DANIELLE LYNN LORDI*

Police Liability Under State Tort Law for Failure to Enforce Protection Orders: The Last Demand for Accountability

> [T]he plainest possible meaning of the Fourteenth Amendment mandate . . . is that no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation. Put differently, no state may, through denials of protection, permit any citizen to live in a state of "dual sovereignty.". . . No citizen shall be subject to uncheckable violence by anyone other than the state; no citizen shall be under the will and command of anyone other than the state.[1]

When a police department fails to enforce a valid order of protection against domestic violence, the state subjects the possessor of that protection order to a system of "dual sovereignty": the victim of domestic abuse is at once under the will and command of both the state and the batterer. According to Robin West and other advocates for battered women who have argued that systematic maladministration of the laws against domestic violence constitutes a violation of equal protection, the state's failure to protect requires an enforceable remedy.[2] With-

* J.D. Candidate, University of Oregon School of Law, 2007. Associate Editor, *Oregon Law Review*, 2006-07. I would like to thank Professor Caroline Forell for her guidance and enthusiasm. Thanks also to Professors Garrett Epps and Robert Tsai for their insight and encouragement, and to my mother for her selfless support and friendship. Finally, thanks to Professor Merle Weiner, my mentor, for her counsel and unwavering confidence in this and all my endeavors.

[1] Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991).

[2] *E.g.*, Brief of Law Professors as Amici Curiae in Support of Petitioners at 18-30, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032805; West, *supra* note 1, at 135. **R**

out such a remedy, the state's inaction reduces protection orders to little more than dangerously deceptive pieces of paper.

The claim that police failure to enforce protection orders violates the Equal Protection Clause[3] has never reached the U.S. Supreme Court. However, the response at the lower federal court level indicates that the problems of proof in establishing the discriminatory intent required to prove this claim are probably insurmountable.[4] As for other constitutional claims, in May of 2005, a majority of the Court dashed the last remaining hope for domestic violence victims seeking recognition of a due process[5] right to enforcement of their protection orders. In *Town of Castle Rock v. Gonzales,* the Court ruled that Jessica Gonzales did not have a property interest under the procedural aspect of the Due Process Clause in having the police enforce the restraining order she had secured against her estranged husband.[6] Sixteen years earlier, in *DeShaney v. Winnebago County Department of Social Services*, the Court eliminated any possible substantive due process argument along these lines when it held that the Due Process Clause does not require a state to protect its citizens against the private violence of third parties.[7]

In accordance with the historical view that domestic violence is a private matter beyond the scope of criminal law, the U.S. Supreme Court has adamantly refused to recognize any constitutional right to the enforcement of protection orders, even where this enforcement is seemingly mandatory under state statute.[8] Justice Scalia, writing for the *Castle Rock* majority, noted that "[i]n light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested

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[3] The Equal Protection Clause of the Fourteenth Amendment states that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[4] *See* Hynson v. City of Chester Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988) (articulating the plaintiff's burden of proof to establish a prima facie case of discrimination under the Equal Protection Clause when a police department's administration of the laws turns on domestic violence versus nondomestic violence classifications).

[5] The Due Process Clause of the Fourteenth Amendment states that "no state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[6] 125 S. Ct. 2796, 2810 (2005).

[7] 489 U.S. 189, 195 (1989).

[8] *See, e.g.*, *Castle Rock*, 125 S. Ct. at 2801 (referencing the language at issue in the notice to law enforcement officials printed on the back of respondent's restraining order).

for a crime generally does not trigger [constitutional] protections . . . [reflecting] our continuing reluctance to treat the Fourteenth Amendment as a 'font of tort law.'"[9]

As a result, civil liability under state tort law is the last possible basis for accountability. Victims must be able to seek civil damages against state police departments that fail to enforce their orders of protection. Without a meaningful threat of tort liability for failure to enforce, protection orders do little more than pay lip service to the safety of the victims that they are supposed to protect.

Part I of this Comment will describe the history and purpose of domestic violence protection order statutes, both nationally and in Oregon. It will analyze victims' use and the efficacy of these orders to demonstrate their value in protecting individual victims' safety and combating the domestic violence epidemic.

Part II will describe the failure of claims that a state's refusal to protect an individual from the violence of third parties violates due process. It will also examine the doomed equal protection argument that failure to enforce protection orders constitutes sex discrimination.

Part III will examine civil liability under state tort law systems, which is the last viable route that domestic violence victims may take to hold authorities accountable for failure to enforce protection orders. It will also assess Oregon tort law as it applies to the civil liability of local police agencies that fail to enforce Family Abuse Prevention Act restraining orders.

Part IV will argue for national adoption of the Oregon approach of abolishing the public duty doctrine and imposing a statutory duty to enforce. It will also advocate codification of an explicit cause of action within protection order statutory schemes in every state, which will allow domestic violence victims to sue police departments for failure to enforce. Together, these methods create a strong basis for liability and thus encourage the enforcement of domestic violence protection orders.

[9] *Id.* at 2810.

I

CIVIL PROTECTION ORDERS AND DOMESTIC VIOLENCE

A. Historical Overview

A battered woman faces unique obstacles in securing state protection against domestic violence, including historic tolerance of this behavior and sporadic enforcement of the laws against it.[10] The context in which the law enforcement response to domestic violence developed reveals archaic notions about violence against women committed by intimate partners—notions that have greatly affected the state of modern domestic violence law. This nation's treatment of domestic violence has evolved from legal approval in times of coverture, to tolerance in the interest of so-called marital privacy, to an independent grassroots victim-assistance movement, to, finally, state condemnation and accompanying legislative action.[11] A major shift has occurred in the past twenty-five years in response to the efforts of the women's movement of the 1960s and 1970s to make domestic violence an issue of public concern.[12] Even so, many obsolescent attitudes about domestic violence persist, which makes law enforcement accountability vitally important to both the safety of domestic violence victims and the equality of women.

The common law doctrine of coverture, by which women ceased to exist legally upon marriage, persisted from the time of America's founding through the late nineteenth century.[13] Coverture made a man liable for the actions of his wife.[14] Correspondingly, a man had the right of chastisement, which permitted him to subject his wife to beatings when she was disobedient.[15] Although some states had criminalized wife beating by the late

[10] *See, e.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661-65. *See also* Kapila Juthani, Note, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 53-56 (2003) (exploring the historical police response to domestic violence and sexual assault and the persistence of privacy notions regarding domestic violence).

[11] Sack, *supra* note 10, at 1666. **R**

[12] *Id.*

[13] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13 (2000).

[14] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122-23 (1996).

[15] *Id.*

1800s, such conduct was informally tolerated well into the twentieth century.[16] Both law enforcement and court systems viewed domestic violence as existing within the private sphere and, thus, outside the law's reach.[17]

In the 1970s, this notion of the private domestic sphere shaped the policies of local police departments regarding their responses to reports of domestic abuse. Police commonly responded to these low-priority calls by telling the victim that there was nothing they could do or by instructing the batterer to take a walk to "cool off."[18] With police explicitly instructed to avoid arrest and prosecutors dismissing the few cases in which arrests were made, the criminal law was virtually useless to a domestic violence victim.[19] Furthermore, there were no effective civil remedies available to battered women, except in limited cases as part of a divorce proceeding.[20]

In response to the tireless efforts of battered women's advocates in the mid to late 1970s, state legislatures began to enact civil protection order statutes to protect victims of domestic violence against their abusers.[21] All fifty states had enacted domestic violence civil protection-order legislation by 1994.[22] These statutes provide victims of domestic violence with a comprehensive remedy to prevent future violence.[23] Depending on the jurisdiction, relief may include prohibiting the abuser from contacting the victim, awarding temporary child custody to the victim, ordering the abuser to vacate the residence in which he and the victim reside, requiring the abuser to seek counseling, or some combination of the above.[24] Protection orders are relatively easy to obtain and they normally require only the preponderance of the evidence burden of proof.[25] The protection of a temporary order is quickly available by participation in an ex parte proceeding and is effective until a hearing on the issuance

16 Sack, *supra* note 10, at 1661-62. **R**

17 *Id.* at 1662.

18 *Id.*

19 *See id.* at 1662-65.

20 *Id.* at 1665.

21 *Id.* at 1667.

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

23 See *id.* at 121 (providing an illustrative list of remedies).

24 *Id.* at 100.

25 *Id.* at 101.

of a permanent order.[26] In nearly every state, the violation of a civil protection order is at least a misdemeanor, and in most states, one who violates an order can be held in civil or criminal contempt as well.[27]

The next section describes Oregon's civil protection order statutory scheme to illustrate how these statutes work. To understand Oregon's approach to municipal police liability for failure to enforce protection orders, which is discussed in Part III.B of this Comment, a description of Oregon's Family Abuse Protection Act is essential.

B. Civil Protection Orders in Oregon

In 1977, Oregon enacted the Family Abuse Prevention Act (FAPA).[28] A FAPA order allows a person who was a victim of domestic abuse within the preceding six months to obtain a restraining order against further abuse without having to file for divorce or legal separation.[29] This statute, like many other state civil protection-order statutes, requires an Oregon victim to prove a danger of future abuse by a preponderance of the evidence.[30] "Abuse" is defined as attempting to cause or actually causing bodily injury, placing another in fear of imminent bodily injury, or forcing, overtly or by threat, another to engage in sexual relations.[31] A FAPA restraining order is available only against a family or household member,[32] and the victim and abuser must both be eighteen or older, with few exceptions.[33]

Under FAPA, if the judge at an ex parte hearing finds that

[26] *Id.* at 119.

[27] *Id.* at 101. In some states, repeat violations of civil protection orders can be charged as a felony subjected to both fines and possible jail time. *Id.*

[28] OR. REV. STAT. §§ 107.700-107.732 (2003).

[29] *Id.* § 107.710(1), (3). To do so, the victim must file a petition with the circuit court alleging that she or he is in imminent danger of further abuse. *Id.* § 107.710(1). The six-month requirement is waived if the abuser lives more than 100 miles from the victim or if the abuser has been in jail or prison during the preceding six-month period. *Id.* § 107.710(6).

[30] *Id.* § 107.710(2).

[31] *Id.* § 107.705(1).

[32] *Id.* "Family or household members" are defined as the victim's spouse; former spouse; adults related to the victim by blood, marriage, or adoption; persons cohabitating or who have cohabitated with the victim; persons who have been involved in a sexually intimate relationship with the victim within the preceding two years; or the unmarried parent of the victim's child. *Id.*

[33] *See id.* § 107.726 (listing exceptions that apply when the minor is the spouse or former spouse of the respondent or a person who has been sexually intimate with the respondent if that respondent is over the age of eighteen).

there exists imminent danger to the victim's safety, the judge must issue a temporary protection order.[34] This order may include an award of temporary custody of minor children to the victim.[35] At the request of the petitioner, the judge must order the abuser to leave the couple's mutual residence, refrain from contacting the petitioner, remain a certain distance from the victim, refrain from bothering the victim in any way, or any combination of the above.[36] The respondent then receives notice that he may request a hearing within twenty-one days if he wishes to contest the order or any of its provisions.[37] If a permanent order is issued, it is effective for up to one year.[38] A police officer responding to a call about a FAPA order violation must arrest the batterer if there is probable cause to do so.[39]

Civil protection order systems, both nationally and in Oregon, depend on police departments to enforce their provisions. The following section shows that most abusers obey the civil protection orders against them.[40] The incentive to obey is clearly related to the likelihood of police enforcement. In this way, enforcement is vital to ensuring an order's actual and perceived efficacy.

C. Use and Efficacy of Civil Protection Orders

Domestic violence primarily affects women. According to a report published by the U.S. Department of Justice, 85% (or 588,490) of the 671,790 nonfatal intimate-partner victimizations reported in 2001 involved female victims.[41] This report also re-

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[34] *Id.* § 107.718(1).

[35] In 2005, the Oregon legislature passed Senate Bill 424, which gives courts discretion in awarding temporary custody of minor children to a restraining order petitioner. All other forms of relief, if requested, must be awarded once a preliminary finding of danger has been made. S.B. 424, 73rd Legis. Assem., Reg. Sess. (Or. 2005).

[36] § 107.718. The above list is not exhaustive. See § 107.718(1)(a)-(i) for a detailed list of available remedies.

[37] *Id.* § 107.716.

[38] *Id.* § 107.718(3). FAPA orders may be renewed beyond one year upon a finding that a person in the petitioner's situation would reasonably fear further abuse if the order were not to be renewed. *Id.* § 107.725.

[39] *Id.* § 133.310(3). *See infra* note 144 and accompanying text. **R**

[40] *See infra* text accompanying notes 48-56.

[41] CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1, 1993-2001 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf. "Intimate partner violence" is defined in this study as nonfatal violent victimizations committed by current or former spouses, boyfriends, or girlfriends of the

vealed that a current or former intimate partner killed 33% of female murder victims in that year, while only 4% of male murder victims were killed by current or former intimate partners.[42] Many incidents of intimate partner abuse, however, are never reported to law enforcement.[43] Of a conservatively estimated two million women who are physically assaulted, stalked, or raped each year by an intimate partner, only 20% seek protection orders.[44] The situation in Oregon appears even less optimistic. According to a survey by the Oregon Department of Human Services, an estimated one in ten Oregon women aged twenty to fifty-five experienced intimate partner violence over a five-year period.[45] However, only 9,161 of the estimated 24,428 physical domestic violence assaults committed by intimate partners within the twelve months preceding this survey were reported to law enforcement.[46] Furthermore, only 23% of the victims in these reported incidents actually sought FAPA restraining orders.[47] This means that even fewer victims of intimate partner abuse seek protection orders in Oregon than on average nationally.

If civil protection orders fail to stop abuse, they encourage a false, and therefore dangerous, sense of security. Studies have shown, however, that protection orders help secure the safety of domestic violence victims in two important ways: they deter future violence[48] and prevent an escalation in the severity of future violent incidents.[49] Although earlier studies suggest otherwise,[50] new research finds that civil protection orders decrease future abuse by as much as 68%[51] and keep victims safer over time.[52]

victims. *Id.* Violent acts considered include rape, sexual assault, robbery, aggravated assault, and simple assault. *Id.*

[42] *Id.*

[43] One study estimates that in an average twelve-month period, as many as four million women suffer a serious assault by an intimate partner. AM. PSYCHOL. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10 (1996).

[44] Victoria L. Holt et al., *Do Protective Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16, 16 (2003).

[45] OR. DEP'T OF HUMAN SERVS., INTIMATE PARTNER VIOLENCE IN OREGON: FINDINGS FROM THE OREGON WOMEN'S HEATH AND SAFETY SURVEY 6 (2004), *available at* http://oregon.gov/DHS/ph/ipv/docs/survey.pdf.

[46] *Id.* at 17.

[47] *Id.*

[48] Smith, *supra* note 22, at 123-24. R

[49] *Id.* at 123 & n.189.

[50] *Id.* at 124-26.

[51] *Id.* at 123.

[52] *Id.*

Several studies have also shown that civil protection orders have a positive effect on the personal well-being of the victim.[53] They empower the victim with choice and control.[54] Of the 285 participants interviewed by telephone in a study conducted by the National Institute of Justice, 72% initially said that their lives had improved as a result of having obtained a protection order.[55] In follow-up interviews six months later, 85% of participants said that their lives had improved, 90% reported feeling better about themselves, and 80% felt safer.[56]

Although the percentage of battered women who choose to obtain protection orders is small, it nonetheless represents a significant number of women. Perception of enforcement is necessary to ensuring the safety of these women. Enforcement also likely influences the decisions of the women who do not choose to report domestic abuse or obtain protection orders. If a woman is uncertain whether the police will respond appropriately to a reported protection order violation, she may be reluctant to seek the state's protection. For this same reason, it is also likely that many victims are reluctant to place their lives in the hands of a law enforcement system with ultimate discretion in deciding whether or not to enforce. As a result, accountability for failure to enforce is essential to ensuring the efficacy of existing civil protection orders. It is equally essential to foster trust in the system and, thus, encourage more victims to obtain this effective form of protection from domestic abuse.

The following section discusses one route victims have taken to demand accountability: victims have claimed that police failure to respond adequately to domestic violence incidents constitutes a violation of their constitutional rights.

II

Accountability and the Constitution

Title 42, § 1983 of the *United States Code* provides a federal damages remedy to private individuals when the state has infringed upon their constitutional rights.[57] Domestic abuse vic-

[53] *Id.*

[54] *Id.* at 120.

[55] Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement, and Effectiveness*, 61 J. Mo. B. 29, 37 & nn.104-05 (2005); Smith, *supra* note 22, at 120 & nn.175-76. R

[56] *Id.*

[57] Section 1983 provides that "[e]very person who, under color of any statute, or-

tims have attempted to bring claims under this statute by alleging that police failure to protect them from domestic violence requires constitutional redress on three separate bases: equal protection, substantive due process, and procedural due process. To bring a § 1983 claim, a plaintiff must demonstrate (1) that the conduct was committed by an individual acting under the color of state law, and (2) that such conduct infringed upon the plaintiff's constitutional rights.[58]

A. Equal Protection: Problems of Proof

Battered women have attempted to argue that a state's inadequate response to domestic violence committed against them violates the Equal Protection Clause of the U.S. Constitution.[59] Unlike race, for example, gender is not considered a "suspect class" by the U.S. Supreme Court, which means that a gender-based law does not trigger the Court's most critical strict scrutiny review.[60] Instead, when a state seeks to defend a gender-based law, it must only establish an exceedingly persuasive justification for differentiating on that basis.[61] In order to invoke this intermediate scrutiny, however, the plaintiff must establish either that the police department's policy is gender-discriminatory on its face or that the policy intentionally discriminates against women as a class.[62] Although the Court has never addressed an Equal Protection Clause claim in the context of restraining order enforcement, decisions from the lower courts indicate that it would be nearly impossible for such a claim to succeed. Claims of unequal police protection under the Fourteenth Amendment are un-

dinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . shall be liable to the party injured . . . for redress . . . ." 42 U.S.C. § 1983 (2000).

[58] *Id.*

[59] *Compare* Watson v. City of Kansas City, 857 F.2d 690, 696 (10th Cir. 1988) (holding that city police department's policy of treating domestic violence incidents as low priority did not violate equal protection where plaintiff could not show sufficient discriminatory intent), *with* Thurman v. City of Torrington, 595 F. Supp. 1521, 1527-28, 1529 (D.C. Conn. 1984) (denying city's motion to dismiss plaintiff's equal protection claim where city's practice of affording inadequate protection to women complaining of domestic abuse operated as an administrative classification used to implement the law in a discriminatory fashion on the basis of sex). Since *Torrington*, no plaintiff has been able to establish sufficient discriminatory intent in claiming a violation of equal protection for police failure to respond adequately to domestic violence crime.

[60] *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996).

[61] *Id.*

[62] *See* Juthani, *supra* note 10, at 58. **R**

likely to withstand the tremendous burden of establishing the requisite intent to discriminate. Even if discriminatory intent is somehow shown, if the state proves an important government objective to which the classification substantially relates, the plaintiff loses.[63]

The 1988 case *Hynson v. City of Chester* demonstrates the difficulties involved with using § 1983 to sue state police departments or officials under the Equal Protection Clause.[64] In this case, the plaintiff alleged that the state police department's policy of ignoring domestic violence complaints violated the deceased victim's right to equal protection of the laws and that the police failed to protect the deceased from her estranged boyfriend who murdered her at her place of work.[65]

The Third Circuit considered whether a policy of treating domestic violence differently than nondomestic violence crimes discriminated against women on its face absent a showing of discriminatory intent.[66] The court noted what it perceived as "a growing trend of plaintiffs relying upon the [D]ue [P]rocess and [E]qual [P]rotection [C]lauses . . . to force police departments to provide women with the protection from domestic violence that police agencies are allegedly reluctant to give."[67] In response to this trend, the court articulated a clear standard for other courts to follow regarding equal protection claims of this kind. This new standard declared that in order for a plaintiff to survive summary judgment, she would have to show sufficient evidence from which a jury could infer that the policy or custom in question was enacted to provide less protection to domestic violence victims than to other victims of violent crime, that a motivating factor in adopting such a policy was discriminatory intent against women as a class, and that the plaintiff was injured because of the policy or custom.[68] The court remanded the case back to the trial court

[63] United States v. Virginia, 518 U.S. at 532-33.

[64] 864 F.2d 1026 (3d Cir. 1988).

[65] *Id.* at 1027-28. Although the victim in this case had obtained a temporary protection order, that order had expired by the time the victim called the police for assistance. *Id.* The legal standard articulated, however, applies to victims who might bring suit under the Equal Protection Clause against police departments for failure to enforce a valid protection order, as well as for failure to respond to reports of domestic abuse absent the existence of any valid order or protection.

[66] *Id.* at 1027.

[67] *Id.* at 1030.

[68] *Id.* at 1032-33.

to apply this test.[69]

Because domestic violence laws protect victims of both genders, police department policies that designate domestic violence assaults as low priority are not facially discriminatory even though these assaults primarily victimize women. Furthermore, it is extremely difficult for a plaintiff to prove that discriminatory intent against women as a class was a motivating factor of the police department in enacting the policy. As Catharine MacKinnon remarked in a debate concerning the defunct civil rights provision of the Violence Against Women Act, "[t]he definition of intent . . . under the Fourteenth Amendment has made the Fourteenth Amendment nearly worthless to women. That is, if you don't think bad thoughts about women while doing bad things to them, it doesn't violate the Equal Protection Clause."[70]

It is even more difficult to prove the necessary discriminatory intent for an equal protection claim today. An increased awareness about domestic violence has developed since *Hynson*, and local law enforcement domestic violence policies have changed, at least on paper, to reflect this awareness. It is no longer acceptable to classify domestic violence crimes as low priority. Many states have even enacted mandatory arrest policies for domestic violence incidents. It would, therefore, be extremely difficult to show discriminatory intent on the face of today's domestic violence police policies, as they appear to place these incidents at the top of the priority list. While the lip service paid to prioritizing domestic violence is encouraging, this does not mean that the policies are enforced. It is clear from recent lawsuits against state police departments, such as *Castle Rock*, that just because the policy looks good does not mean the mindset of the individuals enforcing it has changed. Nevertheless, in light of standards like that set forth in *Hynson*, the equal protection route looks all but closed off to women who wish to invoke its protection against inadequate police response to domestic violence.[71]

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[69] *Id.* at 1033. Although the court found that the evidence proffered, surprisingly, was sufficient to show discriminatory intent, it ruled against the plaintiff on the basis that the officers possessed a qualified immunity from suit. *See* Hynson v. City of Chester, 731 F. Supp. 1236, 1240-41 (E.D. Pa. 1990). It is, of course, unclear how the lower court might have decided if this immunity was not available.

[70] Charles Fried & Catharine MacKinnon, *Arguing the Violence Against Women Act: Two Views* 51:15-51:32 (Berkman Ctr. for Internet & Soc'y at Harvard Law Sch. webcast May 1, 2000), http://cyber.law.harvard.edu/events/vaw/.

[71] A recent case from the Ninth Circuit was remanded to allow consideration of the equal protection question when the family of a wife slain by her estranged hus-

B. Substantive Due Process: No Duty to Protect

Women have also argued that police failure to protect them as victims of domestic violence violates substantive due process under the Fourteenth Amendment. For such a claim to succeed, the victim must show that she was deprived of a liberty interest[72] in that she was denied the right to affirmative police protection for failure to arrest and enforce her restraining order.

This claim was effectively rejected in 1989 when the U.S. Supreme Court declared that the Due Process Clause did not require a state to protect its citizens against third party violence in *DeShaney v. Winnebago County Department of Social Services*.[73] In *DeShaney*, local child protection services failed to protect Joshua, a young boy, by failing to take him from his father's custody after receiving numerous complaints of abuse and having reason to believe that the abuse was occurring.[74] His father's beatings eventually left the boy with permanent brain damage.[75] The plaintiff brought a § 1983 action claiming that the state's failure to protect the young boy constituted a violation of his liberty, which is a substantive due process right under the Constitution.[76]

The Rehnquist majority rejected this claim. The Court held that the substantive due process clause did not require affirmative, protective action by the state to ensure minimal levels of safety and security to private individuals.[77] Rather, the Court said that substantive due process was merely a limitation on the state's power to affirmatively deprive an individual of safety and security.[78] As the Court noted, "[the Fourteenth Amendment's] purpose was to protect the people from the State, not to ensure that the State protected them from each other."[79]

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band was denied the chance to prove an equal protection violation at the trial court level. Estate of Macias v. Ihde, 219 F.3d 1018, 1028-29 (9th Cir. 2000). Finally, in June of 2002, six years after the murder/suicide, the county offered to settle the case for one million dollars and the plaintiffs agreed. Nancy K.D. Lemon, *Sonoma County, California, Sheriff's Department Settles Domestic Violence Murder Case for One Million Dollars*, 8 DOMESTIC VIOLENCE REP. 1, 15 (2002). Although this case is encouraging, it is not indicative of future success in proving discriminatory intent because it was settled.

[72] Juthani, *supra* note 10, at 58. **R**

[73] 489 U.S. 189, 195 (1989).

[74] *Id.* at 191-93.

[75] *Id.* at 193.

[76] *Id.* at 191, 195.

[77] *Id.*

[78] *Id.* at 195.

[79] *Id.* at 196.

The Court's reasoning contrasts directly with Robin West's view that the Fourteenth Amendment's main purpose was to ensure that no state could deprive an individual of the protections afforded by the civil and criminal law against private violence.[80] The Court's reasoning is also antithetical to Catharine MacKinnon's theory of a feminist state, in which she argues that the negative conception of liberty, which is the foundation of American Constitutional Law and the principle behind the *DeShaney* decision, makes it impossible for women to achieve equality within the system.[81] She reasons that:

> If one group is socially granted the positive freedom to do whatever it wants to another group, to determine that the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it the equal of the first. For women, this has meant that civil society, the domain in which women are distinctively subordinated and deprived of power, has been placed beyond reach of legal guarantees.[82]

Within this framework, battered women have only the right to be left alone—alone with their batterers. They are denied the positive liberty of protection from male violence.

Alternatively, the *DeShaney* petitioners argued that even if the Court found no duty to protect Joshua from the violence of his father initially, a special relationship created between Joshua and the state imposed upon the state a constitutional duty to protect him.[83] This special relationship, they argued, formed when the state took temporary custody of Joshua.[84] When the state failed to discharge the duty to protect him after this point, the petitioners claimed, by returning him to the custody of his father, it deprived him of substantive due process.[85] The majority rejected this argument as well.[86] While the Court acknowledged that the state may have been aware of Joshua's situation, it also noted that the state did not create the danger, nor did it do anything to make the situation worse by returning Joshua to his father's

[80] West, *supra* note 1, at 129. **R**

[81] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 164-65 (1989).

[82] *Id.*

[83] *DeShaney*, 489 U.S. at 197.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 198.

care.[87] The Court coldly reasoned that Joshua was in "no worse position than that in which he would have been had [the state] not acted at all."[88]

The Court expressly declined to address, however, whether Wisconsin's child protection statutes created a constitutional entitlement to protection services under the procedural component of the Due Process Clause.[89] It was precisely this question of procedural due process that the Court answered in May 2005.

C. Procedural Due Process: The Last Constitutional Chance

Sixteen years after the *DeShaney* decision, the Court addressed whether a state's failure to protect might violate the procedural component of the Due Process Clause. In *Town of Castle Rock v. Gonzales*,[90] the Court held that Jessica Gonzales did not have a property interest in police enforcement of her restraining order.[91] The shocking facts of this case make the Court's rejection of this last chance for constitutional protection especially difficult to swallow.

The facts are, even by Justice Scalia's standards, "horrible."[92] Jessica Gonzales obtained a temporary restraining order as part of her divorce proceedings that commanded her estranged husband not to "molest or disturb" the peace of her or her three daughters.[93] When made permanent on June 4, 1999, it was altered to give the respondent ex-husband custody of their three daughters on alternate weekends, two weeks during the summer, and a prearranged, midweek dinner visit upon reasonable notice.[94] Late in the afternoon of June 22, eighteen days after the issuance of this order, the three girls disappeared from Jessica's front lawn where they had been playing.[95] Suspecting that her husband had taken them, she called the police.[96] The police responded, viewed the restraining order, and told Jessica there was nothing they could do.[97] She was instructed to call if her ex-hus-

[87] *Id.* at 201.
[88] *Id.*
[89] *Id.* at 195 n.2.
[90] 125 S. Ct. 2796 (2005).
[91] *Id.* at 2810.
[92] *Id.* at 2800.
[93] *Id.* at 2800-01.
[94] *Id.* at 2801.
[95] *Id.*
[96] *Id.*
[97] *Id.*

band and daughters did not return by 10 p.m.[98] At 8:30 p.m., Jessica talked to her ex-husband and learned that he was with the girls at an amusement park.[99] She called the police again, and they reiterated that she should call back at 10 p.m.[100] She called at 10 p.m., as instructed, and was told to call back at 12 a.m.[101] She called at 12 a.m. and was told that an officer had been dispatched, yet no one arrived.[102] She went to the police station and filed an incident report around 1 a.m.[103] An officer took the report and went to dinner.[104] At 3:20 a.m., Jessica's ex-husband arrived at the police station and was killed in a shoot-out with the officers.[105] The police found Jessica's three girls in the cab of her ex-husband's truck, murdered.[106]

Jessica sued under § 1983 and claimed that the police's blatant refusal to enforce her restraining order violated her procedural due process rights.[107] The Tenth Circuit Court of Appeals reversed the district court's dismissal of Jessica's claim and held that she had a protected property interest in the enforcement of her restraining order, denial of which constituted a violation of her right to procedural due process.[108] This court found that the city had deprived her of this right when the police refused to seriously consider her pleas for enforcement.[109]

The U.S. Supreme Court reversed; Justice Scalia, writing for the majority, gave no deference to the Tenth Circuit when he reversed its decision.[110] The majority opinion stated that the procedural component of the Due Process Clause does not protect everything that could be described as a benefit.[111] The Court held that there must be a legitimate claim of entitlement—something more than an abstract desire or a one-sided expectation.[112]

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98 *Id.*
99 *Id.*
100 *Id.* at 2801-02.
101 *Id.* at 2802.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 Gonzales v. City of Castle Rock, 366 F.3d 1093, 1095-96 (10th Cir. 2004), *rev'd*, 125 S. Ct. 2796 (2005).
108 *Id.* at 1109.
109 *Id.* at 1109-10.
110 *Castle Rock*, 125 S. Ct. at 2803.
111 *Id.*
112 *Id.*

The key to whether an entitlement existed in this case, the Court noted, was the written notice to law enforcement on the back of Jessica's restraining order, which described a police officer's duty to enforce that order.[113]

That notice stated that the law enforcement officer "shall use every reasonable means to enforce a restraining order" and that the officer "shall arrest . . . or . . . seek a warrant" when probable cause exists that a violation has occurred.[114] Despite the clarity of this language, Scalia declared that "[a] well established tradition of police discretion has long coexisted with *apparently* mandatory arrest statutes."[115] A statutory entitlement, he reasoned, would require a stronger indication that action was required than did the language contained in the notice.[116] For the U.S. Supreme Court, mandatory, very simply, did not mean mandatory. Jessica's interest was held to stem from one part of a greater statutory scheme, giving the option to either (1) arrest or (2) make a reasonable effort to respond.[117] According to the Court, this choice of options was a clear indicator that the statute invited police discretion.[118] The Court also pointed out that the statutory obligation to seek an arrest warrant was one of mere procedure and therefore did not rise to the level of an entitlement under due process.[119]

The Court noted, however, that even if an entitlement could be found, it would not necessarily create a property interest protected by the Due Process Clause.[120] Enforcement of a restraining order, the majority reasoned, had no monetary value.[121] Rather, the interest in enforcement arose only incidentally from a function that states have always performed: that of arresting wrongdoers.[122] In a few brief pages, the U.S. Supreme Court closed its doors to battered women and, thus, clearly declared

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113 *Id.* at 2804-05.

114 *Id.* at 2805 (quoting COLO. REV. STAT. § 18-6-803.5(3)(a)-(b) (2004)).

115 *Id.* at 2805-06 (emphasis added).

116 *Id.* at 2806.

117 *Id.* at 2807-08.

118 *Id.* ("Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague.").

119 *Id.* at 2808.

120 *Id.* at 2809.

121 *Id.*

122 *Id.*

that their interest in an adequate police response to violence had no constitutional import.

In *Castle Rock*, Justice Scalia acknowledged what he viewed as the Court's reluctance to use the Fourteenth Amendment as a "font of tort law."[123] The majority noted, however, that the states were not rendered powerless by this decision to provide victims of domestic violence with enforceable remedies.[124] Instead, Scalia noted that the individual states were free to propose enforceable remedies, as each saw fit, to promote enforcement of restraining orders within their borders.[125]

There is clearly a distinct qualitative difference between a constitutional remedy and the option of municipal liability under state tort law. The Court's refusal to recognize a battered woman's right to enforcement as a constitutional right implies that such an interest is inferior to other rights that receive constitutional protection. Domestic violence has been historically overlooked and disregarded at both the federal and state levels,[126] and the Court's decision in *Castle Rock* continues that trend.

As the U.S. Supreme Court has refused to recognize a constitutional right to enforcement, civil liability under state tort law is the only tool left to give civil protection orders the teeth they need to protect victims of domestic violence. The following sections survey various state tort law approaches to municipal liability in the context of police failure to enforce civil protection orders.

III

CIVIL LIABILITY FOR FAILURE TO ENFORCE PROTECTION ORDERS

A. General Principles of Civil Liability for State and Local Entities

While all states have waived their blanket common-law immunity from tort liability, two basic protections for state and local police departments remain. These doctrines are hurdles that a victim of domestic violence must overcome in order to hold a state or local police department liable for failing to enforce her

[123] *Id.* at 2810 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

[124] *Id.*

[125] *See id.* ("[T]he people of Colorado are free to craft such a system under state law.").

[126] See *supra* Part I.A.

order of protection. The first is discretionary immunity, which protects police departments from suits relating to decisions of departmental policy.[127] The second hurdle is the public duty doctrine, which provides that when a statute imposes a duty upon a public entity to the public at large, rather than to a particular class of individuals, this duty is not enforceable in tort (i.e., the general police duty to protect the public from violent crime).[128] This public duty has often been summarized as "a duty to all is a duty to none."[129]

As a result of these doctrines, state police departments are usually not liable for failing to provide protection, even if that failure is negligent.[130] There are two exceptions to these doctrines. First, a police department may be held liable for failing to protect a specific person if the department has actively undertaken to protect that individual and that person relies to his or her detriment on that promise of protection.[131] In cases stemming from this exception, courts have held that a special relationship forms between the individual and the government entity that gives rise to liability if a police officer acts negligently.[132] Second, where a statute imposes a duty or specific obligation to a particular class, such as victims of domestic violence, some courts have found that the state may be held liable for negligent performance of that duty.[133] Courts often combine both exceptions in holding that the special relationship created by a protection order imposes a specific statutory duty on police departments to protect domestic violence victims by enforcing that order.[134]

For example, the Tennessee Supreme Court has held that a county police department could be held liable for failing to enforce a restraining order where that restraining order, combined with the statutory mandate, created a special duty to arrest if

127 DAN B. DOBBS, THE LAW OF TORTS 720 (Hornbook Series, West 2000).

128 *Id.* at 723.

129 *Id.*

130 *Id.* at 728-29.

131 *Id.* at 729; Phillips, *supra* note 55, at 30. **R**

132 DOBBS, *supra* note 127, at 729. **R**

133 *Id.* at 724.

134 *See, e.g.*, Calloway v. Kinkelaar, 659 N.E.2d 1322, 1331 (Ill. 1995) (holding that sheriff may be held liable if injured party establishes that she is a person in need of protection); Sorichetti v. City of New York, 482 N.E.2d 70, 76-77 (N.Y. 1985) (holding that when police are made aware of a possible protection order violation, they are obligated to respond); Nearing v. Weaver, 670 P.2d 137, 144-45 (Or. 1983) (en banc) (holding that individuals with protection orders may allege a police officer's failure to perform a specific duty).

probable cause was found.[135] This court held that the officers were not entitled to discretionary immunity from suit because their lack of action was operational and unrelated to decisions of policy.[136] The court also said that the public duty doctrine did not immunize the department because the state affirmatively undertook to protect the petitioner when it issued the order and she relied, to her detriment, on that protection.[137]

Similarly, the New Jersey Superior Court in *Campbell v. Campbell* held that a police officer had no discretion as to whether to arrest when there was probable cause to believe that a protection order had been violated.[138] The court held that the police officers' duties were ministerial and that discretionary immunity only applied to policy or planning decisions made at the highest levels of government.[139]

New York has also employed the special relationship doctrine to impose liability where the police are aware of a possible violation of a restraining order and fail to respond and investigate.[140] While the New York Court of Appeals said that the existence of a protection order itself was not enough to create a special relationship, it allowed the order to be considered as evidence that a special relationship existed.[141] The court held that when police are made aware of a possible violation and fail to respond appropriately or investigate, they are liable for the consequences of their negligence.[142]

While these approaches are commendable and provide useful guidance, Oregon's approach implies a duty directly from the FAPA statute, which is an easily administered and more simplified solution that holds police accountable for their failure to comply with FAPA's mandatory arrest provisions. The following section discusses this approach.

B. Oregon Law and the Statutory Duty to Enforce: Nearing v. Weaver

Under Oregon law, a restraining order imposes a specific stat-

135 Matthews v. Pickett County, 996 S.W.2d 162, 165 (Tenn. 1999).
136 *Id.* at 164.
137 *Id.* at 164-65.
138 682 A.2d 272, 276-77 (N.J. Super. Ct. Law Div. 1996).
139 *Id.* at 274.
140 Sorichetti v. City of New York, 482 N.E.2d 70, 75 (N.Y. 1985).
141 *Id.* at 76.
142 *Id.*

utory duty on police to protect victims of domestic violence. In 1983, the Oregon Supreme Court held that state and local police departments are liable for failing to enforce domestic violence restraining orders in *Nearing v. Weaver*.[143] The court held that the following statute imposed a mandatory duty to arrest:

> A peace officer shall arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that: (a) [t]here exists an order issued . . . restraining the person; and (b) [a] true copy of the order and proof of service on the person has been filed . . . ; and (c) [t]he peace officer has probable case to believe that the person to be arrested has violated the terms of that order.[144]

In *Nearing*, police failed to arrest Henrietta Nearing's estranged husband for violating the restraining order because the officer did not see him on her premises.[145] This estranged husband sought entry to Henrietta's home three more times.[146] During the last of these three incidents, he assaulted Henrietta's friend and damaged his van.[147] In response to the report of this incident, the police department told Henrietta that they would arrest her estranged husband but never did.[148] Two days later, her estranged husband called and threatened to kill Henrietta's friend.[149] The final incident prior to Henrietta's suit involved her estranged husband stopping her and her friend in front of her home, threatening again to kill her friend, and then assaulting him.[150]

The Oregon Supreme Court reversed the judgment of the

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143 670 P.2d 137, 140 (Or. 1983) (en banc). The Oregon Supreme Court has also abolished the public duty doctrine. Brennen v. City of Eugene, 591 P.2d 719, 725 n.4 (Or. 1979) (en banc).

144 *Nearing*, 670 P.2d at 139 n.1 (quoting OR. REV. STAT. § 133.310(3) (1979) (amended 1981)). A companion section mandates arrest at the scene of a domestic dispute when the officer has probable cause to believe that one person has assaulted another or placed another in imminent fear of serious physical injury. OR. REV. STAT. § 133.055(2)(a) (2005). This statutory language is an interesting contrast to the language found to be nonmandatory in the *Castle Rock* decision. While the Colorado statute at issue in the *Castle Rock* case used the word "shall," it also included an instruction to use *every reasonable means* to make an arrest. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2801 (2005). This appears to be an even clearer mandate than that of the Oregon statute interpreted in *Nearing*.

145 *Nearing,* 670 P.2d at 139.

146 *Id.*

147 *Id.*

148 *Id.* at 139-140.

149 *Id.* at 140.

150 *Id.*

lower appellate court that had affirmed the grant of summary judgment in favor of the city and its police officers.[151] The court held that victims of abuse may recover for both physical and emotional injuries that result from a police officer's failure to comply with Oregon's mandatory arrest statute.[152] The court held that the statutory language imposed a duty to protect a specific class of people: victims of domestic abuse.[153] The court ruled that the very purpose of section 133.310(3) of the Oregon Revised Statutes was to negate any discretion in enforcing FAPA orders; therefore, the officers had no discretion in deciding whether or not to arrest.[154] In effect, the Oregon Supreme Court ruled that a police failure to respond once probable cause has been shown entails strict liability under the mandatory arrest statute.

With the Oregon approach in mind, the final section of this Comment advocates a national solution to the accountability problem. This solution calls for other states to adopt the Oregon approach by implying a statutory duty to enforce in the short term. In the long term, it argues that victim advocates should press for the explicit codification of a strict liability cause of action within state civil protection order statutory schemes in order to enable victims of domestic violence to hold police departments liable for failing to enforce their protection orders.

IV

THE SOLUTION: CODIFYING A CAUSE OF ACTION

Accountability for failure to enforce is essential to ensuring the effectiveness of protection orders. When the police fail to pursue or refuse to address protection order violations, women die. Inadequate enforcement also encourages a false sense of security. When victims rely on the police to enforce these orders and that enforcement is sporadic or nonexistent, orders may per-

151 *Id.* at 145.

152 *Id.*

153 *Id.* at 143 ("The statutes in this case . . . are unique among statutory arrest provisions because the legislature chose mandatory arrest as the best means to reduce recurring domestic violence. They identify with precision when, to whom, and under what circumstances police protection must be afforded. The legislative purpose in requiring the police to enforce individual restraining orders clearly is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity.").

154 *Id.* at 142. The court also noted that factual and legal defenses were still available to the department and its officers. *Id.* at 141-42.

petuate future abuse. They may do so by provoking the batterer when the victim calls the police or attempts to leave the relationship, relying on the order to protect her, and no assistance materializes. Nonenforcement of protection orders may also perpetuate further abuse by encouraging the batterer to not take the order seriously. Furthermore, consistent enforcement is essential to foster trust in the system. Such trust would result in more victims obtaining this effective form of protection from domestic abuse.

In the short term, police departments need to be held accountable for failure to provide adequate protection to the holders of civil protection orders. As the U.S. Supreme Court has failed to recognize a constitutional right to have one's protection order enforced, it is vitally important that state tort law be made available to victims. While many states have adopted mandatory arrest policies for violations of protection orders, some still have not.[155] This is the obvious first step.[156] For the majority of states that have adopted mandatory statutory schemes, courts should look to Oregon's approach and imply a statutory duty to enforce by concluding, as the Oregon courts did, that the legislature intended an implied statutory tort. This immediate solution requires no further legislative action and allows victims to hold law

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[155] *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239 n.2 (2005).

[156] Mandatory arrest for domestic violence is an extremely contentious issue. *Compare* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1879-80 (1996) (arguing that the societal benefits gained from mandatory arrest for domestic violence crimes far outweigh any short-term costs to women's autonomy and collective safety), *with* Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 439-41 (2003) (claiming that mandatory arrests have failed to take into account differences among races and cultures), *and* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 565-69 (1999) (proposing a clinical approach as an empowering alternative to mandatory interventions). See generally Miccio, *supra* note 155, at 241-42, for a discussion on the current discourse regarding mandatory arrest as an ideological divide between protagonists, who view such policies as necessary because battered women are incapable of making rational choices, and antagonists, who view such policies as an unnecessary and often racist and sexist regulation of women's lives. Such policies are essential, however, to deal with this overwhelmingly gendered violence. Due to the systemic nature of this problem, this Comment proposes that the most effective mandatory arrest laws contain no-drop provisions, which bar the victim from stopping the prosecution from moving forward. **R**

enforcement accountable for failing to provide the protection it promised by issuing the order without having to prove negligence or physical injury.

States should take this solution one step further, however, and codify a specific cause of action for failure to arrest when there is probable cause to do so. Enacting an express statutory tort cause of action as part of its state protection order legislation would provide victims with a more certain and, therefore, more powerful tool. Such codification would also send a clear message to law enforcement that domestic abuse will not be tolerated and restraining orders must be enforced against abusers consistently.

This statutory tort action should specifically define the duty to be analyzed: the duty of police departments to respond adequately to reported violations of civil protection orders. Breach of this duty should be defined by an illustrative, but not exhaustive, list of qualifying actions: e.g., duty to investigate a reported violation, duty to arrest at the scene when there is probable cause to believe that a violation has occurred, and duty to provide requested protection such as a police escort to a location away from the scene.[157] The statutory standard of care would preempt the reasonable person standard when a police department breaches these specifically illustrated duties and hold police departments strictly liable in these specific and limited cases defined by the statute.[158] The victim would bear the burden of proving, of course, that a violation occurred, that the police department caused the violation, and that there are resulting damages. The statute should allow a plaintiff to recover attorney's fees and all court costs in addition to actual and emotional damages, including purely emotional harm.

For negligent breaches not specifically defined in the proposed statute that might arise, normal negligence law should remain open to victims as a remedy. Police action or inaction should be measured by how a reasonable police officer responding to a domestic abuse assault would respond. It is important to define the standard of care in this way because domestic abuse assaults pose

[157] Particular cases might present unique sets of facts that constitute a police department's breach of duty. An illustrative list does not preclude such claims. These claims are simply subjected to the normal negligence analysis, rather than strict liability under the proposed statute.

[158] It is important to remember that police departments will still have the opportunity to prove that a violation has not actually occurred by a showing of good faith investigation, etc.

unique risks to victims. These crimes require action above and beyond that typically taken in response to stranger assaults. Like any other negligence case, when dealing with actions or inactions not specifically defined in the statute, the plaintiff would have to show that her injury was actually caused by the police department's failure to respond and also that the injury was foreseeable.

CONCLUSION

Catharine MacKinnon and many other feminist scholars have recognized that the negative conception of rights operating in the United States does very little to provide a majority of its population with the tools they need to live freely and equally to men in modern society.[159] We respect the right to be let alone yet ignore the right of each and every woman abused by an intimate partner to have access to at least the same protection the law provides against other violent assaults. In the wake of *Town of Castle Rock v. Gonzales* and the effective denial of all constitutional options, the time to provide victims access to tort remedy is now.

[159] *E.g.,* MACKINNON, *supra* note 81 and accompanying text. **R**