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Constitutional Law - When States Break Promises: Defining Property Interests in the Procedural Due Process Context, Town of Castle Rock v. Gonzales

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CONSTITUTIONAL LAW—When States Break Promises: Defining Property Interests in the Procedural Due Process Context, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

INTRODUCTION

As part of her divorce proceedings, Jessica Gonzales sought and obtained a protection order (PO) against her husband, Simon Gonzales, in a Colorado state court on May 21, 1999.[1] The PO enjoined the husband from disturbing Gonzales or their mutual children and required him to stay at least 100 yards from Gonzales's home.[2] On the reverse side, the PO contained a warning that violation of the order was a crime that could result in arrest and a notice to law enforcement officials instructing them to "use every reasonable means to enforce this restraining order."[3] The PO also told police that they "shall arrest, or, if an arrest would be impracticable under the circumstances, seek a warrant for the arrest of the restrained person when [the officer has] information amounting to probable cause" of a violation of the order.[4] The state court made the PO permanent on June 4, 1999, and modified it to give the husband some visitation time with his daughters.[5]

Between 5:00 and 5:30 p.m. on June 22, 1999, the husband took the three daughters, who were playing outside Gonzales's house, in contravention of the PO.[6] Approximately two hours later, Gonzales called the Castle Rock Police Department, which sent two officers.[7] She showed them the PO

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1. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2800 (2005).
2. *Castle Rock*, 125 S. Ct. at 2800-01. The couple had three daughters, Rebecca, Katherine, and Leslie. *Id.* The children were ten, nine, and seven years old. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1096 (10th Cir. 2004) (*en banc*) ("*Gonzales II*").
3. *Castle Rock*, 125 S. Ct. at 2801.
4. *Id.* The PO stated that an officer:

> *shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when [the officer has] information amounting to probable cause that the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order.

Gonzales II, 366 F.3d at 1103-04 (alteration in original) (citations omitted).
5. *Castle Rock*, 125 S. Ct. at 2801. The husband was able to take the children on alternate weekends, two weeks during the summer, and for a mid-week dinner as arranged by the parties. *Id.* He was allowed to go to the house to collect and drop off the children during the exchanges. *Id.*
6. *Id.* This was a Tuesday, but no arrangements for the allowed mid-week dinner visit had been made. *Id.*
7. *Id.*

and requested its enforcement, but the officers told her that there was nothing they could do and she should call again if the children were not returned by 10:00 p.m.[8] Gonzales called the Police Department three more times that evening: 1) at 8:30 p.m. after receiving a phone call from the children's father during which he told Gonzales where he was with the children; 2) at 10:10 p.m.; 3) and again at 12:10 a.m.[9] At the 8:30 p.m. call, the police told her to call if the children were not back by 10:00 p.m.[10] At the 10:10 p.m. call, the police told her to call again if the children were not back by 12:00 a.m.[11] At the 12:10 a.m. call, the police told her to wait for an officer to arrive.[12] By 12:50 a.m., no officer had arrived, so Gonzales went to the police station.[13] When she arrived, an officer took her statement and went to dinner.[14] At approximately 3:20 a.m., the husband arrived at the police station and began shooting a handgun at the building.[15] The police shot and killed him, then found his daughters dead in the cab of his truck; their father had killed them earlier in the night.[16]

Jessica Gonzales subsequently filed an action in the United States District Court for the District of Colorado under 42 U.S.C. § 1983 against the town of Castle Rock, alleging that the Castle Rock Police Department violated her due process rights by having a policy of refusing to enforce POs.[17] She alleged that as applied to her this practice was either willful or with "deliberate indifference" to her civil rights.[18] The district court was unsure whether the suit was based on substantive or procedural grounds from the complaint, but granted a motion to dismiss on the grounds that the complaint failed under either theory.[19] A divided panel of the United States Court of Appeals for the Tenth Circuit affirmed the ruling with respect to the

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8. *Id.*
9. *Id.* at 2801-02.
10. *Id.*
11. *Id.* at 2802.
12. *Id.*
13. *Id.* at 2802.
14. *Id.*
15. *Id.*
16. *Id.*
17. Gonzales v. City of Castle Rock, 307 F.3d 1258, 1260 (10th Cir. 2002) ("*Gonzales I*").
18. *Id.*; *Gonzales II*, 366 F.3d at 1127. The federal statute, 42 U.S.C. § 1983, creates a cause of action for any act by or on behalf of a state which deprives a person of his or her constitutional rights. 42 U.S.C. § 1983 (2001). *See generally* Jack M. Beermann, *A Critical Approach To Section 1983 With Special Attention To Sources of Law*, 42 STAN. L. REV. 51 (1989) (discussing § 1983 actions).
19. *Gonzales II*, 366 F.3d at 1126 (McConnell, J., concurring in part and dissenting in part). The panel of the Tenth Circuit concluded that Gonzales and her children did not allege a "special relationship" with the police and concluded the police did not create the danger, which would possibly have created an affirmative duty to protect them from that danger. *Gonzales I*, 307 F.3d at 1262-63.

substantive issue, but reversed with respect to the procedural – a result which was repeated on an en banc rehearing.[20] The Tenth Circuit held Jessica Gonzales had a protected property interest in the enforcement of the PO, and the town had deprived her of that property interest by not seriously considering its enforcement.[21] The United States Supreme Court granted certiorari.[22] In a 7-2 decision, the Court reversed the Tenth Circuit's decision and held that Colorado law did not create a property interest in the enforcement of a PO, and thus no property interest could have been deprived by the police department's failure to act.[23]

Castle Rock presents the application of procedural due process jurisprudence to the unique area of domestic violence mandatory arrest laws. The history of this area lends a new dimension to procedural due process analysis because the legislative purpose of enacting these laws contrasts with traditional law enforcement discretion. This case note will review the history of mandatory arrest in domestic violence cases with a focus on Colorado's domestic violence statutes in particular. It will show that these laws were created to protect victims at the scene and to alter cultural attitudes of the public and police by eliminating a traditional discretion the police have enjoyed. The note will review a selection of United States Supreme Court decisions defining "property interests" protected by the procedural due process component of the Fourteenth Amendment to the Constitution, specifically focusing on how state law creates these property interests. The note will review how the Supreme Court has applied due process to active government services, such as the government's obligation to provide certain kinds of medical care. The note will explore the *Castle Rock* opinion and demonstrate that in holding the traditional discretion of statutory law enforcement instructions applied, the majority failed to consider the domestic violence context of Colorado's mandatory enforcement laws. By disregarding these laws, the Court ignored the Colorado Legislature's policy choices. Finally, this note will explore some of the implications of the *Castle Rock* ruling, particularly in the area of domestic violence victim advocacy.

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20. *Gonzales II*, 366 F.3d at 1096.
21. *Id.* at 1117.
22. Town of Castle Rock v. Gonzales, 543 U.S. 955 (2004) (granting certiorari).
23. *Castle Rock*, 125 S. Ct. at 2800, 2810. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. *Id.* at 2800. Justice Souter filed a concurring opinion, joined by Justice Breyer. *Id.* at 2811. Justice Stevens dissented, joined by Justice Ginsburg. *Id.* at 2813.

BACKGROUND

Mandatory Enforcement for Domestic Violence

Domestic violence has a long history of being socially accepted in society.[24] Resistance to the subordinate status of women in the United States began to grow after the Civil War.[25] Studies appeared in the late 1960s and early 1970s showing that in general, police responses to domestic violence were "perfunctory."[26] Research even pointed to police ineffectiveness in domestic violence as a cause for excessive homicide rates.[27] The push for a change in police policies was initially a political strategy and a "corrective to a social system that refused to treat male intimate violence as offensive conduct and as criminal behavior."[28] Policy makers saw mandatory arrest statutes as a way to change traditional ideas and send a message to abusers and communities that domestic violence was a crime and would be treated as such.[29] In 1977, Oregon became the first state to pass a law requiring law enforcement officers to make arrests in domestic violence cases with probable cause.[30] More states adopted this approach and by 1983, six states had mandatory arrest laws.[31] This trend intensified with the 1984 release by the United States National Institute of Justice's (NIJ) Minneapolis Experiment.[32] The Minneapolis Experiment provided strong evidence that arresting domes-

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24. Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 172 (2001).

25. *Id.* at 172-73.

26. *Id.* at 173. (quoting EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 37-38 (2d ed. 1996)).

27. *Id.* at 173-74.

28. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and The Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 266, 265 (2005).

29. Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 752 (2004) ("The policy behind mandatory arrests was to defeat the notion that government should not interfere in family affairs and dictate to the husband how to rear his children or maintain control of his family.").

30. Machaela M. Hoctor, Comment, *Domestic Violence As a Crime Against The State: The Need For Mandatory Arrest in California*, 85 CAL. L. REV. 643, 653 (1997) (naming Oregon as the first state to require arrests in domestic violence cases); Jessica Dayton, Essay, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 283 (2003) (referring to Oregon as the first state to pass a domestic violence mandatory arrest statute).

31. Hoctor, *supra* note 30, at 653. In addition to the mandatory arrest laws, two-thirds of the states had made the arrest process easier by allowing warrantless arrests in misdemeanor domestic violence cases. *Id.*

32. *Id.* at 655.

tic violence offenders greatly reduced recidivism over a six-month period.[33] As a result of this study and the United States Attorney General's recommendations, mandatory arrest quickly became the standard law enforcement response in domestic violence cases.[34]

Subsequent data and commentary called into question the wisdom of mandatory arrest policies. Results from subsequent studies attempting to replicate the results of the Minneapolis Experiment were ambiguous.[35] While these studies may have been flawed in their methods, the results still cast some doubt on the efficacy of mandatory arrest as a specific deterrence.[36] Other criticisms of mandatory arrest policies have surfaced as well. Some women's advocates and feminists argue that mandatory arrest policies and statutes may actually increase the chance of further violence, are disempowering to victims, and serve to reinforce patriarchal state involvement.[37] With full access to this information about the benefits and drawbacks, many states today have settled on mandatory arrest in domestic violence cases as part of the strategy of reducing this crime.[38]

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33. *Id.* at 655-56. The study randomly assigned one of three police responses to 314 calls to police. *Id.* at 655. The police either arrested the suspect based on probable cause, counseled the suspect, or separated the suspect from the victim with a warning that future contact would result in an arrest. *Id.* Arrest records showed that in the following six-month period, the arrest procedure resulted in the lowest recidivism (13%), separation resulted in the highest (26%), and counseling was insignificant compared to either. *Id.* Victim reports over the same period showed that counseling resulted in the highest recidivism (37%) and arrest the lowest (19%), with removal close to counseling (33%). *Id.* at 656.

34. *See Iid.* Mandatory enforcement in domestic violence cases was not always required by statute; many police departments adopted the procedure as a policy. *Id.*

35. Hoctor, *supra* note 30, at 657-58.

36. *Id.*

37. *See* Dayton, *supra* note 30, at 285-86 (arguing that mandatory arrest serves to dis-empower abused women); Miccio, *supra* note 28, at 280-281 (pointing out that pro-arrest policies may cause abusers to move on to new victims rather than stop abusing); Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 175-79 (2003) (arguing that mandatory arrest is the expression of a state opinion that victims are helpless and thus the state must take control).

38. Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae in Support of Respondent at 20, Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (No. 04-278). Twenty-four states require arrest for violation of a protection order: Alaska, California, Colorado, Kentucky, Louisiana, Maryland, Massachusetts, Maine, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. *Id.* at 20 n.7. Seventeen states and the District of Columbia require arrest for domestic violence regardless of the presence of a protection order: Alaska, Arizona, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Louisiana, Maine, Nevada, New

Colorado's Domestic Violence Mandatory Enforcement Scheme

In Colorado, legislators approached domestic violence victim's advocates concerning mandatory arrest provisions.[39] Advocates welcomed the legislators' approach because the advocates had been working to persuade police departments to implement pro-arrest policies.[40] Colorado passed the modern form of its protection order and domestic violence scheme in 1994.[41] In passing the sweeping bill, the Legislature specifically "[found], determine[d], and declare[d] that this act [was] necessary for the immediate preservation of the public peace, health, and safety."[42]

The first important applicable change made by the Act of June 3, 1994 (1994 Act) was the Legislature's addition of the mandatory arrest provision for the crime of violating a protection order.[43] Before the 1994 revision, section 18-6-803.5(3) established violation of a protection order as a misdemeanor and required that the sentence for a violation be served consecutively with the crime giving rise to the protection order.[44] The 1994 Act

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Jersey, Ohio, Oregon, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. *Id.*

39. Miccio, *supra* note 28, at 279.

40. *Id.*

41. *See* Brief of Peggy Kerns, Former Member of the House of Representatives of the State of Colorado, and Texas Domestic Violence Direct Service Providers, as Amici Curiae in Support of Respondent at 7, Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (No. 04-278) ("In 1994, the Colorado General Assembly tackled the problem of domestic violence through legislative reform.") (citation omitted); *see* Act of June 3, 1994, 1994 Colo. Sess. Laws. H.B. 94-1253 (legislating several statutory provisions to reduce the incidence of domestic violence) [hereinafter "1994 Act"]. These provisions were codified in part at COLO. REV. STAT. ANN. § 18-6-800.3 *et seq.* (West 1995), COLO. REV. STAT. ANN. § 14-4-102 *et seq.* (West 1995), COLO. REV. STAT. ANN. § 14-11-101 (West 1995), and COLO. REV. STAT. ANN. § 16-3-105 *et seq.* (West 1995).

42. 1994 Act § 28.

43. *Id.* § 4. The 1994 Act language refers to "restraining order[s]," however the term was changed to "protection order" in 2003 legislation. Act of Apr. 17, 2003, 2003 Colo. Legis. Serv. Ch. 139 (West). As the term "protection order" is the current generally accepted language, it will be used throughout this Note.

44. COLO. REV. STAT. ANN. § 18-6-803.5(3) (West 1993). The subsection formerly read:

> Violation of a restraining order is a class 1 misdemeanor when the court order violated has been issued pursuant to section 18-1-1001. Any sentence imposed pursuant to this subsection (3) shall run consecutively and not concurrently with any sentence imposed for any crime which gave rise to the issuing of the restraining order.

replaced this language with a far more expansive provision requiring police to arrest or seek a warrant for arrest with probable cause of a violation.[45]

The 1994 Act also altered the definition of "domestic violence." Prior to this change, Colorado law gave a fairly simple definition of domestic violence as the actual or threatened physical abuse or destruction of property as a method of control of an intimate partner.[46] The 1994 legislation created a way for any crime to be classified as "domestic violence" by stating that domestic violence included any crime against a person when that crime is used to coerce, punish, control, intimidate, or get revenge on an intimate partner, or former partner.[47] The idea of applying the element of

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Id. The Colorado statute referred to in the above excerpt provided for a mandatory restraining order prohibiting all criminal defendants from "harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged." COLO. REV. STAT. ANN. § 18-1-1001 (West 1993). Thus "restraining orders" in Colorado prior to the 1994 Act did not resemble those at issue today. The modern Colorado protection order was created by this same legislation. *Id.* § 14-4-101 *et seq.*

45. COLO. REV. STAT. ANN. § 18-6-803.5(3) (West 1994). The statute states in relevant part that

> (a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. 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 impractical 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 restraining order; and
> >
> > (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

Id.

46. COLO. REV. STAT. ANN. § 18-6-800.3(1) (West 1993). Subsection (1) reads that "'[d]omestic violence' means the infliction or threat of infliction of any bodily injury or harmful physical contact or the destruction of property or threat thereof as a method of coercion, control, revenge, or punishment upon a person with whom the actor is involved in an intimate relationship." *Id.*

47. COLO. REV. STAT. ANN. § 18-6-800.3(1) (West 1994). In relevant part, the statute reads,

domestic violence to other crimes is reinforced under several other provisions of the 1994 Act, one of which elevated the severity of "a crime [for which] the underlying factual basis . . . included an act of domestic violence . . . ."[48] In connection with this change, the 1994 Act added section 18-6-803.6, which required an arrest "without undue delay" in cases where there is "probable cause to believe that a crime or offense involving domestic violence . . . has been committed."[49]

The mandatory nature of the 1994 Act's arrest provision has never been questioned. Commentators have accepted the arrest provision as mandatory as a matter of course.[50] This universal acknowledgement shows there was no concern whether the statute required arrest. In an unpublished case, the Court of Appeals for the Tenth Circuit accepted without comment that Colorado's arrest statute required arrest where the police found probable

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> Domestic violence also includes any other crime against a person or felony crime against property or any municipal ordinance violation against a person, but not against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

Id.

48. *Id.* § 16-21-102. This section defined "offender" as one guilty of a class one misdemeanor or an offense involving domestic violence, even if the criminal act itself did not rise to the level of a class one misdemeanor. *Id.*

49. *Id.* § 18-6-803.6(1). In full, the statute requires that

> [w]hen a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in section 18-6-800.3(1), has been committed, the officer shall, without undue delay, arrest the person suspected of its commission and charge the person with the appropriate crime or offense.

Id. The new § 18-6-803.6 gave the police guidelines on criteria for arrest. *Id.*

50. *See* Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 343 n.18 (1995) (including Colorado as one of forty-three states mandating arrest); Timothy Johnson, *Domestic Violence and Federal Firearms Laws*, 33 COLO. LAW. 61, 63 (2004) ("[V]iolation of any of the provisions [of § 18-6-300.5] requires an arrest."); Melody K. Fuller and Janet L. Stansbury, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 COLO. LAW. 2327, 2327 (finding that the new § 18-6-300.5 "mandates law enforcement officers to arrest and charge people suspected of committing domestic violence"); Miccio, *supra* note 28, at 239 n.2 (including Colorado in a list of states mandating arrest for probable cause violation of a protection order).

cause.[51] Thus the common understanding was clear that these statutes required police action.

Definition of Property Interest

The first section of the Fourteenth Amendment to the United States Constitution requires, in relevant part, that no state shall "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."[52]

An analysis of a claim for an undue deprivation of due process rights begins with the question of whether the plaintiff has a protected interest in life, liberty, or property.[53] The modern era of defining protected property interests began with the 1972 case *Board of Regents of State Colleges v. Roth*.[54] Prior to *Roth*, the United States Supreme Court held that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[55]

Roth was, and remains, the landmark case in defining property rights with respect to due process issues. David Roth was a professor at Wisconsin State University originally hired to teach for one year.[56] His notice of appointment referred to Wisconsin state law, which provided that professors only gained tenure rights after four years of employment.[57] Nevertheless, when Roth's one-year appointment ended and the university did not retain

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51. Eckert v. Town of Silverthorne, 25 F. App'x 679, 686 (10th Cir. 2001). Appellant sued the Town of Silverthorne, Colorado for failing to enforce a protection order by not arresting the man she lived with. *Id.* at 683. She appealed summary judgment in favor of the defendants under equal protection and substantive due process theories. *Id.* The panel of the Tenth Circuit affirmed because the officers did not have probable cause to arrest the man. *Id.* at 686. The court stated that the "mandatory arrest provisions [§§ 18-6-803.5(3)(b) and -800.3(1)] require as a prerequisite that an officer establish probable cause." *Id.* While it has no precedential value, the case is notable because the court accepted the statutes' mandatory nature without question. *Id.*

52. U.S. CONST. amend. XIV, § 1 (emphasis added).

53. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999).

54. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

55. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)). In *Goldberg*, recipients of New York's Aid to Families with Dependent Children (AFDC) faced termination of their benefits without any kind of hearing. *Id.* at 255-56. The AFDC recipients sued and the Court held that such benefits constituted an entitlement for qualified individuals and the plaintiffs were entitled to a hearing before being deprived of their benefits. *Id.* at 271 (affirming the district court's judgment for the plaintiffs).

56. *Roth*, 408 U.S. at 566.

57. *Id.* at 566 nn.1, 2.

him, he sued the university, alleging that the decision violated his Fourteenth Amendment rights.[58] The United States District Court for the Western District of Wisconsin held that Roth's interest in his employment outweighed the university's interest in dismissing him without any proceedings.[59] The United States Supreme Court considered the question of "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year."[60] The Court decided that the proper analysis was to look at "the nature of the interest at stake."[61] The Court noted that while due process protections "extend[ed] well beyond actual ownership of real estate, chattels, or money," the protections had "certain boundaries."[62] In order to have a valid claim, the person alleging a deprivation of property must have "already acquired . . . specific benefits."[63] The Court stated that a person's interest in a benefit must be "more than an abstract need or desire" or "unilateral expectation of it."[64] The person "must . . . instead . . . have a legitimate claim of entitlement to it."[65] The Court held that protected property interests "stem from a[] [constitutionally] independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement . . . ."[66] In applying these rules, the Court held that because the university only appointed him for one year with no provision for renewal, Roth had no legitimate entitlement to re-employment and, therefore, no property interest requiring a hearing's protection.[67]

The Court repeated this construction of protected rights in subsequent cases, such as *Wolff v. McDonnell* and *Goss v. Lopez*.[68] In *Wolff*, a prisoner in a Nebraska prison filed a complaint alleging that disciplinary procedures revoking good-time credits without adequate process violated the Fourteenth Amendment.[69] The Court acknowledged that the Federal Consti-

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58. *Id.* at 566, 568.
59. *Id.* at 570.
60. *Id.* at 569.
61. *Id.* at 571.
62. *Id.* at 572.
63. *Id.* at 576.
64. *Id.* at 577.
65. *Id.*
66. *Id.*
67. *Id.* at 578 ("[The university] did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.").
68. Wolff v. McDonnell, 418 U.S. 539 (1974); Goss v. Lopez, 419 U.S. 565 (1975).
69. *Wolff*, 418 U.S. at 543. Good-time credits were given to prisoners at the discretion of the prison administrators and reduced a prisoner's incarceration time. *Id.* at 546 n.6. The deprivation of the credits had the effect of lengthening the prisoner's term relative to the term with the credits. *Id.*

tution did not require good-time credits.[70] Nevertheless, once such credits were given, the protections of the Fourteenth Amendment applied to their deprivation and required the State to institute appropriate procedural safeguards.[71]

In *Goss*, several suspended students sued the school district, alleging that the schools' procedures for appeal of suspensions were inadequate.[72] The school argued that because the state had no constitutional duty to provide education, the deprivation of that education could not be a deprivation of procedural due process.[73] The Court rejected this argument, holding that because the State created a statutory right to education, that right could not be deprived without appropriate procedural safeguards.[74] The school argued in the alternative that even if there was a protected interest, the deprivation was too small to require due process.[75] This argument was reminiscent of pre-*Roth* case law and did not persuade the Court.[76] The Court held that while the magnitude of the deprivation may play a part in the decision about the nature of the required due process, it was immaterial to the question of whether a protected interest was involved.[77] The Court ultimately held that deprivation of education was subject to protection under the Fourteenth Amendment and specifically noted that part of the Amendment's purpose was to protect against arbitrary deprivation.[78]

The Court qualified its language defining property interests in *Memphis Gas, Light and Water Division v. Craft*.[79] In this case, several public utility customers sued the utility company requesting, in part, declaratory

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70. *Id.* at 557.
71. *Id.*
72. *Goss*, 419 U.S. at 567. The then-existing regulations allowed a principal to suspend students for up to ten days or expel the student. *Id.* The principal was required to notify the student's parents within twenty-four hours, and the student or parents could appeal the decision to the school board at the next meeting. *Id.* The plaintiffs in the case requested some kind of process before or within a reasonable time following a suspension or expulsion. *Id.*
73. *Id.* at 572.
74. *Id.* at 574.
75. *Id.* at 575.
76. *Id.* at 576. The pre-*Roth* trend did consider the magnitude of the deprivation, but this is no longer relevant to defining property in the modern line of cases. *Goldberg*, 397 U.S. at 262-63.
77. *Goss*, 419 U.S. at 575-76. The Court said that "its view has been that as long as a property deprivation is not de minimis, [the deprivation's] gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Id.* at 576. The Court excluded de minimis property deprivation from protection. *Id.*
78. *Id.* at 576, 574. The Court went on to hold that the existing procedure was inadequate and set out guidelines for new procedures. *Id.* at 581.
79. Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978).

and injunctive relief.[80] The principal plaintiffs had duplicate utility meters and despite efforts to correct the situation both by communicating with the utility company and by hiring individuals to combine the meters, they were consistently double-billed.[81] In time, the company discontinued utility service for nonpayment.[82] The United States District Court for the Western District of Tennessee, Western Division, ruled that the utility service was not property, but the United States Court of Appeals for the Sixth Circuit disagreed.[83] The Supreme Court, in considering the question of whether the service was property under the Fourteenth Amendment, reiterated the rule that existing state law defined constitutionally protected property rights.[84] The Court went a step further, however, and stated that "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."[85] A review of Tennessee law revealed that utility companies did have the power to terminate customers' service, but not in cases of bona fide bill disputes.[86] The plaintiffs argued this meant that utility service could only be terminated for cause, creating a property interest in continued service.[87] If there was a property interest in continued service, the utility company would be required to give some kind of process before it was cancelled.[88] The Court held that Tennessee law recognized the property interest in public utility service by providing that termination of service may only be performed for a good reason.[89] It went on to affirm the Sixth Circuit's holding that the utility company's procedures were inadequate to provide due process with respect to bill disputes.[90]

In *Logan v. Zimmerman Brush Company*, the Court again explored the "for cause" rationale for defining a benefit as property.[91] Zimmerman Brush Company discharged Logan after a one-month probationary period because his disability prevented him from meeting the physical requirements

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80. *Id.* at 3.
81. *Id.* at 4-5.
82. *Id.* at 5.
83. Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 687 (6th Cir. 1976). The panel of the Court of Appeals for the Sixth Circuit disposed of the issue by perfunctorily noting that eight federal district court and court of appeals opinions held utility service as property. *Id.*
84. *Memphis Light*, 436 U.S. at 9.
85. *Id.* (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).
86. *Id.*
87. *Id.* at 11-12.
88. *Id.* at 9.
89. *Id.* at 11.
90. *Id.* at 15.
91. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

of the job.[92] He filed a complaint with the Illinois Fair Employment Commission.[93] The Commission was required by statute to provide a hearing within 120 days.[94] This time period passed before the hearing and Zimmerman moved for dismissal, arguing that the Commission no longer had jurisdiction.[95] The Illinois Supreme Court disagreed with Logan's argument that depriving him of this hearing opportunity was a violation of his due process rights.[96] The United States Supreme Court emphasized the mandatory language of the statute providing for a hearing.[97] The Court held "the state scheme [had] deprived Logan of a property right."[98] In its procedural due process case law, the Court has carefully considered whether the asserted property interest is mandated or simply discretionary according to state law.

Nature of State Protection

Because *Castle Rock* involves an allegation that the police failed to protect named parties in a protection order, it is important to explore the extent of the Government's obligation to provide services. In the 1977 case *Mahers v. Roe*, the Court discussed whether, as a general matter, a state is obligated to *provide* services which it may not constitutionally *deny*.[99] The case involved the Connecticut Medicaid system's self-imposed obligation to pay for birth expenses of indigent women.[100] The Connecticut regulations only allowed Medicaid payment for abortions which were medically necessary.[101] The plaintiffs were indigent women who were unable to secure certificates of medical necessity from physicians and were therefore denied funding for abortion services.[102] Among other arguments, the plaintiffs claimed a denial of their due process rights.[103] The Court acknowledged that while a State has no obligation to provide medical care to indigent citizens, once it undertakes to do so, its actions are subject to constitutional limitations.[104] Under an Equal Protection analysis, the Court held that while the state rules may have encouraged one decision about pregnancy over another, it did not actually interfere with a constitutionally protected right.[105] The Court concluded the Constitution did not oblige Connecticut to pay for *non-*

92. *Id.* at 426.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 426-27.
97. *Id.* at 430.
98. *Id.* at 433.
99. Mahers v. Roe, 432 U.S. 464 (1977).
100. *Id.* at 466-67.
101. *Id.* at 466.
102. *Id.* at 467.
103. *Id.*
104. *Id.* at 469-70.
105. *Id.* at 470, 479-80.

therapeutic abortions, even while funding *therapeutic* abortions.[106] A state may not block an individual's constitutional right, but it is not obligated to spend resources to provide that right.

The Court applied this principle to state protection against private actors in *Martinez v. California*.[107] State officials paroled a convicted rapist after five years despite a sentence of one to twenty years with a recommendation that he serve the maximum.[108] The man subsequently tortured, raped, and killed a fifteen-year-old girl, whose family then sued the State.[109] The plaintiffs had several theories, most notably that by releasing her murderer, the state deprived the victim of her life without due process of law.[110] The Court disagreed.[111] The Court reasoned that the Fourteenth Amendment provided protection from State action, and the murder in this case was the result of a private actor.[112] The Court pointed out that the parole board had no awareness of the particular danger to the victim, as opposed to the public at large.[113] The implication is that releasing a person who may have some dangerous propensities to the population as a whole may be acceptable.[114] However, liability may be created if the parole board knows that the convicted person poses a danger to a particular person.[115]

The Court furthered this concept in *DeShaney v. Winnebago County Department of Social Services*, a case with as tragic a factual background as *Castle Rock*.[116] Joshua DeShaney was a child in the custody of his father, Randy.[117] Randy physically abused Joshua over a significant period of time.[118] The Winnebago County Department of Social Services (DSS) became involved, removed Joshua from the home, and convened a Child Protection Team (CPT).[119] The CPT met and decided that there was insufficient evidence to keep Joshua away from the home and returned him to Randy

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106. *Id.* at 481.
107. Martinez v. California, 444 U.S. 277 (1980).
108. *Id.* at 279.
109. *Id.* at 279-80.
110. *Id.* at 283.
111. *Id.* at 285.
112. *Id.*
113. *Id.*
114. *See id.*
115. *See id.* The Court implied that the case may be different if a parole board is aware of danger to a particular person. *Id.* "[T]he parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Id.*
116. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).
117. *Id.* at 191.
118. *Id.* at 192-93.
119. *Id.* at 192.

with several protective requirements.[120] From January 1983 to March 1984, DSS documented that Randy was not complying with the recommendations of the CPT, that Joshua repeatedly exhibited injuries on caseworker home visits, and an emergency room visit occurred at which time the hospital reported suspected abuse of Joshua by Randy.[121] DSS did not act until March of 1984, when Randy beat Joshua so severely he sustained permanent brain injury.[122] Joshua's mother sued DSS under her name and his, arguing that DSS deprived Joshua of his liberty without due process of law by failing to adequately protect him against a known danger.[123] The Court, consistent with its decision in *Martinez v. California*, held the Fourteenth Amendment does not "require[] the State to protect the life, liberty, and property of its citizens against invasion by private actors."[124] The purpose of the Amendment "was to protect the people from the State, not to ensure that the State protected them from each other."[125] The Court broadly held "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[126]

Joshua's mother also argued that DSS's initial actions to protect him created a special relationship obligating DSS to provide reasonable protection.[127] The Court disagreed.[128] While acknowledging certain affirmative obligations for care were placed on the State in cases of involuntarily restricted persons such as prisoners, those obligations rise from the fact that the State has restricted the ability of the individual to care for himself, not from mere awareness of hardship.[129] The Court held that the State neither created nor exacerbated Joshua's danger and therefore was not liable for his injury.[130]

In summary, the United States Supreme Court stressed that property interests were created by obligations independent of the Federal Constitution. These interests arose from the entitlements granted in some state services such as employment or benefits. At the same time, states had no obligation to protect individuals from non-state actors. The Court explicitly excepted prisoners because states restricted their ability to fend for them-

120. *Id.*
121. *Id.* at 192-93.
122. *Id.* 193.
123. *Id.* In contrast to *Castle Rock*, which was appealed on procedural due process grounds, *DeShaney* was pursued on substantive due process grounds. Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 (2005); *DeShaney*, 489 U.S. at 195.
124. *DeShaney*, 489 U.S. at 195.
125. *Id.* at 196.
126. *Id.* at 197.
127. *Id.*
128. *Id.* at 198.
129. *Id.* at 200.
130. *Id.* at 201.

selves, and implied that state creation or exacerbation of a danger may also be excepted. Some circuits implemented these exceptions. Even though commentators and courts routinely accepted Colorado's PO statutes as mandatory, the issue had never been squarely addressed, particularly in a procedural due process context.[131]

PRINCIPAL CASE

In *Castle Rock v. Gonzales*, the United States Supreme Court considered whether Colorado state law provided an entitlement to enforcement of a PO which would require procedural due process to deny.[132] Justice Scalia, writing for the majority and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer, began the analysis by restating the principle that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."[133] The Court also declined to defer to the United States Court of Appeals for the Tenth Circuit's analysis of state law.[134] The Court stated that while state law did determine whether the interest was created, federal constitutional law determined "whether that interest rises to the level of a legitimate claim of entitlement . . . ."[135] The majority acknowledged that there is a general presumption of deference to the courts of appeals regarding the state law within their jurisdictions, but the Court refused to defer to the appellate court's view of Colorado law.[136] The Court explained its refusal by noting that the en banc opinion relied primarily on "language from the restraining order, the statutory text, and a state-legislative-hearing transcript" rather than "on a deep well of state-specific expertise."[137] It reasoned there was nothing specific to Colorado law to which the Tenth Circuit's expertise would apply.[138] The Tenth Circuit had relied on the language of the PO instructions to officers, legislative history, and a Colorado provision granting immunity to officers making good-faith arrests.[139] The Court of Appeals for the Tenth Circuit commented that to hold no property interest existed "would render domestic abuse restraining orders utterly valueless."[140] The Supreme Court characterized the comment as "sheer hyperbole."[141] The Court did not believe that

131. *See supra* notes 38, 50-51 and accompanying text.
132. Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 (2005).
133. *Id.*
134. *Id.*
135. *Id.* at 2803-04 (quoting Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 9 (1978)) (internal quotations omitted).
136. *Id.* at 2804.
137. *Id.*
138. *Id.*
139. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1105-10 (10th Cir. 2004) (*en banc*).
140. *Id.* at 1109.
141. *Castle Rock*, 125 S. Ct. at 2805.

"these provisions of Colorado law truly made enforcement of restraining orders *mandatory*."[142]

The Court then explored the "well established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes."[143] The Court noted that in a case relating to a statute requiring police to disperse certain crowds, it had previously held that "common sense [dictated] that *all* police officers must use some discretion in deciding when and where to enforce city ordinances."[144] In this context, the Court required stronger language from the Colorado Legislature to show a "true mandate."[145] In response to the dissent by Justice Stevens, the Court stated that even though mandatory arrest statutes may have more effect in the domestic violence context, "it is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested."[146] The Court also noted that mandatory government actions may exist for a reason other than to give Gonzales an entitlement, and that such actions may be a public benefit rather than private.[147] The Court explained that Gonzales was not stating that the police should have performed any particular action, but instead named a range of options by alleging that the police should have "'use[d] every reasonable means, up to and including arrest, to enforce the order's terms.'"[148] The Court labeled such a requirement "vague" and inadequate to support a property interest.[149] Finally, the Court reasoned that the mandatory arrest statute did not connect the "'protected person'" with a right to enforcement.[150] The Court acknowledged that the statute referred to the protected person in other contexts, such as distributing copies of the PO and, notably, giving the protected person the right to initiate contempt proceedings.[151]

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142. *Id.*

143. *Id.* at 2805-06.

144. *Id.* at 2806 (quoting Chicago v. Morales, 527 U.S. 41, 62 n.32 (1999)) (alteration in original).

145. *Id. See* COLO. REV. STAT. ANN. §§ 18-6-803.5(3)(a), (b) (West 2005) (requiring that a peace officer "shall use every reasonable means to enforce a protection order" and that "[a] peace officer shall arrest . . . or . . . seek a warrant for the arrest of a restrained person" with probable cause of a protection order violation).

146. *Castle Rock*, 125 S. Ct. at 2807. *See infra* notes 167-71 and accompanying text.

147. *Castle Rock*, 125 S. Ct. at 2807-08.

148. *Id.* at 2807 (quoting Respondent's Brief on the Merits at 29-30, Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (No. 04-278)).

149. *Id.* at 2807, 2808.

150. *Id.* at 2808 (quoting COLO. REV. STAT. ANN. §§ 18-6-803.5(3)(a)).

151. *Id.* at 2809.

The Court then declared that even if an entitlement was created, it need not necessarily be a property interest.[152] First, the enforcement of a PO does not have a monetary value "as even [the Court's] *Roth*-type property-as-entitlement cases have implicitly required."[153] Second, the nature of the alleged entitlement was "a function that government actors have always performed – to wit, arresting people who they have probable cause to believe have committed a criminal offense."[154] The Court reiterated its *O'Bannon* decision, implying that Gonzales's benefit from the PO would constitute an indirect benefit and, therefore, would not be a protected property interest.[155] Based on these arguments, the Court held that Gonzales had no protected property interest in enforcement of her PO.[156] In conclusion, the Court specified that while the holdings in *Castle Rock* and *DeShaney* precluded a suit for third-party enforcement under the Constitution, individual states are free to craft such a remedy independently.[157]

Justice Souter's Concurrence

Justice Souter's concurrence, with which Justice Breyer joined, agreed with all the points of the majority opinion, but emphasized the role of police discretion.[158] He argued the alleged entitlement interest was in conflict with traditional police discretion to either enforce or not enforce a protection order.[159] He noted a protected person does not have the power to limit the police's discretion in choosing not to enforce and implied the same person has no power to compel enforcement.[160] Justice Souter also argued that the actual property interest for which Gonzales had claimed protection was in fact a procedural consideration.[161] Since the procedural due process protection applies to substantive rights, it may not be invoked to protect an entitlement to procedure.[162] A State does not "create a property right merely by ordaining beneficial procedure unconnected to some articulable substan-

152. *Id.* at 2809.
153. *Id.* (internal quotations omitted).
154. *Id.*
155. *Id.* at 2810.
156. *Id.*
157. *Id.*
158. *Id.* at 2811 (Souter, J., concurring).
159. *Id.* (Souter, J., concurring).
160. *Id.* (Souter, J., concurring). Justice Souter wrote that "no one would argue that the beneficiary of a Colorado order like the one here would be authorized to control a court's contempt power or order the police to refrain from arresting." *Id.*
161. *Id.* at 2812 (Souter, J., concurring).
162. *Id.* (Souter, J., concurring).

tive guarantee."[163] In other words, a property interest must exist apart and be distinguished from any constitutional protections in procedure.[164]

Justice Stevens's Dissent

In a dissent joined by Justice Ginsburg, Justice Stevens first argued that, without question, a private security contract creating the functional equivalent of a PO would be considered "property."[165] According to Justice Stevens, there is no functional difference between an entitlement to contract for security services and the state law which enabled Gonzales's PO, even though such protection is not available to the ordinary citizen, only to those who are protected persons under POs.[166]

A major thrust of the dissent was the majority's refusal to defer to the Court of Appeals for the Tenth Circuit's interpretation of Colorado law.[167] Justice Stevens commended the Tenth Circuit's examination of the law with regard to police discretion and its contextual exploration of the particular Colorado law in question.[168] He argued the Tenth Circuit's conclusion that Gonzales did hold an enforceable property right was reasonable and "worthy of [the Court's] deference."[169] He said the majority's reason for dismissing the Tenth Circuit's analysis was that the court relied solely on "the statute's text and legislative history and distinguished arguably relevant Colorado case law."[170] Justice Stevens noted that "it is precisely when there is no state law on point that the presumption that circuits have local expertise plays any useful role."[171]

In the alternative, Justice Stevens argued that the question of whether Colorado created a property interest should have been certified to

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163. *Id.* (Souter, J., concurring).
164. *Id.* (Souter, J., concurring).
165. *Id.* at 2813 (Stevens, J., dissenting).
166. *Id.* (Stevens, J., dissenting).
167. *Id.* at 2814 (Stevens, J., dissenting).
168. *Id.* at 2814-15 (Stevens, J., dissenting).
169. *Id.* at 2815 (Stevens, J., dissenting). Justice Stevens criticized the majority, stating that "[u]nfortunately, although the majority properly identifies the 'central state-law question' in this case as 'whether Colorado law gave respondent a right to police enforcement of the restraining order,' it has chosen to ignore our settled practice by providing its *own* answer to that question." *Id.* at 2814 (internal citation omitted).
170. *Id* at 2815 n.2 (Stevens, J., dissenting) ("[I]t is precisely when there is no state law on point that the presumption that circuits have local expertise plays any useful role. When a circuit's resolution of a novel question of state law is grounded on a concededly complete review of all the pertinent state-law materials, that decision is entitled to deference.").
171. *Id.* (Stevens, J., dissenting).

the Colorado Supreme Court.[172] He put forth several reasons for this position. First, federalist principles militated toward interpretation of a state's statute by that same state's courts, particularly in cases with important policy implications.[173] He also argued that doing so would relieve the Court from a duty to adjudicate an unnecessary issue of constitutional law.[174] Finally, he argued that because the Colorado Supreme Court was the final arbiter of Colorado law, certification would serve judicial economy by resolving the issue immediately, as opposed to the possibility that Colorado's high court could subsequently hear the same issue and decide it differently.[175]

Justice Stevens then discussed several flaws in the majority analysis. First, the majority improperly considered arrest statutes in general without accounting for the unique circumstances of the domestic violence context.[176] In Justice Stevens's view, state statutes in the domestic violence field uniquely eliminated police discretion.[177] Importantly, Colorado's history included joining the trend of mandatory arrest statutes nationwide to counter traditional police practices of non-involvement in domestic violence.[178] Justice Stevens noted that the discretion the majority read into the Colorado statute was probably appropriate in other circumstances, but that domestic violence may be distinguished from those circumstances.[179] To reinforce this claim, he said that other states with similar statutes have interpreted them as eliminating police discretion and even allowed causes of action similar to that at issue in the instant case.[180] Justice Stevens responded to the majority's vagueness argument by showing that while the police may have some situational discretion, the statute removes the choice to do nothing at all.[181]

Justice Stevens then addressed the second significant flaw in the majority opinion: the Court failed to account for the fact that the Colorado stat-

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172. *Id.* at 2815 (Stevens, J., dissenting) ("Even if the Court had good reason to doubt the Court of Appeals' determination of state law, it would, in my judgment, be a far wiser course to certify the question to the Colorado Supreme Court. Powerful considerations support certification in this case." (footnote omitted)).

173. *Id.* (Stevens, J., dissenting).

174. *Id.* at 2815-16 (Stevens, J., dissenting).

175. *Id.* at 2816 (Stevens, J., dissenting).

176. *Id.* (Stevens, J., dissenting) ("[T]he Court gives short shrift to the unique case of 'mandatory arrest' statutes in the domestic violence context; States passed a wave of these statutes in the 1980's and 1990's with the unmistakable goal of eliminating police discretion in this area.").

177. *Id.* (Stevens, J., dissenting).

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

179. *Id.* at 2818 (Stevens, J., dissenting).

180. *Id.* at 2818-19 (Stevens, J., dissenting).

181. *Id.* at 2819-20 (Stevens, J., dissenting). *See supra* notes 148-49 and accompanying text.

ute was intended to create a narrow benefit for a narrow class of persons.[182] Justice Stevens argued that while other state laws may be broader, the Colorado Legislature plainly did not mean the statute at issue to provide a benefit for the general Colorado population.[183] Additionally, Gonzales was specifically named as a protected person, which deflated the majority position that any benefit from the PO was incidental.[184]

Finally, Justice Stevens criticized the implication that an interest in PO enforcement is less valid than other government services, such as welfare benefits.[185] Justice Stevens explained that the novelty of domestic violence mandatory arrest statutes makes a property interest in enforcement equally novel.[186] He concluded that just because a property interest is new does not make it any less a property interest.[187]

At the end of his dissent, Justice Stevens addressed the question of what process would be constitutionally required. Given that the majority opinion decided that Gonzales had no protected property interest in enforcement and thus never reached what kind of enforcement *would* be due, he only briefly covered how to evaluate that question.[188] Justice Stevens's criteria included that "a relevant state decisionmaker *listen* to the claimant and then *apply the relevant criteria* in reaching his decision."[189]

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182. *Castle Rock*, 125 S. Ct. at 2816, 2821 (Stevens, J., dissenting).

183. *Id.* at 2821 (Stevens, J., dissenting) ("[T]here is little doubt that the statute at issue in this case conferred a benefit 'on a specific class of people' – namely, recipients of domestic restraining orders.").

184. *Id.* at 2822 (Stevens, J., dissenting).

185. *Id.* at 2822-23 (Stevens, J., dissenting).

186. *Id.* at 2823 (Stevens, J., dissenting).

187. *Id.* (Stevens, J., dissenting).

188. *Id.* at 2824-25 (Stevens, J., dissenting).

189. *Id.* at 2824 (Stevens, J., dissenting). Justice Stevens cited Fuentes v. Shevin, 407 U.S. 67, 81 (1979) (stressing the requirements of notice and opportunity to be heard); Bell v. Burson, 402 U.S. 535, 541-42 (1971) (requiring hearings to be meaningful and appropriate to the nature of the case to satisfy due process); and Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (stressing decisionmaker impartiality and that the decision rest on legal rules and evidence from the hearing) for this proposition. *Id.* at 2825 n.22. The implication seems to be that officers must consider the report of a protection order violation and apply the relevant criteria, probable cause in this case, to determine the appropriate action. Colorado's § 18-6-803.5(3)(b) states that:

> A peace officer shall arrest, or . . . 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

ANALYSIS

The United States Supreme Court incorrectly concluded that the Colorado domestic violence mandatory enforcement statutes were not sufficient to create a property interest in their enforcement. [190] To do this, the Court discounted a history of domestic violence mandatory enforcement statutes across the country, improperly dismissed the context of and policy reasons behind the domestic violence statute, and applied a de facto requirement of monetary value.[191] The *Castle Rock* ruling could have several effects. The decision reduces the clarity of procedural due process law and may discourage POs as a solution to violence in the minds of victims, perhaps making violence towards abusers a more attractive method of escape.[192] There are several ways that states and domestic violence specialists may deal with the *Castle Rock* decision. The states may be able to strengthen their mandatory arrest statutes or choose to pursue the same policy ends through different means.[193] Despite the Court's ruling in *Castle Rock*, domestic violence specialists will probably continue as before, focusing on working directly with local law enforcement agencies to encourage protection order enforcement and mandatory arrest practices.[194]

The majority in *Castle Rock* failed to consider the important policy goals and the means chosen by Colorado and other states to achieve those goals. There are unique circumstances surrounding domestic violence legislation and mandatory arrest, as articulated in the dissent.[195] Justice Stevens properly criticized the majority's dismissal of the unique context of these

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> protection order or the restrained person has received actual notice of the existence and substance of such order.

COLO. REV. STAT. ANN. § 18-6-803.5(3)(b) (emphasis added).

190. In order to fully understand the issues involved in domestic violence, it is helpful to have a solid understanding of the dynamics, cultural issues, and various public means of addressing this problem. Such a topic is beyond the scope of this note. *See generally* Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 107-15 (2004) (outlining domestic violence dynamics in general); White, *supra* note 29, at 711-19 (discussing broad domestic violence principles).

191. *See* Hocter, *supra* note 30 (discussing the history of mandatory arrest policies); Dayton, *supra* note 30 (exploring mandatory arrest and no-drop prosecution policies); Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (mandatory statutory language insufficient to create an obligation to arrest).

192. *See infra* text accompanying notes 233-34.

193. *See* Castle Rock v. Gonzales, 125 S. Ct. 2796, 2806 (2005) (implying that a "stronger indication" may sufficiently show that mandatory enforcement is the true intent of the legislature); Tebo, *infra* note 202 (stating administrative remedies as possible alternatives to promote protection order enforcement).

194. Tebo, *infra* note 202.

195. *Castle Rock*, 125 S. Ct. at 2816-17 (Stephens, J., dissenting).

mandatory arrest laws.[196] The majority quickly discounted the history, stating that "much of the impetus for mandatory arrest statutes and policies derived from the idea that it is better for police officers to arrest the aggressor in a domestic-violence incident than to attempt to mediate the dispute or merely to ask the offender to leave the scene."[197] This reasoning was clearly based on the Minnesota Experiment, as these were the three experimental conditions used in that study.[198]

The Court also refers to the American Bar Association's (ABA) 1980 Standards for Criminal Justice.[199] The standards generally state that statutes that seemed to require enforcement for some crimes could not be taken literally.[200] The standards' applicability in this context is questionable because they were issued just as the domestic violence context began to distinguish itself from criminal justice as a whole.[201] A co-chair of the ABA Criminal Justice Section's Amicus Curiae Briefs Committee, Rory K. Little, said that "the [C]ourt's reliance on a single paragraph of commentary written more than 25 years ago may not accurately reflect the current day views of the ABA."[202]

Additionally, the majority interpreted the mandatory arrest statute's focus as personal, emphasizing arrest when an abuser is present.[203] In the following paragraph, however, the majority characterized the statute as general and stated that even if there were an entitlement, it would not be specific enough to Gonzales to constitute a property interest.[204] The Court asserted both that the focus is personal protection, when an abuser is present, and that

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196. *Id.* (Stephens, J., dissenting) ("[I]t is clear that the elimination of police discretion was integral to Colorado and its fellow States' solution to the problem of underenforcement in domestic violence cases. Since the text of Colorado's statute perfectly captures this legislative purpose, it is hard to imagine what the Court has in mind when it insists on 'some stronger indication from the Colorado Legislature.'" (footnote and citation omitted)).

197. *Id.* at 2806-07.

198. *See supra* notes 32-34 and accompanying text.

199. *Castle Rock*, 125 S. Ct. at 2806 (citing ABA STANDARDS FOR CRIMINAL JUSTICE Standard 1-4.5 cmt. (1986)).

200. *Id.*

201. Hocter, *supra* note 30, at 653 (explaining the growth of mandatory arrest laws since 1977); Dayton, *supra* note 30, at 283 (following state mandatory arrest laws from 1977 to 1991).

202. Margaret Graham Tebo, *Protective Orders' Power in State's Hands*, ABA J. E-REPORT July 1, 2005, WL 4 NO. 26 ABAJEREP 1.

203. *Castle Rock*, 125 S. Ct. at 2806-07. The majority claims that the point of the arrest laws was to prompt action only "when the offender is present at the scene." *Id.* at 2807.

204. *Id.* at 2808.

the focus is too general to apply to Jessica Gonzales specifically enough to create a protected interest.[205]

The Colorado Legislature seems to acknowledge the difficult role of police in situations where the suspect may not be present by providing options in addition to arrest in protection order violations.[206] Without this guidance, officers would probably be bound to arrest per the general domestic violence law found in sections 18-6-800.3 and 18-6-803.6.[207] Violation of a PO is already a crime according to Colorado law.[208] Furthermore, offenders' violative actions will probably be used to coerce, control, punish, intimidate, or get revenge on the protected party.[209] The protection order statute offers two options for enforcement. The police may either arrest a violator or seek an arrest warrant.[210] According to the statute, the only case in which an officer may do nothing is if there is no probable cause to believe that a protection order was violated.[211] Probable cause is a "wholly objective" measurement, indicating far less discretion than the Court acknowledged.[212]

The Court also failed to address the other compelling reasons states enact mandatory arrest statutes, such as changing societal norms and general

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205. *Id.* at 2806-08.

206. 1994 Act, *supra* note 45.

207. *Id.*, *supra* notes 47, 49.

208. COLO. REV. STAT. ANN. § 18-6-803.5(1) (West 2005).

209. *Id.* § 18-6-800.3(1). In this case, it may be arguable whether the abduction of the daughters was used for the referenced purposes, although it is likely considering the known abuser strategy of using children against the victim. *See* Prentice L. White, *You May Never See Your Child Again: Adjusting the Batterer's Visitation Rights to Protect Children From Future Abuse*, 13 AM. U. J. GENDER SOC. POL'Y & L. 327 (2005) (illustrating ways batterers manipulate the child custody system and suggesting reforms to address them); Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 173 n.109 (1998) (noting "using children" as one of several abuser tactics); 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, 28 (2004) (noting ways abusers use the legal system); Susan G. Bendar, *Substance and Woman Abuse — A Proposal for Integrated Treatment*, 67 FED. PROBATION 52, 52 (2003) (including "using children" in list of abuser tactics).

210. 1994 Act, *supra* note 45.

211. *Id.*

212. U.S. v. Anderson, 923 F.2d 450, 456 (6th Cir. 1991) ("The test for the existence of probable cause is wholly objective. Probable cause exists when a 'man of reasonable caution[]' would be warranted in the belief that the person arrested had or will commit a crime.") (citing Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979)). *See also* Katz v. U.S., 389 U.S. 347, 358 (1967) (referring to probable cause as "a neutral predetermination"); Beck v. Ohio, 379 U.S. 89, 96 (1964) (referring to "an objective predetermination of probable cause").

deterrence, both of which are important policy reasons for these statutes.[213] States, including Colorado, have legislated removal of police discretion as the best solution for the problem of domestic violence.[214] There may be some debate about the merits of such policies, but it is not the place of the federal judiciary to second-guess those policy choices.[215] In the words of Justice Blackmun, "the States cannot serve as laboratories for social and economic experiment . . . if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands."[216]

Ignoring these principles, the Court's reasoning suggests the statute requires a more specific entitlement, which is a departure from its holdings in other procedural due process cases.[217] In these cases, the individual states created benefits for classes of people, such as welfare recipients or employees, and then acted to include individuals in those classes by hiring those individuals or actually giving the benefits.[218] In this respect, there is nothing to distinguish those cases from *Castle Rock.* The state created a statute mandating enforcement of protection orders and then actively included Jessica Gonzales and her children as statutorily "protected person[s]."[219] In fact, the statute in effect at the time of the events giving rise to this case defined a protected person as one "*for whose benefit* the [protection] order was issued."[220]

Castle Rock muddies the waters somewhat in the law surrounding procedural due process, though the case's applicability is probably limited to

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213. *See supra* notes 24-38 and accompanying text.
214. *Id.*
215. Hoctor, *supra* note 30, at 657-60 (describing the inconclusiveness of studies measuring the efficacy of mandatory arrest statutes); Chandler v. Miller, 520 U.S. 305, 328 (1997) (Rehnquist, C.J., dissenting) ("[Georgia statute requiring drug tests for senatorial candidates] is the sort of policy judgment that surely must be left to legislatures, rather than being announced from on high by the Federal Judiciary.") *See also* Lewis v. Casey, 518 U.S. 343, 386 (1996) (Thomas, J., concurring) ("[T]he Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy.").
216. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546, 567 n.13 (1985) (Blackmun, J., concurring) (internal quotations omitted) ("The genius of our government provides that, within the sphere of constitutional action, the people – acting not through the courts but through their elected legislative representatives – have the power to determine as conditions demand, what services and functions the public welfare requires." (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (Black, J., concurring))).
217. *See supra* notes 54-78 and accompanying text.
218. *Id.*
219. *See Castle Rock*, 125 U.S. at 2800-01.
220. COLO. REV. STAT. ANN. § 18-6-803.5(1.5)(a) (West 1999) (emphasis added).

similar factual situations.[221] The situations in which this case would apply would, for now, be limited to those areas in which the states have traditionally held so much discretion that the benefit is tenuous in most situations. *Castle Rock* also gave the monetary value of state entitlements considerably more weight than prior cases.[222] Justice Scalia cited a law review article written by Professor Thomas W. Merrill of Northwestern University.[223] Professor Merrill stated that "it also seems implicit . . . that [property] interests have some ascertainable monetary value."[224] Professor Merrill based this conclusion in part on an inductive evaluation of the case law, concluding that the recognized interests "nearly all have a monetary value."[225] He also reasoned that such a distinction is necessary to distinguish property rights from liberty rights.[226] Finally, he concluded that such a requirement "preserves a degree of continuity between the constitutional definition and the ordinary understanding of property."[227] The Court did not explore any of Professor Merrill's reasons for holding a monetary value necessary.[228] The decision cursorily noted the lack of any monetary value and cited Professor Merrill's article for the proposition that it is required.[229]

Apart from departures from existing case law, this decision could affect victims' reliance on protection orders as a solution to abuse. State legislatures, including Colorado's, provided a mechanism designed to deter abuse.[230] It is logical to conclude that allowing discretion in an area where policymakers identified a problem would tend to encourage the original status quo.[231] Indeed, the Tenth Circuit seems to have come to that conclusion when it wrote that a decision that the police were not liable "would render domestic abuse restraining orders utterly valueless."[232]

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221. *Castle Rock*, 125 U.S. at 2810. Section 1983 does "not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented . . . ." *Id.* at 2810.

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

223. *Id.*

224. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000).

225. *Id.*

226. *Id.*

227. *Id.* at 965.

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

229. *Id.*

230. *See supra* notes 24-49 and accompanying text.

231. *See supra* notes 39-49 and accompanying text.

232. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1109 (10th Cir. 2004). The Court responded to the Tenth Circuit by stating: "[t]he creation of grounds on which [Mr. Gonzales] could be arrested, criminally prosecuted, and held in contempt was hardly 'valueless'—even if the prospect of those sanctions ultimately failed to prevent him from committing three murders and a suicide." *Castle Rock*, 125 S. Ct. at

Another possible effect of *Castle Rock* is increased risk for abusers. One important though rarely discussed purpose of criminal law is to promote the rule of law by deterring vigilante justice and "self-help."[233] Offenders in domestic violence face a possible danger from their victims, albeit as an effect of their own abusive actions. Victims who eventually kill their abuser usually have attempted various strategies to end the abuse and their efforts to protect themselves have failed.[234] The perception that a PO will not be enforced will make protection orders a less attractive solution to victims.[235] If the apparent viability of a legal option is drastically reduced, the remaining solutions – even the illegal ones – may become more attractive.

Overcoming Castle Rock

States passing mandatory arrest laws are making conscious choices to raise the status of domestic violence crimes and eliminate the traditional discretion of police officers.[236] This case threatens those purposes. Nevertheless, the Court seemed to imply that it was possible for a state to overcome the burden the Court set by using language giving a "stronger indication" that mandatory enforcement is the true intent of the legislature.[237] Unfortunately, the Court did not explore precisely how emphatic such language must be.

Alternatively, legislatures may require some kind of administrative discipline for officers who fail to enforce mandatory arrest statutes.[238] This may encourage enforcement of POs, though it does not address the issue of a protected property interest. The Court also pointed out that state legislatures

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2805. Victims seeking solutions may or may not share that characterization. Tebo, *supra* note 202.

233. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976)("'When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.'") (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

234. White, *supra* note 29, at 731. White states:

> [M]ost victims have attempted to end the terror of violence by either leaving the relationship, petitioning the courts for protective orders, calling the police, or seeking refuge in shelters. The women who do resort to using lethal violence against their partners are the ones who are faced with an ongoing attack or the imminent threat of death or serious bodily injury.

Id.

235. Tebo, *supra* note 202.

236. *See supra* notes 26-38 and accompanying text.

237. *Castle Rock*, 125 S. Ct. at 2806.

238. *See* Tebo, *supra* note 202.

may elect to explicitly create a cause of action under state law.[239] In any case, accountability will continue to be a primary concern of state legislatures.

Domestic violence advocates are accustomed to working with law enforcement agencies on a local level to promote effective protection order enforcement.[240] *Castle Rock* will probably not change that aspect of advocacy a great deal.[241] The message that such a ruling sends to victims, however, could be another matter.[242]

CONCLUSION

In order to find a protected property interest in a government service, a person must have a legitimate entitlement to a benefit. The benefit does not have to be one a government is obliged to provide, but it must be mandatory once given. In *Castle Rock*, the Court added an additional requirement that the benefit in question may not be one with traditionally wide governmental discretion, at least not without stronger language than was in the Colorado statute at issue. This is true even in the face of legislative efforts to limit that discretion over the last thirty years. The Court also indicated that a property interest must have some monetary value, though it did not elaborate on this requirement. The Court effectively undermined the means the Colorado Legislature chose to address a pressing societal problem. It neglected to account for the unique history of mandatory arrest in the domestic violence context and reduced the accountability of law enforcement. However, state legislatures are not without further strategies to implement mandatory arrest practices in their states. While the effect of *Castle Rock* on victims is still unknown, there could potentially be a negative impact on the perceived viability of protection orders.

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239. *Castle Rock*, 125 S. Ct. at 2810.
240. Tebo, *supra* note 202.
241. *Id.*
242. *Id.* ("'Mandatory arrest statutes don't mean what they say . . . .'") (citation omitted).