Lessons from the *Town of Castle Rock*

Providing Meaningful Protection for Domestic Violence Victims at the State and Federal Level

I. Introduction

The social contract is a political theory that explains the formation of government.[1] According to this theory, before government mankind lived in a "state of nature" consisting of *bellum omnium contra omnes* (a war of all against all) resulting in a "nasty, brutish and short" life for many.[2] To end this intolerable state, men contracted with one another to relinquish personal freedoms in exchange for protection from a centralized government. Feminist social theorists have described this social contract as also being a sexual contract.[3] The sexual contract was formed without consideration for the specific needs of women;[4] instead it reinforced men's access to and power over women.[5] Understanding this fundamental flaw during the formation of government provides the framework for the following analysis of *Town of Castle Rock v. Gonzales*[6] and its subsequent international case *Jessica Lenahan (Gonzales) v. U.S.A.*[7]

There is another social contract specific to America. To form the union that is now the United States, each individual State government relinquished some power to create a limited centralized federal government that would "establish Justice, insure domestic Tranquility, [and] provide for the common defense" of its citizens.[8] Under the framework of the Constitution, each State government retained its sovereignty in certain government matters, such as the exercise of

[1] *See generally* THOMAS HOBBES. LEVIATHAN (1651).
[2] *Id.* at Chapters XIII-XIV.
[3] *See e.g.* CAROLE PATEMAN. THE SEXUAL CONTRACT 1 (Standford Univ. Press 1988).
[4] Catharine A. MacKinnon. *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281 (1991) ("No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented.").
[5] *See* THE SEXUAL CONTRACT at 1–2.
[6] 545 U.S. 748 (2005).
[7] Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).
[8] U.S. CONST. pmbl.

police power.[9] Among other things, the police power allows the State to ensure the safety of its citizens, a duty whose parameters are explained by the public duty doctrine.[10] The federal government has very limited power to review a State's exercise of its police powers.[11] The Fourteenth Amendment provides the federal government power to review State actions, however it was enacted within the context of the sexual contract.[12] It has therefore inadequately remedied the effects of the sexual contract.[13]

Violence against women is a byproduct of the sexual contract.[14] Domestic violence is one form that is most commonly inflicted by male spouses, family members or intimate partners against women to assert control.[15] This form of gender violence is prevalent in the United States[16] and abroad.[17] While the State prohibits this abuse on its face, many argue our legal system actually condones such gender violence.[18] One example of this condonation is the

[9] *E.g. Lochner v. New York*, 198 U.S. 45, 53 (1905) ("Those powers . . . relate to the safety, health, morals and general welfare of the public.").
[10] *See e.g. Hines v. District of Columbia*, 580 A.2d 133 (D.C. Cir. 1990) ("Under that doctrine, a government and its agents owe no duty to provide public services to particular citizens as individuals. Instead, absent some "special relationship" between the government and the individual, the District's duty is to provide public services to the public at large.").
[11] *See United States v. Lopez*, 514 U.S. 549, 552 (1995) (finding the federal government has limited, enumerated powers with all other remaining with the States to avoid "the accumulation of excessive power in any one branch, [and create] a healthy balance of power between the States and the Federal Government [to] . . . reduce the risk of tyranny and abuse from either front (internal citations omitted).").
[12] MacKinnon, *supra* note 4, at 1283 (" . . . the Fourteenth Amendment guaranteed 'equal protection of the laws.' Racial inequality was its crucible, its paradigm, its target, and its subtext. Sex-based denials of equal rights were not covered. It is thus a misnomer to say that the Reconstruction Amendments gave Blacks even formal constitutional equality. To the extent gender inequality limited it—no woman could vote, for example—equality was reserved for Black men.").
[13] *See infra*, Part II.B.2.
[14] *See* THE SEXUAL CONTRACT at 2
[15] *See* WORLD HEALTH ORG. (WHO), WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN, SUMMARY REPORT vii, 5–14 (2005).
[16] *See e.g. United States v. Morrison*, 529 U.S. 598, 631–33 (2000) (Thomas, J., concurring) (citing Congressional findings for the Violence Against Women Act on gender-motivated violence and the legal system's failure to meaningfully address the problem).
[17] *See* UNITED NATIONS DEP'T OF PUBLIC INFO., U.N. SECRETARY-GENERAL'S CAMPAIGN, UNITE TO END VIOLENCE, FACTSHEET, DPI/2546 (Nov. 2011) *available at* http://www.un.org/en/women/endviolence/pdf/press materials/unite_the_situation_en.pdf.
[18] MacKinnon, *supra* note 4, at 1300 ("Much sex inequality is successfully accomplished in society without express legal enforcement and legitimation. Yet the law is deeply implicated in it. Law actively engages in sex inequality by apparently prohibiting abuses it largely permits."); *see also Morrison*, 529 U.S. at 664 (Breyer, J., dissenting)

prevalent abuse of police discretion to avoid arresting male perpetrators of domestic violence.[19] Many States have addressed this problem by enacting mandatory arrest laws for domestic violence incidents.[20] However, the public duty doctrine safeguards police discretion to frustrate these and other legislative efforts to address gender violence.[21]

In *Town of Castle Rock*, the U.S. Supreme Court continued to follow the long-standing legal tradition of safeguarding law enforcement discretion. In that case a domestic violence victim, Jessica Lenahan Gonzales (hereinafter "Ms. Lenahan"),[22] sought State protection against her convicted abuser through a court issued restraining order but was denied protection first by the police then by the judiciary.[23] In 2011, the Inter-American Committee on Human Rights ("IACHR") reviewed that case, which was the first domestic violence case ever brought against the United States.[24] The IACHR found the United States failed to provide due diligence to Ms. Lenahan as a victim of gender violence, violating her human rights under the American Declaration of the Rights and Duty of Man.[25] This finding should counsel reconsideration of the public duty doctrine since it denies victims any legal avenue to hold States accountable when police fail to protect women from gender violence. To end the effects of the sexual contract, the

("States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth.").

[19] *See Jessica Lenahan (Gonzales)*, *infra* notes 168 & 169 at 27, citing Martha Smithey et al. *Collaborative Effort and the Effectiveness of Law Enforcement Training Toward Resolving Domestic Violence* 19 (2002) finding that "Police officers still tend to support 'traditional patriarchal gender roles, making it difficult for them to identify with and help female victims.'").

[20] *E.g. Donaldson v. City of Seattle*, 65 Wash.App. 661, 674 (1992) ("In the past, a common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could 'cool off.' Mandatory arrest policies eliminate this practice and require the police to treat domestic assaults the same as any other assault, arresting the offender and removing him/ her from the scene.").

[21] *See infra*, Part II.

[22] While all domestic cases within the United States refers to the victim as "Ms. Gonzales" this was her married name, and she had taken up her maiden name "Ms. Lenahan," which was used in her IACHR case in 2011. To respect the victim, her maiden name is used rather than the name she obtained through a marriage she left due to domestic violence.

[23] *See infra*, Part III.

[24] Amy J. Sennett. Lenahan (Gonzales) v. United States: *Defining Due Diligence*. 53 HARV. INT'L L.J. 537, 537 (2012).

[25] *See infra*, notes 160–66.

United States must provide meaningfully legal remedies to women suffering from domestic violence in the wake of State inaction.

II. The Public Duty Doctrine: Safeguarding Law Enforcement Discretion to Deny Victims of Gender Violence the Protection of State Laws.

Domestic violence often finds itself at the intersection of family and criminal law, areas traditionally left to the States.[26] While States have undertaken many legislative efforts to address this violence in recent decades, the federal government has also enacted legislation protecting women from gender violence.[27] A common weak link in these legislative efforts is State abuse of law enforcement discretion. Discretion is a long-standing and necessary feature of the criminal justice system;[28] however it has and continues to be used to deny women State protection against gender violence. Law enforcement is judicially safeguarded by the public duty doctrine, which removes government accountability for discriminatory use of police discretion. This judicial policy creates a safe harbor for the sexual contract since women denied protection under State law are then left without any legal recourse to challenge this abuse of law enforcement discretion. The public duty doctrine therefore stands as a barrier to meaningful enforcement of legislation aimed and diminishing the prevalence of gender violence and to continued existence of the sexual contract within the American legal system.

A. Denying Victims Standing through the Public Duty Doctrine

The public duty doctrine is the legal tradition safeguarding police discretion[29] by framing a State's duty to protect its citizens as one owed to a collective rather than an individual.[30] The

[26] *See Lopez*, 514 U.S. at 564.
[27] *Town of Castle Rock*, *infra* note 145, at 779.
[28] *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (noting that discretion is essential to the functioning of the criminal justice system).
[29] *See* Refusing to Remove an Obstacle to the Remedy, at 422.

cases that best capture the public duty doctrine also illustrate the presence of a sexual contract since it is often raised by States to deny women government protection against gender violence.[31] The judiciary has largely embraced the public duty doctrine even though an omnipresent group of dissenters has noted the disparity it creates under the law for the most vulnerable in our society.[32] The following cases show the extent to which the judiciary has protected law enforcement discretion to effectively deny government accountability for negligent protection of vulnerable citizens.

1. *Riss v. City of New York* (1968): Denying review of police discretion or State government accountability under the public duty doctrine.

Riss v. City of New York[33] is an infamous case since the government raised the public duty doctrine to prevent a victim from holding it accountable for failing to protect her against intimate partner violence. In *Riss*, Ms. Linda Riss repeatedly sought and was denied police protection against a jealous ex-suitor who eventually had her disfigured.[34] She sued the city in a State tort action asserting that it had a duty to protect her and failed to do so. The court found the city had no specific duty to Ms. Riss since the police had a public duty to all citizens. It also held that police discretion was a law enforcement necessity given the State's limited resources and the prevalence of violence throughout New York City.[35] This reasoning, taken together with the common law tradition of sovereign immunity, led the court to declare it "foolhardy" to extend

[30] *See Riss v. City of New York*, 240 N.E.2d 860, 862 (N.Y. Ct. App. 1968) (Keating, J. dissenting)(" It is not a distortion to summarize the essence of the city's case here in the following language: 'Because we owe a duty to everybody, we owe it to nobody.' Were it not for the fact that this position has been hallowed by much ancient and revered precedent, we would surely dismiss it as preposterous.").
[31] *See infra*, notes 32–35, 42–45, and 50–54.
[32] *See infra*, notes 36–40, 46–48, and 55–60.
[33] 240 N.E.2d 860 (N.Y. Ct. App. 1968).
[34] 240 N.E.2d at 862 (Keating, J. dissenting) (detailing the six months Ms. Riss was terrorized by a former suitor, including threats of violence and death, for which she sought police protection, only to be gained the three years after she was blinded and disfigured by a thug he had hired).
[35] *Id*. at 860–61.

liability to situations where the police fail to protect a citizen requesting aid and denied Ms. Riss any remedy.[36] The only exception to the public duty doctrine exists when police undertake a special duty to protect an individual, allowing that individual standing to bring suit against the government for resulting harm. [37]

In his dissent, Judge Keating rejected the public duty doctrine and found that the City of New York had a fundamental duty to protect its citizens, which included Ms. Riss.[38] This duty included enforcement of the laws as well as crime prevent efforts reviewable by the same "minimal standard of professional competence" that a private detective would have to follow.[39] He found the majority's reasoning sounded in sovereign immunity, an "unrighteous doctrine" that the State had already waived without the feared result of endless liability.[40] Instead of the court imposing its own policy decision, Judge Keating advocated that the court should follow the policy decision of the State to allow government accountability for law enforcement discretion,[41] a needed incentive to ensure adequate protection of citizens.[42]

As illustrated by the case above, the public duty doctrine judicially shields the sexual contract. Women threatened or suffering from gender violence have no standing to claim government protection from gender violence under this doctrine. The cornerstone of the public duty doctrine is police discretion, allowing discriminatory police decisions to go judicially

[36] *Id*. at 861.
[37] *Id.* ("Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks, which then materialize into actual losses.").
[38] *Id*. at 862 (Keating, J., dissenting) ("No one questions the proposition that the first duty of government is to assure its citizens the opportunity to live in personal security. And no one who reads the record of Linda's ordeal can reach a conclusion other than that the City of New York, acting through its agents, completely and negligently failed to fulfill this obligation to Linda.").
[39] *Riss*, 240 N.E.2d at 862.
[40] *Id*. at 867 ("The rule [of sovereign immunity] is Judge made and can be judicially modified. By statute, the judicially created doctrine of 'sovereign immunity' was destroyed. It was an unrighteous doctrine, carrying as it did the connotation that the government is above the law. Likewise, the law should be purged of all new evasions, which seek to avoid the full implications of the repeal of sovereign immunity."); *id.* at 863–66.
[41] *Id*. at 864.
[42] *Id*.

unchecked. While *Riss* is a State court decision, the same lack of standing exists for victims at the federal level, weakening the Fourteenth Amendment's ability to adequately protect women from discriminatory use of State law enforcement discretion.

2. *Linda R.S. v. Richard D.* (1973): Further denial of standing for women seeking the protection and guarantees of criminal law.

Although *Linda R.S. v. Richard D.*[43] is not about gender violence, it is a U.S. Supreme Court case that exemplifies the extent to which women are denied standing to seek the protections of State criminal law. In *Linda R.S.*, a mother sought the enforcement of a criminal statute, which would have jailed Mr. Richard D. for his failure to pay child support.[44] Without reaching her equal protection claim,[45] the Court denied Ms. R.S. standing to challenge the discretion of law enforcement in enforcing the child support law. While the Court noted that Ms. R.S. did in fact suffer injury without the child support payments, it found an insufficient nexus between the injury and the enforcement of the criminal statute.[46] The nexus lacked because the criminal statute only ensured Mr. D. would be jailed, not that he would ultimately pay the child support owed. This reinforced the lack of citizen standing to contest law enforcement discretion unless positioned as a defendant before the Court.[47]

In dissent, JUSTICE WHITE and JUSTICE DOUGLAS found that Ms. R.S. had the same cognizable interest as the State. Here, the State had used a criminal sanction to compel compliance with child support requirements and deter noncompliance, which was also Ms. R.S.'s

[43] 410 U.S. 614 (1973).
[44] *Linda R.S.*, 410 U.S. at 615.
[45] *Id.* at 615–15. The equal protection claim was against the discriminatory State practice of enforcing the criminal statute when children were found legitimate (the product of marriage) rather than illegitimate (produced out of wedlock).
[46] *Id.* at 618.
[47] *Id.* at 619 (". . . in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

interest.[48] The dissent rejected the proposition that only defendants have standing to challenge law enforcement decisions, stating instead that the public should have an interest in the enforcement of State criminal laws.[49] Judicial recognition of this interest was particularly important since standing was necessary to bring an equal protection claim against the State. Without standing, a victim had no ability to challenge discriminatory enforcement of its laws, which here denied Ms. R.S. State protections.[50]

As well articled by the dissent in *Linda R.S.*, denying victims standing to challenge law enforcement discretion removes the ability of the judiciary to ensure States adequately protect women under its laws. Here, the interest was in child support payments, which are particularly relevant to women as the childbearing sex. This holding likewise extends to deny women protection against gender violence, as shown by *Riss*. As shown in the following case, the only exception to hold law enforcement accountable for failure to protect a citizen is exceedingly narrow denying many victims a legal means to hold States accountable.

3. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*. (1989): Narrowing the special duty exception to the public duty doctrine to deny redress against private party violence.

Until *Town of Castle Rock*, the most notable case exemplifying the public duty doctrine was *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*.[51] In *DeShaney*, a mother brought suit against the Wisconsin the Department of Social Services (DSS) on behalf of her victimized

[48] *See id.* at 621 (White, J., dissenting) ("The Court states that the actual coercive effect of those sanctions on Richard D. or others 'can, at best, be termed only speculative.' This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct . . . . Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.").
[49] *Id.* at 620.
[50] *See Linda R.S.*, 410 U.S at 620, in light of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding an equal protection violation under laws criminalizing birth control use by unmarried but not married persons).
[51] 489 U.S. 189 (1989).

son.[52] DeShaney was three years old and in the sole custody of his father when he moved to Wisconsin. DSS received several reports that DeShaney was likely being abused.[53] Despite some intervention by DSS, the State agency ultimately left him in the sole custody of his father where he was eventually beaten to the point of permanent mental retardation.[54] In a 6–3 decision, the majority rejected a due process claim under the Fourteenth Amendment regarding the lack of law enforcement protection, finding that the State had no duty to protect its citizens against private party violence even where the State had intervened and should have known the risk of future violence.[55] Likewise, it found that DSS had no special duty to DeShaney since such a duty arose only when a State restrained an individual's liberty before the harm occurred.[56]

The dissent rejected the narrowing of a special duty exception to only situations where the State had restrained a citizen's physical liberty (most commonly as a defendant).[57] Speaking for the dissent, JUSTICE BRENNAN stated that a special duty should arise when a State has previously intervened to protect against private party violence and has knowledge of a citizen's ongoing risk of harm.[58] The dissent reasoned that State intervention contributes to subsequent citizen inaction due to his reliance on the government for protection, thereby effectively limiting that individual's liberty.[59] When the State has a monopoly on protection, as it did with DSS,

[52] *DeShaney*, 489 U.S. at 191–93.
[53] *Id.* at 191–94.
[54] *Id.* at 193.
[55] *See id.* at 195 ("Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").
[56] *Id.* at 197–99 (finding a special duty when person is in police custody, incarcerated or involuntarily committed to State care).
[57] *Id.* at 200 (suggesting an affirmative duty arises upon State knowledge and intent to aid a citizen).
[58] *DeShaney*, 489 U.S. at 206–07 (Brennan, J. dissenting).
[59] *Id.* at 205 (Brennan, J. dissenting) ("Cases from the lower courts also recognize that a State's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant (internal citation omitted)"; *see also Jessica Lenahan (Gonzales) infra*, note 159, at 7 ("The petitioners indicate that Jessica Lenahan trusted that the police would take action, and had she known the police would not do anything to locate her daughters, she would have undertaken steps to find them herself and avoid the tragedy.").

citizens are invited to rely upon the government.[60] Under this reasoning, State inaction could be challenged in a court of law since States would have a special duty to the victim, an exception to the public duty doctrine.[61] In his separate dissent, JUSTICE BLACKMUN noted that such a "sympathetic" reading of the special duty exception was necessary to assure fundamental justice and avoid divorcing compassion from judicial review.[62]

The public duty doctrine exception of a special duty is clearly too narrow to adequately protect those who are most vulnerable in society and in need of government protection. Standing to hold State governments accountable for law enforcement discretion is therefore reserved from defendants and denied to innocent victims. The public duty doctrine denies women an interest in State protection under its laws even when the police may have previously intervened and are aware of an ongoing risk of citizen harm. Since the judiciary has failed to provide victims a remedy against State abuse of law enforcement discretion, the federal and State governments have undertaken legislative efforts to address this issue.

B. Preventing Effective Legislative Remedies for Gender Violence

Despite judicial efforts to shield law enforcement discretion under the public duty doctrine, State and federal governments have enacted legislation to remove that discretion in cases of domestic violence. The judiciary has given mixed effect to these State laws given the legal tradition of the public duty doctrine,[63] while federal legislation has met significant barriers under the limited Fourteenth Amendment power.[64] The judiciary's continued efforts to protect State sovereignty through the public duty doctrine and narrowly read the Fourteenth Amendment

[60] *Id.* at 207–08. DSS was the centralized authority for receiving and responding to allegations of child abuse.
[61] *See id.* at 208–12 ("My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it . . . I cannot agree that our Constitution is indifferent to such indifference . . . .").
[62] *Id.* at 213 (Blackmun, J. dissenting).
[63] *See infra*, notes 70–80.
[64] *See infra*, notes 81–90.

have both worked to keep the sexual contract alive despite increasing government efforts to remove its negative effect and protect female citizens from the byproduct of gender violence.[65]

1. State Legislative Efforts to Address Domestic Violence

Common State legislative efforts to curb domestic violence have been mandatory arrest laws[66] and statutes governing the enforcement of restraining orders.[67] These laws required police to arrest a batterer when there is probable cause to believe domestic violence has occurred or that a restraining order was violated.[68] These laws removed police discretion since it was frequently abused by the State to avoid undertaking meaningful law enforcement action to protect women from gender violence.[69] Although the effectiveness of these laws is disputed,[70] women have reported increased police protection as a result.[71] Judicial review of these laws has balanced legislative intent to protect women while also considering the public duty doctrine. The following two State court cases highlight the mixed judicial interpretations of mandatory arrest laws to effectively remove police discretion in instances of domestic.

In *Nearing v. Weaver*,[72] the Oregon Supreme Court found that a mandatory arrest law was narrowly tailored and had sufficient legislative intent to effectively remove police discretion from the enforcement of domestic violence restraining orders.[73] In this particular case, a previous domestic violence arrest allowed a woman to obtain a restraining order against her husband.

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[65] *See* Refusing to Remove an Obstacle to the Remedy at 391 ("While legislatures have created legal remedies for women who suffer from abuse, the judiciary has historically been unwilling to enforce legislation capable of providing women with meaningful recourse against their abusers. Courts have interpreted legislation strictly and narrowly, adhering to the common law and refusing to remove the obstacles that prevent women from fully realizing the law's protection.").
[66] *See id.* at 402–30, *citing* U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEPT. OF JUSTICE FINAL REPORt 10-26 (1984) (endorsing implementation of mandatory arrest laws in every state).
[67] *See* Refusing to Remove an Obstacle to the Remedy at 399–400.
[68] *Id.*
[69] *Id.* at 402.
[70] *See* Janell D. Schmidt & Lawrence W. Sherman. *Does Arrest Deter Domestic Violence?* In Eve S. Buzawa & Carl G. Buzawa, DO ARRETS AND RESTRAINING ORDERS WORK? (Sage Publications 1996).
[71] Refusing to Remove an Obstacle to the Remedy, at 403–04 (internal citation omitted).
[72] 295 Or. 702 (1983).
[73] *Nearing*, 295 Or. at 712–713.

Subsequent to this order, several incidents of domestic violence occurred amounting to probable cause that the order had been violated, however the police did not take efforts to arrest the husband.[74] The court allowed the victim to bring a State tort claim of negligence against the State for its failure to protect her since the mandatory arrest law created a statutory duty different than an "ordinary common law duty."[75] Under the law, the police owed the holder of a restraining order a special duty different than the duty it owed the public at large, thus created a statutory exception to the public duty doctrine.[76]

As distinguished from the above case, *Donaldson v. City of Seattle*[77] found a limited special duty for law enforcement under a State mandatory arrest statute. In *Donaldson*, the Washington Court of Appeals found that mandatory arrest statutes created a special duty because of the statute's language and legislative intent to "assure the victim of domestic violence the maximum protection from abuse."[78] However, the court found this duty to arise solely when police respond to a domestic violence scene and the batterer is present,[79] therefore any follow up investigation or action is left to police discretion.[80] In support of this holding, the court noted that any broader reading could create a possibly unlimited scope for the special duty that could strain the limited resources of State law enforcement.[81] Although the dissent noted that the mandatory

[74] *Id*. at 704–06.
[75] *See id.* at 707.
[76] *Id*. at 712.
[77] 65 Wash.App. 661 (1992).

[78] *Donaldson*, 65 Wash.App. at 667.
[79] *Id*. at 667-68 ("When a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers with reference to the criteria in RCW 10.31.100."); i*d*. at 675 ("We hold the Domestic Violence Protection Act limits the mandatory duty to arrest to cases where the offender is on the scene and does not create an on-going mandatory duty to conduct an investigation.").
[80] *Id*. at 671 ("Nowhere in the original act, nor any of the subsequent amendments, did the legislature create a special duty to conduct follow up investigations after the initial response where the violator is absent.").
[81] *Id*. at 671–72.

arrest statute provided a four-hour time limit,[82] the majority imposed the public duty doctrine past the limited special duty it interpreted within the mandatory arrest statutes.

These two state court cases highlight the continued place of the public duty doctrine within modern legislative efforts to ensure women are protected against domestic violence. As noted by the court in *Donaldson*, the imposition of the public duty doctrine stems from continued judicial concern for State sovereignty by granting it immunity from suit. Given the State's broad responsibilities to protect its citizens, the courts have hesitated to interpret any statute as forcing the police to prioritize enforcement of any one law. A related judicial concern for State sovereignty is seen below regarding federal legislative efforts to address gender violence.

2. Federal Efforts to End Violence Against Women

In addition to many State legislative efforts to address domestic violence, Congress enacted Violence Against Women Act (VAWA) in 1994 and has continually reauthorization it over the years. VAWA passed after four years of legislative hearings on gender violence, which revealed the pervasiveness of gender violence throughout the United States as well as the inadequacy of State law enforcement efforts to address the issue.[83] In response, the federal government increased criminal penalties for gender violence, created crime victim funds, provided grants to improve State awareness on and responses to sexual and domestic violence, established full faith and credit for State restraining orders, and at one point even enacted a private cause of action for gender-motivated violence under VAWA.[84] This later provision was

[82] *Id.* at 677 (Coleman, J. dissenting).
[83] *See generally Morrison* infra, note 15, at 630-33 (Thomas, J., concurring).
[84] Leonard Karp & Laura C. Belleau. *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIM. LAW 173, 179–80 (1999).

found invalid in *United States v. Morrison*[85] as an unconstitutional exercise of Congress' Fourteenth Amendment powers.[86]

In *Morrison*, the federal government defended a provision of VAWA that authorized a cause of action for victims of gender violence to sue both State and private parties.[87] The government argued that the cause of action was a necessary and proper exercise of Congressional power under the § 5 of the Fourteenth Amendment to address sex discrimination in the form of State inaction to address gender violence perpetrated by private parties.[88] While the Fourteenth Amendment allows a federal check on the State police power,[89] the Court ultimately rejected this argument 5–4 given prior Fourteenth Amendment precedent that prevented it from authorizing any remedy for discrimination by private parties.[90] Despite prior suggestive *dicta*,[91] the majority rejected the dissent's position that a sufficient nexus existed between private party perpetration of gender violence and State inaction.[92] Instead, the majority firmly limited the scope of federal power under the Fourteenth Amendment to strike the cause of action against private actors as

[85] 529 U.S. 598 (2000).
[86] The Supreme Court also invalidated VAWA under the commerce clause in *Morrison*, but this is beyond the scope of this article.
[87] *Morrison*, 529 U.S at 620 (arguing that the cause of action both addressed State bias in addressing gender violence while also deterring future state court discrimination).
[88] *Id.* at 619 ("Section 5 is 'a positive grant of legislative power' . . . to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into legislative spheres of autonomy previously reserved to the States.'").
[89] *See supra*, Part I.
[90] *Id.* at 624, *citing United States v. Harris*, 106 U.S. 629, 639 (1883) (holding that the Fourteenth Amendment prohibits only State discrimination and therefore does not apply to the private action of individuals).
[91] *Id.* at 622-23, noting dicta in *United States v. Guest*, 383 U.S. 745, 756 (1966).
[92] *Id.* at 619–20 ("Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. (internal citation omitted) Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts."); *id.* at 624 ("Petitioners alternatively argue that, unlike the situation in the Civil Rights Cases, here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action.").

unconstitutional.[93] This holding severely limited federal efforts to remedy abuse of State law enforcement discretion that contributes to gender violence within the United States.

In *Morrison*, the judiciary effectively barred the federal government from using the Fourteenth Amendment to circumvent the public duty doctrine by allowing victims standing to challenge discriminatory law enforcement discretion. Progressive legislative efforts to address violence against women have therefore been stymied by judicial policies. This continual imposition of the public duty doctrine to safeguard police discretion serves to perpetuate the sexual contract.[94] Nowhere is this state of affairs more clear than in the U.S. Supreme Court's decision in *Town of Castle Rock v. Gonzales*.[95]

III. The Avoidable Tragedy at Castle Rock Due to the Law Enforcement Decision not to Enforcement a Domestic Violence Restraining Order.

In 1994, the Colorado General Assembly joined the national movement to address violence against women by passing omnibus legislation addressing domestic violence.[96] Under Colorado Revised Statute § 18-6-803, mandatory arrest[97] and restraining order[98] legislation were enacted to improve police responsiveness to domestic violence.[99] On May 21, 1999, Ms. Jessica Lenahan[100] obtained a temporary restraining order against her husband to protect herself and her children.[101] Her husband, Mr. Gonzales, had repeatedly demonstrated "erratic and emotionally

[93] *Id.* at 625.
[94] *See* Refusing to Remove an Obstacle to the Remedy, at 393 ("The Supreme Court continues to substitute its own policy judgments for those of the legislature, thereby preventing the victims of domestic abuse from seeking protection through a meaningful legal remedy.").
[95] *See infra* Part III.B.
[96] *Town of Castle Rock*, *infra* note 136, at 779.
[97] COLO. REV. STAT. § 18-6-803.6 (1994).
[98] COLO. REV. STAT. § 18-6-803.5 (1994).
[99] *See Town of Castle Rock*, *infra* note 136 at 779–80.
[100] Jessica Gonzales is the married name of the plaintiff during her domestic suits, however her IACHR case is under Jessica Lenahan.
[101] *Gonzales*, *infra* note 106 at 1096.

abusive behavior" towards his family over the course of several years, which included a suicide attempt in front of his daughters and driving recklessly while they were in his car.[102] As a result, the court issued a restraining order that stated Mr. Gonzales could "not molest or disturb the peace of [Ms. Lenahan] or . . . any child" since "physical or emotional harm would result" if he was "not excluded from the family home."[103]

On June 4, 1999, a court made the restraining order permanent while also allowing Mr. Gonzales occasional visitation of his children when prior arrangements were made with Ms. Lenahan.[104] Despite this order, he violated the restraining order on four separate occasions to damaged property, steal personal items, stalk Ms. Lenahan, and break into or otherwise tamper with the family home.[105] After one incident, the police even charged Mr. Gonzales with trespass and obstruction of a public official.[106] Despite these events, the police did not take immediate action on June 22, 1999, when he violated the restraining order again by taking his three daughters without making prior arrangements with Ms. Lenahan.[107] For eight hours, Ms. Lenahan pled several times for the police to enforce the restraining order and find her children, yet no action was taken and the children were eventually found dead on June 23, 1999.[108] Ms. Lenahan subsequently brought an action under 42 U.S.C. § 1983 against the City of Castle Rock claiming she had a property interest in her restraining order under the Fourteenth Amendment.

A. *Gonzales v. City of Castle Rock* (10th Cir. 2004): Allowing a Domestic Violence Victim to Challenge Abuse of State Law Enforcement Discretion by Finding a Property Interest in a Restraining Order.

[102] *See Jessica Lenahan (Gonzales), infra* note 159 at 15–16. After his suicide attempt, the CRPD took Mr. Gonzales to a hospital psychiatric facility.
[103] *Id.* at 1096. The restraining order also ordered Mr. Gonzales to stay at least 100 yards away from the family home at all times.
[104] *See Gonzales, infra* note 106 at 1097.
[105] *Id.*
[106] *See Jessica Lenahan (Gonzales), infra* note 159 at 16.
[107] *See id.* at 18–21.
[108] *Id.*

In 2001, a federal district court dismissed Ms. Lenahan' § 1983 suit for failure to state a claim.[109] On appeal, a panel of the U.S. Court of Appeals reversed this dismissal causing the government to request a rehearing *en banc*, which occurred in *Gonzales v. City of Castle Rock*.[110] Reviewing the facts *de novo* and in the light most favorable to her as the plaintiff, the Tenth Circuit likewise reversed the district court by finding that Colorado had created a property interest in restraining orders for domestic violence victims. The case was then remanded to determine if Ms. Lenahan's due process rights were violated by the State.[111] Below is the Tenth Circuits reasoning that allowed Ms. Lenahan to challenge State law enforcement discretion as a victim of domestic violence in possession of a restraining order.

1. Property Interest in a Restraining Order

The Tenth Circuit noted that property interests " . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[112] These interests are not discretionary rather they must have "objective and defined criteria."[113] Therefore, legislation that utilizes mandatory language to limit discretion, as well as other legislative criteria, determine whether the State has created a property interest.[114] If a property interest is established, a court must determine the appropriate level of due process by balancing the individual interest against injury, the risk of erroneous deprivation, and the

[109] *Gonzales v. City of Castle Rock*, 2001 WL 35973820 (D. Colo. Jan. 23, 2001), *rev'd en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev'd sub nom. Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).
[110] *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1096 (10th Cir. 2004).
[111] *Gonzales*, 366 F.3d at 1106–18.
[112] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").
[113] *See Gonzales*, 366 F.3d at 1102 ("…[P]articularized standards or criteria [guiding] the State's decision makers. If the decision maker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected interest (citation omitted)."
[114] *See id.* at 1102–03.

government's interest in avoiding substantial burdens.[115] An essential feature of due process is the right to be heard at a time when erroneous deprivation can be avoided.[116] It is with these criteria that the Tenth Circuit reviewed Ms. Lenahan's claim.

In reversing the district court, the Tenth Circuit found that Colorado had created a property interest in domestic violence restraining orders based on the language of the order, its mandatory enforcement statutes, and the legislative intent for the domestic violence omnibus legislation.[117] Specifically, the order contained a law enforcement notice that restricted police discretion by requiring that "every reasonable means" be used to enforce the order, and that an officer "*shall* arrest, or . . . seek a warrant for the arrest" a domestic violence suspect upon probably cause that the order had been violated.[118] The word "shall" was mandatory given the surrounding legislative scheme[119] and the fact that it mirrored the statute § 18-6-803.5(3)(a-b), which was part of omnibus legislation that included mandatory arrests. Though the court conceded that some amount of discretion was inherent in law enforcement, the majority held that it "by no means eviscerates the underlying entitlement to have the order enforced if there is probable cause to believe the objective predicates are met."[120] Therefore Ms. Lenahan had a right under the Fourteenth Amendment to challenge the lack of State enforcement for her restraining order under the Due Process Clause.

2. Procedural Due Process for Restraining Order Enforcement

[115] *Id.* at 1115, *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[116] *Id.* at 1111–12 (internal citation omitted).
[117] *See id.* at 1103.
[118] *Town of Castle Rock*, *infra* note 136 at 752.
[119] *See Gonzales*, 366 F.3d at 1109 ("The word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation.").
[120] *See id.* at 1111.

The Tenth Circuit remanding Ms. Lenahan's claim to be assessed as a procedural due process claim, rather than one on substantive due process.[121] This was based on the pleaded facts, which suggested the Castle Rock Policed Department provided no meaningful opportunity to be heard, but instead "repeatedly ignored and refused [Ms. Lenahan's] requests for enforcement."[122] Ms. Lenahan asserted that this response was part of a State policy or custom for police dealing with domestic violence victims,[123] therefore the State remedy of a contempt hearing was an insufficient to protect due process.[124] Furthermore, the Tenth Circuit noted that the Colorado statutes in question contained procedural safeguards by requiring police to determine: if a valid restraining order existed, if notice of the order had been served, and whether there was probable cause that the order was violated.[125] Therefore, the police had an outline of the appropriate procedural due process regarding Colorado restraining orders and could have notified Ms. Lenahan if these criteria were not satisfied by her complaint.

3. Counter-Arguments of the Dissent

Two dissents in *Gonzales* argued Ms. Lenahan's due process claim was substantive rather than procedural, while another challenged the majority holding directly. In one of the former dissents, Judge McConnell noted that neither the pleading nor the nature of Ms. Lenahan's claim raised procedural due process.[126] He believed the issue was not that she was denied a hearing, but that the police failed in their duty to enforce the restraining order,[127] which would be a

[121] *See id*. at 1009–1100. Although discussed by the dissent, the majority did not read Ms. Lenahan's pleading as a substantive due process question.
[122] *Id*. at 112.
[123] *Id.* at 1098 ("She also alleged the city maintained a custom and policy of failing to respond properly to complaints of domestic restraining order violations and tolerated the nonenforcement of such protective orders by police officers, resulting in the reckless disregard of a person's right to police protection granted by such orders.").
[124] *Id.* at 1112 ("Conversely, when the deprivation is caused by established state procedures, the existence of an adequate remedy at state law does not extinguish a procedural due process claim.") (citation omitted).
[125] *See Gonzales*, 366 F.3d at 1116.
[126] *Id.* at 1126–27 (McConnell, J. dissenting).
[127] *See id.* at 1128.

substantive claim.[128] In a separate dissent, Justice O'Brien expounded on this argument. He noted that no substantive claim could be supported based on *DeShaney* since previous State intervention could not create a special duty requiring State protection against subsequent private party violence.[129] Additionally, he believed no special duty was created under the Colorado statute since "shall" was often directory rather than mandatory in State criminal statutes.[130] No liability could therefore be imposed on the State unless there was clear intent that the Colorado legislature had desired that.[131] In the later dissent, Justice Kelly disagreed with the majority that the holder of a restraining order gained special protection[132] since no result was guaranteed by the restraining order to indicate the creation of a property interest.[133]

In *Gonzales*, the majority's dicta supported State legislative efforts to address domestic violence by noting procedural safeguards for the enforcement of restraining orders. The Tenth Circuit strongly suggested that restraining order holders had a property interest under Colorado law that created a special duty exception to the public duty doctrine.[134] However, this reasoning faced a skeptical U.S. Supreme Court, which granted certiorari. The Court considered police discretion under the public duty doctrine and the Fourteenth Amendment's inability to protect against private party conduct to ultimately reduce restraining orders to nothing more than

[128] *Id.* at 1127.
[129] *Id.* at 1132 (*"*Seemingly, but apparently not, *DeShaney* put to rest the notion that simply because a state takes steps to protect citizens from harm it thereby insures them against all ravages of modern life."); *see also* Part III.B.
[130] *Id.* at 1133.
[131] *Gonzales*, 366 F.3d at 1126–27 (McConnell, J. dissenting).
[132] *See id.* at 1109 ("The court observed that holders of protective orders are entitled to greater rights than other citizens and that such an order 'would have no valid purpose unless a means to enforce it exists.' (internal citation omitted).
[133] *Id.* at 1118–26 (Kelly, J. dissenting).
[134] *Id.* at 1109 ("The court observed that holders of protective orders are entitled to greater rights than other citizens and that such an order 'would have no valid purpose unless a means to enforce it exists.' (internal citation omitted).

"expensive pieces of paper"[135] that did not provide victims of gender violence a means to challenge law enforcement discretion resulting in State inaction.

B. *Town of Castle Rock v. Gonzales* (2006): Finding no Fourteenth Amendment Due Process Protection for Domestic Violence Restraining Order to Allow Victims to Challenge State Law Enforcement Inaction.

On November 1, 2004, the U.S. Supreme Court granted certiorari to decide whether a domestic violence restraining order created a property interest that required police provide due process for its enforcement.[136] This issue had been left open in *DeShaney*, therefore the Court had to determine whether a State could create an entitlement that essentially imposed a special duty on law enforcement to protect citizens against private party violence.[137] If States had this ability, it would circumvent the public duty doctrine for those specific instances where victims possessed a court order to require State law enforcement protections.

1. Property Interest in Restraining Order Enforcement

In *Town of Castle Rock*, the Court found that Colorado had not created a property interest in restraining orders given the clear language needed to overcome the "well established [American] tradition of police discretion."[138] It noted that State criminal law often used "shall" as a directive rather than a mandate and therefore was insufficient to remove police discretion to enforce domestic violence restraining orders.[139] Furthermore, the Court stated it could "hardly imagine" that, even when there was probable cause that the order was violated, competing responsibilities and limited resources might not dictate the need for police discretion.[140] While noting that many State courts had found domestic violence statutes "more mandatory" than other

[135] *Refusing to Remove an Obstacle to the Remedy*, at 428 (quoting James Martin Truss, *The Subjection of Women... Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1190-91 (1995)).
[136] *See Town of Castle Rock, infra* note 136, at 750–51.
[137] *See Town of Castle Rock, infra* note 136, at 755.
[138] 545 U.S. 748, 760 (2005).
[139] *Castle Rock*, 545 U.S. at 760 (citations omitted).
[140] *Id.* at 761.

criminal statutes, it was unclear if they remained mandatory in circumstances where the abuser's whereabouts where unknown.[141] In the alternative, if Colorado had established mandatory enforcement of restraining order that did not necessarily mean it created an individual property interest in that order given the broader public duty inherent in law enforcement.[142] Absent clear legislative intent to the contrary, the majority denied any property interest existed in restraining orders given the tradition of the public duty doctrine to hold its enforcement as discretionary by the State, a sentiment echoed by the concurrence.[143]

In dissent, JUSTICE STEVENS and JUSTICE GINSBURG largely criticizing the majority for failing to certify the question of whether or not Colorado intended to create a property interest in restraining orders to its highest State court.[144] They noted that within Colorado statutes "shall" was clearly distinguished from permissive language where police discretion was allowed.[145] The dissent also approved of the Tenth Circuit's analysis of Colorado law to find the State's intention to abrogate the public duty doctrine by removing police discretion within mandatory arrest

[141] *Id.* at 762; *but see id.* at 753 (recounting that Ms. Gonzales learned that Mr. Gonzales' had taken the kids to an amusement park in Denver, a different jurisdiction, after which she informed the CRPD and requested they take action).

[142] *Id.* at 764–65 ("Even if the statute could be said to have made enforcement of restraining orders 'mandatory' because of the domestic violence context of the underlying statute, that would not necessarily mean that state law gave respondent an entitlement to enforcement of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people (internal citation omitted) . . .The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals . . . strike at the very being of society . . . .").

[143] *Id.* at 769-72 (Souter, J., concurring) (". . . traditional public focus of law enforcement as reason to doubt that these particular legal requirements to provide police services, however unconditional their form, presuppose enforceable individual rights to a certain level of police protection.").

[144] *Town of Castle Rock*, 545 U.S. at 773 (Stevens, J. dissenting) "Unfortunately, although the majority properly identifies the "central state law question" in this case . . . it has chosen to ignore our settled practice by providing its own answer to that question."); *id.* at 776-77 ("Even if the Court had good reason to doubt the Court of Appeals' determination of state law, it would, in my judgment, be a far wiser course to certify the question to the Colorado Supreme Court."); *id.* at 778 ("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court.") (internal quotation omitted).

[145] *Id.*. at 775 (Stevens, J. dissenting) (". . . [I]t is certainly plausible to construe "shall" . . . as conveying mandatory directives to the police, particularly when the same statute, at other times, tellingly employs different language that suggests police discretion, *see* § 18-6-803.5 (6)(a) ("A peace officer is authorized to use every reasonable means to protect . . . . ").

statutes.[146] This was further supported by an extensive legislative history on domestic violence reforms to show an express purpose of removing law enforcement discretion through such statutes.[147] Ultimately, the dissent believed the police "lacked the discretion to do nothing" for Ms. Lenahan as a holder of a court-issued restraining order guaranteeing State protection for herself and her family from a known and convicted domestic violence abuser.[148]

2. Due Process Entitled by a Restraining Order

In entertaining the possibility that police enforcement of the restraining orders could be legislatively mandated, the Court turned to the subsequent issue of appropriate procedural due process.[149] The Court again expressed skepticism that a property interest in a restraining order could create a special duty giving the existing public duty doctrine.[150] Additionally, the Court noted that the Fourteenth Amendment could not be used to require government protection against private parties since it was not the purpose of the amendment.[151] States however were free to create such a remedy under their own laws.[152] However, from the dissent's perspective, the State had done just that. It had created a property interest similar to any other government benefit and thus due process was guaranteed.[153] According to the dissent, minimal due process

[146] *See contra id.* at 766 (majority opinion).
[147] *See id.* at 779-84 (Stevens, J. dissenting).
[148] *Id.* at 784 (Stevens, J. dissenting).
[149] *Id.* at 766 (majority opinion).
[150] *Id.* at 767-68 "Perhaps most radically, the alleged property interest here arises incidentally, not out of some new species of government benefit or service, but out of a function that government actors have always performed-to wit, arresting people who they have probable cause to believe have committed a criminal offense.").
[151] *Id.* at 768–69 ("This result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law,' (internal citation omitted) but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented . . . .").
[152] *Id.* at 769.
[153] *Id.* at 790 (Stevens, J. dissenting).

protections dictated an opportunity for domestic violence victims to be heard and have the relevant criteria applied by law enforcement regarding a restraining order.[154]

In one fowl swoop, *Town of Castle Rock* reinforced the public duty doctrine despite modern legislative efforts to remove law enforcement discretion when responding to domestic violence incidents. Therefore, State abuse of law enforcement discretion to deny protection against gender violence cannot be challenged by victims in a court of law. Although the U.S. Supreme Court noted that it was possible for States to create a property interest in restraining order, it also indicated an extreme unwillingness to interpret statutes to that end.[155] In speaking for the majority, JUSTICE SCALIA rejected the notion that the Court had reduced the effectiveness a restraining order. However, the Court's holding clearly limits legislative efforts to provide victims of gender violence the ability to hold States accountable for enforcement of domestic violence laws. Without adequate redress for such sex discrimination, women are left to bear out the consequences of the sexual contract within our society.

C. *Jessica Lenahan (Gonzales) v. U.S.A.* (2011): The IACHR finds the United States failed to Provide Due Diligence to Ms. Lenahan as a Victim of Gender Violence.

After exhausting all her domestic remedies, Ms. Lenahan turned to the IACHR for some measure of justice. With the help of the American Civil Liberties Union, she brought the first domestic violence based human rights claim against the United States.[156] The IACHR governs

[154] *See id.* at 792 (Stevens, J. dissenting).

[155] Refusing to Remove an Obstacle to the Remedy at 766 ("The Supreme Court continues to substitute its own policy judgments for those of the legislature, thereby preventing the victims of domestic abuse from seeking protection through a meaningful legal remedy."); *see also id.* at 766 (majority opnion)(". . . it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for purposes of the Due Process Clause.").

[156] Defining Due Diligence at 537 (noting that the human right case of Jessica Lenahan and her three daughters in the first domestic violence case brought against the United States and sustained by an international human rights tribunal).

the Organization of American States (OAS),[157] which consists of 34 independent American countries including the United States.[158] Although the United States is not subject to the jurisdiction of OAS's human rights court, it is still obligated under the American Declaration of the Rights and Duty of Man[159] ("the American Declaration").[160] In *Jessica Lenahan (Gonzales) v. U.S.A.*,[161] the IACHR found that the United States had failed to provide due diligence to Ms. Lenahan and her children as victims of gender violence to violate her human rights under the American Declaration.[162]

In *Jessica Lenahan (Gonzales)*, the IACHR's findings supported Ms. Lenahan's human rights claims under Art. II (equal protection),[163] Art. I (right to life),[164] and Art. VII (right to special protection for mothers and children).[165] The IACHR's findings showed that the United States had provided Ms. Lenahan with a restraining order, knew of her ex-husband's criminal history, had been asked by Ms. Lenahan for help from June 22–23 of 1999, and had provided domestic legal review for Ms. Lenahan's claims.[166] These facts supported the conclusion that the United States had failed to respond with due diligence to Ms. Lenahan's requests for State

[157] OAS, Charter of the OAS, art. 3(l), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.
[158] Caroline Bettinger-López. *The Inter-American Human Rights System: A Primer*. 42 CLEARINGHOUSE REV. J. OF LAW & POLITICS 582 (2009). The OAS was founded in 1948 and is one of the oldest regional organizations.
[159] Organization of American States, American Declaration of the Rights and Duty of Man, April 1948, O.A.S. Doc. OEA/Ser.L.V/II/82 doc. 6rev. 1 (1948) *available at* http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm.
[160] The Inter-American Human Rights System, at 582.
[161] Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).
[162] *See* Defining Due Diligence at 537 (defining due diligence as a standard in international law that is both context-dependent and case-specific), *citing Velásquez Rodríguez v. Honduras*, Inter-Am. Comm'n H.R., (Ser. C) No. 4 (1988).
[163] *Id.* at 46 ("Based on these considerations, the Commission holds that the systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration.").
[164] *Id.* at 44 ("…the failure of the United States to adequately organize its state structure to protect them from domestic violence not only was discriminatory, but also constituted a violation of their right to life under Article I and their right to special protection as girl-children under Article VII of the American Declaration.").
[165] *See supra* Part III.
[166] *Id.* at 14–26. Further findings regarding the circumstances of Ms. Gonzales' children's murder was omitted from this article.

protection against gender violence. The IACHR however rejected her claim under Art. XVIII (right to a fair trial) since Ms. Lenahan had been given a fair trial at all levels of the United States' domestic court system.[167]

Significantly, the IACHR noted that restraining orders were a legal tool specifically designed to remove police discretion and thereby improve State enforcement of domestic violence laws.[168] This enforcement was necessary to counteract prevalent domestic violence within the State of Colorado[169] and throughout the country.[170] The IACHR noted that the prevalence of gender violence within the United States[171] was a byproduct of broader sex discrimination[172] and national failure to act with due diligence to protect women.[173] Given these findings, the United States needs to review federal and State laws to ensure due diligence for female victims of gender violence. This violence is a remnant of the sexual contract and such sex discrimination must be eradicated based on the principles of the American Declaration and the U.S. Constitutional. Legal mechanisms to check law enforcement discretion are therefore need to

[167] *Jessica Lenahan (Gonzales)*, Report No. 80/11 at 52 ("The undisputed facts show that her allegations reached the U.S. Supreme Court, the highest judicial instance and appellate court in the United States . . . [e]ven though this ruling was unfavorable to the victim . . .[it] does not display that this legal process was affected by any irregularities, omissions, delays, or any other due process violations that would contravene Article XVIII of the American Declaration.").

[168] *Id.* at 26, para. 97 ("Therefore, the creation of the restraining order is widely considered an achievement in the field of domestic violence in the United States, since it was an attempt at the state level to ensure domestic violence would be treated seriously. A 2002 national survey found that female victims of intimate partner violence are significantly more likely than their male counterparts to obtain a protective or restraining order against their assailants. However, one of the most serious historical limitations of civil restraining orders has been their widespread lack of enforcement by the police. Police officers still tend to support "traditional patriarchal gender roles, making it difficult for them to identify with and help female victims.")(citing U.S. Department of Justice, National Institute of Justice, Research Preview: Civil Protection Orders: Victims' Views on Effectiveness, January 1998, http:/.www.ncjrs.gov/pdffiles/fs000191.pdf).

[169] *Id.* at 28. About 20% of all the criminal cases filed in Colorado are incidents of domestic violence (icitation omitted).

[170] *Id.* at 14–26. Further findings regarding the circumstances of Ms. Gonzales' children's murder was omitted from this article.

[171] *See supra* notes 169 & 163.

[172] *Jessica Lenahan (Gonzales)*, Report No. 80/11 at 30, para. 110 ("Gender-based violence is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women's rights. The inter-American system as well has consistently highlighted the strong connection between the problems of discrimination and violence against women.").

[173] *Id.* at 38 (". . . the Court has ruled that a State's failure to protect women from domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.").

ensure victims adequate legal protections under American domestic law.

IV. Government Reform: Creating Government Accountability for the Abuse of State Law Enforcement Discretion as a Means to Eradicate Violence Against Women.

As an outside observer, the IACHR identified law enforcement discretion, in the form of State inaction, as a factor that contributed to the perpetration of domestic violence. This failure to protect women against gender violence was labeled a violation of American Declaration's right to equal protection for women under State laws,[174] something which the Fourteenth Amendment has been unable to do given the lack of standing for victims[175] or ability for the amendment to address private party violence.[176] The IACHR is free from the traditions of the sexual contract and can therefore serve as an objective government body to declare State inaction as a violation of women's human rights.[177] Given such a finding, the United States must reassess State and federal legislative efforts to address domestic violence so that future legislation and judicial policy can provide legal remedies for women victimized by gender violence.

A. State Efforts to Enforce Mandatory Protection for Domestic Violence Victims

As already noted, the American judiciary is exceedingly unwilling to abandon the public duty doctrine, which has left domestic violence victims without legal recourse against State who fail to protect them against private party violence.[178] To prevent the courts from continually reinforcing these policies,[179] State legislatures must use a layered approach when clarifying their intent in create mandatory arrest and restraining order legislation. State legislatures must clearly

[174] *See supra*, note 163, at 46.
[175] *See supra*, Part.II.A.2.
[176] *See supra*, Part.II.B.2.
[177] *See* The Inter-American Human Rights System, at 581 ("In recent years U.S. civil rights and poverty lawyers, spurred in large part by an increasingly conservative judiciary and a nationwide rollback in civil rights and antipoverty legislation and programming, have looked to international human rights law as alternative avenues for domestic advocacy.") (internal citations omitted).
[178] *See supra*, Part II.B.2, notes 85–90.
[179] Refusing to Remove an Obstacle to the Remedy, at 397–98.

articulate that victims of gender violence have a recognized State interest in police protection.[180] This should be coupled with declarations of legislative intent to abrogate the public duty doctrine given the particular need to remove law enforcement discretion to ensure adequate State responses to gender violence.[181] Based on this reasoning, any statutes should define "shall" as mandatory within the specific legislation and indicate that permissive verbs are used where police discretion is preserved, thus distinguishing domestic violence legislation from other criminal statutes. Whenever "shall" is used, the statute should also provide a clear set of objective considerations and possible outcomes, which should include a carefully crafted "catch all" phrase that assures some form of police action will occur when a victim reports a domestic violence incident.[182] The entire legislative scheme must reinforce the provisions removing law enforcement discretion while emphasizing the State's intent to create a cause of action for failure to enforce its mandatory provisions.[183]

States must also decide whether new domestic violence legislation should establish a special State law enforcement duty or provide a federally enforced property interest in State law protections. The former allows enforcement through State tort actions, when accompanied by a specific waiver of sovereign immunity to avoid the judicial presumption of the public duty doctrine. The later creates an entitlement to federal due process, yet faces significant barriers to its effectiveness. In *Town of Castle Rock*, the Court expressed skepticism that an entitlement to

[180] *See Town of Castle Rock*, 545 U.S. at 779 (Stevens, J. dissenting).
[181] *See Jessica Lenahan (Gonzales) supra*, note 163, at 44; *see also Morrison*, *supra* note 15, at 631–33 (Thomas J., concurring).
[182] As an example: "Upon information amounting to probable cause that a restraining order has been violated an arrest shall be made of the violator on the scene, an arrest warrant shall be issued when the violator is not present, furthermore additional efforts to locate and arrest the violator should be promptly undertaken by law enforcement."
[183] *See Town of Castle Rock*, 545 U.S. at 765 (majority opinion)("If she was given a statutory entitlement, we would expect to see some indication of that in the statute itself.").

police enforcement could ever be judicially recognized.[184] Even if the property interest is judicially recognized, courts must apply a balancing test to determine the appropriate level of due process warranted given the States' law enforcement interest.[185] This balancing test considers an individual's interest against injury, the risk of erroneous deprivation, and the government's interest in avoiding substantial burdens.[186] This latter element provides a safe haven for the public duty doctrine to remove State liability when police fail to protect individual citizens from private party violence. To avoid this traditional presumption and support federal due process protections, the States would have to undertake broader criminal law reforms.

A broader reformulation of a State's criminal justice system would best support any legislative efforts to establish a federally protected due process interest for victims in police protection. In particular, victims would need to be assured certain bedrock rights within the legal system. Over 28 States have taken efforts to establish victims' rights either through State constitutional amendments or through statute.[187] Such legislative action indicates a clear departure from traditional judicial policy that denies victims standing within the criminal justice system. Instead, it establishes rights to support a duty for law enforcement to provide meaningful State law protections for victims. Therefore, successful State legislative reform must be expansive to sufficiently remove the judicial default of the public duty doctrine and ensure

[184] Refusing to Remove an Obstacle to the Remedy, at 409–10. ("The Court stated that even if Colorado law had conferred upon Jessica Gonzales a personal entitlement to enforcement of the restraining order, the Court would probably not recognize it as a property interest under the Due Process Clause. As a temporary restraining order has no ascertainable monetary value, the Court found that it does not "resemble any traditional conception of property.").
[185] *Id.* at 413 ("Due process is flexible and the type of procedural protection it provides depends on the nature of the property right that the government seeks to infringe upon. Had the Court recognized Jessica Gonzales' property interest in her protection order, it would have had to balance the governmental and private interests affected by the government's (in)action.").
[186] *See Mathews*, 424 U.S. at 335.
[187] *See Brandoni v. Rhode Island*, 715 A.2d 580, 585 (R.I. 1998).

victims of gender violence will have a legal remedy when State inaction exposes them to third party violence.

B. Federal Efforts to Address Discriminatory Discretion by Law Enforcement

While the Fourteenth Amendment remains limited in its ability to provide a federal check on the State police power, other federal legislative effort can begin to address State inaction regarding violence against women. The 1994 VAWA authorized the creation of the Office on Violence against Women (OVW) within the Department of Justice.[188] Currently, OVW provides federal funding and technical assistance to improve the administration of justice and support provided to victims of gender violence. This department could be expanded to serve a similar function to the Department of Justice's Civil Rights Division, which enforces federal civil rights statutes, including those protecting against sex discrimination.[189] Creating an administrative remedy through the OVW would allow victims who are denied the protections of State criminal law a means to seek redress. The OVW could investigate these complaints and when found supported, offer federal grants to improve State law enforcement policies and hire qualified implementing personnel as a positive means of improving State responsiveness to gender violence. Additionally, OVW could be federally authorized to act upon international determinations of human rights violations specifically regarding violence against women. This ensures international obligations are acknowledged and acted upon by the United States. While further mechanisms for federal enforcement would need to be developed, the framework above provides a starting point for the United States to meaningfully provide due diligence to victims of gender violence.

[188] *See* 42 U.S.C. § 3796gg-0(a); *see also* Dep't of Justice, Office on Violence Against Women, "About Us", http://www.ovw.usdoj.gov/overview.htm (last visited June 3, 2013).
[189] *See* the Dep't of Justice, Civil Rights Divison, "About the Division," http://www.justice.gov/crt/about/ (last visited June 3, 2013).

In addition to administrative reviews, advocates need to continually press the use of the Fourteenth Amendment to address State abuses of law enforcement discretion that neglect victims of gender violence. While *Morrison* appeared to close this avenue, the recent decision in *Tennessee v. Lane*,[190] suggests that Congress may properly legislate to address specific categories of sex discrimination by States. In writing for the majority, JUSTICE STEVENS found that the American with Disabilities Act of 1990 could not abrogate state sovereign immunity regarding disability discrimination generally,[191] but could do so specifically regarding disable persons' access to courthouses historical discrimination in this area.[192] Historical abuse support the use of the Fourteenth Amendment's Due Process Clause to remedy the gravity of harm caused by disability discrimination in this specific arena.[193] The Court noted that despite several federal and State legislative efforts to address discrimination against disabled persons, it still persisted at the State level.[194] Therefore, the Fourteenth Amendment was properly invoked by Congress to provide a cause of action for disable individuals to seek remedy to State abuses in limited circumstances.

Although *Lane* focused on the Fourteenth Amendment's ability to abrogate sovereign immunity, it creates a possible legal pathway for victims of gender violence to circumvent the public duty doctrine. Similar to the tradition of sovereign immunity, the public duty doctrine

[190] 541 U.S. 509 (2004).
[191] *Lane*, 541 U.S. at 521.
[192] *Id.* at 523–24.
[193] *Id.* at 523–25 ("It is not difficult to perceive the harm that Title II [of the Americans with Disabilities Act] is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights . . . . [a] majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled { "pageset": "S72 persons by state agencies in a variety of setting s. . . . [to] demonstrate a pattern of unconstitutional treatment in the administration of justice.").
[194] *Id.* at 526.

prevents an individual from effectively bringing a claim against the State for failure to provide protection under its laws. Victims of gender violence are often women who have historically been discriminated against by State law enforcement that fails to hold male abuses accountable given the existence of the sexual contract in our society. Therefore, the Fourteenth Amendment arguably can protect women victims of gender violence against State abuse of law enforcement discretion given specific historical abuse in that arena. This history is supported by extensive legislative findings as well as federal and State legislative efforts to address domestic violence.[195] Within the specific context of police discretion to protect women against domestic violence, especially when the risk of ongoing harm is known by the State and previous intervention has occurred, the Fourteenth Amendment's Equal Protection Clause is justifiably raised. While the U.S. Supreme Court has shown a reticence to allow the Fourteenth Amendment to address private party violence, international law has declared such government intervention necessary to prevent a violation of women's human rights.[196] Rather than continuing in the legal tradition of the public duty doctrine, the Fourteenth Amendment should allow Congress to ensure States are not abusing law enforcement discretion.

V. Conclusion

The public duty doctrine presents a paradox, both declaring States has a duty to protect their citizens while denying enforcement of that duty by any individual citizen. This judicial policy impedes our nation's international obligations to provide due diligence to complaints of gender violence. Under social contract theory, the public duty doctrine merely reflects the

[195] *E.g. Morrison*, 529 U.S. at 631–33 (Thomas, J., concurring); *see also supra* Part.II.B.
[196] *See Velásquez Rodríguez v. Honduras*, Inter-Am. Comm'n H.R., (Ser. C) No. 4 (1988) (finding an obligation for Honduras to act with due diligence upon notification of disappearances of female citizens).

existing sexual contract within the government. This is so because the doctrine prevents government accountability for failing to intervene when men assert power over and access to women. While many progressive federal and State legislative efforts have sought to improve laws enforcement response to gender violence, this judicially imposed doctrine remains to render such efforts ineffective. By maintaining discretion as a necessary feature of law enforcement, States may continue to deny protection to women despite prevalent gender violence. Therefore the public duty doctrine must be removed through tailored State legislative action and progressive federal efforts. Only then will State abuse of law enforcement discretion create government accountability and ensure due diligence is provided by the United States to victims of gender violence.