

SURVIVING *CASTLE ROCK*: THE HUMAN RIGHTS OF DOMESTIC VIOLENCE

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INTRODUCTION

On June 22, 1999, the police department of Castle Rock, Colorado repeatedly dismissed Jessica Gonzalez' cries for help after her estranged, abusive husband abducted their three young daughters from her front yard.² In so doing, law enforcement ignored a permanent restraining order Jessica had taken against her estranged husband explicitly stating on the back of the order that law enforcement "shall" enforce its terms using "every reasonable means" and arrest or seek an arrest warrant following any attempted or actual violation.³ Within ten hours of learning of her daughters' disappearance, Jessica called and met with law enforcement nine times, but police refused to enforce the order.⁴ Again and again, law enforcement instructed Jessica to wait and see and then check back with them hours later, neglecting to take any action when Jessica filed a report at the station; in fact, they never dispatched any officer even after promising that they would take action.⁵ While Jessica feared for her daughters' lives, law enforcement took dinner breaks, searched for a lost dog, and sent three officers to investigate a routine traffic stop.⁶ Ultimately, despite Jessica's numerous requests for help and personal attempts to find her daughters by phone and by going to her estranged husband's apartment, and without law enforcement making any reasonable effort to enforce

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² *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 753 (2005).

³ *Id.* at 752. The preprinted notice to law enforcement officials on the back of the restraining order read:

[Y]ou shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order. *Id.*

⁴ Testimony of Jessica Lenahan, Inter-Am. Comm'n H.R. (Oct. 22, 2008), available at <http://www.chrgj.org/events/docs/Jessica%20Testimony%20FINAL%20for%20posting.pdf>.

⁵ *Town of Castle Rock*, 545 U.S. at 753-54.

⁶ Testimony of Jessica Lenahan, Inter-Am. Comm'n H.R. (Oct. 22, 2008), available at <http://www.chrgj.org/events/docs/Jessica%20Testimony%20FINAL%20for%20posting.pdf>.

the order or locate the children, Jessica's estranged husband opened fire on the Castle Rock Police Station.⁷ Law enforcement shot back, killing him, before finding Jessica's three children dead in the back of their father's truck.⁸ Law enforcement then detained and interrogated Jessica for twelve hours.⁹ Jessica was never allowed to identify the bodies of her children, and she still does not know whether it was the police or her estranged husband that fired the shots that killed her three girls.¹⁰

Subsequently, Jessica brought suit against Castle Rock, asserting that by failing to enforce the restraining order, the police department had violated her constitutional rights.¹¹ The United States Court of Appeals for the Tenth Circuit sided with Jessica in her action against the State and found that she had a protected property interest that law enforcement had violated without adequate procedural due process.¹² The Supreme Court of the United States reversed, holding that Jessica did not have a constitutional right to police enforcement of the order because Colorado law did not create a personal entitlement to enforcement¹³ and that even if it did create such an entitlement, it would not constitute a property interest warranting due process protections under the Fourteenth Amendment.¹⁴ The Court's opinion invoked earlier decisions in which it had refused to impose affirmative duties on the government,¹⁵ fortifying a deeply ingrained conceptualization of the Constitution of the United States as a "Negative Constitution" that creates a government with restraints on its actions but extremely limited responsibilities to its citizens.¹⁶

⁷ *Town of Castle Rock*, 545 U.S. at 753-54.

⁸ *Id.*

⁹ Testimony of Jessica Lenahan, Inter-Am. Comm'n H.R. (Oct. 22, 2008), available at <http://www.chrgi.org/events/docs/Jessica%20Testimony%20FINAL%20for%20posting.pdf>.

¹⁰ *Id.*

¹¹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750-51 (2005).

¹² *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101, 1117 (10th Cir. 2004) *rev'd sub nom.* *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

¹³ *Town of Castle Rock*, 545 U.S. at 766.

¹⁴ *Id.* at 766-69.

¹⁵ See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989) (holding that state social service workers' failure to remove a repeatedly beaten boy from his abusive father's custody did not deprive the boy of his liberty in violation of the Due Process Clause of the Fourteenth Amendment); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510-11 (1989) (finding that a statute prohibiting the use of public funds and facilities to encourage or counsel a woman to have a nontherapeutic abortion was constitutional because states do not have an affirmative duty to provide access to abortion-related services). *But see* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (holding that prison officials have an affirmative duty under the Eighth Amendment to foster humane conditions and that officials face liability if they fail to protect detainees from violence when they knew about a substantial risk of serious harm).

¹⁶ See, e.g., Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001) (explaining that "judges have dismissed any claim that citizens have any positive rights to government services; that is, any claim that the federal government has an affirmative duty to ensure that its citizens can actually enjoy their constitutional liberties").

After exhausting her domestic remedies, Jessica petitioned the Inter-American Commission on Human Rights to review her case. The Commission approved Jessica's petition on October 7, 2008.¹⁷ Jessica alleged that law enforcement did not adequately respond to her pleas for assistance and that the State never properly investigated the deaths of her three daughters, whose time, place, and cause of death are still unknown.¹⁸ On August 17, 2011, the Commission ruled that the United States had violated Jessica's human rights as well as the rights of other abuse survivors throughout the country. The Commission's report declared that the United States had continuously failed to fulfill its legal obligation to protect individuals like Jessica from domestic violence, and set forth recommendations to guide the country into compliance with international law.¹⁹ The immediate impact of the report is largely symbolic, as the proceedings before the Commission allowed Jessica to tell her story and realize a sense of justice she did not experience in the American system.²⁰ The report's most concrete consequence, however, is that the Commission will continue to monitor the United States and release follow up reports about the country's progress.²¹ Nevertheless, the Commission's findings draw attention to the stark contrast between the American response to domestic violence and international standards, providing an opportunity for reflection and valuable leverage to advocates for reform.²²

Accordingly, this Article will view the Commission's report through the lens of the United States' Negative Constitution and examine the source of the country's incapacity to meet international standards for human rights. Part I will explain the global legal framework for the Commission and its findings before placing the United States' mechanisms for protecting survivors in the context of the Negative Constitution, which exacerbates the vulnerability of underprivileged populations and ensures ongoing social inequality.²³ Part II will describe the potential for

¹⁷ *Gonzales v. U.S.*, Petition 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07 (2007).

¹⁸ *Lenahan (Gonzales) v. U.S.*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011) [hereinafter Report]. While autopsy reports on the children show that they died due to gunshot wounds to the head, when they were shot and whether the bullets originated from the police during the shootout, their father, or someone else remain unknown. *Id.* at 22-23.

¹⁹ *Id.* at 56-57.

²⁰ See Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 *FORDHAM L. REV.* 529, 538 (2008) (explaining that communication with international bodies gave Jessica "some sense of justice" and "provided her with an opportunity to push the United States to answer for its failures, rather than having the issue simply end with the Supreme Court's ruling dismissing her lawsuit.").

²¹ Report, *supra* note 18, at 57 ("The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.").

²² See Lapidus, *supra* note 20, at 538 (observing that international human rights mechanisms cannot force a country's compliance, but that reports on a country's compliance "shine a spotlight on human rights abuses and can shame a country into altering its practices").

²³ See discussion *infra* Part I.B.

American courts to incorporate international standards into legal proceedings and assert that respect for outside sources of law accords with both contemporary developments and history.²⁴ Finally, this Article will argue that a wholesale abdication of negative constitutionalism is necessary to protect the United States against the widely borne economic ramifications of domestic violence, the reputational costs of the nation's failure to participate in the global effort to aid survivors of abuse, and the depreciation of its expressive value as a country with an abysmal legacy of State-sanctioned violence against women.²⁵

I. INTERNATIONAL AND AMERICAN STANDARDS FOR DOMESTIC VIOLENCE

Legal reactions to domestic violence vary distinctly between the international and national levels. Global actors like the Organization of American States have recognized a uniform responsibility for government to take affirmative measures in its response to domestic violence, including the exercise of due diligence by the United States.²⁶ Yet, the Supreme Court has demanded state statutory enactments to achieve government support for survivors while neglecting impediments to implementation and relegating survivors' lives to unlikely protections.²⁷

A. *The Global Laws of Affirmative Measures and Due Diligence*

The Commission's report on Jessica's case emerged from a long tradition of international laws that have strongly favored the intrinsic rights of abuse survivors. The Universal Declaration of Human Rights of 1948, created by a Commission on Human Rights that was newly formed in the wake of the Holocaust, has served as the foundational document for both the United Nations and international human rights.²⁸ Today, the Universal Declaration of Human Rights remains the most important source of protection for human rights,²⁹ recognizing that they are inherent to individuals rather than conferred by a sovereign government onto its people.³⁰ Additional international human rights laws arise from various other treaties, resolutions, and conventions that States have passed.³¹ The Inter-

²⁴ See discussion *infra* Part II.A.

²⁵ See discussion *infra* Part II.B.

²⁶ See discussion *infra* Part I.A.

²⁷ See discussion *infra* Part I.B.

²⁸ See Lapidus, *supra* note 20, at 535-36 (describing the significance and formation of the Universal Declaration of Human Rights).

²⁹ See HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 120 (1996) ("[The United Nation's Universal Declaration of Human Rights of 1948] is the parent document, the initial burst of enthusiasm and idealism, terser, more general and grander than the treaties, in some sense the constitution of the entire movement—the single most invoked human rights instrument.").

³⁰ See Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1164 (1998) (stating that human dignity is "inherent" in the United Nation's Universal Declaration of Human Rights and that "dignity and rights are 'recognized,' not conferred").

³¹ See Lapidus, *supra* note 20, at 535 ("The universal system for the protection of human rights has two dimensions: U.N. Charter-based bodies for the protection of human rights and international treaty-based bodies for the protection of human rights.").

American Convention on the Prevention, Punishment and Eradication of Violence against Women is particularly relevant to contemporary international domestic violence law and policy, and it provides that every woman has the right to be free from violence, the State shall exercise due diligence in its response to violence against women, and any person or group may petition the Commission to review a State's noncompliance with its measures.³²

Global enforcement entities administer justice regionally and based on the extent to which each State has institutionalized these standards. While statutory and constitutional law is a democratic manifestation of majority values, international law is administered by supranational entities of less conventional legitimacy.³³ Particularly relevant to Jessica's case, the Commission supervises human rights in the member states of the Organization of American States (OAS)³⁴ and, in conjunction with the Inter-American Court of Human Rights, investigates complaints and makes recommendations concerning human rights.³⁵ The Commission has treated the American Declaration of the Rights and Duties of Man³⁶ as binding on OAS member states that have not ratified the American Convention on Human Rights, including the United States.³⁷ According to the Commission, the United States is bound as a matter of law to take affirmative measures to give effect to the rights contained in the Declaration.³⁸

After years of correspondence, briefs, and hearings, the Commission ruled in Jessica's favor, holding that the State had deprived her of equal protection, failed to take reasonable measures to protect its citizens, and provided an inadequate response to private violence. First, the Commission found that the United States had violated Article II³⁹ of the Declaration by failing to protect Jessica and her

³² Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, June 9, 1994, 33 I.L.M. 1534.

³³ See FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* 273 (2011) (describing legislatures, executives, and constitutions as democratically legitimated at varying degrees of collective consent and acknowledging "supranational legal bodies like the European Court of Human Rights or the International Criminal Court, whose basis of legitimacy is much murkier than those of national-level courts").

³⁴ The OAS is an agent of the United Nations that fosters cooperation and integration among its members in a hemispheric inter-state society. BETTY HORWITZ, *THE TRANSFORMATION OF THE ORGANIZATION OF AMERICAN STATES: A MULTILATERAL FRAMEWORK FOR REGIONAL GOVERNANCE* 23 (2011).

³⁵ See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 439 (1990).

³⁶ Ninth International Conference of American States, American Declaration of the Rights and Duties of Man, Apr. 1948, O.A.S. Res. XXX (1948) [hereinafter Declaration].

³⁷ See S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 41 (2001) (explaining that the American Declaration on the Rights and Duties of Man is the principal instrument for determining applicable substantive rights for countries in proceedings before the Commission that are not parties to the American Convention on Human Rights).

³⁸ Report, *supra* note 18, at 32-33.

³⁹ "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Declaration, *supra* note 36, art. II.

three daughters from domestic violence.⁴⁰ The Commission echoed international and regional systems, announcing that a State's "failure to act with due diligence" to prevent domestic violence constitutes discrimination and denies women equality before the law.⁴¹ Second, the Commission found that the United States had violated Article I⁴² and Article VII⁴³ of the Declaration because it did not take reasonable measures to protect Jessica's children's lives.⁴⁴ A person's right to life⁴⁵ is the most fundamental human right, and the Commission considered measures to protect the right to life like enforcement of restraining orders critically important for vulnerable populations—especially young girls.⁴⁶ Finally, the Commission found that the United States had violated articles V⁴⁷ and VI,⁴⁸ which pertained to Jessica's right to judicial protection.⁴⁹ Specifically, the United States violated Jessica's right to judicial protection⁵⁰ when it did not enforce the restraining order⁵¹ and when it failed to adequately investigate and provide access to information about the deaths of Jessica's children.⁵²

The report's findings and aspirations extended far beyond Jessica's circumstances. The Commission acknowledged that Jessica's case was one of several instances of the United States having violated citizens' human rights by failing to take reasonable measures to address domestic violence.⁵³ The Commission specified that the report's conclusions were tailored to the question of whether Jessica had the opportunity to present her claims and be heard and also that "it is not the formal existence of judicial remedies that demonstrates due diligence, but rather that they are available and effective."⁵⁴ Thus, while the report focused on Jessica's case,⁵⁵ its recommendations encompassed the entire national response to domestic violence.⁵⁶

⁴⁰ Report, *supra* note 18, at 2.

⁴¹ *Id.* at 30.

⁴² "Every human being has the right to life, liberty and the security of his person." Declaration, *supra* note 36, art. I.

⁴³ "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." Declaration, *supra* note 36, art. VII.

⁴⁴ Report, *supra* note 18, at 2.

⁴⁵ In the international context, a right to life refers to the right of a human being to live and does not connote opposition to reproductive choice. *Id.* at 30-31.

⁴⁶ *Id.* at 31.

⁴⁷ "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." Declaration, *supra* note 36, art. V.

⁴⁸ "Every person has the right to establish a family, the basic element of society, and to receive protection therefor." *Id.* at art. VI.

⁴⁹ Report, *supra* note 18, at 2.

⁵⁰ *Id.* at 53.

⁵¹ *Id.* at 47.

⁵² *Id.* at 48.

⁵³ *Id.* at 37-38.

⁵⁴ *Id.* at 46.

⁵⁵ The Commission's recommendations to specifically address Jessica's case were for the State to investigate the cause, time, and place of her daughters' deaths, investigate the systemic failures that contributed to the unenforced restraining order, and offer full reparations to Jessica and her next-of-kin.

The Commission's report signaled the systematic failures of the United States to realize widely accepted international standards for human rights, particularly considering that due diligence is a longstanding requirement of State responsibility in the prevention and punishment of violent acts.⁵⁷ Moreover, the report pointed to various international instruments to show the existence of a global consensus that states have an obligation to exercise due diligence in response to the problem of violence against women.⁵⁸ The report offered four principles highlighted by current law and practice: the State may incur international responsibility if it fails to act with due diligence to address violence against women; international consensus "underscore[s] the link between discrimination, violence against women, and due diligence; due diligence includes adequate judicial remedies for victims; and the State must consider factors like age and minority status that could place individuals at heightened vulnerability for victimization."⁵⁹

The report addressed the United States' response both in terms of law enforcement and the law itself. First, it detailed standards for law enforcement's reaction to abusers' potential violations of restraining orders and made recommendations to better protect the human rights of survivors.⁶⁰ Unlike the steps taken by the officers in Jessica's case, minimum standards for officers are that they read an order in its entirety to determine whether it has been violated, verify the existence of an order even when its holder does not have a copy, and attempt to locate the abuser in violation of an order and seize his or her firearms.⁶¹ An adequate response requires defined protocol,⁶² and law enforcement should be trained in the complex problem of domestic violence⁶³ and be able to determine the risks of a particular violation by weighing situational factors, including an aggressor's access to weapons, threats of suicide, and history of violence.⁶⁴

Turning to the judiciary, the report described the pressing need for multifaceted legal reforms across the country. The Commission acknowledged that as a result of the Supreme Court's holdings in *Castle Rock v. Gonzales*,⁶⁵

Id. at 56.

⁵⁶ *Id.* at 56-57.

⁵⁷ See generally Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265 (2004).

⁵⁸ Report, *supra* note 18, at 34. These instruments included General Assembly resolutions, widely approved declarations and platforms, treaties, and the jurisprudence of universal and regional legal systems. *Id.* See also Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 292-95 (1994) (discussing the emergence of the belief that violence against women is a matter of human rights).

⁵⁹ Report, *supra* note 18, at 35-36.

⁶⁰ *Id.* at 40.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 41.

⁶⁴ *Id.* at 40.

⁶⁵ *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (highlighting police discretion in the enforcement of restraining orders and holding that a domestic violence survivor did not have a right under the Due Process Clause of the Fourteenth Amendment to enforcement of an order).

DeShaney v. Winnebago County Department of Social Services,⁶⁶ and *United States v. Morrison*,⁶⁷ the United States might have improperly narrowed the remedies available to domestic violence survivors in legal proceedings against government officials.⁶⁸ While legislative developments like the Violence Against Women Act of 1994⁶⁹ are positive, the Supreme Court has left victims of domestic violence with no constitutional or federal statutory remedy when police are grossly negligent in the execution of their duty to protect an individual's physical security.⁷⁰ Therefore, the Commission called for new policies and legal approaches that would mandate enforcement of precautionary measures to benefit survivors, better protect children, and help to restructure discriminatory sociocultural patterns that compromise survivors' safety by impeding the American response to domestic violence.⁷¹

B. American Constitutionalism's Astonishing Disregard for Human Consequences

The Commission called for sweeping legal reforms in a country preoccupied with a conceptualization of law that is antithetical to basic principles of human rights. In stark contrast to international standards, the United States' domestic violence interventions are limited to political processes and subsequent judicial review because citizens do not have a constitutionally guaranteed right to government assistance to meet their most basic needs.⁷² Generally, the Constitution limits and empowers government, and it does not create positive rights such as those advocated in the report and widely accepted elsewhere in the world.⁷³

The Supreme Court has espoused negative constitutionalism irrespective of the gravity of the human indignity at stake. In his 1989 majority opinion for the child abuse case *DeShaney v. Winnebago County Department of Social Services*,

⁶⁶ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that government obligations generally arise only through political processes and that state social service workers had no constitutional duty to protect a repeatedly beaten boy after numerous reports of abuse even when the abuse left the boy severely mentally disabled).

⁶⁷ *United States v. Morrison*, 529 U.S. 598 (2000) (finding that Congress lacked authority under either the Commerce Clause of Article I or the Fourteenth Amendment to enact a nationwide civil cause of action for survivors of gender-motivated violence after a student was assaulted and raped by two men; the student brought suit against the perpetrators and their university).

⁶⁸ Report, *supra* note 18, at 54-55.

⁶⁹ Violence Against Women Act, Pub. L. No. 103-322, §§ 40001-03, 108 Stat. 1796, 1902-55 (1994) (codified as amended in scattered Sections of 8, 16, 18, and 42 U.S.C.).

⁷⁰ See Report, *supra* note 18, at 55.

⁷¹ *Id.* at 56.

⁷² See Lapidus, *supra* note 20, at 549 (explaining that major differences between international law in comparison to the Constitution of the United States include the State's "affirmative obligation to provide protection from harm" and not merely preclude itself from causing harm and the obligation to act with due diligence to protect individuals from third parties).

⁷³ See, e.g., Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409-10 (1990) (discussing how the judiciary's refusal to impose affirmative duties on the State, such as the duty to protect against private violence or to assist women in receiving abortions, reinforces the general notion that the Constitution of the United States only requires the government to refrain from certain actions).

Chief Justice Rehnquist recognized that government obligations could arise from political processes but not from the Constitution.⁷⁴ The Court held that even when a father beat his child repeatedly and to the point of lifelong mental impairment,⁷⁵ and regardless of whether the county's department of social services had definitive knowledge of the abuse and did not act to remove the child over the course of years,⁷⁶ the State did not have a constitutional obligation to protect the child from private violence.⁷⁷ In *DeShaney*, the Court explained that the State's failure to act did not deprive the child of his liberty without due process of the law and thus did not violate the Due Process Clause of the Fourteenth Amendment.⁷⁸ The Due Process Clause cannot create a government obligation "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁷⁹

Later in the same term as *DeShaney*, Chief Justice Rehnquist again evoked the Negative Constitution in another majority opinion and emphasized that the State did not violate the Constitution even when government action to dictate later inaction would inevitably deprive an individual of a constitutionally protected right. *Webster v. Reproductive Health Services* involved a Missouri law that restricted access to abortion through multiple controversial measures, including prohibitions against the use of public facilities for abortions, public employees' performance of abortion services, and public funding of abortion counseling.⁸⁰ In upholding the statute, the Court found it insignificant that in the absence of public facilities, employees, and funds, an indigent woman could not otherwise access abortion services—even if the abortion was medically necessary.⁸¹ According to the Court, the Missouri Act withstood a constitutional challenge because "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all."⁸²

In addition to the State's limited obligation to act, it has tremendous power should it choose to wield it, including the power to infringe on the fundamental rights of individuals. This power was articulated early in the twentieth century in *Jacobson v. Massachusetts*,⁸³ in which the Court upheld a Massachusetts statute that mandated vaccination against smallpox after a citizen who had refused vaccination or to pay the monetary penalty associated with his refusal faced

⁷⁴ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989).

⁷⁵ *Id.* at 191, 193.

⁷⁶ *Id.* at 192-93.

⁷⁷ *Id.* at 200, 203.

⁷⁸ *Id.* at 194-95.

⁷⁹ *Id.* at 196.

⁸⁰ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 504 (1989)

⁸¹ *Id.* at 509.

⁸² *Id.*

⁸³ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

criminal penalties.⁸⁴ The Court weighed the individual's interest in bodily integrity against the community's interest in safety and found that the law was justified to protect the public health.⁸⁵ The Court proclaimed that the interests of the individual could not subjugate the health and safety of the community,⁸⁶ explaining that "liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."⁸⁷ According to the Court, the State had expansive power to promote its policy interest in maintaining a safe, ordered society, and the State's interest was fundamentally superior as a matter of law to the individual's interest in his or her constitutional rights.⁸⁸

The Supreme Court has found narrow exceptions to the Negative Constitution and, on rare occasions, found State inaction unconstitutional. Specifically, a citizen may possess positive rights to government action in contexts such as state-imposed detention, at which point the government's obligation to the individual emanates "from the limitation which it has imposed on his freedom to act on his own behalf" rather than "the State's knowledge of the individual's predicament."⁸⁹ For example, in *Farmer v. Brennan*,⁹⁰ the Court held that prison officials who exhibited deliberate indifference to a transsexual inmate's safety⁹¹ could be liable under the Eighth Amendment if they exposed the inmate to a substantial risk of serious harm while possessing knowledge of the risk and failing to take reasonable measures to abate it.⁹² Yet, the outcomes in other cases when the State had not already in some way limited individual action contrast sharply with the Court's holding in *Brennan* despite the vital interests at stake: even when the Court had admitted that access to services cut to the core of "the very means to subsist—food, shelter, and other necessities," the Court did not admit a positive right to welfare or that the State possessed a constitutional obligation to act.⁹³

Accordingly, even when the judiciary has occasionally recognized the State's affirmative duty to preserve its citizens' rights, the bench has demonstrated a high tolerance for human suffering. A recent example arose in May 2011 when the Supreme Court decided *Brown v. Plata*⁹⁴ and upheld a California federal district court's mandate to limit prison populations to remedy violations of the Eighth

⁸⁴ *Id.* at 12.

⁸⁵ *Id.* at 26.

⁸⁶ *Id.* at 26-27.

⁸⁷ *Id.* at 26.

⁸⁸ *Id.* at 29.

⁸⁹ *DeShaney v. Winnebago Cnty. Dep't. of Soc. Services*, 489 U.S. 189, 199-200 (1989).

⁹⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁹¹ *Id.* at 829.

⁹² *Id.* at 847.

⁹³ *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

⁹⁴ *Brown v. Plata*, 131 S. Ct. 1910 (2011).

Amendment due to overcrowding.⁹⁵ The Court described evidence of suicidal inmates held for extended periods in telephone booth-sized cages without toilets, and it focused on one particular inmate, nearly catatonic and standing in a pool of his own urine, held in such a cage for nearly twenty-four hours.⁹⁶ Similarly, the Court observed that numerous prisoners experienced prolonged illness, unnecessary pain, and preventable death.⁹⁷ Moreover, the Court's decision to uphold the California district court's order sprang from the Prison Litigation Reform Act of 1995,⁹⁸ through which Congress created detailed protocol for reducing prison populations in compliance with the Eighth Amendment.⁹⁹ Justice Scalia, who delivered the opinion of the Court in *Gonzalez v. Castle Rock*,¹⁰⁰ argued in *Plata*'s dissent that the majority had decided to uphold "the most radical injunction issued by a court in our Nation's history" and that this was "a case whose proper outcome is so clearly indicated by tradition and common sense . . . [t]he proceedings that led to this result were a judicial travesty."¹⁰¹

Similar to *Plata*, Justice Scalia exhibited indifference toward human consequences when he acknowledged *Castle Rock*'s "horrible facts" at the outset of his opinion and never again alluded to Jessica's personal tragedy or the life-threatening ramifications of the Court's decision.¹⁰² A judicially unrecognized outcome of *Castle Rock* is that it compromised the safety of survivors in the thirty-two jurisdictions that had mandatory arrest provisions for violations of restraining orders.¹⁰³ Domestic violence advocates had not found these mandatory arrest measures easily won.¹⁰⁴ By declining to recognize mandatory arrest provisions, the Court simultaneously ignored and voided the accountability and security that sparked the early movement to improve the American response to domestic violence, recalling a recent time in the country's history when men could violate and beat their wives without legal consequence.¹⁰⁵

⁹⁵ *Id.* at 1923.

⁹⁶ *Id.* at 1924.

⁹⁷ *Id.* at 1925-26.

⁹⁸ Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, §§ 801-810 (1996).

⁹⁹ *Plata*, 131 S. Ct. at 1929-47 (detailing the statutorily predetermined judicial process for reducing prison populations in the Prison Litigation Reform Act and concluding that the order of the California District Court was in compliance with the law).

¹⁰⁰ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750 (2005).

¹⁰¹ *Plata*, 131 S. Ct. at 1950-51 (Scalia, J., dissenting).

¹⁰² *Town of Castle Rock*, 545 U.S. at 751 ("The horrible facts of this case are contained in the complaint that respondent Jessica Gonzalez filed in Federal District Court.").

¹⁰³ See G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 289 (2011) ("In what I term the 'yeah, but' theory of constitutional analysis, the Court dismissed not only Jessica's claim, but also implicitly the claim of anyone in any of the thirty-two jurisdictions where mandatory arrest provisions exist.").

¹⁰⁴ See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239-40 (2005) (observing that the road to mandatory arrest in cases of violence against women "was both long and arduous for battered women's advocates").

¹⁰⁵ *Id.* at 250-51 (asserting that state interventions through mandatory arrest policies grew out of individual and collective accountability and that the need for heightened accountability resulted from a

Whether endemic to American constitutional design or a manifestation of judicial apathy, the Supreme Court has stripped away aid for survivors of domestic violence. In *United States v. Morrison*,¹⁰⁶ the Court concluded that Congress did not have power under the Commerce Clause¹⁰⁷ to enact a civil remedy in the Violence Against Women Act of 1994 that would have allowed victims of gender-motivated violence to bring tort actions against their perpetrators.¹⁰⁸ Notwithstanding an abundance of evidence in the congressional record that linked domestic violence to interstate commerce,¹⁰⁹ the Court declined to create a civil remedy because gender-motivated violence is not an economic activity and “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”¹¹⁰ Yet, decided five years after *United States v. Lopez*,¹¹¹ *Morrison* was only the second time the Supreme Court rejected a law Congress passed on Commerce Clause grounds after upholding every other law derived from the congressional power to regulate interstate commerce between 1937 and 1994.¹¹² In addition, the Court rejected the argument that Congress could enact the civil remedy as a matter of the Equal Protection Clause,¹¹³ reasoning that regardless of law enforcement’s gender-disparate treatment of domestic violence cases, the Fourteenth Amendment only applied to state action and the civil remedy was not explicitly designed by Congress to proscribe discrimination by government actors.¹¹⁴

Under a constitution that requires victims of intimate partner violence to rely on congressional action for preservation of their basic human rights, the Court’s decisions in *Morrison* and *Castle Rock* represent colossal barriers to meaningful advances across the whole nation. Following *Morrison*, only a few states have taken legislative steps to provide survivors with private remedies against their perpetrators,¹¹⁵ and the numerous problems associated with progressive lawmaking

legal tradition that allowed husbands to freely rape and beat their wives and to control their bodies, material resources, and public identity).

¹⁰⁶ *United States v. Morrison*, 529 U.S. 598 (2005).

¹⁰⁷ The Constitution provides Congress with the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁸ *Morrison*, 529 U.S. at 619.

¹⁰⁹ *Id.* at 628-30 (Souter, J., dissenting).

¹¹⁰ *Id.* at 613 (majority opinion).

¹¹¹ *United States v. Lopez*, 514 U.S. 549 (1995) (rejecting provision of the federal Gun-Free School Zones Act of 1990 prohibiting possession of a firearm within a school zone).

¹¹² See Lainie Rutkow et al., *Violence Against Women and the U.S. Supreme Court: Recent Challenges and Opportunities for Advocates and Practitioners*, 15 VIOLENCE AGAINST WOMEN 1248, 1250-51 (2009).

¹¹³ The Equal Protection Clause of the Fourteenth Amendment provides, “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

¹¹⁴ *United States v. Morrison*, 529 U.S. 598, 619-26 (2005).

¹¹⁵ See Lapidus, *supra* note 20, at 542 (explaining that as a result of *Morrison*, the only civil legal recourse for victims of gender-based violence is through state courts, which frequently minimize violence against women and typically provide state officials with immunity for failing to protect women

within every state leave uniform improvements improbable.¹¹⁶ *Castle Rock* further complicated the regime of state-by-state domestic violence laws because the Court found that the word “shall”¹¹⁷ in a state statute still left room for police discretion, casting a shadow on any legislation that could mandate the enforcement of restraining orders.¹¹⁸ Furthermore, other potential legislative fixes to address law enforcement’s inadequate response to domestic violence have been subjected to strong opposition by local police departments.¹¹⁹

The Court’s belief in a Negative Constitution, in combination with the continuous unraveling of national domestic violence legislation, has amounted to government-sanctioned private violence with little hope for improved protection. Abuse survivors are especially unlikely to benefit from legislative remedies in states because the experience of victimization compromises participation in democracy and engenders a process defect in the American political system.¹²⁰ Without better protection through proper intervention, survivors of domestic violence are more likely to be passive actors in representative democracy, and elected officials are less likely to reflect their needs.¹²¹ As a result, those for whom reform would be most vital are the least likely to seriously influence domestic violence law and policy, and the Negative Constitution elongates victimization to societal governance in an ongoing cycle of lost chances and silenced voices.¹²²

from violence, and that most women in the United States have no federal or state remedy available to take civil action against perpetrators or to redress police failure).

¹¹⁶ See Rutkow, *supra* note 112, at 1254-55 (discussing model state laws that engender the civil remedy in the Violence Against Women Act of 1994 and remarking that “advocates should not underestimate the challenges associated with getting these laws passed at the state level”).

¹¹⁷ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 752 (2005).

¹¹⁸ See Rutkow, *supra* note 112, at 1255 (discussing the need for especially careful domestic violence legislation in the wake of *Castle Rock*).

¹¹⁹ *Id.* (noting that legislation to provide survivors with private causes of action for law enforcement’s disparate treatment of domestic violence cases is likely to face opposition by police departments).

¹²⁰ See Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 677 (1979) (suggesting that individuals’ basic needs, including “shelter . . . from the physical and psychological onslaughts of social debilitation[,]” are “universal, rock-bottom prerequisites of effective participation in democratic representation”).

¹²¹ Justice Harlan Stone sparked widespread discussion about representative defects in the democratic process when he justified enhanced scrutiny of government action in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), because certain groups are unable to participate effectively in the political process and politics cannot be trusted with their protection. See Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088-89 (1982) (discussing Justice Stone’s observation and explaining that “[o]ur Constitution assumes that majorities should rule and that the government should be able to govern” and legislatures should be able to do as they choose without judicial revocation except when legislative action “cannot be trusted to protect these groups the way it protects most of us”).

¹²² See Copelon, *supra* note 58, at 305 (claiming “domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and the economic, social and political predominance of men”). Similarly, much debate has surrounded mandatory arrest practices about the capacity of abuse survivors to make rational decisions about their own safety. See Miccio, *supra* note 104, at 241 (explaining the ideological position on mandatory arrest practices that “battered women are incapable of making a ‘rational’ choice while being traumatized by the violence”).

This cycle of unfair governance and individual tragedy is characteristic of an ongoing system of oppression in the United States that stems from the Negative Constitution. Even when laws are applied equally across the country, Americans experience legal outcomes and their social consequences in different ways.¹²³ Negative constitutionalism disproportionately disadvantages less resourced Americans because in the context of government restraint without affirmative obligations, wealthier individuals are more likely to be able to afford to effectuate their liberties in the absence of government intervention while individuals without enough resources cannot attain the same constitutionally guaranteed entitlements.¹²⁴ Thus, negative constitutionalism unfairly hinders communities of color, women, and other lower-resourced populations who might experience reduced employment options, unequal pay, limited access to education and health care, or additional systemic barriers to prosperity.¹²⁵

The Negative Constitution shrouds social injustice and magnifies the subordination of vulnerable populations. At times, the very perception that negative rights exist can be damaging to individuals by mediating the stigmatization of domestic violence survivors and other groups potentially in need of assistance because even when negative rights never realistically enhance the individual's opportunities for constructive change, they create the façade that the individual has choices and is making bad ones.¹²⁶ Law does more than regulate society: it creates society.¹²⁷ Negative constitutionalism contributes to a nation in which purportedly universal rights are exercised unequally across socioeconomic classes, genders, communities, and survivors of abuse.¹²⁸ Under a Negative Constitution, rights are not truly guaranteed, and the entitlements of the collectively disempowered hinge on the moralizing impulses of the social elite.¹²⁹

¹²³ See NANCY EHRENREICH, *THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD* 1, 3 (Nancy Ehrenreich ed., 2008) (“[F]ormally equal treatment can hurt—or help—one group much more than another.”).

¹²⁴ *Cf. id.* (describing reproductive rights and explaining that some women may require government intervention to enjoy the same rights as wealthier women).

¹²⁵ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 294 (Vintage Books 1997) (“Liberty protects all citizens’ choices from the most direct and egregious abuses of governmental power, but it does nothing to dismantle social arrangements that make it impossible for some people to make a choice in the first place.”).

¹²⁶ See EHRENREICH, *supra* note 123, at 3-5 (articulating the critical constructivist view that individual choices are socially constructed and describing choices that are voluntary in name only, leading to a paradigm in which women are blamed for their own subordination).

¹²⁷ *Id.* at 6 (explaining that critical constructivists believe law creates society because law and behavior are interrelated).

¹²⁸ *Id.* at 5 (describing the view that nonintervention by government is most helpful to those with resources who do not rely on government assistance).

¹²⁹ *Id.* at 6 (“[A] critical perspective on the law contends that legal rules frequently serve the needs and perspectives of those with socioeconomic power in society.”)

II. PROTECT THE HUMAN RIGHTS OF ABUSE SURVIVORS

The United States has a long road to travel before it meets the standards in the Commission's report.¹³⁰ Recognition for the persuasive value of international law in American courts is a realistic starting point in line with longstanding tradition,¹³¹ but a fundamental shift in the Court's constitutional jurisprudence is necessary to insulate the United States from further damage to its economy, international reputation, and domestic legitimacy.¹³²

A. Give International Standards Persuasive Value in Domestic Courts

The vast parameters of constitutional interpretation demand judge-made choices about rules and their application. Legal challenges and outcomes are unlimited in variety, and the language of the law can be ambiguous.¹³³ While the role of the judiciary in modern systems of government inescapably depends on interpretation,¹³⁴ and even though judges could always find ways to manifest their personal beliefs during their administration of justice,¹³⁵ law should err on the side of human rights by incorporating international standards into the broader milieu of American legal thought.

Castle Rock represents a case study in how the Court could have untethered itself from the Negative Constitution and brought the United States into better compliance with international standards. The circumstances in *Castle Rock* more closely resembled *Farmer v. Brennan* and other exceptions to the Negative Constitution than they resembled *DeShaney* because the State limited Jessica's capacity to act on her own behalf. The Court could have distinguished *Castle Rock* from *DeShaney* based on the extent of the State's involvement in each case; while Jessica repeatedly and directly interacted with the State in *Castle Rock* and relied on what she believed was the State's legally mandated duty to arrest her estranged husband,¹³⁶ the State had mere knowledge of the private violence taking place in

¹³⁰ See discussion *supra* Part I.

¹³¹ See discussion *infra* Part II.A.

¹³² See discussion *infra* Part II.B.

¹³³ See David M. Beatty, *Human Rights and the Rules of Law*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 6 (David M. Beatty ed., 1994) (positing that legal interpretation is a subjective task, law is not comprised of self-applying principles or rules, and no words are free from ambiguity).

¹³⁴ *Id.* at 7-8 (arguing that the majority of individuals who study law believe that it has an objective existence of its own, but they remain "hopelessly divided on virtually all of the most basic issues in law," including the role of judges in systems of government, how to "determine when a law is valid and must be obeyed," and the difference between law and sociocultural phenomena like morality and politics).

¹³⁵ *Id.* at 7 (describing populist distrust of the judiciary and those who believe that "every judge will be able to read the law or find some principle or precedent which will allow their personal feelings to govern the outcome of the case").

¹³⁶ *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 751-54 (2005).

DeShaney.¹³⁷ In *Castle Rock*, the State possessed an affirmative obligation to respond to Jessica's cries for help, emanating from its promise to act on Jessica's behalf in the restraining order and the legal limits the State places on all citizens' abilities to defend themselves against systematic acts of harassment and private violence.¹³⁸

Once distinguished from *DeShaney* and other cases within the realm of negative constitutionalism, the legal analysis in *Castle Rock* falls apart. As Justice Stevens pointed out in his dissent, the statute giving rise to the restraining order at issue in *Castle Rock* was intended to mandate police enforcement,¹³⁹ an order of protection is issued to benefit the specific holder of the order,¹⁴⁰ and the Court had already recognized various nontraditional property rights in other cases, including property without specific monetary value that indirectly benefited its owner.¹⁴¹ It necessarily followed that the State violated Jessica's constitutional rights because no one on the Court contested that if Jessica had a property interest, then *Castle Rock*'s deprivation of Jessica's interest was in violation of the Due Process Clause.¹⁴²

Moreover, the Court should have considered elements of international standards for human rights throughout its process of contemplation. While the Court greatly weighted the importance of police discretion,¹⁴³ it should have also valued the vital impact of unchecked police discretion on each domestic violence survivor's right to life.¹⁴⁴ Additionally, the Court should have more thoroughly assessed the human tragedy that led to the proceedings; the deaths of Jessica's children were not irrelevant to Jessica's rights but rather ineradicable consequences of a society that does not take affirmative measures to protect children or other vulnerable populations or to preserve women's equal protection before the law.¹⁴⁵

¹³⁷ See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191-92 (1989).

¹³⁸ *Id.* at 199-200.

¹³⁹ *Town of Castle Rock*, 545 U.S. at 779-81 (Stevens, J., dissenting).

¹⁴⁰ *Id.* at 786-89.

¹⁴¹ *Id.* at 789-90. In particular, Justice Stevens pointed to the Court's recognition of property rights in welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970), disability benefits, *Mathews v. Eldridge*, 424 U.S. 319 (1976), public education, *Goss v. Lopez*, 419 U.S. 565 (1975), utility services, *Memphis Lights, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), and government employment, *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985), as well as other entitlements that challenge traditional classification as property, including revocation of a driver's license pending the adjudication of an accident, *Bell v. Burson*, 402 U.S. 532 (1971), and claims before a state commission that had been arbitrarily denied, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *Town of Castle Rock*, 545 U.S. at 789-90 (Stevens, J., dissenting).

¹⁴² *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 774 (2005).

¹⁴³ *Id.* at 761-62 (majority opinion) (discussing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands" and "the practical necessity for discretion").

¹⁴⁴ See Report, *supra* note 18, at 30 ("Various international human rights bodies have moreover considered State failures in the realm of domestic violence not only discriminatory, but also violations to the right to life of women.").

¹⁴⁵ *Id.* at 30-31 (observing that "international and regional systems have pronounced on the strong link between discrimination, violence and due diligence, emphasizing that a State's failure to act with

These considerations need not have been determinative, but should have been at least persuasive. This would have been in line with the *Castle Rock* Court's reliance on legal articles¹⁴⁶ as well as the Court's inspection of international standards for the treatment of sexual minorities in *Lawrence v. Texas*¹⁴⁷ and its recognition that other countries' experiences with emergency power "may not be irrelevant" in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁴⁸

As a further example, *Roper v. Simmons*¹⁴⁹ was another case that highlighted the practicability and enduring importance of international human rights standards in American jurisprudence. In 2005, the *Roper* Court considered whether the execution of a juvenile who was older than fifteen but younger than eighteen when he committed a capital crime was constitutional under the Eighth Amendment.¹⁵⁰ The Court had previously divided narrowly around the question before allowing executions to continue,¹⁵¹ but found a new reason to uproot its old decision that the death penalty was not disproportionate punishment for offenders under eighteen "in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."¹⁵² Although Justice Scalia criticized the Court's respect for international laws in his dissent,¹⁵³ both Justice Kennedy¹⁵⁴ writing for the majority and Justice O'Connor¹⁵⁵ in her dissent registered positive impressions about the congruence between domestic and international laws, fostering the potential for persuasive treatment of international laws in courtrooms across the United States.

Other countries have continuously demonstrated this degree of respect for foreign law—especially American law—and it is becoming necessary for American courts to maintain cognizance of developments outside the United States in order to meaningfully participate in a globalized society. Undoubtedly, countries differ and the world's constitutions are not identical, but the United States has greatly

due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law,[]" and remarking that protection is particularly important for "girl-children").

¹⁴⁶ *Town of Castle Rock*, 545 U.S. at 763, 766.

¹⁴⁷ *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003) (discussing British law and the findings of the European Court of Human Rights in considering the constitutionality of Texas' anti-sodomy law).

¹⁴⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651 (1952) (Jackson, J., concurring) (contemplating whether President Truman's actions were constitutional when he directed the Secretary of Commerce to take possession of the country's steel mills).

¹⁴⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵⁰ *Id.* at 555-56.

¹⁵¹ *Id.* at 556.

¹⁵² *Id.* at 575.

¹⁵³ *Id.* at 624 (Scalia, J., dissenting) ("[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.").

¹⁵⁴ *Id.* at 578 (majority opinion) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

¹⁵⁵ *Id.* at 605 (O'Connor, J., dissenting) (proclaiming that the Court "should not be surprised to find congruence between domestic and international values").

influenced other nations' constitutions and the decisions of foreign courts.¹⁵⁶ Much of international law is not such a significant departure from American standards that it is unwieldy in American courtrooms.¹⁵⁷ Moreover, the application of foreign law in non-American, domestic courtrooms is increasingly common, and a more international perspective is essential for the United States to maintain political, economic, ethical, and social traction in a progressively globalized world.¹⁵⁸

Fortunately, measured contemplation of human rights has already informed American jurisprudence for centuries. Similar to the international principle that rights are inherent rather than bestowed by government,¹⁵⁹ the generation of the Constitution's framers believed in a higher law protecting natural rights that could not have been entirely codified in a written document.¹⁶⁰ Subsequently, understanding law through the lens of humanistic traditions such as natural law theory and the European Enlightenment became a dominant component of legal education in the United States.¹⁶¹ Recognition of natural law has received great credit and criticism over the centuries, and this debate is perhaps best epitomized by the dispute between Justice Chase and Justice Iredell in *Calder v. Bull*,¹⁶² in which the justices debated whether legislatures should be bound as a matter of natural justice flowing from general principles of law and reason or if judicial review should be cabined by the plain language of the Constitution such that the mechanics of the Constitution's writing would predominate over policy, belief, or function.¹⁶³

¹⁵⁶ See Justice Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 348 (2006) (acknowledging that international legal sources must be confined in the United States due to differences in constitutional provisions and societies, but international law must not be ignored in light of the United States' influence on other nation's constitutions and judicial developments).

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 329 (commenting that by “[d]rawing upon sources found in international law, not as binding rules but as contextual principles” and in light of the values, ethics, politics, and economics of globalization, “judges of municipal courts in this century will assume an important function in making the principles of international law a reality throughout the world”).

¹⁵⁹ See Glendon C. *supra* note 30, at 1164.

¹⁶⁰ See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975) (“For the generation that framed the Constitution, the concept of a ‘higher law,’ protecting ‘natural rights,’ and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt. An essential element of American constitutionalism was the reduction to written form—and hence to positive law—of some of the principles of natural rights.”).

¹⁶¹ See Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. LEGAL EDUC. 311, 316 (1998) (explaining that “[T]he ideals of legal education in the late eighteenth and early nineteenth centuries placed the science of law squarely within the broad humanistic traditions of natural law theory and the eighteenth-century European Enlightenment”).

¹⁶² *Calder v. Bull*, 3 U.S. 386 (1798).

¹⁶³ See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 75-76 (6th ed. 2009) (presenting the conflict between Justice Iredell and Justice Chase in *Calder v. Bull* and remarking that “[T]he dispute between Justice Chase and Justice Iredell has proved fundamental to constitutional law”).

Unlike the natural law approach, recognition of international standards would broaden the scope of judges' contemplation without granting them the authority to make individual judgment calls about what constitutes a natural right. Like electorally accountable decision-makers,¹⁶⁴ judges frequently confront controversial issues by reflecting on pre-established moral conventions.¹⁶⁵ An international approach does not give rise to the same potential pitfalls as natural law because the approach does not assume a specific, predetermined solution in any given context but rather asks judges to consider international norms and agreements in the larger process of reaching decisions.¹⁶⁶ This consideration should not embody citation to conveniently supportive foreign decisions¹⁶⁷ but instead take the form of serious contemplation of plausibly related legal decisions in contexts where outcomes are not firmly rooted in uncontroversial precedents.¹⁶⁸

Ultimately, accounting for international standards for domestic violence constitutes legal realism. Based on the belief that "our government is not a government of laws[], but one of laws through men[,]"¹⁶⁹ early legal realists argued that available sources of law would not always guide reasonable judges to only one outcome.¹⁷⁰ In recent years, a new generation of legal realists has emerged and combined legal theory and empirical research to improve law and policy.¹⁷¹ Sometimes labeled "legal empiricism,"¹⁷² new legal realism refers to a variety of interdisciplinary inquiries¹⁷³ that ultimately erode the delineation

¹⁶⁴ See MICHAEL J. PERRY, *THE COURTS, THE CONSTITUTION, AND HUMAN RIGHTS* 100-01 (1982) (remarking that electorally accountable policymakers are not well suited to deal with controversial developments "in a way that is faithful to the notion of moral evolution," relying instead on "established moral conventions").

¹⁶⁵ See Grey, *supra* note 160, at 705 (arguing that courts "appropriately apply values not articulated in the constitutional text, and appropriately apply them in determining the constitutionality of legislation").

¹⁶⁶ See STONE, *supra* note 163, at 77 (questioning whether the function of natural law in American jurisprudence is flawed because it inevitably depends on "... an unwarranted belief in the possibility of "right answers"").

¹⁶⁷ See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 86-87 (2005) (describing the complicated environments of foreign decisions to which the American judiciary is "largely ignorant" and arguing that reliance on these decisions as precedents "is indeed to flirt with the idea of universal natural law, or, what amounts to almost the same thing, to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience").

¹⁶⁸ See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116 (2005) (asserting that other countries' approaches may provide empirical information in judicial decisions when more than one interpretation is possible from domestic sources).

¹⁶⁹ Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243 (1931).

¹⁷⁰ See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832 (2008) (reflecting on the early movement of legal realists as a reaction to the formalist view that law mechanically determined outcomes of particular cases and describing the belief that "existing law did not compel particular outcomes" and that "available sources would not require a rational and fair-minded judge to reach only one result").

¹⁷¹ See Howard Erlanger et al., *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 (2005).

¹⁷² See, e.g., Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 822 (2002).

¹⁷³ See Erlanger, *supra* note 171, at 337-38.

between law and political science in modern American jurisprudence.¹⁷⁴ The work of new legal realists has focused on the personality of judicial decision makers and systematically examined how institutions and individuals respond distinctively to the stimuli of different cases.¹⁷⁵ As a result, new legal realists have leveraged statistical analyses to illustrate the significant impact of judges' political affiliation, ideology, race, sex, and other personal characteristics on legal outcomes.¹⁷⁶

Giving international law persuasive force in domestic proceedings could counteract unfair influences in the judicial process. As Ronald Dworkin famously theorized, judges must always to some extent fit and justify their decisions, and the factors underlying legal outcomes are generally cabined by the potential for appeal and the necessity of maintaining institutional legitimacy.¹⁷⁷ Enhanced consideration for international human rights standards flows naturally from this context because it is increasingly apparent that American law is not algorithmic and that judges could benefit from increased external guidance.¹⁷⁸ Thus, international law could provide much-needed balance in an era of growing awareness about the impact of judges' personal characteristics on legal outcomes and the serious consequences of the bench's idiosyncrasies in the lives of abuse survivors.¹⁷⁹

B. Reject the Negative Constitution

Increasing the persuasive value of international standards in American courtrooms is a realistic mechanism for improving the United States' compliance with global human rights law,¹⁸⁰ but it is the first among many steps toward rectifying the deeper failure of the State to adequately respond to domestic violence. There are no quick fixes that would immediately and everlastingly secure the adequate protection of human rights in the United States.¹⁸¹ If the Supreme Court ever backs away from the amplified version of the Negative Constitution that it applied in *Castle Rock*,¹⁸² it would have another important decision to make:

¹⁷⁴ See Miles & Sunstein, *supra* note 170, at 834 (arguing that “[M]uch of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism” and that large-scale studies of judicial personality “will erode the distinctions between ‘law and politics’ political science and ‘empirical legal studies’”).

¹⁷⁵ *Id.* at 834-35.

¹⁷⁶ *Id.* at 836-41.

¹⁷⁷ See RONALD DWORKIN, *LAW'S EMPIRE* 254-58 (Harv. Univ. Press 1986).

¹⁷⁸ See Miles & Sunstein, *supra* note 170, at 844 (noting that political convictions are only a partial predictor of judicial outcomes and that law is a constraining force in judicial decision making).

¹⁷⁹ *Id.* at 851 (contemplating remedies to judicial bias such as mandatory diversity in the judiciary and recognizing that sometimes knowledge provides protection and enhanced judicial awareness could improve outcomes).

¹⁸⁰ See discussion *supra* Part II.A.

¹⁸¹ See Lapidus, *supra* note 20, at 554 (describing improvements to the United States' response to domestic violence that “will not come easily or quickly, especially given the United States government's often-espoused disdain for international human rights mechanisms”).

¹⁸² See, e.g., Miccio, *supra* note 103, at 300 (asserting that while *DeShaney* was problematic for various reasons, in it, the Court did not insert the negative rights interpretation of the Constitution to the exclusion of the people's voice like it did in *Castle Rock* because in *DeShaney*, Wisconsin had not

whether to decisively renounce its violations of international standards by giving fair balance to domestic violence survivors' human rights or to preserve the State's opportunity to avoid its responsibilities for another day by leaving the mantle of *DeShaney* intact.¹⁸³ Only through renouncing *DeShaney* and the other cases in which it denied a constitutional right to intervention and by adopting affirmative measures as a nationwide approach to the State's response to domestic violence could the United States curtail the various destructive consequences of its noncompliance with international standards, including the economic and reputational damage that arise from its human rights violations and the depreciative impact of domestic violence on the expressive value of the Constitution.¹⁸⁴

The harmful economic consequences of domestic violence are both immediate and long lasting. Justice Souter made this clear during his dissent in *Morrison* when he reviewed the mountain of data about the enormous financial impact of violence against women available in VAWA's congressional record.¹⁸⁵ Between five and ten billion dollars are spent in the United States each year on "health care, criminal justice, and other social costs of domestic violence."¹⁸⁶ Additional partial estimates show violent crime against women generates at least three billion dollars in annual national expenses.¹⁸⁷

This financial upshot is both individually devastating and widely significant to the broader community. Domestic violence transforms the function of women and girls in daily life, diminishing women's contributions in the workplace and weaving domination through every aspect of society.¹⁸⁸ Moreover, domestic violence is an expensive public health concern; abuse survivors experience heightened levels of mental and physical health problems, contributing to an increased demand for medical and mental health care services and a simultaneous decline in productivity.¹⁸⁹ Beyond its potential to cause permanent disability and death, domestic violence drains health care and social service resources and

enacted legislation to mandate specific outcomes from the police or Child Protective Services such as a mandatory arrest provision).

¹⁸³ See MacNaughton, *supra* note 16, at 752 (asserting that recognition for positive rights is plausible and legitimate based on theoretical sources of law like deontology and consequentialism and that *DeShaney*'s effects on constitutional law "has deformed the development of the law and has led judges to rely on formalistic logic games rather than real principles of justice").

¹⁸⁴ This Essay focuses on the financial, political, and expressive ramifications of the United States' noncompliance with international standards for human rights, but an exhaustive list of the consequences of domestic violence would be far more extensive. See, e.g., Miccio, *supra* note 104, at 305-08 (describing various socioeconomic costs associated with intimate partner violence).

¹⁸⁵ *United States v. Morrison*, 529 U.S. 598, 630-33 (2000) (Souter, J., dissenting).

¹⁸⁶ *Id.* at 632.

¹⁸⁷ *Id.*

¹⁸⁸ See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 490-91 (1990) (stating that violence against women is a political act: its message is "stay in your place or be afraid").

¹⁸⁹ Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 259, 259-60 (2004).

negatively affects coworkers, friends, relatives, and potentially anyone else in a survivor's life.¹⁹⁰

Beyond the financial ramifications of domestic violence, the United States has reputational incentives to comply with international standards for human rights. In addition to the judiciary's effective disregard for survivors of domestic violence,¹⁹¹ the country's failure to participate in international efforts to end violence against women is a result of various elements of society and the conceptual complications inherent in the globalization of law and policy, including the challenge of pluralism underlying worldwide support for specific intrinsic values associated with being human¹⁹² and the disconnect between American human rights activists and domestic violence advocates.¹⁹³ Regardless of the various external and internal situational factors affecting the United States' response, it is the responsibility of the country's government to improve its compliance with international standards for human rights and exhibit the same concern for its reputation in the domestic violence context that it has repeatedly shown in the course of military action.¹⁹⁴ The United States' international reputation plays an unavoidable role in its future place in the world, and it has a dramatic impact on its national security, the success of its humanitarian efforts, its political credibility, and the strength of its markets.¹⁹⁵

The Commission's decision in *Castle Rock* highlighted human rights violations in a nation that has been repeatedly put on notice about its inadequate treatment of women.¹⁹⁶ Similar to the Commission's findings that the country's

¹⁹⁰ *Id.* at 260.

¹⁹¹ See *supra* notes 111-118 and accompanying text.

¹⁹² For a more thorough treatment of why domestic violence and other human rights initiatives might lack traction within the United States, see Sally Engle Merry & Jessica Shimmin, *The Curious Resistance to Seeing Domestic Violence as a Human Rights Violation in the United States*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM, 113, 113-14 (Shareen Hertel & Kathryn Libal eds., 2011) (explaining that successful global initiatives led by Americans to address violence against women have not had much impact on the American movement against domestic violence because human rights activists in the United States are focused on the experiences of individuals in other countries and domestic violence advocates have adopted the neoliberal ideal that American survivors should take responsibility for themselves).

¹⁹³ See C. Scott Pryor, *Looking for Bedrock: Accounting for Human Rights in Classical Liberalism, Modern Secularism, and the Christian Tradition*, 33 CAMPBELL L. REV. 609, 610 (2011) (arguing that "consensus on new human rights is increasingly difficult" because human rights theories derived from "historical, moral, and theological conceptions of life" are not universally palatable due to pluralism, but offering Christian doctrines as an example of how candid discussions about religious traditions could prove helpful to efforts to universalize human rights).

¹⁹⁴ JONATHAN MERCER, REPUTATION & INTERNATIONAL POLITICS 19-20 (1996) (discussing the various occasions that the United States has allowed its reputation to influence its nuclear strategy and military interventions).

¹⁹⁵ *Id.* at 3-5 (exploring the ramifications of the United States' international reputation).

¹⁹⁶ See Lapidus, *supra* note 20, at 554 (analyzing the influence of international law on the United States and concluding that "pressure mounts from all sides, and from several separate international human rights mechanisms, for the United States to reform its policies so as to protect women from domestic and gender-based violence").

human rights deprivations were multifaceted and ongoing,¹⁹⁷ the Committee on the Elimination of Racial Discrimination has registered concerns in its official capacity under the International Convention on the Elimination of All Forms of Racial Discrimination¹⁹⁸ about the insufficient response among American authorities to violence and abuse against minority women, which deprives them “of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered.”¹⁹⁹ Elsewhere, as with the Convention on the Elimination of All Forms of Discrimination Against Women,²⁰⁰ the United States has averted violations of international treaties by simply refusing to ratify them, although not without disapproval from the global community.²⁰¹

But even if the United States ratified and enforced every relevant treaty and facilitated civil remedies across the country, a fundamental shift in constitutional interpretation would remain necessary to neutralize the moral fallout of domestic violence and restore principle to the United States. In an article he published before joining the Supreme Court, Circuit Judge Antonin Scalia observed the bidirectional relationship between the Constitution and morality:

One would be foolish to deny the relevance of moral perceptions to law. Society’s moral beliefs necessarily affect its constitutional perceptions in general and its perceptions of what economic rights are protected by its constitution in particular. There is no need to apologize for the phenomenon, even when the moral beliefs spring from a theological belief. In any case, it is useless to rail against the phenomenon because it is inevitable.²⁰²

By enshrining liberties and documenting society’s most prized values, the Constitution of the United States is more than descriptive of a system of government or ground rules for civilization but also aspirational and expressive of the nation’s ideals.²⁰³ In its current incarnation, this country is comprised of local,

¹⁹⁷ See discussion *supra* Part I.A.

¹⁹⁸ Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965). This convention, signed by the United States in 1966 and ratified in 1994, prohibits racial discrimination and requires the State to report on the intersection of race and gender. See Lapidus, *supra* note 20, at 545 (explaining the purposes of the convention and the activities required of the United States).

¹⁹⁹ Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, at 8, U.N. Doc. CERD/C/USA/Co/6 (Feb. 2008), available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>.

²⁰⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

²⁰¹ See Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 389, 397 (2008) (explaining that despite politically palatable explanations, “critical attention is often focused on the U.S. failure to ratify certain internationally popular treaties, including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the American Convention on Human Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)”).

²⁰² Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL’Y 123, 123 (1986).

²⁰³ Michael C. Dorf, *The Living Constitution and Future Generations: The Aspirational*

state, and federal governments with the power to subordinate the rights of individuals in the name of public health and safety while simultaneously maintaining extremely limited affirmative obligations to actually ensure individual health and safety.²⁰⁴ This conceptualization of governance is unbalanced and evades fundamental notions of fairness, favoring constitutional formalism over approaches to statehood that accord with human rights principles.²⁰⁵ In addition, it disproportionately penalizes minorities and otherwise politically disempowered groups that cannot incite government accountability through democratic processes despite plain constitutional language purporting to guarantee equal protection before the law.²⁰⁶

The individual must have a right to government intervention in cases of domestic violence. Strengthening rights-based approaches to government enhances the public's perceived legitimacy of institutions,²⁰⁷ and the Constitution should accommodate the positive obligation of government protection in light of citizens' persistent expectations that government obligations constitute a normative right and that the government has a duty to protect the public.²⁰⁸ Constitutional requirements for affirmative measures like mandatory arrest provisions are especially vital in the domestic violence context because they demand affirmative measures from a government that once sanctioned violence against women.²⁰⁹ Thus, affirmative measures that preserve fundamental human rights are not just the international standard for State conduct; rather, the government's responsibilities to prevent and respond to domestic violence are American values of constitutional import.

CONCLUSION

In its current form, the American response to domestic violence is a troubling violation of international standards for human rights. Now that *Castle Rock* has been acknowledged as an injustice on the world's stage, Jessica has given the country the guidance it needs in the Commission's report to improve the State's response and move toward compliance with international laws.²¹⁰ Progress

Constitution, 77 GEO. WASH. L. REV. 1631, 1631 (2009).

²⁰⁴ See *supra* notes 70-89 and accompanying text.

²⁰⁵ For a deeper examination of the contrast between constitutional formalism and functionalism, see William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998).

²⁰⁶ See *supra* notes 116-125 and accompanying text.

²⁰⁷ See Beatty, *supra* note 133, at 3 (observing that bills of rights have long been associated with government legitimacy).

²⁰⁸ See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (detailing the historical origins and continuing power of the fundamental principle that the government has a duty to protect).

²⁰⁹ See Miccio, *supra* note 104, at 240 ("One must not overlook the radical and beneficial nature of mandatory arrest provisions: They placed male intimate violence at the center of law enforcement policy by criminalizing conduct that the justice system and society previously had sanctioned.").

²¹⁰ See discussion *supra* Part I.A.

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requires an entirely new understanding of the realities of surviving abuse,²¹¹ but treating global standards as persuasive in American courts is a feasible starting point.²¹² The United States' reputation, financial health, and legitimacy demand reform, warranting a clean break from negative constitutionalism in favor of internationally acceptable affirmative measures to protect human rights.

²¹¹ See discussion *supra* Part I.B.

²¹² See discussion *supra* Part II.A.