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Town of Castle Rock v. Gonzales: A Hindrance in Domestic Violence Policy Reform and Victory for the Institution of Male Dominance.

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NOTE

TOWN OF CASTLE ROCK V. GONZALES: A HINDRANCE IN DOMESTIC VIOLENCE POLICY REFORM AND VICTORY FOR THE INSTITUTION OF MALE DOMINANCE

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I. INTRODUCTION

Domestic violence affects millions of women in the United States.[1] Despite the availability of civil protective orders, one of the most serious limitations on their effectiveness has been the pervasive lack of enforcement by the police. The tragic consequences of this phenomenon are illustrated in *Town of Castle Rock v. Gonzales*,[2] a case in which three children were murdered by their father as a result of the police's failure to enforce a protective order. Despite these consequences, the Supreme Court found that the children's mother had no recourse.[3] Ignoring the plain language of the Colorado statute and extensive legislative history indicating law enforcement's mandatory obligation to enforce civil protection orders, the Court held that the mother was not entitled to enforcement of the order. *Castle Rock* is thus the most recent example of the courts' resistance to treat violence against women as a serious problem worthy of the attention and remedial powers of law enforcement officials. On a more fundamental level, *Castle Rock* is an example of the courts' implicit sanctioning of male power and control. Part I of this note details the underlying facts and the Court's analysis in *Castle Rock*. Part II presents a brief history of domestic violence policy in America. Part III introduces the feminist framework used to challenge the Court's decision. Part IV applies this framework to *Castle Rock* and argues that the decision reinforces social dominance of men over women. Part V argues that courts need to acknowledge the pervasiveness of domestic violence and address this problem by tackling the deeply rooted underlying issue of gender inequality.

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1. *See, e.g.*, Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Natures, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, 2000 NAT'L INST. OF JUST. 20 *available at* http://www.ncjrs.gov/pdffiles/njj/181867.pdf (stating that approximately 1.3 million women are physically assaulted by an intimate partner in the United States each year); *see also* United States v. Morrison, 529 U.S. 598, 629, 631 (1999) (citing *Domestic Violence: Not Just a Family Matter: Hearing on Domestic Violence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994)) (estimating that up to three to four million women are battered each year).

2. 125 S. Ct. 2796 (2005).

3. *See* Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2802 (2005).

II. *TOWN OF CASTLE ROCK V. GONZALES*

A. *The Facts*

In 1999, Jessica Gonzales and her estranged husband, Simon Gonzales, were going through a divorce.[4] According to Ms. Gonzales, Mr. Gonzales had been behaving erratically, breaking into the house numerous times, and once attempting to hang himself in front of their three children.[5] Ms. Gonzales repeatedly contacted the police to notify them of her husband's frightening behavior.[6]

In May of 1999, Ms. Gonzales obtained a temporary restraining order against her husband.[7] The order commanded her husband not to "molest or disturb the peace" of Ms. Gonzales and their three daughters[8] and to "remain at least 100 yards from the family home at all times."[9] The order warned that violators may be arrested without any notice and that law enforcement officials "shall use every reasonable means to enforce [the] restraining order . . . when [they] have probable cause that the restrained person has violated or attempted to violate any provision of [the] order . . . ."[10]

At approximately five o'clock one evening, Mr. Gonzales abducted the children while they were playing outside their family home.[11] Ms. Gonzales called the Castle Rock Police Department, which dispatched two officers.[12] When the officers arrived, they told Ms. Gonzales "there was nothing they could do" about the protective order, and suggested that "[she] call the Police Department again if the . . . children did not return . . . by 10:00 p.m."[13]

Around 8:30 p.m., Ms. Gonzales spoke to Mr. Gonzales on his mobile telephone.[14] Mr. Gonzales indicated he had the children at a nearby amusement park.[15] Ms. Gonzales again called police, requesting that

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4. *Id.* at 2800.

5. *Gonzales vs. Castle Rock*, CBS NEWS, Mar. 20, 2005, http://www.cbsnews.com/stories/2005/03/17/60minutes/main681416.shtml (recounting the traumatic attempted hanging, where the three daughters had to contact the police while their mother held the rope away from their father's neck).

6. *Id.*

7. *Castle Rock*, 125 S. Ct. at 2800.

8. *Id.* at 2800–01.

9. *Id.* at 2801.

10. *Id.* at 2800–01.

11. *Id.* at 2801.

12. *Castle Rock*, 125 S. Ct. at 2800.

13. *Id.* at 2801 (noting that the officers were unwilling to follow the temporary restraining order produced by Ms. Gonzales).

14. *Id.*

15. *Id.*

they attempt to find and arrest Mr. Gonzales at the park.[16] The police refused to perform any duties prescribed by the temporary restraining order, and instead, insisted Ms. Gonzales wait for her husband to bring the girls home.[17]

At approximately 10:10 p.m., Ms. Gonzales called the police to report that the children were still missing.[18] The dispatcher instructed Ms. Gonzales to continue waiting until midnight rather than obtain help from the police.[19] At midnight she reported that the children remained missing.[20] When the dispatcher refused to help, Ms. Gonzales went to her husband's apartment, and upon discovering he was not home, she called the police.[21] After waiting at least forty minutes for the police to arrive, Ms. Gonzales went to the police station and met with an officer who took an incident report.[22] But rather than attempt to enforce the protective order or locate her three children, the officer went to dinner.[23]

Mr. Gonzales later arrived at the police station, opening fire on the police with a semiautomatic handgun. Police returned fire and killed him.[24] Police then located the lifeless bodies of the children inside his truck.[25]

B. *The Supreme Court's Opinion*

1. The Majority

The Supreme Court posed the issue "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order . . . ."[26] The Court began by noting that a person must have a legitimate claim or "entitlement" to a benefit before the benefit can be enforced as a property interest.[27] According to the Court, entitlements are created by "existing rules or understandings that stem from an independent

16. *Id.* at 2801–02.
17. *Castle Rock*, 125 S. Ct. at 2801–02.
18. *Id.* at 2802.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Castle Rock*, 125 S. Ct. at 2802.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 2800 (2005) (considering that "[the police] have probable cause to believe [the restraining order] has been violated").
27. *Castle Rock*, 125 S. Ct. at 2803 (citing Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)) (defining benefits as a mere unilateral expectation of a property right).

source, such as state law."[28] A benefit is not an entitlement, however, if officials have discretion to grant or deny it.[29]

The Court first held that the Colorado statute, which provides that "a peace officer shall use every reasonable means to enforce a restraining order"[30] did not create an entitlement due to the "well established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes."[31] The Court pointed out that, "[f]or a number of reasons, including their legislative history, insufficient resources, and [the] sheer physical impossibility [of enforcing every protective order], it has been recognized that [these] statutes cannot be interpreted literally."[32] Against this backdrop, the Court held that the Colorado statute needed "stronger" mandatory language if it were to be a "true mandate[.]"[33] Even if the statute were interpreted to make enforcement mandatory, the Court reasoned, Ms. Gonzales did not have an entitlement to enforcement because the statute did not explicitly state that she was a "protected person" specifically entitled to *enforcement* of restraining orders.[34] The Court added that, even if the right were an entitlement, it was not clear that an individual entitlement to enforcement of a protective order could constitute a "property" interest, as "such a right has no ascertainable monetary value."[35] From this analysis, the Court concluded that Ms. Gonzales did not have a property interest under the Due Process Clause in enforcing the restraining order against Mr. Gonzales.[36]

2. The Dissent

The dissenting opinion successfully identifies the flaws in the majority's reasoning. Justice Stevens argued that while some states give law enforcement officials discretion to decide when enforcement of a protective order is necessary, the legislative history of the Colorado statute and the language of the statute on its face clearly indicate that Colorado intended to limit police officer discretion when responding to domestic violence. Justice Stevens noted:

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28. *Id.* at 2803 (citing Paul v. Davis, 424 U.S. 693, 709 (1976)).

29. *Id.* at 2803 (citing Chicago v. Morales, 527 U.S. 41 (1999)).

30. COLO. REV. STAT. § 18-6-803.5(3)(a) (2002).

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

32. *Id.* at 2806 (quoting 1-4.5 ABA STANDARDS FOR CRIMINAL JUSTICE 1-124 to -25 cmt. (2d ed. 1980)).

33. *Id.*

34. *Id.* at 2808–09 (distinguishing the power of a "protected person" to initiate criminal or civil contempt hearings and requesting that the violator be arrested).

35. *Id.* at 2809.

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

> In adopting this legislation, the Colorado General Assembly joined a nationwide movement of States that took aim at the crisis of police underenforcement in the domestic violence sphere by implementing "mandatory arrest" statutes. The crisis of underenforcement had various causes, not least of which was the perception by police departments and police officers that domestic violence was a private, "family" matter and that arrest was to be used as a last resort . . . . [T]he purpose of these statutes was precisely to "counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion; mandatory arrest policies would increase police response and reduce batterer recidivism."[37]

In response to the majority's holding that Ms. Gonzales did not have an entitlement to enforcement of the protective order because the statute did not explicitly identify her as a "protected person," the dissent correctly pointed out that explicit identification is not necessary, as it is clear that the Colorado statute was enacted precisely for the narrow class of persons who are beneficiaries of protective orders.[38] The dissent also undermined the majority's concern that enforcement of a property right must have "some ascertainable monetary value"[39] by pointing out that the Court has previously "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money[,]"[40] and that "the types of interests protected as property are varied and, as often as not, intangible, relating to

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37. *Id.* at 2817 (Stevens, J., dissenting) (citing Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1669 (2004)); *see also* Gonzales v. City of Castle Rock, 366 F.3d 1093, 1107 (2004) *rev'd sub nom.* Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796 (2005) (quoting *Hearing on House Bill 1253 Before the H. Judicial Comm.*, 59th Cong. 3 (Colo. 1994)). Colorado's legislative history indicated a clear intent to impose mandatory obligations on law enforcement officials:

> [T]he entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy. So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal. And so we hope that House Bill 1253 starts us down this road." (emphasis omitted). *Id.*

38. *Castle Rock*, 125 S. Ct. at 2816 (Stevens, J., dissenting) (discussing why the Court's formalistic analysis fails).

39. *Id.* at 2809 (majority opinion).

40. *Id.* at 2822 (Stevens, J., dissenting) (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 571–72 (1972)) (describing how property can include intangibles).

the whole domain of social and economic fact."[41] Justice Stevens accordingly concluded that the enforcement of a protective order is an entitlement "no less concrete and no less valuable than other government services" that have been given "property" status, such as education and other entitlements that defy easy categorization.[42]

III. Domestic Violence Policy in America

A. *Early Tolerance of Domestic Violence*

The practice of domestic violence in the United States originated from English common law, which allowed a man to beat his wife with a rod no thicker than the width of his thumb.[43] Although domestic violence was no longer overtly endorsed by the turn of the nineteenth century, courts continued to hold that the government should not interfere with marital relationships unless "serious" violence had occurred.[44] In 1874, the North Carolina Supreme Court held that "[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[45] Until the 1970s, the response from the legal system at large was still one in which "women's complaints of abuse were [effectively] trivialized and ridiculed, women's injuries were ignored, women's terror and fear were invalidated, and women were blamed by the police and the courts for the violence they suffered."[46] During that period, courts were reluctant to grant women involved in abusive relationships legal remedies.[47] For example, a woman could file for limited injunctive relief in some jurisdictions, but only if

41. *Id.* (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)) (internal quotations omitted).

42. *Id.* at 2822–23 (citing Bell v. Burson, 402 U.S. 535 (1971), in which the Supreme Court held that there is a property interest in receiving due process in the procedures surrounding the revocation of a driver's license while an accident claim is pending adjudication).

43. *See* Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. Ill. L. Rev. 533, 535–36 (1996) (describing the source of domestic violence in the United States and the notorious "rule of thumb").

44. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 10 (1999).

45. *Id.* (quoting State v. Oliver, 70 N.C. 60, 61–62 (1874)).

46. James Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses 47–48 (1999).

47. *Id.* at 47 (discussing that it was not until the mid 1970s that courts began holding police departments liable for failing in their duties when an arrest was warranted).

they were divorced or separated from their partners, and no criminal penalty for an injunction violation existed.[48]

B. *Civil Protective Orders*

Beginning in the 1960s, battered women's advocates began to direct public attention to the issue of domestic violence. These advocates offered services to domestic violence victims independent of state involvement, providing the first shelters for battered women fleeing their abusers.[49] Although many battered women's advocates did not seek recourse within the government because they regarded the state as the ultimate "enforcer of a patriarchal system,"[50] others acknowledged that their efforts to protect battered women would be severely limited in the absence of state involvement.[51] Starting in the mid-1970s, advocates for state involvement successfully fought for legislation providing easier access to civil protection orders.[52] Unlike typical criminal and civil court-decreed orders of protection, domestic violence civil protection orders provide more comprehensive options for relief.[53] These orders can include provisions for child custody arrangements, provisions requiring an abuser to terminate all contact with the victim,[54] and even provisions requiring a person to seek counseling[55] or drug and alcohol treatment.[56] The vast majority of legislation also provides for emergency *ex parte* relief, which gives court-ordered protection for the victim immediately upon issuance of the order up through the time the case actually goes to

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48. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1665 (2004) (explaining that in conjunction with police department apathy, the courts could do little to provide assistance to battered women because no civil remedy was available).

49. *Id.* at 1666 (indicating that women who began the safe houses had often overcome abusive relationships themselves).

50. *Id.* (speculating that states' support of male dominance in the courtroom made it unlikely to establish state-provided shelter to those domestically abused).

51. *Id.* at 1665 ("[M]any battered women's advocates realized the need to effect systematic change, and focused not only on assistance to individual women, but also on revamping the *laws and policies* that ignored domestic violence as an issue for the public justice system.") (emphasis added).

52. PTACEK, *supra* note 46, at 48 (indicating that attempts at change were successful because of a domestic violence restraining order and other new civil and criminal remedies at the state and federal level).

53. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 95, 100 (2005).

54. *Id.* at 100 (citing COLO. REV. STAT. § 13-14-102 (2001); N.M. STAT. ANN. § 40-13-5 (Michie 2003)).

55. *Id.* (citing KAN. STAT. ANN. § 60-3107 (2003)).

56. *See id.* at 95, 100 (explaining the difference between civil protection orders, criminal orders of protection, and the relief each may provide).

trial.[57] Studies show that properly enforced protective orders reduce violence against victims, providing them with the protection needed to help them regain their emotional well-being, a sense of security, and overall control over their lives.[58] By the 1990s, every state had enacted a civil protection order statute.[59]

C. *Mandatory Arrest Statutes*

Despite the availability of protective orders, one of the most serious limitations on their effectiveness has been the widespread lack of enforcement by the police. As *Castle Rock*[60] exemplifies, police indifference can lead to tragic consequences. Women like Ms. Gonzales regularly encounter law enforcement officers who discount domestic violence as "non-serious, non-criminal, or as a private matter best settled within the home."[61] Police often respond to domestic violence calls either by taking no action, by purposefully delaying response in the hope of avoiding confrontation, or, when they do respond, by attempting to mediate the situation or allowing the parties time to collect themselves.[62] Data collected by several agencies suggest that police seldom make arrests in cases of domestic violence to which they actually respond.[63] Other anecdotal evidence suggests that officers would blame the wives for being victims of domestic violence or make comments implying that

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57. Epstein, *supra* note 44, at 11 (citing Catherine F. Klein & Leslye E. Ofloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 901, 1031–43 (1993)) (indicating that all jurisdictions authorize some form of emergency *ex parte* relief upon filing a complaint for civil protection).

58. Smith, *supra* note 53, at 95; Jeremy Travis, U.S. Dep't of Justice, *Civil Protection Orders: Victims' Views on Effectiveness*, 1998 NAT'L INST. OF JUST. RES. PREVIEW 1 (distinguishing instances where the abusers had previously acted violently and where the protective order likely did not prevent future attacks).

59. Sack, *supra* note 48, at 1667; Smith, *supra* note 53, at 100; OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, OVC BULL. NO. 4, ENFORCEMENT OF PROTECTIVE ORDERS (2002) (providing an overview of current protective order statutes).

60. Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2816 (2005).

61. 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, 1189 (1994–1995).

62. Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 649 (1997).

63. Sarah Mausolff Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 217 (1988) (citing various studies on arrest rates by police, reporting rates as low as three to fourteen percent in situations where they observed an injured victim); U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence*, 2000 NAT'L VIOLENCE AGAINST WOMEN SURV. 49 (finding that domestic violence calls resulted in arrests 34.6% of the time for victims of a physical assault).

they deserve to be beaten by their husbands.[64] Such archaic misconceptions and stereotypes have contributed to law enforcement's failure to arrest men who abuse their partners or violate protective orders.[65]

By the early 1990s, over a dozen jurisdictions enacted "mandatory arrest" statutes that restricted police discretion in domestic violence situations.[66] These statutes generally provide that the following circumstances are grounds for mandatory arrest by the officer, based on probable cause: (1) when violence previously occurred or is likely to occur in the future; (2) when terms of the protective order are violated; (3) when terms of a protective order are violated in the presence of a police officer; (4) when there is an aggravated battery; and (5) when an officer witnesses a physical injury on a party.[67] In 1984, the Attorney General's "Task Force on Family Violence" publicly acknowledged the failure of police to arrest perpetrators of crimes of domestic violence as one of the most formidable obstacles to addressing the epidemic of domestic violence in the United States.[68] Citing several well-known studies documenting the effectiveness of mandatory arrest in domestic violence cases,[69] the Attorney General issued a report recommending arrest as the "preferred response" in domestic violence cases.[70] Subsequent congressional hearings made simi-

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64. Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 798 n.46 (1986) (providing examples of police officers endorsing violence against women by their intimate partners); *see also* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992) (discussing police response to domestic violence calls).

65. Zorza, *supra* note 64, at 48–49.

66. Sack, *supra* note 48, at 1670.

67. Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U.J. GENDER & L. 171, 180 n.44 (1994).

68. *See* Sack, *supra* note 48, at 1669 n.61 (analyzing the developments in domestic violence policy and its effect on future domestic violence policy); see also ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT [hereinafter TASK FORCE ON FAMILY VIOLENCE] 16–18 (1984) for Attorney General's report on the effectiveness of police officers' arrest of domestic violence offenders.

69. *See generally* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1854 (2001) (citing ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 17 (1984)) (describing the most publicized study, the Minneapolis Domestic Violence Experiment, which was conducted in 1984 by researchers Lawrence Sherman and Richard Berk). The study reported that arrest significantly reduced the risk of re-offense over a six month period, as compared with alternative police responses of either ordering one party out of the residence or advising the couple on how to solve their problems at the scene. *Id.*

70. TASK FORCE ON FAMILY VIOLENCE, *supra* note 68, at 22.

lar recommendations and presented a plethora of evidence on law enforcement's longstanding practice of treating domestic violence less seriously than similarly violent crimes among strangers.[71] Indeed, the Colorado statute sought to address these very issues.[72] Today, Colorado is one of twenty-one states and the District of Columbia that have implemented statutes mandating arrest in domestic violence situations.[73]

Despite studies documenting the effectiveness of mandatory arrest policies in curtailing domestic violence,[74] there has been much resistance to meaningful implementation.[75] Opponents argue that mandatory arrest statutes are too inflexible, requiring arrest when the facts are disputed, and preventing police from exercising discretion in order to maximize limited resources.[76] Courts dismiss the extensive legislative history documenting the seriousness and pervasiveness of domestic violence as issues of "privacy"[77] and "property" thereby failing to provide adequate recourse to victims. Without getting into an involved debate about the validity of mandatory arrest statutes as a means of addressing the problem of domestic violence,[78] it is clear that—even with mandatory arrest stat-

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71. *See, e.g.*, S. REP. NO. 103–138, at 41–42 (1993) (discussing possible amendments to the Violence Against Women Act which reflect a "national consensus" intolerant of those who engage in domestic violence).

72. Brief of National Coalition Against Domestic Violence & National Center for Victims of Crime as Amici Curiae Supporting Respondent at 4, Town of Castle Rock of Colo. v. Gonzales, 125 S. Ct. 2796 (10th Cir. Mar. 21, 2005) (No. 04-278).

73. Sack, *supra* note 48, at 1670 (citing NEAL MILLER, INST. OF LAW & JUSTICE, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 28 n.86 (2004), *available at* http://ilj.org/publications/DV_Legislation-3.pdf (listing mandatory arrest statutes)).

74. *See* Epstein, *supra* note 69, at 1853–54.

75. *See, e.g.*, Wanless, *supra* note 43, at 544 (indicating that sixty percent of Ohioans were against mandatory arrest in domestic violence situations).

76. *Id.* (arguing police must continue to use discretion to determine probable cause exists that a crime was committed, removing the decision of whether or not to arrest after the determination of whether domestic violence had occurred).

77. United States v. Morrison, 529 U.S. 598, 613–15 (2000) (holding Congress had no authority under the Commerce Clause to prohibit gender-motivated crimes of violence under the Violence Against Women Act because the crimes were not "economic in nature" and because they were "truly local" rather than national in scope; ignoring the extensive Congressional record pointing to the economic effects of domestic violence and the failure of states to address the clearly pervasive problem of domestic violence); *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 89 (Yale University 2000) (arguing that the use of "privacy" rhetoric to justify nonintervention devalues women and communicates to the wider public that women's issues are so invaluable they do not warrant equal protection of the law).

78. *See* SCHNEIDER, *supra* note 77, at 186 (criticizing mandatory arrests because they: (1) are "paternalistic and essentialize women's experiences" presupposing that mandatory arrests are the best approach for all women; (2) subject abused women to what amounts to "coercion at the hands of the state" and re-victimize the woman; (3) cause the perpetrator

utes—a protection order remains "just a piece of paper," a token display of concern[79] for the millions of women who are battered each year in the United States.

D. *Civil Challenges to Police Conduct*

The 1970s and 1980s saw a handful of successful civil challenges to police conduct. In *Bruno v. Codd*,[80] twelve domestic violence victims brought an action for declaratory judgment and injunctive relief against the New York City Police Department, alleging a pattern of discrimination and noncompliance with controlling statutes and regulations.[81] The court acknowledged that the failure of the officers to respond to requests for help reflected police reluctance to intervene in what they characterized as "domestic disputes" instead of criminal offenses.[82] The court also acknowledged that, because forty percent of police night calls in New York City at that time involved such cases, the lack of police response made protective orders issued by courts largely ineffective.[83] As a result, the New York City Police Department agreed to change its policies to improve domestic violence call response times and arrest rates.[84]

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to retaliate by inflicting further abuse on the victim; (4) strip women of their autonomy; and (5) depict them as eternally weak or always victims by removing control).

79. PTACEK, *supra* note 46, at 169–170 (demonstrating some batterers are "incorrigible" and no piece of paper will prevent their violent actions).

80. 393 N.E.2d 976 (N.Y. 1979).

81. Bruno v. Codd, 393 N.E.2d 976, 977 (N.Y. 1979). The court noted:

> In a nutshell, the gravamen of their complaint is that probation and Family Court nonjudicial personnel, with the knowledge and either the tacit consent or express approval of their supervisors, engage in a pattern of conduct calculated (1) to deter battered wives from filing petitions for orders of protection against their offending husbands, (2) to block them from meaningful access to Family Court Judges empowered to issue temporary orders of protection, and (3) by failing to advise the wives that the defendants proffer of counseling is voluntary, to dissuade complainants from pursuing their legal remedies. *Id.*

82. *Id.* at 980.

83. *Id.* (quoting *Wife Beating: The Hidden Offense*, N.Y.L.J., Apr. 29, 1976, at 1).

84. *Id.* The quote noted:

> By its terms the police have agreed hereafter to respond swiftly to every request for protection and, as in an ordinary criminal case, to arrest the husband whenever there is reasonable cause to believe that a felony has been committed against the wife or that an order of protection or temporary order of protection has been violated. Moreover, officers are to remain at the scene of the alleged crime or violation in order to terminate or prevent the commission of further offenses and to provide the wife with other assistance. To assure that these undertakings are fulfilled, supervisory police officers are to make all necessary revisions in their disciplinary and other regulations. *Id.*

A few years later, in *Thurman v. City of Torrington*,[85] a federal court held that the longstanding police practice in Connecticut of providing less protection to women in abusive relationships than to people abused by strangers violated the Equal Protection Clause.[86] In *Thurman*, the police failed to arrest the plaintiff's husband on several occasions, even after he violated his probation conditions and a protective order.[87] When one officer finally responded, the plaintiff's husband had already severely injured her.[88] Around the same time, in *Sorichetti v. City of New York*,[89] a mother brought a negligence action against the city to recover damages for injuries inflicted on her child after police failed to respond to her request for enforcement of a protective order.[90] The court reasoned that, based on the history between the police and the mother, the police had a sufficient "special relationship" with the mother and child to establish a duty on the part of the police, which in turn supported the mother's negligence claim.[91] Holding in favor of the mother's claim, the court based its decision on several factors: (1) police knowledge of the father's violent history; (2) police knowledge of the threats the father made against the mother and child; (3) the mother's previous pleas for assistance; and (4) the police's failure to respond, even though the police assured the mother that they would act.[92] The court felt those factors created a "special relationship" between the police and the mother and child, which was sufficient to establish negligence.[93]

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85. 595 F. Supp 1521, 1527 (D. Conn. 1984).

86. Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984). The court noted:

> City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship . . . . If officials have notice of the possibility of attacks . . . they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Failure to perform this duty would constitute a denial of equal protection of the laws (citation omitted). *Id.*

87. *Id.* at 1524 ("[A]lthough informed of the violation of the conditional discharge, [the police] made no attempt to ascertain [husband's] whereabouts or to arrest him.").

88. *Id.* at 1524–26 (documenting victim received multiple stabbings to the chest, neck and throat before the police arrived at the scene 25 minutes later).

89. 482 N.E.2d 70 (N.Y. 1985).

90. Sorichetti v. City of N.Y., 482 N.E.2d 70, 72–73 (N.Y. 1985).

91. *Id.* at 74 (holding that the City of New York breached a special duty of care to the mother, which extended to the child).

92. *Id.* at 74–75 (reasoning that a city only owes a duty to provide adequate police protection when such a "special relationship" exists between the parties).

93. *Id.* at 75.

Unfortunately, these successes have become the exception rather than the rule. A few years after *Sorchietti*, the Supreme Court decided *DeShaney v. Winnebago County Department of Social Services*,[94] where the mother of a four-year-old child who had been severely beaten by his father sued social workers and local officials who knew that the child was being abused but did not remove him from his father's custody.[95] The child was beaten so severely that he fell into a coma.[96] Emergency brain surgery revealed that the child suffered a series of hemorrhages from repeated head injuries over a long period of time.[97] The child suffered brain damage so severe that doctors predicted he would spend the rest of his life confined to an institution.[98]

In an opinion described by Justice Blackmun as "a sad commentary upon American life and constitutional principles,"[99] the Supreme Court held that state and local government agencies had no constitutional duty to protect its citizens from private violence[100] or other mishaps not attributable to the conduct of its employees.[101] This case regrettably set the tone for the Supreme Court's decision in *Castle Rock*.[102]

IV. THE "DOMINANCE" FRAMEWORK

A. *Introduction to the Feminist Movement*

> Although social failure to respond to problems of battered women has been justified on the grounds of privacy, this failure to respond is an affirmative political decision that has serious public consequences . . . . The state actively permits [domestic] violence by protecting the

94. 489 U.S. 189 (1989).

95. *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 192–93 (1989) (finding that the Department of Social Services "suspected child abuse" based on the child's numerous hospital visits but failed to take any action beyond "dutifully record[ing] the[ ] incidents in her files").

96. *Id.* at 193.

97. *Id.*

98. *Id.*

99. *Id.* at 213 (Blackmun, J., dissenting) ("Poor Joshua! . . . abandoned by [the Department of Social Services] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . 'dutifully record[ ] these incidents in their files . . . .'").

100. *DeShaney*, 489 U.S. at 195–97 (majority opinion) (ignoring the facts which establish the state's active part in the life of the child and creating a special relationship with that child to protect him from the danger into which the state placed him).

101. *See id.*

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

> privileges and prerogatives of the batterer . . . . These failures to respond . . . are part of "public patterns of conduct and morals."[103]
>
> [Domestic] violence is part of a larger system of coercive control and subordination; this system is based on structural gender inequality and has political root . . . . In the context of [domestic] violence, the impulse behind feminist legal arguments [is] to redefine the relationship between the personal and the political, to definitively link violence and gender.[104]

During the "battered women's movement" in the 1960s, feminist activists challenged socially accepted notions of gender roles within the family and in the workplace.[105] Feminists argued that domestic violence not only threatened a woman's right not to be physically harmed, but also undermined a woman's right to liberty, autonomy, and equality.[106] They viewed domestic violence as part of a larger system of control and subordination, stemming from structural gender inequality.[107] This feminist movement succeeded in shifting domestic violence from a private problem to an important public issue.[108] But while the law no longer *expressly* grants men the right to abuse their partners, law enforcement protocols[109] and high court decisions like *Castle Rock*[110] continue to implicitly condone domestic violence by effectively allowing the violence to continue.[111] As a result, domestic violence remains a major cause of injury to women in the United States.[112] Feminists argue that in order to suc-

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103. SCHNEIDER, *supra* note 77, at 92 (alteration in original) (quoting Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671–72 (1990)).

104. *Id.* at 5–6 (alterations in original).

105. *Id.* at 5.

106. SCHNEIDER, *supra* note 77, at 4.

107. SCHNEIDER, *supra* note 77, at 4–5.

108. *Id.* at 5–6 (explaining classification of domestic violence as a "private problem" through the male dominated perspective).

109. Eppler, *supra* note 64, at 798 n.46; *see also* Zorza, *supra* note 64, at 46, 50.

110. Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2816 (2005).

111. *See id.;* Eppler, *supra* note 64, at 798 n.46; *see also* Zorza, *supra* note 64, at 46, 50.

112. *See generally* Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Natures, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, 2000 NAT'L INST. OF JUST. 10 *available at* http://www.ncjrs.gov/pdffiles/njj/181867.pdf (presenting statistical finds from the National Violence Against Women Survey totaling the number of physically assaulted women at over one million). *See also* United States v. Morrison, 529 U.S. 598, 629, 631 (1999) (citing *Domestic Violence: Not Just a Family Matter: Hearing on Domestic Violence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994)) (speculating that between three and four million women are victims of domestic violence each year).

cessfully address the problem of domestic violence, courts must recognize the deeply-rooted underlying social issue of gender inequality.[113]

B. *MacKinnon and "Dominance Feminism"*

Catharine MacKinnon addresses this underlying issue of gender inequality by demonstrating how the legal system fundamentally opposes women's interests through a structure that perpetuates male dominance.[114] MacKinnon argues that, in a male-dominated society such as the United States, the law, which purports to be "objective," is actually constructed to benefit the male perspective.[115] She uses this notion as a basis for the argument that the legal system effectively reinforces social dominance of men over women.[116]

MacKinnon likens objectivity to "point-of-viewlessness,"[117] where no particular point of view is expressed. She argues that what passes as objective analysis or point-of-viewlessness actually reflects the perspective of the dominant group, which is concealed from society's view because the dominant group possesses the power to have its version of reality accepted as the "objective" view, or the truth:[118]

> Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies design workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, . . . their presence defines family, their inability to get along with each other—their wars and rulerships—define history, [and] their image defines god [sic]. . . .[119]

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113. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 257 (Aspen Publishers 2d ed. 2003) ("[W]omen's self assertion through jobs or school particularly infuriates some [abusive] men.") (alterations in original) (quoting SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 220 (1982)).

114. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989) (suggesting that the invisibility of male dominance perpetuates a male point of view on society through the laws).

115. *See id.* at 162 (analyzing objectivity as a masculine, socially created concept).

116. *Id.* at 237.

117. *Id.* at 162.

118. *Id.* at 237 ("Liberal legalism is thus a medium for male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.").

119. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES OF LIFE AND LAW 36 (1987) (internal footnotes omitted).

> Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard . . . . Think about it like those anatomy models in medical school. A male body is the human body; all those extra things women have are studied in ob/gyn.[120]

Feminists have pointed out that the definition of domestic violence used by courts tends to be "incident-focused, looking to the types of assaultive or coercive incidents and the number of times these occurred."[121] Feminists adopting MacKinnon's theory argue that such an approach, although seemingly objective and gender-neutral, is actually an application of the male standard or an incorporation of a subjective male version of reality.[122] Focusing on the incident ignores the victim's experience of the violence as well as the power dynamics involved in an abusive relationship.[123] MacKinnon argues that a better approach to domestic violence instead emphasizes the victim's behavioral and emotional responses in addition to the batterer's point of view and motivation. This type of approach acknowledges the ongoing nature of an abusive relationship and considers such things as whether the victim "modified her behavior or intentionally maintained a particular consciousness or behavioral repertoire" in order to avoid being battered.[124] This conceptualization not only considers the perspective and experiences of the "other" gender, but also acknowledges the underlying issue of dominance and subordination, thereby serving as a starting point from which one can address the issue of domestic violence.[125] By embracing the status quo "objective" definition of domestic violence, society remains bound by the resulting legal consequences (or lack thereof). A continuation of "the standard" uncritically takes for granted the arrangements made by a male-dominated society without acknowledging the context of power and control in which battering takes place.[126]

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120. *Id.* at 34.

121. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 28 (1991-1992).

122. MACKINNON, *supra* note 119, at 43.

123. Mahoney, *supra* note 121, at 28, 33.

124. *Id.* at 33 (internal quotations omitted).

125. MACKINNON, *supra* note 119, at 43.

126. *Id.* at 42–43.

MacKinnon goes on to point out that social power over women is present in laws that profess to protect women through purportedly gender-neutral rhetoric about liberty, equality, and citizen's rights.[127] For example, the Supreme Court has held—to the detriment of battered women—that government intervention in marital relationships is unconstitutional because the government should not interfere with private familial social arrangements, and that they should respect citizens' right to privacy.[128] MacKinnon would argue that, instead of masking the existence of gender equality with such constitutional rhetoric, courts should focus on whether the law perpetuates the subordination of women.[129] This approach directly confronts the issue of women's inferior status, instead of using men's needs and experiences as the standard by which to judge the treatment of women.[130]

V. *Castle Rock:* A Case Study

Analyzing the Supreme Court's decision in *United States v. Morrison*[131] where the Court struck down a portion of the Violence Against Women Act,[132] MacKinnon describes how the Court used "ostensibly gender-neutral tools to achieve a substantive victory for the socially unequal institution of male dominance."[133] It can be argued that the Court used the same reasoning in *Castle Rock*.[134] On a superficial level, *Castle Rock* signifies the Court's reluctance to expand the definition of "property" to incorporate the mandatory enforcement of civil protection orders.[135] In reality, however, and considering the Supreme Court's previous use of notions like "privacy" to deny recourse for victims of domestic violence, an application of MacKinnon's dominance framework reveals that *Castle Rock* is not an "abstract application of neutral institutional priori-

127. MacKinnon, *supra* note 114, at 42 (arguing that these purported gender neutral laws only facilitate the domination).

128. *See id.* at 164–65. *See generally* United States v. Morrison, 529 U.S. 598 (2000).

129. MacKinnon, *supra* note 114, at 164 (discussing that when the government participates in "negative freedom," refusing to alter the status quo, the group who receives the "positive freedom" will control a second group and no amount of "negative freedom" will protect the suppressed second group).

130. *Id.* at 242.

131. 529 U.S. 598 (2000).

132. United States v. Morrison, 529 U.S. 598, 613 (2000) (holding Congress exceeded the power granted in the Commerce Clause to create the Violence Against Women Act because the activity it sought to regulate was not economic activity).

133. Catharine A. MacKinnon, Women's Lives, Men's Laws 207 (2005).

134. Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2809 (2005) (holding that in addition to the restraining order not being an entitlement, it is also not an interest in property).

135. *Id.* at 2816.

ties[.]"[136] Rather, it is a refusal to recognize domestic violence as a serious issue that both grows out of and reinforces a pervasive pattern of male dominance.

A. *The Court's "Objective" Analysis*

Feminists like MacKinnon have challenged the law's "objective" process of selecting what should count as "fact," choosing what principles to apply, and employing these principles to reach logically sound decisions.[137] This "legal method" has "[t]raditionally . . . operated within a highly structured framework which offers little opportunity for fundamental questioning about the *process* of defining the issues, selecting relevant principles, and excluding irrelevant ideas."[138] For example, courts have traditionally analyzed cases according to patterns of questions established in the past (e.g., is there a property right?), and in a context in which consistency of ideas may be valued more highly than the identification of new issues and perspectives, such as those of women in domestic violence cases.[139] This structure of the legal inquiry and its claim to neutrality and objectivity governed the way the Court in *Castle Rock* analyzed the case and significantly affected the outcome in favor of upholding the institution of male dominance.

1. The Substantive Analysis

The Court's substantive analysis centers on the supposedly gender-neutral notion of "property." At first glance, analyzing a case according to whether the asserted right fits under the fundamental guarantees of "life, liberty, and property" seems "objective." Accordingly, the determination of whether an interest involves life, liberty or property determines whether a person has a right to have his or her interest enforced. The Court in *Castle Rock* found that, because the statutory language was not "mandatory enough," Ms. Gonzales was not entitled to a property interest of enforcement of the order and that, even if there were an entitle-

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136. MACKINNON, *supra* note 133.

137. *See, e.g.*, Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 WIS. WOMEN'S L.J. 147, 148–49 (1987).

138. *Id.*

139. *Id.* at 154 (manipulating accepted ideas about the differences between men and women to support the Court's desire to prevent a woman from practicing law in the British Commonwealth).

> That the court [in Mabel French's case in 1905] apparently did not question the appropriateness of applying a precedent from an earlier generation [thirty years earlier], and from a foreign jurisdiction, seems remarkable. The possibility of distinguishing the earlier decision is clear and the court's acceptance of the *Bradwell* decision as both relevant and apparently binding is initially perplexing. *Id.*

ment, such a right would not be a property interest, as the right has no "monetary value."[140] By applying these seemingly objective notions of property and entitlement to the analysis, the Court's decision seems justified.

Nevertheless, MacKinnon would argue that what seems like objective analysis is actually the *subjective* viewpoint of the dominant group, because it dismisses women's interests offhand.[141] The Court's systematic property-based analysis ignores the arguments advanced by Ms. Gonzales and organizations such as the National Coalition Against Domestic Violence and the National Network to End Domestic Violence.[142] The court makes no mention of the domestic violence issues clearly implicated by the facts of the case. It gives no thought to the fact that women have the constitutional right to have their injuries addressed through effective and equal enforcement of the laws against the actors that injure them. Therefore, the Court's decision lies "less with the imperatives of institutional forces [such as property and conserving resources] than with the gender relations that impel those forces."[143] The decision establishes and reinforces a historical "male tradition" of discounting domestic violence as "simple trespass," "hurt feelings,"[144] or something to address privately. This is not to say that the Court came to the wrong conclusion in its property analysis, but, as stated by MacKinnon:

> It is to observe that no doctrine . . . requires that women's interest in living as equals free from gender-based violence be judicially accorded . . . priority . . . . Nothing in the design of the system exposes the gender bias built into the history and tradition of the Constitution's structure and doctrines. Nothing requires that women's interests as such be given any consideration at all.[145]

Instead of limiting its substantive analysis to the "objective" question of whether Ms. Gonzales meets the requirements to give her a protected property interest, the Court should have considered the context that gave rise to the facts and, therefore, the perspectives of the women in-

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

141. *See* MACKINNON, *supra* note 114, at 162.

142. Brief of National Coalition Against Domestic Violence & National Center for Victims of Crime as Amici Curiae Supporting Respondent, Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796 (10th Cir. Mar. 21, 2005) (No. 04-278); Brief of National Network to End Domestic Violence et al., Supporting Respondent, Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796 (10th Cir. Mar. 21, 2005) (No. 04-278).

143. MACKINNON, *supra* note 133, at 235.

144. CHAMALLAS, *supra* note 113, at 258.

145. MACKINNON, *supra* note 133, at 236.

volved.[146] If the Court had acknowledged that women have been subject to "law [that] gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place,"[147] and recognized misconceptions and stereotypes about a woman's role in violent relationships (e.g., that she provoked the assault and therefore deserved it), it would have realized that women have long experienced inequalities on the ground of gender. Furthermore, the Court did not give any weight to the statute's legislative history,[148] or to the countless studies documenting the ineffectiveness of protective orders as a result of the lack of enforcement to the detriment of victims of domestic violence.[149] Had the Court seriously considered these elements, it might have concluded that law enforcement practices perpetuate these inequalities.[150] Serious examination of the purpose behind the mandatory arrest statute shows that the statute was established precisely to remedy the lack of enforcement.[151] Put simply, had the Court looked past its "objective" analysis, it would have understood the severity of domestic violence and the underlying existence of gender inequality, where battering is a means for men to control the women they abuse.[152] Only then might the Court begin to formulate a decision that considers all relevant perspectives and gives due recourse for victims of domestic violence.[153]

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146. CHAMALLAS, *supra* note 113, at 258 (suggesting an emphasis on motivation and strategies of the batterer, shifting the focus from the how and why questions surrounding the battery).

147. Joyner v. Joyner, 6 Jones Eq. 322, 325 (1862) (indicating that the mindset of the extant generation of appropriate use of force include the use of a "horse-whip" on occasion and switches to the extent they left bruises on the "weaker sex").

148. S. REP. No. 103–138, at 41–42 (1993).

149. U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence*, 2000 NAT'L VIOLENCE AGAINST WOMEN SURV. 49 (reporting a very low rate of arrest for physical assault victims).

150. SCHNEIDER, *supra* note 77, at 89 ("By declining to punish a man for inflicting injuries on his wife . . . the law implies she is his property and he is free to control her as he sees fit.").

151. Hoctor, *supra* note 62 (suggesting that mandatory arrest statutes intend to protect women by limiting police discretion to arrest the batterer, primarily in reaction to a low arrest rate prior to legislation for domestic violence calls); *see* Epstein, *supra* note 69, at 1854 (citing ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 17 (1984)) (stating that the Minneapolis Domestic Violence Experiment reported that high likelihood arrest will prevent future violent episodes over the next six months).

152. *See* SCHNEIDER, *supra* note 77, at 5 (discussing how battery is a way men attempt to control women, which is only amplified when the law is on the man's side).

153. CHAMALLAS, *supra* note 113, at 258.

2. The Framework

The Court's decision to frame *Castle Rock* as a property issue[154] instead of an issue of equality or women's rights, also serves as an example of how courts use "ostensibly gender-neutral" frameworks to achieve "a substantive victory for the socially unequal institution of male dominance."[155] The structure of a court's "legal inquiry" can have a significant effect on the outcome of a case. Courts have great discretion in deciding how to approach a given set of facts, but often a desire to appeal to "neutral" or "objective" legal concepts like "property" or "privacy" exists.[156] Accordingly, courts may determine what is "relevant" by separating the "legal" issue from "political" or "moral" issues.[157] The result is that courts—like the Supreme Court in *Castle Rock*—often decide cases in a way that ignores the broader social and political issues like those of domestic violence and gender inequality.[158]

Castle Rock is a prime example of this phenomenon. The Supreme Court successfully disregards the political and social significance of the case by construing the legal issue as simply one of property.[159] While the Court engages in an involved discussion about property, entitlement, and discretion, it makes no reference to the extensive Colorado legislative history or reports documenting the pervasiveness and seriousness of domestic violence, and the ineffective enforcement of civil protection orders.[160] Questions which are inside the defined boundaries—those that relate to the notion of property[161]—can be addressed by the Court, but issues outside the boundaries—those relating to battered women's experiences with their perpetrators and with law enforcement officials—are, by the Court's definition, not relevant. For example, the Court refers to legislative history regarding interpretations of similar statutes to determine whether the Colorado statute creates a mandatory obligation (and therefore an entitlement and property interest),[162] but stops short of addressing any legislative history addressing the seriousness of domestic violence

154. Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2809 (2005).

155. MACKINNON, *supra* note 119, at 43.

156. Mossman, *supra* note 137, at 157 (arguing that the court's neutrality oftentimes "both masks and legitimizes their personal views").

157. *Id.*

158. *See id.* (contrasting the court's intentions to avoid political issues and remain neutral).

159. *See* Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2803, 2806, 2810 (2005).

160. *See Castle Rock*, 125 S. Ct. at 2817, 2822–23 (Stevens, J., dissenting).

161. *See id.* at 2810.

162. *See id.* at 2803, 2806, 2810.

and the states' efforts to address it.[163] This was because the question of whether Ms. Gonzales was entitled to protection against her batterer was simply a matter of interpreting and applying a "neutral" legal concept. It did not require any consideration of utility or benefit to Ms. Gonzales and similarly situated women, or of the larger issues of domestic violence and gender inequality.[164] The Court's decision to frame the issue as one of property interests therefore results in a refusal to recognize domestic violence as a serious issue that must be addressed.[165] More fundamentally, and perhaps even more disturbingly, this established practice of framework characterization also reinforces the law's alleged detachment and "objectivity," rather than its actual task to address the social and "moral" issues of the day.[166] Moreover, the Court's power to determine the "real issues" implies that it is the law, rather than an interpretation of the facts and the law, which is responsible for any negative outcome.[167]

B. *Judicial Activism*

The Supreme Court in *Castle Rock* not only framed and analyzed the issue in a manner detrimental to women, but its decision has also been characterized as "the functional equivalent of what [the Court] did to liberty rights one hundred years ago in *Lochner v. New York* . . . ."[168] In *Lochner*,[169] the Supreme Court struck down a New York statute limiting the number of work hours in a baker's workday in order to protect the workers' health[170] and shield them from employer exploitation.[171] In direct contravention to the statute's legislative history, the court "chose the liberty of employers to exploit their workers over the health and safety of the workers, contrary to the views of the legislature."[172] Similarly, in *Castle Rock*:

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163. *Id.* at 2810.

164. *See id.* at 2803, 2806, 2810.

165. *Id.* (stating that ending the analysis at this point minimizes the importance of preventing domestic violence and protecting those whom the statutes are designed to protect).

166. Mossman, *supra* note 137, at 158.

167. *Id.*

168. Christopher J. Roederer, *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,"* 54 DRAKE L. REV. 321, 331 (2006).

169. Lochner v. New York, 198 U.S. 45 (1905) (holding a statute unconstitutional which limited the hours in a baker's work day as an "unreasonable, unnecessary and arbitrary interference" with an individual's right to contract exceeding the police powers).

170. *Id.* at 58–59.

171. *Id.* at 62–63.

172. Roederer, *supra* note 168, at 362.

> [T]he Court has sided with local government, insulating it from claims based on the arbitrary denial of the right of enforcement, rather than helping a cognizable group of vulnerable residents whom the state has made it mandatory for municipalities to protect. The Court has elevated the liberty of police officers to ignore their duty to enforce court-ordered restraining orders over the safety and security of the victims of domestic violence.[173]

Indeed, the fact that the Court struck down a statute that explicitly created a mandatory obligation for police officers to arrest alleged perpetrators whenever there is reasonable cause to believe that they have violated a protection order, seems to render all state-imposed mandatory arrest statutes constitutionally unenforceable.[174] If the Court intended to revoke the power to create constitutionally enforceable mandatory arrest statutes from the states, then law enforcement officials would be able to, once again, decide for themselves when a situation merits the enforcement of a protective order.[175] Indeed, the leadership role of states in legislating on domestic violence issues is not in dispute.[176] State recognition of domestic violence as a critical problem and state enactment of strong protective order legislation represent an important national trend.[177] Courts have also acknowledged that the states have an important role to play in preventing domestic violence, addressing its consequences, and protecting victims.[178] Unfortunately, by narrowly and selectively framing and analyzing the issues, the Court in *Castle Rock* succeeded in covering up the underlying issue of domestic violence.[179]

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173. *Id.*

174. *See* Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2803, 2806, 2822 (2005) (Stevens, J., dissenting) (indicating that the Court's failure to enforce the statute implies a high threshold for a showing of intent to create a mandatory arrest statute which overrides police discretion).

175. *Id.* at 2803, 2817.

176. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 770 (Rehnquist, J., dissenting) (stating that the issue of domestic relations "has been left to the States from time immemorial, and not without good reason").

177. *See Castle Rock*, 125 S. Ct. at 2817 (Stevens, J., dissenting) (reiterating that Colorado was one of several states to have enacted such "mandatory arrest" statutes); Sack, *supra* note 48 (discussing the nationwide movement of states that have established mandatory arrest statutes to address the problem of domestic violence).

178. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (recognizing importance of states as laboratories of democracy).

179. *Castle Rock*, 125 S. Ct. at 2806 (stating that use of "shall" to indicate mandatory arrest was not strong enough to find liability).

C. *The Social Implications*

The Court's decision is not only "un-objective" and perhaps even a kind of judicial activism, but it also implicitly upholds male dominance in at least three more ways. First, the decision leaves battered women with no adequate legal recourse, thereby implicitly sanctioning male power over women. Second, it further suppresses the underlying issue of gender inequality, thereby perpetuating problems such as "unconscious bias."[180] Finally, it sends a strong message to batterers and the public that domestic violence, and hence the expression of male dominance, will continue to be tolerated.

1. No Adequate Legal Recourse

Even after decades of domestic violence reform prompted by battered women's advocates, statistics indicate that the legal system's response to domestic violence has remained largely ineffective: domestic violence is still the single largest cause of injury to women in the United States;[181] approximately thirty percent of murdered women were victims of domestic violence;[182] statistics suggest that physical abuse occurs in at least one out of four intimate relationships;[183] domestic violence is still a significant contributing factor to social problems such as alcoholism, drug abuse, mental illness, suicide, and homelessness;[184] and, women in long-term abusive relationships have resorted to self-help methods to escape abuse.[185]

Civil protective orders have remained one of the most widely available and commonly used methods of legal recourse for victims of domestic violence.[186] In fact, protective orders have been characterized as "the

180. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169 (1995).

181. Epstein, *supra* note 44, at 3.

182. *Id.* (citing BUREAU OF JUSTICE STATISTICS: VIOLENCE BY INTIMATES v (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf).

183. *Id.* at 10.

184. *Id.* at 3–4 (citing Rita Thaemert, NATIONAL CENTER FOR STATE LEGISLATURES, 'TIL VIOLENCE DO US PART 26 (1993)).

185. *See generally* Michelle J. Nolder, *The Domestic Violence Dilemma: Private Action in Ancient Rome and America,* 81 B.U. L. REV. 1119 (2001) (discussing similarities between abused Ancient Roman and Modern American women and their attempts to escape domestic violence).

186. Brief of National Coalition Against Domestic Violence & National Center for Victims of Crime as Amici Curiae Supporting Respondent at 10, Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796 (10th Cir. Mar. 21, 2005) (No. 04-278).

front line in the war against the abuse of women."[187] Because of the lack of enforcement of protective orders, however, numerous states, including Colorado, enacted mandatory arrest statutes, which generally require the police to enforce a protective order whenever there is probable cause to believe that the restrained person has violated or attempted to violate any provision of the order.[188] These mandatory arrest statutes were therefore the latest effort to curb domestic violence. But despite signs of progress, *Castle Rock* halted the effort and left women once again without adequate legal recourse. As a result of *Castle Rock,* a protective order remains "just a piece of paper"[189] and perpetrators of domestic violence know that they can "act with . . . the virtually total assurance that, as statistics confirm, their acts will be officially tolerated, they themselves will be officially invisible, and their victims will be officially silenced." [190] By refusing to recognize Colorado's mandatory statute, the Court effectively sanctions male dominance by leaving women like Ms. Gonzales to the mercy of their perpetrators.[191]

2. Perpetuation of Unconscious Biases

By not recognizing that physical abuse is a way for men to exert superiority over women, the Court further suppresses the underlying issue of male dominance and fails to recognize related problems such as unconscious bias.[192] According to the "cognitive bias" approach, in an attempt to simplify the world, people rely on categories, "person prototypes[,]" and "social schemas," which "function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."[193] This approach regards stereotyping as a pervasive phenomenon that is not qualitatively different from "normal" cognitive processes by which all people, not only prejudiced people, make everyday decisions, and it emphasizes that people unconsciously make biased judgments based on deeply-ingrained stereotypes.[194] These judgments are difficult to prevent because they occur prior to the time the biased thought or decision is made, and because the

187. Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 392 & n.116 (1998).

188. COLO. REV. STAT. § 18-6-803.5(3)(a) (2002).

189. *See, e.g.,* PTACEK, *supra* note 46, at 169 (arguing that gender discrimination has been institutionalized into American laws because male legislatures enacted them).

190. MACKINNON, *supra* note 133, at 234.

191. *Id.*

192. Krieger, *supra* note 180, at 1188.

193. *Id.* (indicating that some biases are cognitive instead of motivated by awareness and a deliberated stance on an issue).

194. *Id.* (explaining how relying on schemas can affect the decisionmaker's judgment even before they are faced with the problem).

decision-makers are rarely aware of the bias that corrupts their judgments.[195]

In the context of domestic violence and protective order cases, allowing the police wide discretion to arrest or otherwise prevent an alleged perpetrator from inflicting further harm presupposes that officers are aware of the unconscious biases that may corrupt their judgment.[196] Many male officers fail to respond to protective order calls, for example, because they are naturally more sympathetic to the male abuser.[197] Officers may also refuse to enforce a protective order because they believe that the victim provoked the attack and therefore deserved the abuse.[198] They may also personally believe that public law enforcement officials should play no role in helping to resolve the private aspects of family life.[199] Such attitudes may prevent police officers from making an objective arrest decision, leaving the victim unprotected[200] and the batterer unpunished.[201] Mandatory arrest prevents police prejudice from influencing arrest decisions, which is precisely what the Colorado legislature contemplated when it enacted the mandatory arrest statute.[202]

Furthermore, the concept of male battering as a private issue continues to exert a "powerful ideological pull on . . . [the] consciousness [of the public] and leads many to deny the pervasiveness and seriousness of domestic violence as a [social and] political issue."[203] The Court's failure to acknowledge and address the underlying issue of gender inequality in domestic violence cases adds to the misconceptions and stereotypes which contribute to law enforcement's failure to enforce protective orders, and to society's view of violence between intimates as less serious than violence between strangers.

3. Message of Tolerance

Mandatory arrest statutes are meant to communicate to society and to law enforcement officials that domestic violence and the violation of pro-

195. *Id.* (suggesting that cognitive biases are likely unintended and unconsciously processed).

196. *See id.*

197. Eppler, *supra* note 64.

198. *Id.*

199. Wanless, *supra* note 43, at 545 (discussing the face of police officer discretion in calls regarding domestic violence).

200. Truss, *supra* note 61, at 1190.

201. Wanless, *supra* note 43, at 545 (discussing the implications of a policy not to arrest as allowing the batterer to "get away with it" and the victim to go unprotected).

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

203. CHAMALLAS, *supra* note 113, at 264 (citing Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991)).

tective orders are grievous crimes that must be treated accordingly.[204] The protective order Ms. Gonzales sought to have enforced represented the promise that the police and other law enforcement officials would no longer dismiss claims of domestic violence. The Supreme Court's decision to hold Colorado's mandatory statute constitutionally unenforceable undermines these very objectives, sending a strong message to the batterer: that his conduct is not only tolerated, but even socially and legally acceptable.[205]

> Men . . . [get] the message from police officers that women battering is not a crime and that the sanctions of the criminal justice system—sanctions which presumably exist to deter and punish those who have the inclination to behave in antisocial ways—are routinely not invoked by police officers and that therefore they have nothing to fear if they beat the women with whom they are, or were, involved.[206]

> [The abuser] is violent at home because he has a bully's "sure winner" mentality. He beats his wife because . . . he can get away with it, as long as society does not intervene. In contrast, he doesn't beat his boss or his male acquaintances, not because he is never angry at them, but because the price of such behavior is too great.[207]

Similarly, the Court's refusal to recognize Colorado's efforts to address problems with the enforcement of protection orders communicates to the larger public that domestic violence is, once again, something to be reckoned with in the private realm (i.e., that it is not as serious as violence between strangers and is not to be treated as such).[208] In an interview with the American Civil Liberties Union, Ms. Gonzales echoed these very concerns:

> I don't think [that the police] ever took this restraining order seriously. And I don't think that they take domestic violence seriously. If I had told them that a stranger had taken my daughters, and I gave them the make of his vehicle and I told them where I believed he had taken them—all of which was information I gave them about

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204. *See, e.g.,* Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1148 (1994).

205. Truss, *supra* note 61, at 1190–91.

206. Welch, *supra* note 204 (alterations in original) (quoting Eva Jefferson Paterson, *How the Legal System Responds to Battered Women*, BATTERED WOMEN 79, 82–83 (Donna M. Moore ed., 1979)).

207. Wanless, *supra* note 43, at 553 (alterations in original) (quoting Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solution*, 60 WASH. L. REV. 267, 304 (1985)).

208. *Id.*

> [my husband]—then I think the reaction would have been different. But Simon was the girls' father, and the police saw this as a domestic issue, which was clearly not a priority for them.[209]

The effect of police inaction and the refusal to treat domestic abuse as serious as violence between unrelated parties turns out to be an implicit sanctioning of the violent expression of male power and dominance.

VI. STRATEGIES FOR CHANGE IN DOMESTIC VIOLENCE POLICY

The process of legal reform on issues of domestic violence is "a process by which women's experiences with battering are translated into law."[210] But this process of feminist lawmaking presents many challenges.[211] First, feminists must put together a legal theory or theories that are expansive and flexible enough to account for the diversity of women's experiences.[212] Indeed, feminist scholars have recognized a variety of approaches to describing and addressing the domestic violence issue.[213] They have also begun to speak to related issues of "race, ethnicity, class, disability, and heterosexism."[214] These issues are important to address because studies indicate that rates of non-lethal domestic violence are highest among women in the following four groups: (1) women between the ages of sixteen and twenty-four, (2) black women, (3) women in low-income households, and (4) women living in urban areas.[215] In order to

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209. Interview by the American Civil Liberties Union with Ms. Jessica Gonzales, *Castle Rock v. Gonzales: Making the Court's Protection Real* (Mar. 17, 2005), http://www.aclu.org/womensrights/gen/13212res20050317.html.

210. SCHNEIDER, *supra* note 77, at 101 ("In theory, feminist lawmaking on battering is a process by which women's experiences with battering are translated into law. But this oversimplified statement presents many problems . . . .").

211. *See generally id.* ("I have argued that the task for feminist lawyers is both to describe and allow for change: to describe a legal problem for women—describe it in detail and in context—and translate it to sympathetic courts in such a way that it is not misheard and at the same time does not remain static.").

212. *Id.* at 7–8 (2000) (discussing the importance of uniting diverse realities of women's experiences and yet remaining flexible to adapt to changes in the needs of these women).

213. *Id.* at 262 n.7 (2000); KATHERINE T. BARLETT & ANGELA P. HARRIS, GENDER AND LAW (2d ed. 1998) (identifying six different feminist theoretical frameworks: formal equality, substantive equality, non-subordination, women's different voice(s), autonomy, and non-essentialism); MARY BECKER, CYNTHIA GRANT BOWMAN, & MORRISON TORREY, Feminist Jurisprudence: Taking Women Seriously (1994) (highlighting the following feminist theories: feminist methodology, dominance theory, formal equality, hedonic feminism, pragmatic feminism, socialist feminism, postmodern feminism, essentialism, and heterosexism).

214. SCHNEIDER, *supra* note 77, at 103.

215. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ-167237, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES,

truly understand and effectively tackle domestic violence issues, battered women's advocates must pay attention and mold their approaches to these diverse contexts in which abuse occurs.[216]

Second, feminists must translate their message in a way that is not misinterpreted. In the context of criminal cases involving battered women who kill, for example, feminist claims for equal treatment are problematic because they are often mistakenly viewed as a request for special treatment.[217] In trials involving women who killed their batterers, the female defendant is often deprived of the right to a fair trial because of widespread misconceptions and stereotypes about women who act violently against their abusers.[218] Women who kill their batterers are often viewed as crazy, "monstrous," or unreasonable, and are thus unlikely to successfully assert self-defense.[219] In the 1993 case of Lorena Bobbitt, for example, Ms. Bobbitt alleged that she had been emotionally, physically, and sexually abused by her husband, and she testified that she injured him in self-defense.[220] Instead of accepting her plea of self-defense, however, the court acquitted her on the basis of temporary insanity and committed her to a mental hospital.[221] The case garnered sentiments of horror from the public and solidified its conception of women who fight back against their abusers as crazy and unreasonable.[222] In light of gender bias issues, feminists argue that courts should evaluate the particular facts and circumstances of each case.[223] However, efforts to provide these women with an equal right to trial are often mistaken as pleas for unjustified special treatment.[224] As a result, such pleas are frowned upon as beyond the traditional framework of the law.[225] Similarly, Ms. Gonzales's plea to have her protection order enforced may be misinterpreted as a request to

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BOYFRIENDS, AND GIRLFRIENDS 11 (1998), *available at* http://www.ojp.usdoj.gov.bjs/pub/pdf/vi.pdf.

216. SCHNEIDER, *supra* note 77, at 103 (describing the diverse constituency that feminists must represent in order to fully address the issue of violence against women).

217. *Id.* at 115–16 (discussing the judicial system's confusion between equal treatment and special treatment when a woman is accused of murder is "inherent in the problem of equality, . . . [and] particularly endemic in claims of gender equality").

218. *Id.* at 113.

219. *Id.* at 114 (arguing that other defenses available to the women will be limited based on the stereotypes of the jurors against "battered women").

220. *Id.* at 265 n.11 (2000).

221. SCHNEIDER, *supra* note 77, at 265 n.11 (citing *Lorena Bobbitt Is Released, Ordered to Get Counseling* ARIZONA REPUBLIC 1 (Mar. 1, 1994)) (noting that, interestingly, Ms. Bobbitt was released from the mental hospital after only five weeks).

222. *See id.* at 114.

223. *Id.* at 115–16.

224. *Id.*

225. *Id.* (arguing that the result is that the gender bias problem is neither addressed nor remedied, but exacerbated).

be given special treatment,[226] instead of an effort to have her injuries addressed through equal and effective enforcement of the laws designed to curtail domestic violence.[227]

Lastly, and most important, in order to successfully address the problem of domestic violence, courts must acknowledge the deeply-rooted underlying social issue of gender inequality. Indeed, "[t]he identification of [domestic] violence . . . as gendered, as affecting women's freedom, citizenship, and autonomy, and as fundamental to women's equality, revives the core precept of the battered women's movement that generated the past twenty-five years of important legal work on battering."[228] This context, however, is lost in both public and legal dialogue; high government officials have acknowledged that domestic violence is a problem affecting the United States today, but fail to make the crucial link between violence and larger issues of male dominance and female subordination.[229] Courts need to do their part to respond to domestic violence in a way that not only acknowledges but also redresses domestic violence as a deprivation of women's fundamental right to equality. Instead of masking the existence of gender equality with "constitutional rhetoric" and claims of "objectivity,"[230] courts should instead focus their analyses on whether the law serves to perpetuate the subordination of women. As feminists have argued, this approach confronts the issue of women's inferior status directly instead of using men's experiences and needs as the standard by which the treatment of women should be held.

VII. CONCLUSION

The development of a battered women's movement has been one of the most important contributions of the women's rights struggle:[231] the issue of domestic violence has been brought from invisibility to the forefront as an important public concern;[232] lawsuits and legislation have im-

226. *See* SCHNEIDER, *supra* note 77, at 116.

227. *Id.* (explaining that although self-defense is a legal justification for murder, this defense rarely sways judges and jurors in a case where a women is battered by her spouse, because the widely socially recognized application of self-defense was shaped by male perspective).

228. *Id.* at 197.

229. *Id.* (arguing that government officials' concerns are empty because they simultaneously claim domestic violence is an important issue, while removing battered women from welfare eligibility).

230. Town of Castle Rock, Colo v. Gonzales, 125 S. Ct. 2796 (2005) (listing the criteria for enforcement of the Colorado statute as "objective").

231. SCHNEIDER, *supra* note 77, at 197.

232. *See* MACKINNON, *supra* note 114, at 237; S. REP. NO. 103-138, at 41-42 (1993) (arguing that the needs of battered women to be protected are necessary); SCHNEIDER, *supra* note 77, at 197 (implying that even if public officials discuss domestic violence with-

proved police and court practices;[233] and mandatory arrest statutes at least superficially acknowledge and address the hierarchical context in which domestic violence occurs.[234] Nevertheless, *Castle Rock* illustrates the legal system's ultimate refusal to recognize domestic violence as a serious issue that both grows out of and reinforces a pervasive pattern of male power and subservience within the family and society.[235] Even Castle Rock Police Chief Tony Lane, who claimed that the officers were not to blame for the tragic deaths of Ms. Gonzales's three children, acknowledged that "[t]he tragedy of the Gonzales shootings points out the much larger problem in this country . . . with [protective] orders. They do not protect society from the Simon Gonzaleses of the world."[236] Until the courts take a step back from their "objective" and "gender-neutral" frameworks to acknowledge the link between domestic violence and gender subordination, the promise of equality will remain a far-off goal for women's rights advocates and for the Ms. Gonzaleses of this country.

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out a full understanding of its implications, they are still bringing the issue to the front of public concern).

233. *See, e.g.*, S. REP. NO. 103–138, at 41–42 (1993); COLO. REV. STAT. § 18-6-803.5(3)(a) (2002); Sorichetti v. City of N.Y., 482 N.E.2d 70, 72–73 (N.Y. 1985) (holding the City of New York liable for failing to uphold the special relationship and duty of care owed to a woman to prevent abuse); Bruno v. Codd, 393 N.E.2d 976, 977 (N.Y. 1979) (addressing the need for the police, legislators, and courts to protect women from the brutality of their husbands). *But see Castle Rock*, 125 S. Ct. 2796.

234. *See Castle Rock*, 125 S. Ct. at 2822 (Stevens, J., dissenting) (pointing to state legislation designed to protect the rights of battered women).

235. *See Castle Rock*, 125 S. Ct. 2796.

236. Gonzales vs. Castle Rock, *supra* note 5.