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Restraining Orders and Law Enforcement Liability After Town of Castle Rock, Colorado v. Gonzales

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**RESTRAINING ORDERS AND LAW ENFORCEMENT LIABILITY
AFTER *TOWN OF CASTLE ROCK, COLORADO v. GONZALES***

I. INTRODUCTION

Domestic violence plagues the United States. One in two women in the United States will experience a violent relationship at some point in her lifetime.¹ In general, police departments treat domestic violence seriously.² Nevertheless, some police departments may refuse to recognize domestic violence as a criminal matter, or they may assign these reports a lower priority than other calls.³ These inadequate responses contribute to the continuing prevalence of domestic violence.⁴ In turn, victim and society both pay a heavy price.⁵

Victims of domestic violence obviously include the women and children directly assaulted by their abusers. However, society also suffers.⁶ Each year in the United States, abusers cause 18,700 workplace incidents.⁷ These incidents contribute directly to problems of workplace violence.⁸ However,

1. Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1297 (1995) (citing Sarah M. Buel, *The Dynamics of Domestic Violence Cases in the United States: An Overview*, in DEFENDING BATTERED WOMEN IN CRIMINAL CASES § A, at 1 (ABA Section of Criminal Justice & Division for Professional Education eds., 1993)).

2. Mike Hendricks, *High Court Deals Out a Low Blow*, KAN. CITY STAR, June 29, 2005, at B1. At least one scholar has questioned the efficacy of this effort. See Johanna Niemi-Kieslainen, *The Deterrent Effect of Arrest in Domestic Violence: Differentiating Between Victim and Perpetrator Response*, 12 HASTINGS WOMEN'S L.J. 283, 291-93 (2001). However, in addition to the procedural shortcomings of the studies cited by Niemi-Kieslainen, the studies discussed in that article looked only at situations where the officer has discretion to arrest the perpetrator. *Id.* at 291-92 (excluding felony arrest situations and situations where the victim demanded arrest). The studies ignored the effect of arrest in situations where state law mandated the officer to arrest the perpetrator. See *id.* at 291. This casenote focuses on those situations where the officer has no discretion to make an arrest.

3. Browne, *supra* note 1, at 1298.

4. *Id.*

5. See Janet Mickish, *Domestic Violence: "Make It Your Business" A Huge Success*, 33 COLO. LAW. 49 (2004).

6. *Id.*

7. *Id.*

8. *Id.*

abuse outside of the workplace indirectly cost employers between \$3.9 billion and \$7.6 billion in 1995 alone.⁹

Abusers usually trap their victims in an escalating pattern of violence.¹⁰ Abusers usually begin abusing their victim with a slap or a shove.¹¹ The victim will convince herself that this behavior was abnormal and unlikely to happen again.¹² The abuser then becomes progressively more violent.¹³ The abuser claims that the violence is unintentional, and the victim is usually in no position to contradict that claim.¹⁴

The abuser projects an image to those outside of the relationship designed to isolate his victim.¹⁵ He will sabotage his victim's ties to friends and family in order to socially isolate his victim.¹⁶ Those aware of the abuse will usually avoid contact with the victim.¹⁷ The isolated victim thus becomes increasingly dependent on her abuser and unable to leave the situation.¹⁸

Unfortunately, society's response to domestic violence may help the abuser trap his victim.¹⁹ Ineffective interventions by friends, police, and the courts may convince a victim that no one will treat her abuse seriously.²⁰ Even if she does manage to leave, the abuser will often cut off his victim's financial resources, forcing her to rely on often inadequate public assistance.²¹

For the last thirty years, the United States has employed several tactics to combat the problem of domestic violence.²² Beginning in the 1970s states began to fund safe houses and shelters for domestic violence victims.²³ Still, police departments routinely trained their officers to treat domestic violence situations as a private matter.²⁴ Frustrated by this situation, state legislatures have made several attempts to help victims find protection within the legal

9. Mickish, *supra* note 5, at 49. These losses can be attributed to lost productivity, absenteeism, tardiness, health costs, employee turnover, and poor customer service. *Id.*

10. Browne, *supra* note 1, at 1295-96.

11. *Id.* at 1295.

12. *Id.*

13. *Id.*

14. *Id.* at 1295-96.

15. *Id.* at 1296.

16. Browne, *supra* note 1, at 1296.

17. *Id.*

18. *Id.*

19. *Id.* at 1296-97.

20. *Id.* at 1296.

21. *Id.* at 1296. The abused, already suffering low self-esteem, may view this move to public assistance as yet another source of shame. *Id.*

22. See generally Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

23. *Id.* at 9.

24. *Id.* at 13. Often, police officers would simply ask the perpetrator to take a walk to cool down. *Id.* Officers were told that police intervention would not solve the problem. *Id.*

system. First, a majority of states passed laws creating civil protection orders and changed custody laws.²⁵ Second, many states passed mandatory arrest laws.²⁶ Finally, some prosecuting attorney offices have enacted policies allowing prosecutors to pursue criminal charges, even where the victim of the domestic violence has recanted her testimony or has refused to testify against the abuser.²⁷

25. Goodmark, *supra* note 22, at 10. Civil protective orders allowed victims to file for a protective order by individually petitioning the court. *Id.* They did not have to rely on police intervention. *Id.* Custody law changes occurred when states required courts to consider allegations of domestic violence when deciding custody disputes. *Id.* at 13.

26. *See, e.g.*, ALASKA STAT. § 18.65.530(a)(1) (2004) (“a peace officer . . . shall arrest a person if the officer has probable cause to believe the person has . . . committed domestic violence . . .”); ARIZ. REV. STAT. ANN. § 13-3601.B (2000) (The officer “shall arrest” a domestic violence perpetrator who has inflicted physical injury or used or exhibited a deadly weapon or dangerous object; in all other cases, the officer “may” arrest the perpetrator.); CAL. PENAL CODE § 836(c)(1) (West 2006) (“the officer shall . . . arrest . . . the person without a warrant . . . whether or not the violation occurred in the presence of the arresting officer.”); KAN. STAT. ANN. § 22-2307 (1995) (“written policies shall include . . . [a] statement directing that the officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed.”); MINN. STAT. ANN. § 518B.01.2(e) (West 2006) (“peace officer shall arrest without a warrant . . . a person whom the peace officer has probable cause to believe has violated [a protective] order . . .”); MISS. CODE ANN. § 99-3-7(3)(a) (West 2000) (“shall arrest . . . when he has probable cause to believe that the person has, within twenty-four (24) hours of the such arrest, knowingly committed . . . an act of domestic violence . . .”); NEV. REV. STAT. § 171.137.1 (2005) (abuser must be arrested if he has committed violence against a spouse, former spouse, any family member related by blood or marriage, anyone sharing a residence, anyone in a dating relationship, and co-parents of the abuser’s children); N.H. REV. STAT. ANN. § 173-B:9.I(a) (2001) (“peace officers shall arrest the defendant” if he or she violates a protective order); N.J. STAT. ANN. § 2C:25-21 (West 2005) (victim must claim to be a victim of domestic violence before the officer must to arrest the perpetrator); N.C. GEN. STAT. § 50B-4.1(b) (2006) (arrest mandated “if the officer has probable cause to believe that the person knowingly has violated a valid protective order”); OR. REV. STAT. § 133.055(2)(a) (2001) (the officer “shall arrest” if he has “probable cause to believe that an assault has occurred . . . or to believe that one such person has placed the other in fear of imminent serious physical injury . . .”). Not all states have adopted this approach. *See, e.g.*, ALA. CODE § 15-10-3 (1995) (the officer has discretion whether or not to arrest, but must make a written report of the alleged incident); FLA. STAT. ANN. § 741.29(2) (West 2005) (officer must make a written report, but has discretion to make an arrest). Some states have found a middle ground. *See, e.g.*, KY. REV. STAT. ANN. § 403.7529 (LexisNexis 1999) (officer must arrest a person who violates a restraining order, but if the victim has no restraining order, then the officer may only arrest the abuser if he has violated some statute). Colorado’s mandatory arrest statute was the central issue in *Town of Castle Rock, Colorado v. Gonzales*, 125 S. Ct. 2796 (2005).

27. Goodmark, *supra* note 22, at 16. In these situations, law enforcement treats the case like any other case where the victim is unavailable, such as homicide cases. *Id.* at 17. The police will collect physical evidence and witness statements to prove the case, rather than rely on the victim’s testimony. *Id.*

These remedies have not been universally successful. Domestic violence victims rarely utilize their state's civil protective order statute.²⁸ Mandatory arrest laws have increased police responsiveness to domestic violence, but they have proven inadequate thus far.²⁹ Finally, even where prosecutors pursue charges without the victim's consent, the victim may see negative consequences. For example, if a prosecuting attorney's office pursues a "hard no-drop" policy, they will require victims to testify regardless of their desire to do so.³⁰ In such a situation, the prosecutor may subpoena and even arrest a victim to compel her to testify.³¹ Such a policy may further traumatize the victim. If the prosecutor adopts a "soft no-drop" policy, the victim may choose not to testify.³² In these cases, the lack of victim testimony may cause the prosecutor to drop the case for lack of good evidence, making the policy moot.³³

This casenote will examine the effect of the Supreme Court's recent decision in *Town of Castle Rock, Colorado v. Gonzales*³⁴ on domestic violence victims. This case effectively dispelled, in dicta, any notion that a victim of domestic violence may sue a police department for violating a state's mandatory arrest statute under U.S.C. § 1983, where the victim claimed a property interest in her restraining order.³⁵ This casenote suggests that domestic violence victims may still have a cause of action under an equal protection claim under § 1983. It then suggests that subjecting police departments to civil liability under state law when they ignore restraining orders may be the best option to fight domestic violence.

II. FACTS IN THE *GONZALES* CASE

On May 21, 1999, Jessica Gonzales requested and received a restraining order against her husband in conjunction with her divorce proceedings.³⁶ The order, served on Gonzales's husband on June 4, "commanded him not to 'molest, or disturb the peace of [respondent] or of any child,' and to remain

28. Goodmark, *supra* note 22, at 11. Only 20% of domestic violence victims have sought protective orders. *Id.*

29. *See id.* at 15. For example, in 1990, the District of Columbia police department only arrested someone on 5% of their domestic violence calls. *Id.* By 1996, the arrest rate climbed to 41%. *Id.* Note that despite the 36% increase in responsiveness, the police department still arrested a perpetrator less than half the time. *Id.*

30. *Id.* at 17.

31. *Id.*

32. *Id.*

33. Goodmark, *supra* note 22, at 17.

34. 125 S. Ct. 2796 (2005).

35. *Id.* at 2802-03.

36. *Id.* at 2800.

100 yards from [Gonzales's] family home at all times."³⁷ The bottom of this form stated that "IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS" were printed on the reverse side.³⁸ The reverse contained the following standard language:

NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU 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.³⁹

On June 4, the state trial court made this restraining order permanent.⁴⁰

On June 22, at around 5:00 p.m. or 5:30 p.m., Gonzales's husband kidnapped the children (aged 10, 9, and 7) while they were playing outside Gonzales's home.⁴¹ He had not arranged for this visit.⁴² At 7:30 p.m., Gonzales called the Castle Rock, Colorado Police Department, suspecting that her husband had taken the children.⁴³ When officers responded, she showed them a copy of the restraining order and asked that they return her children to her immediately.⁴⁴ The officers told her that they could do nothing.⁴⁵ They told her to call the police again if the children were still gone by 10:00 p.m.⁴⁶

At 8:30 p.m., Gonzales talked to her husband on his cellular phone.⁴⁷ He told her that he had the children at a Denver amusement park.⁴⁸ Gonzales called the police again, asking them to check the amusement park for her

37. *Gonzales*, 125 S. Ct. at 2800-01 (citing *Town of Castle Rock, Colorado v. Gonzales*, 366 F.3d 1093, 1143 (10th Cir. 2004)).

38. *Id.* at 2801 (emphasis in original).

39. *Id.* (emphasis in original).

40. *Gonzales*, 125 S. Ct. at 2801. The order also allowed Mr. Gonzales to see his children on alternate weekends, for two weeks during the summer, and "'upon reasonable notice,' for a mid-week dinner visit 'arranged by the parties.'" *Id.* The order also allowed him to visit the home for such "parenting time." *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Gonzales*, 125 S. Ct. at 2801.

47. *Id.*

48. *Id.*

husband's vehicle and to put out an "[all points bulletin]" for her husband.⁴⁹ The officer on the line refused, telling her to wait until 10:00 p.m. to see if her husband returned.⁵⁰

Gonzales followed these directions, calling the police yet again at 10:10 p.m. when her husband failed to return the children.⁵¹ This time, the police department told her to wait until midnight before calling again.⁵² Again, Gonzales followed orders and called at midnight.⁵³ At 12:10 a.m., Gonzales went to her husband's apartment and called the police a fifth time when she found that nobody was present.⁵⁴ Police told Gonzales to wait for police to arrive, but (perhaps tired of waiting on the police) she went to the police station to file an incident report at 12:50 a.m.⁵⁵ The police officer who took the incident report made absolutely no effort to enforce the restraining order; instead, he took his dinner break.⁵⁶

Finally, Gonzales's husband forced the police to react. At 3:20 a.m., he arrived at the police station and opened fire with a semiautomatic weapon.⁵⁷ Police returned fire, killing him.⁵⁸ Inside of his truck, police found the dead bodies of Gonzales's three daughters.⁵⁹ Mr. Gonzales had already murdered his three children.⁶⁰

Gonzales sued the Town of Castle Rock under 42 U.S.C. § 1983, claiming that the town violated her due process rights under the Fourteenth Amendment to the United States Constitution because the police department "had 'an official policy or custom of failing to respond properly to complaints of restraining order violations' and 'tolerate[d] the non-enforcement of restraining orders by its police officers.'"⁶¹ Gonzales further alleged that the town acted "willfully, recklessly, or with such gross negligence as to indicate wanton disregard and deliberate indifference to" her civil rights.⁶² The district court granted the town's motion to dismiss, but the Court of Appeals for the Tenth

49. *Gonzales*, 125 S. Ct. at 2801-02.

50. *Id.* at 2802.

51. *Id.*

52. *Id.* at 2802.

53. *Id.*

54. *Id.*

55. *Gonzales*, 125 S. Ct. at 2802.

56. *Id.*

57. *Id.*

58. *Id.* at 2802.

59. *Id.*

60. *Id.*

61. *Gonzales*, 125 S. Ct. at 2802.

62. *Id.*

Circuit reversed, finding that Gonzales had alleged a cognizable procedural due process claim.⁶³

At the time of filing, the Supreme Court had not yet addressed the validity of a due process claim in a domestic violence situation.⁶⁴ Because Colorado was one of fifteen states mandating arrest for domestic violence offenses and one of nineteen states mandating arrest for violating domestic restraining orders,⁶⁵ this case provided an opportunity for the Court to recognize § 1983 as a powerful tool in the fight against domestic violence. Instead, the Court's opinion narrowed the list of possible legal solutions for domestic violence victims.

III. HISTORY

The *Gonzales* case turned on whether Gonzales had a property interest in the restraining order against her husband.⁶⁶ In order to have a property interest in such a benefit, one must have "more than a unilateral expectation of it. [One] must, instead, have a legitimate claim of entitlement to it."⁶⁷ The hallmark of this property "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"⁶⁸ For example, a creditor has such an interest in a deceased person's estate with an unpaid bill.⁶⁹ State law may create such a right to public education.⁷⁰ A statute granting an operating license revocable only "for cause" creates such an interest.⁷¹ However, if the statute grants wide discretion to revoke such a license, the licensee has no property interest.⁷² To tell the difference, a court should look to the extent to which the statute uses mandatory language.⁷³

63. *Gonzales*, 125 S. Ct. at 2802. The Tenth Circuit found that the repeated use of the word "shall" made enforcement of the protective order statute mandatory on police officers. See *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1264 (10th Cir. 2002).

64. See *Gonzales*, 125 S. Ct. at 2803 ("As the Court of Appeals recognized, we left a similar question unanswered in *DeShaney v. Winnebago County Dept. of Social Servs.* . . .").

65. *Id.* at 2817-18 (Stevens, J., dissenting).

66. *Id.* at 2803-04.

67. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

68. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). Once a court finds this characteristic, "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Id.*

69. *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988). However, such a property interest only protects the holder against state action, not private action. *Id.*

70. *Handberry v. Thompson*, 436 F.3d 52, 70-71 (2d Cir. 2006). However, such a right does not necessarily continue when the individual is incarcerated. *Id.* at 71.

71. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

72. *Id.*

73. *Id.* at 1164-65.

IV. DUE PROCESS CLAIMS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourteenth Amendment to the United States Constitution provides that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.”⁷⁴ Due process of the law originally secured English citizens “against the arbitrary action of the crown.”⁷⁵ 42 U.S.C. § 1983 prohibits anyone from acting “under color of any statute, ordinance, regulation, custom, or usage, or any State” from depriving or causing to deprive any person of the United States of “any rights, privileges, or immunities secured by the Constitution and laws.” This statute “deter[s] state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”⁷⁶

In *Board of Regents v. Roth*⁷⁷ an assistant professor brought suit against his employer, Wisconsin State University-Oshkosh, because the university did not rehire him when his faculty appointment expired after one year.⁷⁸ Under Wisconsin law at that time, a first year teacher was entitled to nothing more than a one year appointment.⁷⁹ Instead, state law left the decision of whether to rehire a first year teacher to the “unfettered discretion” of university officials.⁸⁰ The Court recognized that due process in property rights extends “beyond mere ownership in real estate, chattels, or money.”⁸¹ Property interests may take many forms.⁸² However, in order to have a property interest in a benefit, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁸³ “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”⁸⁴ Property interests are not created by the Constitution.⁸⁵ Instead, they are created by rules or understandings stemming from state law.⁸⁶ The Court found that the plaintiff’s appointment for one year was to terminate, with absolutely no

74. U.S. CONST. amend. XIV, § 1.

75. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 518 (1885).

76. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Phipus*, 435 U.S. 247, 254-57 (1978)).

77. 408 U.S. 564 (1972).

78. *Id.* at 566.

79. *Id.*

80. *Id.* at 567.

81. *Id.* at 571-72 (citing *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

82. *Id.* at 576.

83. *Roth*, 408 U.S. at 577.

84. *Id.*

85. *Id.*

86. *Id.*

provision for renewal whatsoever.⁸⁷ Thus, he had no interest in re-employment once his term expired.⁸⁸

Six years after *Roth*, the Supreme Court decided *Memphis Light, Gas and Water Division v. Craft*.⁸⁹ In *Craft*, a homeowner in Memphis, Tennessee, sought declaratory and injunctive relief and damages against a municipal utility, claiming that the utility company terminated the homeowner's services without due process of the law.⁹⁰ The district court concluded that the homeowner's entitlement to continued utility service did not implicate a property interest protected by the Fourteenth Amendment.⁹¹ The court of appeals reversed in part.⁹² The Supreme Court held that, although the underlying substantive property interest is created by state law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."⁹³ Here, Tennessee state law did not allow a public utility to terminate service "at will."⁹⁴ The availability of causes of action to enjoin a wrongful threat or recover damages shows that Tennessee recognized the plaintiffs' claims as a protected interest.⁹⁵ Because the Fourteenth Amendment protects more than undisputed ownership, the plaintiffs asserted a legitimate claim of entitlement, even though their claims of wrongful termination were disputed.⁹⁶

In *Craft*, the Court held that the state must hold some kind of hearing before depriving someone of his property interests.⁹⁷ To determine what kind of hearing is required, the state must weigh three factors: 1) "the private interest that will be affected by the official action," 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and 3) "the government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute requirement would entail."⁹⁸ The utility violated plaintiff's due process rights because it failed to provide the plaintiff with notice reasonably calculated to alert the plaintiff to an administrative procedure to consider the complaint, and it failed to actually consider the plaintiff's complaints.⁹⁹

87. *Roth*, 408 U.S. at 578.

88. *Id.*

89. 436 U.S. 1 (1978).

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.* at 9.

94. *Id.* at 11.

95. *Craft*, 436 U.S. at 11.

96. *Id.* at 11-12.

97. *Id.* at 16.

98. *Id.* at 17-18.

99. *Id.* at 22.

In *DeShaney v. Winnebago County Department of Social Services*,¹⁰⁰ the mother of a 4-year-old boy severely beaten and permanently injured by his father brought suit against the local Department of Social Services.¹⁰¹ The mother claimed, after the state court awarded custody to the child's father, that state authorities ignored strong evidence that the boy's father severely abused him.¹⁰² Over the course of eighteen months, the agency received numerous reports of abuse from a local hospital because the boy kept receiving suspicious injuries.¹⁰³ Furthermore, the boy's father would not follow the voluntary agreement by which the agency agreed to keep the boy in his mother's custody.¹⁰⁴ Finally, after twenty-six months, the boy's father beat his son so badly that he fell into a life-threatening coma.¹⁰⁵ While the boy survived, he suffered brain damage so severe that he will spend the rest of his life in an institution for the profoundly retarded.¹⁰⁶

The boy's mother brought a § 1983 claim against the local agency and several of its employees.¹⁰⁷ The district court granted summary judgment for the agency.¹⁰⁸ The court of appeals affirmed, holding that the Due Process Clause does not require a state or local governmental entity to protect its citizens from "private violence, or other mishaps not attributable to the conduct of its employees."¹⁰⁹ The Supreme Court agreed to hear the case in order to resolve a split between circuits on this issue.¹¹⁰

The Court did not address the issue of whether the child protection statute entitled the boy to receive protective services in the terms of the statute because she did not properly preserve the issue.¹¹¹ The Court noted that the plaintiff relied on the substantive, not the procedural, component of the Due Process Clause.¹¹² The Court expressly held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."¹¹³ The Clause limits the state's power to act; it does not guarantee a minimal level of safety

100. 489 U.S. 189 (1989).

101. *Id.* at 191.

102. *Id.* at 193.

103. *Id.* at 192-93.

104. *Id.*

105. *Id.* at 193.

106. *DeShaney*, 489 U.S. at 193.

107. *Id.*

108. *Id.*

109. *Id.* at 193-94 (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987)).

110. *Id.* at 194.

111. *Id.* at 195 n.2.

112. *DeShaney*, 489 U.S. at 195.

113. *Id.*

and security.¹¹⁴ The purpose of the Fourteenth Amendment is to protect the people from the state, not to coerce the state to protect people from each other.¹¹⁵ Thus, due process cases generally recognize no right to governmental aid, even where that aid “may be necessary to secure the life, liberty, or property interests which the government itself may not deprive from the individual.”¹¹⁶ The Court rejected the plaintiff’s argument that the state created a special relationship such that the state acquired an affirmative duty, enforceable through the Due Process Clause, to protect the boy in a reasonably competent fashion.¹¹⁷ The Court held that only when a state takes a person into custody and holds him there against his will does the state owe a duty to assume responsibility for his safety and general well-being.¹¹⁸ The rationale is simple: when the state takes affirmative action to deprive a person of the ability to care for himself, it must in return offer basic human needs.¹¹⁹ The Court did not address the basic weakness in the Government’s analysis: that the state, through its family court system, assigned custody of the boy to his father, limiting the ability of the boy to care for himself.¹²⁰ The Court noted that the plaintiff may have a claim under tort law, outside of the Due Process Clause.¹²¹

Where a state does deprive a citizen of liberty, a policy must contain “explicitly mandatory language” before it creates a liberty interest.¹²² In *Kentucky Department of Corrections v. Thompson*,¹²³ state regulations allowed prison officials to deny visitation where a “visitor’s presence in the institution would constitute a clear and probable danger to the institution’s security or interfere with [its] orderly operation.”¹²⁴ The Court held that this regulation lacked the necessary mandatory language to create a liberty interest for the institution’s inmates.¹²⁵

114. *DeShaney*, 489 U.S. at 195.

115. *Id.* at 196.

116. *Id.*

117. *Id.* at 197-98.

118. *Id.* at 199-200.

119. *Id.* at 200.

120. *See DeShaney*, 489 U.S. at 191-203.

121. *Id.* at 201-02.

122. *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989).

123. *Id.*

124. *Id.*

125. *Id.* at 464.

V. DISCUSSION

A. *The Gonzales Decision*

In response to Castle Rock's failure to enforce her restraining order, Gonzales filed a § 1983 suit against the Town of Castle Rock, Colorado, and against three individual police officers.¹²⁶ Defendants filed a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss; the district court granted this motion before defendants answered the complaint.¹²⁷ The district court held that, regardless of whether Gonzales was relying on the procedural or substantive component of the Due Process Clause, she had failed to state a claim for which relief could be granted.¹²⁸

The Tenth Circuit upheld the district court's decision to dismiss the individual officers as defendants.¹²⁹ However, the Tenth Circuit reversed the district court's dismissal of the case against the City of Castle Rock.¹³⁰ The Tenth Circuit originally found that Gonzales failed to show that the city had violated any of her *substantive* due process rights when its police department failed to respond to her complaints.¹³¹ However, on a rehearing en banc, the Tenth Circuit held that Gonzales had a protected *procedural* due process right because she had a property interest in the enforcement of the terms of her restraining order.¹³² The Tenth Circuit then found that Gonzales had sufficiently alleged that the town could have deprived her of her due process rights because the town failed to hear or seriously entertain her request to enforce the restraining order and protect her interests in it.¹³³ The Tenth Circuit then reversed the district Court and remanded the case for further hearings.¹³⁴

126. *Town of Castle Rock, Colorado v. Gonzales*, 125 S. Ct. 2796, 2802 & n.3 (2005). Gonzales claimed that the town failed to properly train the officers to respond to domestic violence calls. *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1260 (10th Cir. 2002).

127. *Gonzales*, 125 S. Ct. at 2802.

128. *Id.*

129. *Id.* at 2802 n.3. The court found that the officers were entitled to qualified immunity in their actions as police officers. *Id.*

130. *Id.*

131. *Gonzales*, 307 F.3d at 1263. Gonzales never claimed to have a special relationship with the police department which would entitle her to such a claim. *Id.* at 1262. Gonzales also failed to show affirmative action (as opposed to mere inaction) by the police department which actually created a danger. *Id.* at 1263.

132. *Gonzales*, 125 S. Ct. at 2802.

133. *Id.* The appellate court did not find that the city had violated her procedural due process rights as a matter of law; it only stated that Gonzales was entitled to prove her case. *Id.*

134. *Gonzales*, 307 F.3d at 1267. The Tenth Circuit left open the questions of whether Gonzales could establish municipal liability or if Castle Rock was entitled to qualified immunity. *Id.* at 1266-67.

B. *Scalia's Majority Opinion*

Justice Scalia, writing for seven Justices, delivered the majority opinion of the Court.¹³⁵ Scalia pointed out that the Court in *DeShaney* left open a question similar to the one posed by *Gonzales*: whether a statute which provided for specific services entitled the recipient of those services to protection under the Due Process Clause.¹³⁶ The Court held that the procedural component of the Due Process Clause does not protect all “benefits.”¹³⁷ Instead, a person “clearly must have more than an abstract need or desire He must, instead, have a legitimate claim of entitlement to it.”¹³⁸

The Court based its decision on a state law determination, not a Due Process Clause analysis.¹³⁹ In a due process analysis, a court will first look to see if a state statute has provided the plaintiff with a property interest.¹⁴⁰ The court will then ask if that property interest is sufficient enough to warrant protection under the Due Process Clause.¹⁴¹ Such entitlements are created by state law, not the Constitution.¹⁴² The Court held that a benefit is not a protected entitlement if officials have discretion to grant or deny it.¹⁴³

On the state law issue, the Court refused to defer to the Tenth Circuit’s holding. The Tenth Circuit held that the statute created an entitlement to enforcement where a “‘court issued restraining order . . . specifically dictated that its terms *must* be enforced’ . . . and a ‘state statute command[ed]’ enforcement of the order when certain objective conditions were met.”¹⁴⁴ The presumption that the Court should defer to a federal court as to the law of the state within its jurisdiction was not appropriate here because the Tenth Circuit’s opinion “did not draw upon a deep well of state-specific expertise.”¹⁴⁵ The Tenth Circuit opinion relied only on language from the restraining order, the statutory text, and a state legislative hearing transcript.¹⁴⁶ Furthermore, the Tenth Circuit relied on decisions from Ohio, Pennsylvania, New Jersey, Oregon, and Tennessee, not Colorado.¹⁴⁷ Finally, the Court

135. *Gonzales*, 125 S. Ct. at 2800.

136. *Id.* at 2803 (citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 n.2 (1989)).

137. *Id.*

138. *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

139. *Id.* at 2804.

140. *Id.*

141. *Gonzales*, 125 S. Ct. at 2804.

142. *Id.* at 2803.

143. *Id.*

144. *Id.* at 2803-04 (quoting *Town of Castle Rock, Colorado v. Gonzales*, 366 F.3d 1093, 1101 (10th Cir. 2004)) (emphasis added).

145. *Id.* at 2804.

146. *Id.*

147. *Gonzales*, 125 S. Ct. at 2804.

reasoned that if it were to accept the Tenth Circuit's conclusion, the Court would be faced with conclusively deciding a federal constitutional question: whether such an entitlement constituted property under the Due Process Clause.¹⁴⁸ The Court decided to take the less drastic step of ruling on the state law issue.¹⁴⁹

The Court ultimately found that the critical language in determining whether Gonzales had an interest in the restraining order existed in the restraining order statute, not the actual restraining order itself.¹⁵⁰ At the time of the incident, the Colorado statute stated that:

- (a) A peace officer shall use every reasonable means to enforce a restraining order.
- (b) A peace officer *shall* arrest, or, if an arrest would be impracticable under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
 - (I) The restrained person has violated or attempted to violate any provision of a protection order; and
 - (II) The restrained person has been properly served with a copy of the protection order or . . . has received actual notice of the existence and substance of such order.
- (c) In making the probable cause determination . . . a peace officer *shall* assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.¹⁵¹

One lawmaker stated that, “[t]he entire criminal justice system *must* act in a consistent manner, which does not now occur. The police *must* make probable cause arrests.”¹⁵² Still, the Court did not find that this statute made enforcement of restraining orders mandatory because of a long history of police discretion and the understanding that language in such statutes cannot be read literally.¹⁵³ A true mandate of police action would require language stronger than “‘shall use every reasonable means to enforce a restraining order’ (or even ‘shall arrest . . . or . . . seek a warrant’).”¹⁵⁴ In situations such as

148. *Id.*

149. *Id.*

150. *Id.* at 2804-05.

151. COLO. REV. STAT. § 18-6-803.5(3) (1999) (emphases added).

152. *Gonzales*, 125 S. Ct. at 2805 n.6 (quoting Tr. of Colo. House Judiciary Hearings on H. B. 1253, Feb. 15, 1994) (emphasis added).

153. *Id.* at 2805-06.

154. *Id.* at 2806.

these, where the suspected violator is not present and his whereabouts are unknown, the necessity for discretion is particularly apparent.¹⁵⁵

The Court addressed the arguments raised by the two dissenting Justices. While the dissent points out that some states have found their domestic violence mandatory arrest statutes to be more mandatory than traditional mandatory arrest statutes, the dissent fails to clarify how the mandatory arrest provision applies in situations where the offender is not present to be arrested.¹⁵⁶ There will be some situations where an arrest is not possible, such as when the offender is not home.¹⁵⁷ Nor does Gonzales specify the precise means by which the police are mandated to act in this situation: arrest the husband, seek an arrest warrant for the husband, or have them use “every reasonable means, up to and including arrest,” to enforce the order.¹⁵⁸ If the mandate is for seeking a warrant, this is an entitlement to procedure, not adequate enough to support standing in a § 1983 case.¹⁵⁹

Finally, even if the Colorado statute did make police action mandatory, this would not have necessarily given Gonzales an entitlement to enforcement of the restraining order.¹⁶⁰ Making state actions mandatory may serve legitimate purposes other than to confer a benefit on an individual or a class of people.¹⁶¹

Again addressing concerns raised by the dissenting Justices, the Court noted that Gonzales did not claim any contractual right to enforcement of the statute.¹⁶² Instead, the statute specifically gave Gonzales the power to initiate contempt proceedings against her husband in a civil action or to request a prosecuting attorney to initiate contempt proceedings if the order was issued in a criminal action.¹⁶³

Although the Court did not base its decision on a Due Process Clause analysis,¹⁶⁴ it did find in dicta that even if Colorado law did confer an entitlement to Gonzales, this entitlement would not necessarily have been property for purposes of the Due Process Clause.¹⁶⁵ The Court did not defer to the Tenth Circuit on whether this entitlement constitutes a property interest for purposes of the Fourteenth Amendment.¹⁶⁶ Instead, the Court held that federal constitutional law determines whether an interest rises to a property interest

155. *Id.*

156. *Gonzales*, 125 S. Ct. at 2806-07.

157. *Id.* at 2807.

158. *Id.* at 2807.

159. *Id.* at 2808.

160. *Id.*

161. *Id.*

162. *Gonzales*, 125 S. Ct. at 2808.

163. *Id.* at 2809.

164. *Id.* at 2804.

165. *Id.* at 2809.

166. *Id.* at 2803.

protected by the Due Process Clause.¹⁶⁷ The right claimed by Gonzales did not resemble traditional property rights.¹⁶⁸ Here, the property interest would arise incidentally, not out of some unique government service, but out of a function that government actors have always performed: arresting people they have probable cause to believe have committed a criminal offense.¹⁶⁹ While Gonzales may have had a private right to contract with a third party for her protection, she would not have had the power to arrest her husband.¹⁷⁰ Nor would she have the power to obtain an arrest warrant on her own.¹⁷¹

The Court distinguished “indirect” benefits from “direct” benefits.¹⁷² Withdrawal of direct benefits, such as financial payments under Medicaid for medical services, triggers protection of the Due Process Clause,¹⁷³ while withdrawal of indirect benefits does not deprive a person of any interest in life, liberty, or property.¹⁷⁴ The Court concluded that “[t]he benefit that a third party may receive from having someone arrested generally does not trigger protections under the Due Process Clause, neither in its procedural nor its ‘substantive’” components.¹⁷⁵ Ultimately, the Court recommended that states may provide victims with enforceable remedies under state law.¹⁷⁶

C. Souter’s Concurrence

Justice Souter, joined by Justice Breyer, concurred with the majority of the Court.¹⁷⁷ Justice Souter agreed with the majority that Gonzales had not shown a violation of an interest protected by the Due Process Clause.¹⁷⁸ Courts generally grant police discretion not to enforce the law.¹⁷⁹ In comparison, no one could argue that Gonzales had the power to order the police not to arrest her husband.¹⁸⁰ Gonzales’s argument was unconventional because she claimed federal procedural protection under a state law benefit, which is itself procedural.¹⁸¹ Justice Souter pointed out that “[t]he Due Process Clause extends procedural protection to guard against . . . deprivation[s] . . . of

167. *Id.* at 2803-04 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

168. *Gonzales*, 125 S. Ct. at 2809.

169. *Id.*

170. *Id.* at 2809 n.12.

171. *Id.*

172. *Id.* at 2810.

173. *Id.*

174. *Gonzales*, 125 S. Ct. at 2810.

175. *Id.*

176. *Id.* at 2810.

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

178. *Id.*

179. *Id.*

180. *Gonzales*, 125 S. Ct. at 2811.

181. *Id.*

substantive state law property rights[,] . . . [b]ut Gonzales claim[ed] a property interest in a state-mandated process in and of itself.”¹⁸² Due process is not an end in itself; instead, it is designed to protect substantive interests.¹⁸³ In distinguishing substance and procedure, Justice Souter stated that “[p]roperty cannot be defined by the procedures provided for its deprivation.”¹⁸⁴ “State rules of executive procedure . . . may be nothing more than rules of executive procedure.”¹⁸⁵ Thus, property rights are distinguishable from the procedural obligations imposed to protect them.¹⁸⁶ Gonzales sought to change the scope of federal due process by replacing federal process for state process.¹⁸⁷ Gonzales could not distinguish between the object of her entitlement and the process she sought to protect it.¹⁸⁸ Accepting Gonzales’s argument would “federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected by it.”¹⁸⁹

D. Stevens’s Dissent

Justice Stevens, joined by Justice Ginsburg, dissented.¹⁹⁰ They framed the issue more narrowly than the “far-ranging” arguments of the parties and their amici.¹⁹¹ They framed the issue as whether the restraining order entered by the trial court created a property interest protected from arbitrary deprivation by the Due Process Clause.¹⁹²

Justice Stevens stated that it was clear that neither the Constitution nor any federal statute granted Gonzales or her children any entitlement to police protection.¹⁹³ Neither did any Colorado statute presumptively create such an entitlement for an ordinary citizen.¹⁹⁴ However, Gonzales could easily have entered into a contract with a private security company to provide protection.¹⁹⁵ Gonzales’s interest in such a contract would certainly constitute property within the meaning of the Due Process Clause.¹⁹⁶ Thus, if Colorado performed the functional equivalent by granting Gonzales an entitlement to

182. *Id.* at 2812 (Souter, J., concurring).

183. *Gonzales*, 125 S. Ct. at 2812 (Souter, J., concurring).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 2812.

189. *Gonzales*, 125 S. Ct. at 2812-13 (Souter, J., concurring).

190. *Id.* at 2813 (Stevens, J., dissenting).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 2813.

195. *Gonzales*, 125 S. Ct. at 2813 (Stevens, J., dissenting).

196. *Id.*

mandatory individual protection by her local police, that right would also qualify as property entitled to Due Process Clause protection.¹⁹⁷ Gonzales's allegations that local police ignored her request to enforce the restraining order provide her with a § 1983 remedy against that police force, even if Colorado law does not provide specifically for such a private cause of action.¹⁹⁸ Stevens asserted, "The central question in this case is therefore whether, as a matter of Colorado law, respondent had a right to police assistance comparable to the right she would have possessed to any other service the government or a private firm might have undertaken to provide."¹⁹⁹

Justice Stevens criticized the majority for failing to defer this question to a more "qualified tribunal[]" and for ignoring its own "settled practice."²⁰⁰ The old policy, he said, is more efficient, and this policy reflects the belief that state district courts and appellate courts are more familiar and more able to interpret the laws of their respective states.²⁰¹ Only in rare occasions has the Court declined to show this deference.²⁰² A court could plausibly read "'shall use every reasonable means to enforce a restraining order;' and 'shall arrest'"²⁰³ as mandatory; the majority clearly did not show that such a reading is "clearly wrong."²⁰⁴

Justice Stevens recommended certifying the question to the Colorado Supreme Court.²⁰⁵ This was because "[p]rinciples of federalism and comity favor giving Colorado's high court the opportunity to answer important questions of state law."²⁰⁶ By certifying a dispositive state law issue, the Court could rely on its wise policy of avoiding unnecessary adjudication of difficult questions of constitutional law.²⁰⁷ Finally, certification would promote judicial economy and fairness for all parties.²⁰⁸ Justice Stevens observed that the Colorado Supreme Court could overturn the United State Supreme Court and hold that the statute did provide Gonzales with a property interest in the enforcement of the restraining order.²⁰⁹

197. *Id.*

198. *Id.*

199. *Id.*

200. *Gonzales*, 125 S. Ct. at 2814 (Stevens, J., dissenting).

201. *Id.*

202. *Id.*

203. *Id.* (quoting COLO. REV. STAT. § 18-6-803.5(3)(a)-(b) (1999)) (emphasis added in original).

204. *Id.* Here, Justice Stevens argued that the Court should have reviewed the Tenth Circuit's holding on the state law issue under an abuse of discretion standard, not a de novo standard. *Id.* Under this level of review, the Tenth Circuit's holding is not clearly erroneous. *Id.*

205. *Id.* at 2815.

206. *Gonzales*, 125 S. Ct. at 2815 (Stevens, J., dissenting).

207. *Id.* at 2815-2816.

208. *Id.* at 2816.

209. *Id.*

Justice Stevens then turned to the majority's "rather superficial analysis of the merits."²¹⁰ The Court placed undue weight on other statutes seemingly mandating police enforcement, but the result was to preserve police discretion.²¹¹ By doing so, the Court has "'give[n] short shrift' to the unique case of 'mandatory arrest' provisions in domestic violence" statutes.²¹² Many states have passed these statutes in the last twenty-five years with the "'unmistakable goal' of eliminating police discretion in this area."²¹³ The Court's formalistic analysis also failed to take into account that the statute was designed to protect a narrow class of persons, beneficiaries of these restraining orders.²¹⁴ Finally, "a citizen's property interest in a commitment to provide police enforcement in specific circumstances is 'just as concrete and worthy of protection' as her interest in any other important service which the government or a private firm has undertaken to provide."²¹⁵

Colorado passed this statute along with several other states in an effort to eradicate police underenforcement in domestic violence cases by mandating arrests.²¹⁶ In response to police departments viewing domestic violence as a private matter and consequently assigning them lower priority status, many states followed the example of the Minneapolis police department by mandating arrest when an officer has probable cause to believe that a domestic assault has occurred or that someone has violated a protection order.²¹⁷ The purpose of these statutes was to remove police discretion.²¹⁸ Thus, it is hard to imagine what the Court had in mind when it requested "some stronger indication from the Colorado Legislature."²¹⁹ The majority's opinion is especially brazen, given the trend in many states to interpret their statutes as eliminating police discretion.²²⁰

The majority called for Gonzales to describe the "precise means of enforcement," but this question is a "red herring."²²¹ The statute specifically requires either an arrest or an arrest warrant.²²² The crucial point is not whether the enforcement in the case was an arrest or an arrest warrant (as the answer to this question probably changed through the night as Gonzales gave more information about her husband's whereabouts); it is that "[the police]

210. *Id.*

211. *Id.*

212. *Gonzales*, 125 S. Ct. at 2816 (Stevens, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Gonzales*, 125 S. Ct. at 2817 (Stevens, J., dissenting).

219. *Id.* at 2818.

220. *Id.* at 2818-19.

221. *Id.* at 2819.

222. *Id.*

lacked the discretion to do nothing."²²³ For example, if a state required the provision of healthcare if a person met certain income requirements, no one could say that person lacked entitlement to that healthcare because the form of that entitlement will change depending on the situation.²²⁴

Importantly, Gonzales was entitled to enforcement of the restraining order because she received the individual benefit from a state court under a state statute benefiting a narrow class of people.²²⁵ She specifically applied for the restraining order, and the state judge found a risk of "irreparable injury" and "physical or emotional harm" if the husband were to return to the Gonzales home.²²⁶ Because the statute only operates when a judge grants an identified individual its benefits, the majority's finding that the statute provides "incidental" or "indirect" benefits misses the mark.²²⁷ "[D]omestic restraining order statutes 'identify with precision when, to whom, and under what circumstances police protection must be afforded.'"²²⁸

Because Colorado law clearly eliminates police discretion, Gonzales has demonstrated the "legitimate claim of entitlement" of enforcement required to show a Due Process Clause property right.²²⁹ Clearly, property interests extend beyond "mere ownership of real estate, chattels, or money."²³⁰ The Court has previously found property interests in several state-conferred benefits and services, including disability benefits, public education, utility services, government employment, and some state procedures, such as fair procedures before a driver's license may be revoked pending the adjudication of an accident claim.²³¹ It is the purpose of property "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."²³² Here, Colorado guaranteed Gonzales the protection of enforcement of the restraining order, a promise on which she relied.²³³

At the very least, the Due Process Clause requires that the relevant state decision-maker listen to the claimant and then apply the relevant criteria in

223. *Id.* at 2819-20 (emphasis in original).

224. *Gonzales*, 125 S. Ct. at 2820 (Stevens, J., dissenting).

225. *Id.* at 2821.

226. *Id.*

227. *Id.* at 2822.

228. *Id.* (quoting *Nearing v. Weaver*, 670 P.2d 137, 143 (Or. 1983) (en banc)).

229. *Id.*

230. *Gonzales*, 125 S. Ct. at 2822 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

231. *Id.* at 2822-23 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985); *Bell v. Burson*, 402 U.S. 535 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1972)).

232. *Id.* at 2823 (quoting *Roth*, 408 U.S. at 577).

233. *Id.*

reaching his decision.²³⁴ Here, the police ignored Gonzales's complaints.²³⁵ The police had a "callous policy of failing to properly respond" to similar violations.²³⁶ The police department provided Gonzales with nothing more than a "sham or a pretense" of process.²³⁷

VI. AUTHOR'S ANALYSIS

The Court based its decision on a determination of state law.²³⁸ Consequently, a Colorado state court could overturn the U.S. Supreme Court on the issue of whether or not Gonzales had a property interest in seeing her restraining order enforced.²³⁹ The Court found that in statutory interpretation, "shall" does not apply to police officers like it does to other government officials.²⁴⁰ The Court's reasoning here confused discretion in *how* to meet the requirements of the statute with *whether* to meet the requirements of the statute.²⁴¹ Justice Stevens pointed this out in his dissent when he stated that, under the Colorado statute, the police lacked discretion to do nothing.²⁴² The Court's holding here may not be universally upheld in all state courts with similar mandatory arrest provisions.²⁴³

The Court went further in dicta to say that, even if Gonzales did have a property interest in the restraining order, it did not meet the kind of "legitimate expectation" that would prevent the state from removing such a benefit without the due process required under the Fourteenth Amendment.²⁴⁴ The Court's distinction between direct and indirect rights initially seems convincing.²⁴⁵ However, this analysis did not address the holding in *Logan v. Zimmerman Brush Co.*,²⁴⁶ which stated that property interests are, "often as not,"

234. *Id.* at 2824.

235. *Id.*

236. *Gonzales*, 125 S. Ct. at 2824 (Stevens, J., dissenting).

237. *Id.* at 2825.

238. *Id.* at 2804.

239. *Cf. id.* at 2816 (Stevens, J., dissenting). Justice Stevens points out that the Court should have certified this question of law for a Colorado state court, regardless of whether the parties sought such certification. *Id.* at 2815-2816.

240. *Id.* at 2806 (majority opinion). The Court acknowledged the legislative history of the statute, which included a statement that the criminal justice system was not acting in a uniform manner, and that this statute required police to make probable cause arrests. *Id.* at 2805 n.6.

241. *Id.* at 2805-06. The Court found that because police may have discretion to actually make an arrest, or merely seek an arrest warrant, then the statute gave the police some discretion. *Id.*

242. *Gonzales*, 125 S. Ct. at 2819-20 (Stevens, J., dissenting).

243. Many states already interpret such statutes as eliminating police discretion. *Id.* at 2818-19 (pointing to a trend in many states).

244. *Id.* at 2809.

245. *See id.* at 2810.

246. 455 U.S. at 430.

intangible. Such property interests often encompass the “whole domain of social and economic fact.”²⁴⁷ By quickly dispensing of Gonzales’s property claim by labeling the benefit “indirect,” the Court may have seriously limited the rights of many citizens, not just those claiming an interest in a restraining order.²⁴⁸

In addition, the Court probably erred by even deciding the state law issue of whether the statute gave Gonzales a property interest in seeing the restraining order enforced. From a practical standpoint, the Supreme Court will have wasted its time if the Colorado Supreme Court disagrees with the majority’s state law analysis.²⁴⁹ From a legal standpoint, the Court failed to convincingly outline its reasons for refusing to defer to the Tenth Circuit’s determination on this issue.²⁵⁰

Justice Souter’s concurring opinion is more convincing. Justice Souter points out that Gonzales attempted to claim a property right through a procedural rule.²⁵¹ Souter claimed that Gonzales could not distinguish between the object of her entitlement and the process she sought to protect it.²⁵²

However, this may not necessarily be the case. Here, one could view the “object of her entitlement” as the guarantee that her abuser will be arrested if he violates the restraining order. At first glance, this may appear to be identical to the process she claims she was denied. Yet, the Court’s majority opinion contained the answer to this argument when it claimed that the statute granted the officer discretion in *how* to make every “reasonable effort”²⁵³ to enforce the restraining order under the statute. The Colorado statute required more than just a mere arrest.²⁵⁴ It mandated that the officer use “every reasonable means” to enforce Gonzales’ restraining order.²⁵⁵ Thus, Gonzales’s

247. *Id.*

248. For example the Court has held that a creditor has a protected property interest in recovering an unpaid debt from the estate of a debtor. *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1987). Under the Court’s analysis, such a benefit may be called “indirect” because facilitating claims between creditors and debtors is not a unique government service, but a function that courts have always performed. *Gonzales*, 125 S. Ct. at 2809. Similarly the Second Circuit has held that a public education is a protected property interest for non-incarcerated individuals where state statute provides for such an education for 16-21 year olds. *Handberry v. Thompson*, 446 F.3d 335, 352-355 (2006). Under the Court’s analysis, this public education may be considered an “indirect” benefit unworthy of protection because states have traditionally provided public education to all of its citizens. *Id.*

249. *See Gonzales*, 125 S. Ct. at 2815-16 & nn.3-6 (Stevens, J., dissenting).

250. *See id.* at 2814.

251. *Id.* at 2812 (Souter, J., concurring).

252. *Id.*

253. COLO. REV. STAT. § 18-6-803.5(3)(a) (2005).

254. *Id.*

255. *Id.*

property right was for the police department to enforce her restraining order. The *process* by which this right is protected is the officer's method of enforcing the restraining order.²⁵⁶ By denying Gonzales a police response, the police department deprived Gonzales of her property interest protection under the statute and the restraining order.

Despite the limitations of the majority and concurring opinion, Justice Stevens's dissent probably relies on the wrong legal theories to answer those arguments. Justice Stevens analogizes Gonzales's interest in her restraining order to the property interest she would have had in a contract with a private security company to provide protection.²⁵⁷ This analogy fails to distinguish between a contract, where two parties enter an agreement, and a statutory provision which merely provides unilateral protection to a specific group of citizens.²⁵⁸ By framing the issue around this argument,²⁵⁹ the dissenting Justices base their arguments on a mere analogy, rather than a clear, identifiable right. Such an approach may actually expand property interests protected by the Due Process Clause beyond a comfortable limit.²⁶⁰

In sum, the Court should have recognized that Gonzales had a property interest in seeing the restraining order enforced. She did not have such a right because it is analogous to a contractual right. Instead, Gonzales had a legitimate expectation that when her legislature mandated that police "shall" use every reasonable means to enforce a restraining order, including arrest, the legislature never intended the word "shall" to mean "may." The Court should have recognized this property interest as legitimate enough to warrant Due Process Clause protections.

Nevertheless, seven Justices agreed with the Court's decision in *Gonzales*.²⁶¹ Lower federal courts will most likely follow the Court's dicta that Gonzales did not state a claim under § 1983. Victims should not rest on an argument that this part of the opinion was mere dicta.

This casenote examines ways that domestic violence victims and society in general can combat domestic violence after the *Gonzales* decision. The first question is whether society should develop legal procedures to protect victims.

256. The officer has no discretion on whether to arrest the perpetrator if the perpetrator is present. *Gonzales*, 125 S. Ct. at 2814 (Stevens, J., dissenting). He does have discretion in how to seek the arrest warrant. *Id.* at 2805. Here, the officer has clerical discretion: what information to include in the arrest warrant application, for example. *Id.*

257. *Id.* at 2813 (Stevens, J., dissenting).

258. *See id.* at 2803-05. Furthermore, Gonzales never claimed anything like a contractual right to enforcement of the statute. *Id.* at 2803. Gonzales retained the independent right to initiate contempt proceedings against her husband if he violated the restraining order. *Id.* at 2805.

259. *Id.* at 2813 (Stevens, J., dissenting).

260. *Cf. id.* at 2803 (A person "clearly must have more than an abstract need or desire He must, instead, have a legitimate claim of entitlement to it" (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))).

261. *Id.* at 2800.

If society agrees that legal remedies are necessary, the next question is what kind of legal remedies will be most effective. This casenote suggests that civil liability for police departments that fail to respond vigorously to domestic violence calls may be a vital piece of the puzzle necessary to effectively combat domestic violence in the United States.

A. *Should Society Develop Legal Remedies for Domestic Violence Victims?*

Some scholars have argued that legal remedies may not be the best approach to deal with the problem of domestic violence.²⁶² Reasons for this vary.²⁶³ To some extent, the legal system may penalize those women who honestly want to stay with their abusers.²⁶⁴ In addition, legal proceedings can be costly, possibly forcing the victim to forgo other non-legal services.²⁶⁵ Legal involvement can also incite more violence from the abuser, as he attempts to punish such independent behavior.²⁶⁶ The legal system will usually not respond to “mere” verbal, emotional, or economic abuse.²⁶⁷

Nevertheless, the legal system plays a vital role in the lives of women who seek protection from their abusers. Family members and social service agencies cannot threaten an abuser with jail time or civil penalties for his abusive behavior. The inability of the legal system to serve the needs of all women in domestic violence situations is no excuse to abandon all efforts at developing legal options for those women who have turned to the legal system for relief.²⁶⁸ For those women who have called on the legal system for protection, the legal system must not arbitrarily turn a blind eye or ignore its duties to answer that call.

B. *What Kind of Legal Remedies Will Be Most Effective?*

Legislative remedies for domestic violence may be proactive or reactive. An example of proactive policy is the creation of the Office on Violence

262. See Goodmark, *supra* note 22, at 19-23.

263. *Id.*

264. *Id.* at 19-21. One could certainly argue to what extent a woman would want to stay with her abuser. Actually measuring the frequency of women who would stay would be very difficult; a researcher would have to devise a way to distinguish honest answers from coerced answers. Nevertheless, this casenote concedes that it is at least possible that some women would want to stay.

265. *Id.* at 22.

266. *Id.* at 23.

267. *Id.* at 29-30.

268. By analogy courts do not abandon their efforts at contract law because some parties may wish to stay in unenforceable contracts for non-legal reasons (e.g., maintaining a good business relationship with a big client). See, e.g., LYNN M. LOPUCKI ET AL., COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH 5 (2d ed. 2003). Similarly, lack of legal remedies is no reason to abandon contract law. *Cf. id.* at 5-6.

Against Women (OVW) in the U.S. Department of Justice in 1995.²⁶⁹ Since 1995, the OVW has handed out about \$2 billion in grant funds to state law enforcement agencies throughout the United States.²⁷⁰ In addition, President George W. Bush has announced a program for the creation of fifteen domestic violence victim service and support centers throughout the United States.²⁷¹ These centers promise to consolidate all of the social service, criminal justice, economic, and spiritual needs of their clients.²⁷² While these centers are a promising development, their effects are unknown. Society should continue to develop more effective alternative solutions.

Many states have also enacted proactive mandatory arrest laws.²⁷³ These laws have enhanced the arrest rates on domestic violence calls in their respective jurisdictions.²⁷⁴ These laws have two drawbacks. First, where they impose no civil liability, police departments may not necessarily respect the statute. This was probably the case in Castle Rock, Colorado. Consequently, police departments are left only with political consequences for failing to act. While this may be a powerful deterrent if the department fears a high-publicity case, such as *Gonzales*, it will not guarantee that a police department will respond to every domestic violence call it receives. Second, even where the arrest rates may climb, police departments may still fail to respond adequately enough.²⁷⁵

Civil protection orders are another proactive attempt to combat domestic violence.²⁷⁶ Protection orders allow an abuse victim to employ the legal system to prevent her abuser from harassing her.²⁷⁷ However, to be effective, such restraining orders must be enforced. This requires police to arrest abusers when they violate protection orders. Where, as in *Gonzales*, police refuse to enforce such restraining orders, they become nothing more than a paper shield, providing the victim with no protection whatsoever.

269. See Office on Violence Against Women, available at <http://www.usdoj.gov/ovw/overview.htm> (last visited Jan. 13, 2006).

270. *Id.*

271. Alberto R. Gonzales, Remarks at the Opening of the St. Louis Family Justice Center, (Jan. 12, 2006) (transcript available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060112.html). The President has funded these centers with \$20 million. *Id.* As of January 12, 2006, six centers have opened in Oakland, San Antonio, St. Louis, and Brooklyn. *Id.*

272. *Id.*

273. See *supra* note 26.

274. See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 14 (1999) (In the District of Columbia, arrest rates rose from 5% to 41% from 1991 to 1996.)

275. See *id.* (even after improvement, D.C. police arrested a perpetrator less than half the time).

276. See Goodmark, *supra* note 22, at 10.

277. *Id.*

Finally, revised custody statutes may help domestic violence victims when they share a child with their abuser.²⁷⁸ A revised custody statute may require a court to consider allegations of domestic violence when determining a custody arrangement.²⁷⁹ This may sometimes prevent attempts by the abuser to use custody of children as yet another tool for controlling his victim.²⁸⁰ Still, these laws will not work where evidence of domestic violence is weak. Nor will they protect a childless victim.

In summary, society has taken many proactive steps to combat domestic violence. In addition to non-legal remedies, such as social services, family, and friends,²⁸¹ state and federal lawmakers have provided for massive funding of domestic violence prevention programs.²⁸² Lawmakers have required mandatory arrest of perpetrators, and they have revised civil laws to provide more tools for victims of domestic violence.²⁸³ Still, domestic violence persists. A more reactive approach in our legal system may supplement the proactive policies in eradicating domestic violence.

One reactive approach may already exist: a woman might successfully sue a police department that has ignored her protection order under a claim that the police department failed to provide her with equal protection under the law.²⁸⁴ The Equal Protection Clause of the Fourteenth Amendment states that no state may “deny to any person within its jurisdiction the equal protection of the laws.”²⁸⁵ Women seeking protection from gender bias in public housing have successfully brought lawsuits under this theory.²⁸⁶ If one views gender bias in public housing and domestic violence in the home as two points along a spectrum of violence against women, this further supports an argument for an equal protection claim in cases like *Gonzales*.²⁸⁷

In order to support an equal protection claim, a plaintiff must prove that: 1) inadequate police response to domestic violence calls is gender discrimination,

278. *Id.* at 12.

279. *Id.*

280. *Id.*

281. *See id.* at 9.

282. *See* Office on Violence Against Women, *supra* note 268.

283. Goodmark, *supra* note 22, at 15, 10.

284. *See* Browne, *supra* note 1, at 1314-16. *Gonzales* may have erred in failing to bring a claim under this theory. Nevertheless, one could see why *Gonzales* relied on a due process claim rather than an equal protection claim. By claiming violation of due process, *Gonzales* avoided the burden of proving discriminatory intent.

285. U.S. CONST. amend. XIV., § 1.

286. *See, e.g.,* *Shellhammer v. Lewallen*, 1985 WL 13505 *1 (6th Cir. 1985) (per curiam). The tenant had refused to pose nude for the landlord or to have sex with the landlord. *Id.* The court found that the plaintiff stated a cause of action under the Fair Housing Act because the act recognizes sexual harassment as a form of gender discrimination. *Id.*

287. *Cf.* Beverly Balos, *A Man's Home Is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 78 (2004).

and 2) the police intentionally discriminated against victims of domestic violence based on gender.²⁸⁸ The first element should be easy to prove because virtually all victims of domestic violence are female.²⁸⁹ “In fact, the history of profound gender inequality in the government’s treatment of wife-beating makes the problem one of core constitutional concern.”²⁹⁰ A plaintiff may show discriminatory intent by demonstrating that the lack of responsiveness is based on stereotypical notions of gender roles or unconscious sexism.²⁹¹

Still, equal protection claims may not be universally successful. First, the Supreme Court repeatedly ruled against allowing civil rights claims under § 1983 to impose liability on municipalities where the municipality has failed to act.²⁹² Second, equal protection claims may be hard to prove.²⁹³ In an equal protection claim, the plaintiff carries the extra burden of proving that police responses to domestic violence calls actually constitute gender discrimination.²⁹⁴ In addition, the plaintiff must prove intent to discriminate.²⁹⁵

If equal protection claims will not work to encourage police to enforce protection orders, then perhaps state legislatures can enact legislation that will motivate police departments by creating financial consequences for failing to respond to domestic violence calls. Indeed, in *Gonzales* the Court explicitly recommends this approach as a way of putting teeth into mandated arrest statutes.²⁹⁶ Under this approach, a legislature has two options: 1) provide for reductions in a police department’s budget when it fails to respond to domestic violence calls, or 2) provide victims of domestic violence a state cause of action when a police department ignores a protection order.

The first option has several benefits but many limitations. The first benefit is that legislatures could re-emphasize any proactive spending policies to prevent domestic violence.²⁹⁷ Where spending provisions for domestic

288. Browne, *supra* note 1, at 1314-15. The plaintiff would base her theory on the fact that, because domestic violence victims are predominantly female, police inaction in these cases provide females with less protection against assault and battery laws than the police provide males from these crimes. *Id.* at 1315.

289. *Id.* at 1316.

290. Joan Meier, *Battered Justice for Battered Women*, WASH. POST, March 22, 2005, at A 25.

291. See Browne, *supra* note 1, at 1315.

292. Compare *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 193 (1989), and *Town of Castle Rock, Colorado v. Gonzales*, 125 S. Ct. 2796, 2803-04 (2005).

293. See Browne, *supra* note 1, at 1314-1315.

294. *Id.* at 1314.

295. *Id.* at 1315.

296. *Gonzales*, 125 S. Ct. at 2810.

297. See Office of Violence Against Women, available at <http://www.usdoj.gov/fy2004grants/welcome.html> (last visited Jan. 13, 2006). This map provides links to spending

violence programs could easily get lost amongst the various other law enforcement spending programs, a penalty provision might draw the attention of policy-makers.²⁹⁸ The second benefit is that a legislature should be able to accurately predict costs so as to pressure police departments without crippling them financially.

Nevertheless, the drawbacks of such a program are numerous. First, a state legislature or executive oversight committee may not have a strong motivation to carefully scrutinize a police department's practices. Such scrutiny may whither under political pressure to provide robust funding to police departments, and it may lead to arbitrary decisions. Also, this kind of program could lead to significant oversight costs.

In comparison, a private cause of action overcomes these limitations. Any problems inherent in a private cause of action can be overcome by placing limits on these causes of action. Where a political body may not have a strong motivation to carefully examine a police department for limitations, a domestic violence victim will have strong incentives to challenge a police department that has ignored her protection order. By subjecting such claims to the procedures of a civil trial, this approach should be less susceptible to arbitrary outcomes. It will also be open to the public. The plaintiff will bear the burden of investigating the police department's actions, not the state.²⁹⁹

Still, this program would have several limitations. First, unpredictable jury verdicts could run the risk of crippling police departments, especially if the plaintiff seeks and receives punitive damages. The legislature could correct this by prohibiting punitive damages.³⁰⁰ Moreover, the substantial burdens of actually proving that the police department's actions actually caused the plaintiff's harm and proving exactly what harms that failure caused should serve as an inherent limitation on the number of suits filed against police departments. This statute could also lead to significant litigation costs for police departments. A legislature could correct this by providing that court and legal fees be paid by the plaintiff in frivolous cases. The largest hurdle for this type of program would most likely be unpredictability in police budgets. However, a legislature could prevent this by capping the damages allowed. Further, local police departments could share the risk of such lawsuits by purchasing insurance. In some situations, municipalities would be too risky to insure. However, this would actually further encourage lagging police

programs in each of the fifty states. *Id.* Budget expenditures include provisions for homeland security, bullet proof vests, drug training, and other programs. *Id.*

298. *Cf. id.*

299. Court fees may add to the cost of this program, but the legislature could provide that the losing party in such a case carry this burden.

300. Many states already provide for limited recoveries from municipalities. *See, e.g.*, 745 ILL. COMP. STAT. 10/2-102 (2002) (prohibiting collection of punitive damages from local government).

departments to develop strong domestic violence policies and enforce those policies uniformly.

Some states have already allowed for civil liability in these situations.³⁰¹ Some states, such as Massachusetts, have refused to impose municipal liability without specific legislative action.³⁰² As more states implement these policies, domestic violence advocates will get a better idea of which policies are more effective in combating domestic violence.

VII. CONCLUSION

In *Town of Castle Rock, Colorado v. Gonzales*, the Supreme Court had an opportunity to give Gonzales a fair shot at convincing a trial court that her police department deprived her of her due process rights when they failed to enforce her restraining order. Instead, the Court denied Gonzales' claim, cutting off one legal avenue of recourse for domestic violence victims.

Still, domestic violence victims and society have several options remaining to combat domestic violence. Victims and advocates must always be aware of non-legal resources, such as counseling, social services, family, and friends. They must also be aware of the legal options currently available. These include civil restraining orders, mandatory arrest laws, revised custody laws, and funding for police departments to fight domestic violence. Where poor police response to domestic violence calls limits the efficacy of these legal remedies, victims have two options. Currently, they may bring an equal protection claim against a police department that fails to enforce their protection order. However, victims and advocates should consider asking their legislators to provide for a private cause of action against those same police departments. A cause of action created under a specific state statute will provide more concrete protection to victims who have been harmed by the failures of law enforcement to act. That protection would arise from the strong motivation to pursue domestic violence calls vigorously and uniformly.

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301. Such legislation is already in effect in Montana and Tennessee. *Learn from Tragedy: Protective Orders Need More Force*, DAYTON NEWS-JOURNAL, July 5, 2005, at A4.

302. See generally Jennifer Dieringer & Carolyn Grose, *Judicial Deference or Bad Law: Why Massachusetts Courts Will Not Impose Municipal Liability for Failure to Enforce Restraining Orders*, 38 SUFFOLK U. L. REV. 557 (2005).

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