2.4(1) (WESTLAW through 2005 1st Special Sess.) (“Shall without a warrant, arrest”). *See id.* § 30-6-8(1)(a) (WESTLAW through 2005 1st Special Sess.) (“Shall use every reasonable means to enforce the court’s order”).

^{xlii} VT. R. CRIM. P. RULE 3 (LEXIS through Apr. 4, 2005) (“May arrest the person without a warrant”).

^{xliii} 16 V.I. CODE ANN. § 94 (WESTLAW through Acts 6644 through 6725 of the 2004 Reg. Sess.) (“Shall make an arrest without a warrant”).

^{xliiv} VA. CODE ANN. § 19.2-81.3(A) (LEXIS through 2005 Reg. Sess., Acts 2005, cc. 1 to 951) (“May arrest without a warrant”).

^{xlv} WASH. REV. CODE ANN. § 26.50.110(2) (WESTLAW through 2005 legislation effective through July 1, 2005) (“Shall arrest without a warrant and take into custody”). *See id.* § 10.31.100(2)(a) (“Shall arrest and take into custody”).

^{xlvi} W. VA. CODE § 48-27-1001(a) (LEXIS through 3d Ex. Sess.) (“Shall immediately arrest”). *See id.* § 48-27-1001(b) (“may arrest”).

^{xlvii} WIS. STAT. § 813.12(7)(b) (LEXIS through Mar. 11, 2005 (Act 2)) (“Shall arrest and take a person into custody”).

^{xlviii} WYO. STAT. ANN. § 35-21-104(b) (LEXIS through 2005 Reg. Sess.) (“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”).