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Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool - A Discussion of the Tenth Circuit's Decision in Gonzales v. Castle Rock

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PROTECTION ORDERS: A PROCEDURAL PACIFIER OR A VIGOROUSLY ENFORCED PROTECTION TOOL? A DISCUSSION OF THE TENTH CIRCUIT'S DECISION IN *GONZALES V. CASTLE ROCK*

I. INTRODUCTION

Domestic violence is a serious problem in America today. By some estimates, three to four million women a year are victimized by a husband or partner.[1] Some experts consider these estimates to be low, since under-reporting is common due to the private nature of the crime.[2] "Domestic violence is the leading cause of injury to women in America."[3]

The United States Court of Appeals for the Tenth Circuit took a controversial and significant step for the protection of battered women in *Gonzales v. City of Castle Rock*.[4] Part I of this article discusses the problem of domestic violence and the prohibitive tool created by the legislatures and granted by the courts: the protection order. Part II of this article explains the Supreme Court's substantive due process precedent, litigation against the state for failure-to-protect, and *DeShaney's* holding severely limiting state liability in a failure-to-protect situation. Part III of this article discusses the history of procedural due process and the Tenth Circuit's decision in *Gonzales*. Part IV describes and discusses why the *Gonzales* decision is a good one and the public policy arguments for and against the decision. In conclusion, Part V explains the implications of the *Gonzales* decision, and its desired effect on relevant state actors.

A. Domestic Violence and Orders of Protection

States began to recognize domestic violence as a serious problem in the mid-1970's and responded by passing legislation enabling judges to issue civil protection or restraining orders.[5] Protection orders restrict one party from contacting or harming another party and can be temporary or permanent.[6] The eligibility requirements necessary to obtain a temporary

1. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 275 (2004).

2. Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 52 (2000).

3. Thueson, *supra* note 1, at 275.

4. 366 F.3d 1093 (10th Cir. 2004) (en banc).

5. Waul, *supra* note 2, at 53; Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 502 (2003) ("While improving the criminal justice response to domestic violence was an important piece of the new array of legal remedies, the enactment and expansion of civil protection or restraining orders evolved into a primary strategy for improving the safety of battered women.").

6. Waul, *supra* note 2, at 54.

protection order excluding a person from the family home vary among the states; in Colorado, the courts require a showing that "physical or emotional harm would otherwise result."[7] Currently, all 50 states and the District of Columbia have laws enabling the issuance of protection orders.[8] Violation of a protection order can result in criminal charges.[9] Due to the nature of the protection order, it "must be enforced to be effective."[10]

Unfortunately, many protection orders are under-enforced by the police.[11] Although there could be many potential reasons for non-enforcement, a prevalent reason is based in stereotyped views of women.[12] For example, in *Balistreri v. Pacifica Police Department*, the local police refused to enforce a protection order despite obvious evidence that Mr. Balistreri was assaulting and harassing his wife.[13] The police received each of Mrs. Balistreri's complaints "with ridicule"—on one occasion actually suggesting that Mrs. Balistreri "deserved the beating."[14]

As a result of this problem, many women sue police departments and municipalities under state tort law based on the police under-enforcement of protection orders.[15] However, because state tort law only affects individuals living in the victim's state, some women choose to sue under the Constitution, alleging violations of equal protection[16] or due process.[17] A successful constitutional suit has much broader implications, resulting in enhanced protection for a greater number of women.[18]

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7. COLO. REV. STAT. § 14-10-108(2)(c) (2004).

8. Waul, *supra* note 2, at 53.

9. *Id.* at 54.

10. Thueson, *supra* note 1, at 304.

11. Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney*?*, 65 N.Y.U. L. REV. 1280, 1321 (1990).

12. *Developments in the Law—Legal Responses to Domestic Violence: IV. Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1552 (1990).

13. 901 F.2d 696, 698 (9th Cir. 1988) (amended May 11, 1990) ("Balistreri's former husband crashed his car into her garage, and Balistreri immediately called the police, who arrived at the scene but stated that they would not arrest the husband or investigate the incident.").

14. *Balistreri*, 901 F.2d at 698. *See also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 269 n.8 (1985) (discussing a police sergeant that would not prosecute domestic violence cases because of sexist opinions).

15. *E.g.*, Sorichetti v. City of New York, 482 N.E.2d 70, 75 (N.Y. 1985); Nearing v. Weaver, 670 P.2d 137, 141 (Or. 1983).

16. *See, e.g.*, Hynson v. City of Chester, 864 F.2d 1026, 1029-30 (3d Cir. 1988).

17. *See, e.g.*, Gilmore v. Buckley, 787 F.2d 714, 715 (1st Cir. 1986), *cert. denied*, 479 U.S. 882 (1986).

18. Borgmann, *supra* note 11, at 1287 ("A Constitution-based claim is available to women in every state, unlike state tort actions, which vary with the vagaries of the tort law of each individual state.").

B. Section 1983 of the Civil Rights Act

Constitutional claims are brought under section 1983 of the Civil Rights Act.[19] Section 1983 establishes a private, civil cause of action for citizens whose constitutional rights are violated by a state actor.[20] The pertinent part of section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .[21]

Originally written as part of the Ku Klux Klan Act of 1871, the Civil Rights Act provided "a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the . . . rights . . . guaranteed by the Fourteenth Amendment might be denied by the state agencies."[22]

The Supreme Court's decision in *Parratt v. Taylor*[23] established two requirements to sustain a section 1983 action.[24] First, a person must have committed the action "acting under color of state law."[25] Second, the action must have deprived the plaintiff of a federal constitutional right.[26] Cases arise alleging either an affirmative act or an omission. In cases where the State's failure to act is at issue, the plaintiff must prove the State had "an affirmative duty to act and fail[ed] to fulfill this duty."[27]

For a municipality to be liable under section 1983, "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[28] The deprivations can consist of merely customary practices and do not have to be formally approved by the municipality's decision-making channels.[29]

Section 1983 is typically used in conjunction with either the Equal Protection Clause or the Due Process Clause of the Constitution. In due

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19. 42 U.S.C. § 1983 (2004).
20. Borgmann, *supra* note 11, at 1284.
21. 42 U.S.C. § 1983 (2004).
22. Breaden Marshall Douthett, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in* DeShaney v. Winnebago County Department of Social Services, 52 OHIO ST. L.J. 643, 643 (1991); Monroe v. Pape, 365 U.S. 167, 180 (1961).
23. 451 U.S. 527 (1981).
24. *Parratt*, 451 U.S. at 535.
25. *Id.*
26. *Id.*
27. *See* Borgmann, *supra* note 11, at 1285.
28. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).
29. *Monell*, 436 U.S. at 691.

process cases, liability claims come in two areas: substantive and procedural.

II. SUBSTANTIVE DUE PROCESS

A. History of Substantive Due Process

The doctrine of substantive due process declares that there are certain substantive constitutional rights that cannot be infringed upon by governmental action.[30] Historically, the existence of these rights has been a controversial subject since they are not specifically enumerated in the Constitution but are derived from the "liberty" element of the Due Process Clause.[31] Women suing police and municipalities for not enforcing protection orders often allege a deprivation of "liberty" without due process of law.[32] This deprivation arises from the State's failure-to-protect the victim.[33] However, as evidenced by the Tenth Circuit's controversial decision in *Gonzales*, alleging a deprivation of procedural due process based on a "property" interest may bring more success.[34]

The controlling case in the area of substantive due process rights for state liability in failure-to-protect situations is *DeShaney v. Winnebago County Department of Social Services*.[35] The Supreme Court granted certiorari in *DeShaney* to settle the split between the circuits in their determination of a defendant's liability for failure-to-protect arising from a "special relationship" with the State.[36] Prior to *DeShaney*, several more active Courts of Appeals held that a non-custodial "special relationship" arose when the State recognized a danger and undertook protection of the victim.[37] This "special relationship" created a duty to protect, enforced through the Due Process Clause.[38]

Although *DeShaney* did not involve the enforcement of protection orders, it severely limited "failure-to-protect" substantive due process cases by providing a narrow definition of the "special relationship" test.[39] In *DeShaney*, the Supreme Court limited the application of the "special relationship" test to situations in which the victim was in state custody.[40]

30. MICHAEL ARIENS, CONSTITUTIONAL LAW PART II 313 (2004).
31. *Id.*
32. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).
33. *E.g.*, *DeShaney*, 489 U.S. at 193.
34. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1095–96 (10th Cir. 2004) (en banc).
35. 489 U.S. 189 (1989).
36. *DeShaney*, 489 U.S. at 194.
37. *Id.* at 197 n.4.
38. *Id.*
39. Douthett, *supra* note 22, at 646–47.
40. *Id.*

B. DeShaney v. Winnebago County Dep't of Social Services

Joshua DeShaney was one year of age when his mother and father were divorced.[41] A Wyoming court granted custody to Joshua's father, Randy DeShaney, who subsequently relocated to Winnebago County, Wisconsin.[42]

In January of 1982, Mr. DeShaney's second wife reported child abuse allegations to local police.[43] Shortly after the report, a social worker from the Winnebago Department of Social Services ("DSS") interviewed the father, who denied the charges of abuse.[44] There was no follow-up from DSS following the January 1982 allegations.[45]

One year later, in January of 1983, the police again suspected Mr. DeShaney of child abuse when Joshua was admitted to the hospital "with multiple bruises and abrasions."[46] The county assembled a team consisting of DSS caseworkers, a pediatrician, a detective, a psychologist, a lawyer and various hospital personnel to make recommendations in Joshua's case.[47] After finding insufficient evidence to justify placing Joshua in state custody, the team recommended Joshua be enrolled in preschool, for Mr. DeShaney to attend counseling, and for Mr. DeShaney's girlfriend to move out of his home.[48] A month later, the local hospital again notified DSS of Joshua's hospital admission with suspicious injuries, and again DSS determined "there was no basis for action."[49]

Throughout the following six months, a DSS caseworker visited the DeShaney house on several occasions.[50] Although there was further evidence of abuse, DSS took no action.[51] Eventually, Randy DeShaney beat Joshua into a coma.[52] Joshua was left severely retarded and confined to an institution for the rest of his life.[53]

Joshua and his mother sued Winnebago County, DSS and several individual employees of DSS for depriving Joshua "of his liberty without due process of law, in violation of his rights under the Fourteenth

41. *DeShaney*, 489 U.S. at 191.
42. *Id.*
43. *Id.* at 192.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 193.
52. *Id.*
53. *Id.*

Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known."[54]

C. The Supreme Court's Decision

Joshua and his mother (petitioners) argued that the state had a "special relationship" with Joshua since they knew he was in danger and expressed their intention to protect him.[55] This special relationship created a duty to protect in the state, which should have been carried out "in a reasonably competent fashion."[56] Petitioners further argued that the State's incompetency in acting on their duty was an "abuse of governmental power that so 'shocks the conscience'"[57] that it violated their substantive due process rights.[58]

The Court rejected petitioners' arguments, beginning its analysis by examining the history and precedent of the Due Process Clause.[59] The Court stated that the purpose of the Due Process Clause was to protect people from government infringement of "life, liberty or property without 'due process of law.'"[60] It was therefore not intended to "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other [private] means."[61]

The Court acknowledged that under the Constitution, there could be circumstances requiring the government to provide care and protection to individuals, but these circumstances were limited to situations where the government exercised some sort of custody or control over the individual[62] (for example, by providing medical care to prisoners, or by providing adequate services to mental patients "ensuring their 'reasonable safety' from themselves and others.").[63] Therefore, the Court found, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[64]

Since Joshua's father was not a state actor, and Joshua was not in state custody when he was injured, the elements required for a successful

54. *Id.*
55. *Id.* at 197.
56. *Id.*
57. *Id.* (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).
58. *Id.*
59. *Id.* at 198.
60. *Id.* at 195.
61. *Id.*
62. *Id.* at 199 (stating "by reason of the deprivation of his liberty [to] care for himself, it is only 'just' that the State be required to care for him") (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).
63. *Id.*
64. *Id.* at 200.

substantive due process claim were not present.[65] Therefore, "the State had no constitutional duty to protect Joshua."[66]

Although the *DeShaney* Court's holding is a limitation on "failure-to-protect" substantive due process claims, it left the door open for a claim based on procedural due process in two ways. First, the *DeShaney* Court acknowledged the existence of potential liability if the "courts and legislatures impose . . . affirmative duties of care and protection upon its agents . . . ," such as through a court-issued protection order with a corresponding statute mandating enforcement.[67] Additionally, the *DeShaney* Court declined to consider petitioners' procedural due process argument due to an error in the pleadings, leaving the possibility open for a "failure-to-protect" case based on procedural due process.[68] Based on these two factors, a state actor could incur a duty to protect, and a tort committed by a state actor could turn into a constitutional violation.[69]

III. PROCEDURAL DUE PROCESS

A. History of Procedural Due Process

The foundation of the Due Process Clause is set in Chapter 39 of Magna Carta.[70] Chapter 39 states, "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[71] The drafters of the Magna Carta sought to abolish the ad hoc trials of the period, which provided no procedural protections to its citizens, often resulting in the use of improvised laws to try cases.[72]

The Due Process Clause, set forth in the Fourteenth Amendment to the Constitution, states "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[73] The Supreme Court interprets this clause as prohibiting the federal government from depriving any citizen of life, liberty or property without first giving the citizen 1) notice and 2) an opportunity to be heard.[74] The opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[75]

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65. *Id.* at 201.
66. *Id.*
67. *Id.* at 202.
68. *Id.* at 195.
69. *Id.* at 201–02.
70. Duncan v. Louisiana, 391 U.S. 145, 169 (1968).
71. *Duncan*, 391 U.S. at 169.
72. *Id.*
73. U.S. CONST. amend. XIV, § 1.
74. Baldwin v. Hale, 68 U.S. 223, 233 (1864).
75. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

For cases alleging a deprivation of property, the first element of a procedural due process claim is the identification of a property interest.[76] Property interests can be intangible, as in the enforcement of a protection order, or tangible, such as personal or real property. When the State is taking a person's tangible property, the procedural due process violation is usually evident. For example, in *Fuentes v. Shevin*,[77] Margarita Fuentes purchased various items on credit from Firestone Tire and Rubber Co.[78] Ms. Fuentes paid her monthly bill for over a year, when a dispute arose causing her to discontinue payments.[79] As a result, Firestone went to small claims court and obtained a writ of replevin, seizing the goods on the very same day.[80] In granting the replevin order, the court gave Ms. Fuentes no prior notice, nor an opportunity to dispute the order.[81] Ms. Fuentes subsequently challenged the replevin procedure in federal court, charging that it violated the Due Process Clause of the Fourteenth Amendment.[82] The Court held that "[T]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions."[83] Creditors could seize goods to protect their security interests but not until a fair hearing validated their claim.[84]

A difficulty in procedural due process cases arises where the property interest is not as clear as in *Fuentes*. For example, in *Goldberg v. Kelly*,[85] the property interest involved a citizen's entitlement to welfare benefits. Residents receiving public assistance challenged New York State's termination of their benefits without notice or a hearing of any kind.[86] The state's procedure provided for a post-deprivation hearing, but the appellees argued the insufficiency of providing a hearing after the termination of benefits.[87] Based on welfare recipients' dependence on state funds for their food and shelter, the Court, characterizing welfare entitlements as a property interest, held that welfare benefits were a "statutory entitlement," and termination constituted state action adjudicating "important rights."[88] The Court specifically rejected the argument that welfare is a "privilege" and not a "right."[89]

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76. *See* Lehr v. Robertson, 463 U.S. 248, 256 (1983) ("[I]t is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State.").
77. 407 U.S. 67 (1972).
78. *Fuentes*, 407 U.S. at 70.
79. *Id.*
80. *Id.*
81. *Id.* at 71.
82. *Id.* at 71.
83. *Id.* at 80.
84. *Id.* at 96.
85. 397 U.S. 254, 255 (1970).
86. *Goldberg*, 397 U.S. at 256.
87. *Id.* at 259-60.
88. *Id.* at 261-62.
89. *Id.* at 262.

The decision in *Goldberg* evidenced the Court's willingness to find property interests in entitlements such as public assistance benefits.[90] Under *Goldberg*, the enforcement of a protection order would have been declared a property right.[91] Unfortunately, the entitlement revolution started by *Goldberg* was soon limited by subsequent decisions, making the determination of a property right in public assistance benefits less predictable.[92]

In *Board of Regents v. Roth*,[93] the Court trimmed the *Goldberg* decision in finding that property rights were not created by the constitution.[94] Wisconsin State University-Oshkosh ("University") hired David Roth to teach political science during the period of September 1, 1968 and June 30, 1969.[95] After this term was completed, the University notified Roth of its decision not to re-hire him for the next academic year.[96] The University gave Roth neither a reason nor an opportunity to challenge the decision.[97] Since Mr. Roth had not been employed by the University for the statutory "four years of year-to-year employment," he was considered a non-tenured employee.[98] Wisconsin state law clearly gave the University the discretion whether to re-hire non-tenured teachers.[99]

Mr. Roth challenged his termination, alleging in part that the failure of the University to give him a reason or fair hearing violated his procedural due process rights.[100] In evaluating Mr. Roth's claim, the Court looked to the nature of the right to determine if it qualified as "property" as specified by the Fourteenth Amendment.[101]

Departing from *Goldberg*, the Court in *Roth* further narrowed entitlement property interests to rights created and defined by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[102] Thus, in *Roth*, the property interest was only a temporary one created by the "terms of his employment."[103] Since the terms specified employment between the periods of September 1, 1968 and June 30, 1969, the property interest terminated

90. *Id.*
91. *See id.* at 262 n.8.
92. Douthett, *supra* note 22, at 651–52.
93. 408 U.S. 564 (1972).
94. *Roth*, 408 U.S. at 577.
95. *Id.* at 566.
96. *Id.*
97. *Id.* at 568.
98. *Id.* at 566.
99. *Id.* at 567.
100. *Id.* at 569.
101. *Id.* at 570–71 (stating "the range of interests protected by procedural due process is not infinite.").
102. *Id.* at 577.
103. *Id.* at 578.

concurrently with the terms.[104] Although Mr. Roth had a personal interest in re-employment, the Court found he did not have a property interest.[105]

Since *Roth*, the Court has identified many other entitlement property interests protected by the Due Process Clause. These interests include continued public employment,[106] a free education,[107] garnished wages,[108] professional licenses,[109] driver's licenses,[110] causes of action,[111] and the receipt of government utility services.[112] However, it was not until the Tenth Circuit's bold decision in *Gonzales* that a federal court found a property right in the enforcement of a protection order.[113]

B. Gonzales v. City of Castle Rock

On May 21, 1999, Ms. Gonzales went to state court seeking a protection order to limit her husband's contact with their three daughters.[114] The court granted the order under Colorado Revised Statute § 14-10-108, excluding Mr. Gonzales from the family home based on Ms. Gonzales' showing "that physical or emotional harm would otherwise result."[115] The protection order mandated that Mr. Gonzales stay "at least 100 yards away from the property at all times" and specified violation of the order could result in arrest and prosecution.[116] The order also warned that police officers would use "every reasonable means" in enforcing the order, subjecting violators to arrest and detention in "the nearest jail or detention facility."[117]

Mr. Gonzales received the order on June 4, 1999, and the court made the order permanent that same day.[118] The permanent order specified that Mr. Gonzales could not see his children with the exception of two circumstances.[119] First, provided reasonable notice to Ms. Gonzales, Mr. Gonzales was allowed "a mid-week dinner visit with the minor children."[120] Second, the order permitted Mr. Gonzales to gather the children "for the purpose of parental time."[121] In each case, during Mr. Gon-

104. *Id.*
105. *Id.*
106. Perry v. Sindermann, 408 U.S. 593, 602–03 (1972).
107. Goss v. Lopez, 419 U.S. 565, 574 (1975).
108. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969).
109. Barry v. Barchi, 443 U.S. 55, 64 (1979).
110. Bell v. Burson, 402 U.S. 535, 539 (1971).
111. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).
112. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–12 (1978).
113. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1109 (10th Cir. 2004) (en banc).
114. *Gonzales*, 366 F.3d at 1096.
115. COLO. REV. STAT. § 14-10-108 (2004).
116. *Gonzales*, 366 F.3d at 1096.
117. *Id.* at 1097 (citing SUSAN WENDALL WHICHER & CHERYL LOETSCHER, HANDBOOK OF COLORADO FAMILY LAW, ch. IV, F–12 at 2 (3d ed. 1996)).
118. *Gonzales*, 366 F.3d at 1097.
119. *Id.*
120. *Id.*
121. *Id.*

zales' visits he was not to "molest or disturb the peace" at Ms. Gonzales' home.[122]

On June 22, 1999, between 5:00 and 5:30 p.m., Mr. Gonzales violated the order and abducted the children from Ms. Gonzales' front yard.[123] Ms. Gonzales learned the children were missing at approximately 7:30 p.m. and, immediately suspecting Mr. Gonzales, called the Castle Rock police.[124] Shortly thereafter, Officers Brink and Ruisi arrived at Ms. Gonzales' home and reviewed the protection order.[125] The officers did not comply with the order's terms, and told Ms. Gonzales "there was nothing they could do."[126] They directed Ms. Gonzales to call the police station again if Mr. Gonzales did not return her children by 10:00 p.m.[127]

At approximately 8:30 p.m., Mr. Gonzales called Ms. Gonzales and informed her that he had taken the children to Elitch Gardens, a Denver amusement park.[128] Upon receiving this information, Ms. Gonzales called the police a second time to report the whereabouts of her husband.[129] Again, Officer Brink told her to wait until 10:00 p.m.[130] Ms. Gonzales anxiously waited until 10:00 p.m. when she phoned the police again.[131] Unfortunately, Ms. Gonzales received no assistance; dispatch told her to wait another two hours.[132] Ms. Gonzales followed the dispatcher's instructions and waited until midnight to place a fourth call.[133] With the midnight call provoking no action by police, Ms. Gonzales drove to Mr. Gonzales' apartment to look for the girls.[134] Upon finding no one home, Ms. Gonzales phoned police for a fifth time.[135] Despite receiving instructions to wait at the apartment complex until police arrived, no police officer ever met Ms. Gonzales.[136] At 12:50 a.m., Ms. Gonzales drove to the Castle Rock police station and filed an incident report with Officer Ahlfinger.[137] Officer Ahlfinger subsequently made no attempt to enforce the protection order's terms by finding and arresting Mr. Gonzales but instead "went to dinner."[138]

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1097–98.
137. *Id.* at 1098.
138. *Id.*

Approximately eight hours after Ms. Gonzales' initial call to the police, Mr. Gonzales arrived at the police station and opened fire.[139] The police shot and killed him at the scene and, upon searching his truck, found the dead bodies of the three children.[140] He killed them earlier that day.[141]

Ms. Gonzales sued the City of Castle Rock and Officers Ahlfinger, Brink and Ruisi under section 1983 of the Civil Rights Act.[142] She alleged the officers violated her substantive and procedural due process rights by failing to enforce the protection order against her husband, and that the city tolerated the officers' non-enforcement of protection orders resulting in "the reckless disregard of a person's right to police protection granted by such orders."[143]

C. *The United States Court of Appeals for the Tenth Circuit's Decision*

The United States District Court for the District of Colorado dismissed Ms. Gonzales' case, finding she failed to state a claim upon which relief could be granted.[144] On appeal, a panel of the United States Court of Appeals for the Tenth Circuit dismissed Ms. Gonzales' substantive due process claim but held the procedural due process claim could proceed.[145] The City of Castle Rock and Officers Ahlfinger, Brink and Ruisi sought review of the panel decision and were granted rehearing *en banc*.[146]

The *en banc* court reviewed the panel's decision on April 29, 2004.[147] Briefly addressing the panel's dismissal of Ms. Gonzales' substantive due process claim, the court stressed that under *DeShaney* "the Constitution itself does not require a state to protect its citizens from third party harm."[148] Since the State did not create the danger in Ms. Gonzales' case, a "danger creation" exception could not be sustained, and since *DeShaney* put an end to the expansion of constitutional liability using the "special relationship" test, the court dismissed Ms. Gonzales' substantive due process claim.[149]

In discussing Ms. Gonzales' procedural due process claim, the court first distinguished procedural from substantive due process.[150] Proce-

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1096.
148. *Id.* at 1099.
149. *Id.*
150. *Id.* ("Contrary to the assertions of the city and officers, as well as those of our dissenting colleagues, the issue before this *en banc* court is distinct from the substantive due process claim dismissed below.").

dural due process claims stem from state law.[151] Substantive due process claims are brought based on rights contained in and protected by the Constitution.[152] Note that while the Court in *DeShaney* held "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,"[153] it left the door open for state-created property rights imposing "affirmative duties of care and protection upon its agents."[154] Thus, the court analyzed Ms. Gonzales' case to determine 1) whether state law, through granting the protection order, created a property interest protected by the Fourteenth Amendment[155] and, if so, 2) whether the State denied Ms. Gonzales "an appropriate level of process."[156]

1. Determination of a Property Interest

The *Gonzales* Court acknowledged Tenth Circuit precedent, holding that statutory mandates alone cannot create a property interest—but stressed a different situation was present in this case.[157] Ms. Gonzales held a court-issued protection order that was also mandated by state statute.[158] The court held that it was the combination of the state statute and the protection order, both mandating enforcement, that created the property interest.[159]

Citing the Supreme Court's decision in *Olim v. Wakinekona*, the court stressed that an entitlement property interest is only created when there are "objective and defined criteria" for a decision maker to follow.[160] If the decision maker "can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected . . . interest."[161] In applying these standards to *Gonzales*, the *en banc* court found both the protection order and the state statute relied upon by Ms. Gonzales contained mandatory language and specific criteria for a decisionmaker to follow.[162] The protection order set forth the state's intent to enforce with language mandating that police "use every reasonable means to enforce this restraining order," and officers "shall take the restrained person to the nearest jail or detention facility . . . ."[163] Likewise, the statute contains similar language

151. *Developments in the Law—Legal Responses to Domestic Violence: IV. Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1562 (1993).

152. *Id.*

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

154. *Id.* at 201. ("A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.").

155. *Gonzales*, 366 F.3d at 1100.

156. *Id.* at 1110.

157. *Id.* at 1101.

158. *Id.*

159. *Id.*

160. Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

161. *Olim*, 461 U.S. at 249.

162. *Gonzales*, 366 F.3d at 1103–04.

163. *Id.*

ordering the arrest of the order's violator, "or, if an arrest would be impractical . . . , seek a warrant for the arrest . . . when the peace officer has information amounting to probable cause that the restrained person has violated or attempted to violate any provision of the restraining order."[164] Recognizing that police officers must use some judgment in their determination of probable cause, the court noted that "objectively ascertainable standards" are used to evaluate probable cause decisions based on "what a reasonably well-trained officer would know."[165] Therefore, in the court's view, a statute requiring a showing of probable cause met the requirement of "objective and defined criteria" for a decision maker to follow set in *Olim*.[166]

The Tenth Circuit's holding—that a court-ordered protection order containing mandatory language requiring enforcement, based on specific objective criteria, created a constitutionally protected property interest—had some support from other district courts,[167] but no other circuit court had gone this far.[168]

For example, the court in *Gonzales* cited a district court's decision in *Coffman v. Wilson Police Department*[169] as support for its ruling.[170] In *Coffman*, the United States District Court for the Eastern District of Pennsylvania analyzed facts disturbingly similar to those in *Gonzales*. *Coffman* involved the police's refusal to enforce a protection order despite repeated calls from the victim requesting assistance.[171] Noting that in *DeShaney* the Supreme Court "specifically did not reach whether a *Roth* entitlement might have existed,"[172] the court in *Coffman* examined the statute and protection order for language mandating enforcement.[173] Although the use of the words "[the arrest] *may* be without warrant" in the statute were obviously precatory, the protection order contained the mandatory, unambiguous phrase "the police department *shall* enforce the [protection] orders."[174] The court opined, "The word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation."[175] Based on the mandatory language in the pro-

164. *Id.* at 1104.
165. *Id.* at 1105.
166. *Olim*, 461 U.S. at 249.
167. *See* Coffman v. Wilson Police Dep't, 739 F. Supp. 257, 264 (E.D. Pa. 1990); Siddle v. Cambridge, 761 F. Supp. 503, 509 (S.D. Ohio 1991).
168. *Gonzales*, 366 F.3d at 1131 n.2 (O'Brien, J., dissenting) ("In nearly fifteen years since *DeShaney* no other circuit has ventured this far.").
169. *See Coffman*, 739 F. Supp. at 254.
170. *Gonzales*, 366 F.3d at 1102.
171. *Coffman*, 739 F. Supp. at 260.
172. *Id.* at 264 n.7.
173. *Id.* at 264.
174. *Id.*
175. *Id.*

tection order, the court found a "property interest in police enforcement [of a protection order] that is cognizable under *Roth*."[176]

2. Determination of an Appropriate Level of Process

Once the court established that Ms. Gonzales had a protected interest in the enforcement of the protection order, the next step was to determine whether she was denied "an appropriate level of process."[177] An acceptable level of process can generally be stated as "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[178]

In *Parratt v. Taylor*, the Supreme Court held that random actions of a state actor cannot be the basis of a procedural due process claim if there is an adequate post-deprivation remedy available.[179] However, Ms. Gonzales did not allege the non-enforcement of her protection order was "random" but argued the non-action resulted from a "custom and policy of the City of Castle Rock not to enforce domestic abuse protection orders."[180]

In ignoring Ms. Gonzales' requests for enforcement of her protection order, the court held that she did not receive any process at all.[181] While the court deemed a formal pre-deprivation hearing impractical and a post-deprivation hearing ineffective, it suggested that "something less than a full evidentiary hearing [would be] sufficient."[182] As an example, the court used the process required in[183] *Memphis Light, Gas & Water Div. v. Craft*.[184] In *Memphis Light*, customers sued their utility company for shutting off their service without providing adequate notice and process.[185] The Supreme Court held that procedural due process was satisfied if a customer had an opportunity to talk with a company employee who could correct billing mistakes before terminating utility services.[186]

The *Gonzales* Court possessed an undeveloped record, so they were unable to develop specific procedures in determining what process was due.[187] However, the court used the statute for direction and suggested a general process for dealing with protection orders.[188] The process required "police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and

176. *Id.*
177. *Gonzales*, 366 F.3d at 1110 (quoting Farthing v. City of Shawnee, 39 F.3d 1131, 1135 (10th Cir. 1994)).
178. *Id.* at 1111 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).
179. Parratt v. Taylor, 451 U.S. 527, 540–43 (1981).
180. *Gonzales*, 366 F.3d at 1112–13.
181. *Id.* at 1111 n.15.
182. *Id.* at 1114 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985)).
183. *Id.* at 1115.
184. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).
185. *Memphis Light*, 436 U.S. at 11.
186. *Gonzales*, 366 F.3d at 1115.
187. *Id.*
188. *Id.* at 1116.

whether probable cause exists that the restrained party has notice of the order."[189] After completion of these steps, if it is determined the protection order does not warrant mandatory enforcement, the person holding the order should be notified of the determination and why.[190] The court speculated that if the police had followed the procedures outlined in the statute, the Gonzales children's lives might have been spared.[191]

Although the court held Ms. Gonzales' section 1983 action could proceed, it could only proceed against the municipality.[192] The standard for holding police officers liable requires it be "sufficiently clear that a reasonable official would have understood that his conduct violated the right."[193] The court held the officers were therefore entitled to qualified immunity, since prior to this decision "a reasonable officer would [not] have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest."[194]

IV. *GONZALES* ARGUMENTS

One of the main reasons the dissenters in *Gonzales* were unwilling to expand state protective services under the Fourteenth Amendment was a fear of endless lawsuits being brought against the State.[195] In his dissent, Judge Kelly quoted the First Circuit case of *Estate of Gilmore v. Buckley*:

> Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution.[196]

However, this parade of horrors argument misses the point and overlooks the narrow[197] holding of the majority in *Gonzales*. In finding a property interest in the enforcement of a protection order, the court specifically required the order 1) be issued by a court, 2) contain mandatory language requiring enforcement, and 3) must also contain "specific ob-

189. *Id.* (citations omitted).
190. *Id.*
191. *Id.*
192. *Id.* at 1118.
193. *Id.* at 1117 (quoting Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001)).
194. *Id.* at 1117-18.
195. Douthett, *supra* note 22, at 651.
196. Estate of Gilmore v. Buckley, 787 F.2d 714, 722-23 (1st Cir. 1986).
197. *See, e.g.*, Lauren L. McFarlane, Note, *The Right To Privacy One Hundred Years Later, Domestic Violence Victims v. Municipalities: Who Pays When The Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 964-65 (1991) ("At the moment, there are few states with statutory grants of protection clear enough to support [procedural due process] claims.").

jective criteria curtailing . . . decisionmaking discretion . . . ."[198] Additionally, adding weight to its conclusion, the court considered factors such as the mandatory language in the statute enabling the granting of a protection order, the statute's legislative history, and, absent malice, bad faith or non-compliance with adopted rules, the granting of immunity to police in their enforcement of a protection order.[199]

In applying the *Gonzales* analysis to the case of a firefighter not responding to a fire or an ambulance that is late to the scene of the accident, it is obvious that these cases would never get past the determination of a property interest stage of the trial. Neither case involves a specific statute coupled with a court-ordered protection order.[200] The court in *Gonzales* was very clear: this holding does not apply to situations in which a state statute mandates outlined procedures, absent a court order.[201] For example, the court distinguished *Doe by Nelson v. Milwaukee Co.* from *Gonzales*.[202] In the court's view, the Seventh Circuit's decision in *Doe* was correct in not finding a property interest in child protective services created solely by a state statute.[203] Mandatory language in a state statute alone is not enough.[204] Accordingly, the elements required to find a property interest in *Gonzales* leave little room for the endless expansion of due process rights and the potential for a litany of lawsuits against the State.

Another argument criticizing the holding in *Gonzales* claims that requiring police to "conduct pre-deprivation hearings" when dealing with protection orders is impractical.[205] This contention arises from a misunderstanding of the process the court required due. The *Gonzales* process requires "three basic steps" that would take police "only . . . minutes to perform."[206] A pre-deprivation hearing is not required.[207] The steps outlined by the court provide an opportunity for individuals to have their protection order enforcement requests examined and, therefore, minimizing the risk of random, arbitrary denials.[208] As the Supreme Court stated in *Roth*:

> It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action . . . . As long as the gov-

198. *Gonzales*, 366 F.3d at 1109.
199. *Id.*
200. *Id.*
201. *Id.* at 1100 n.4.
202. *Id.* (distinguishing Doe by Nelson v. Milwaukee Co., 903 F.2d 499, 502-03 (7th Cir. 1990)).
203. *Id.* at 1100 n.4.
204. *Id.*
205. *Id.*
206. *Id.* at 1116.
207. *Id.*
208. *Id.*

> ernment has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.[209]

Finally, the dissenters also argued that "it will always be possible for plaintiffs to recharacterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims . . . ."[210] For example, in the Tenth Circuit case *Abeyta by & Through Martinez v. Chama Valley Indep. Sch. Dist. No. 9*,[211] a teacher was sued for continually calling his twelve-year-old student a "prostitute."[212] The student alleged the teacher violated her substantive due process rights "to be free from invasion of her personal security by sexual abuse and harassment and by psychological abuse."[213] The court denied the student's claim, holding "extreme verbal abuse typically is insufficient to establish a constitutional deprivation."[214]

Judge McConnell argues that, in light of *Gonzales*, the student in *Abeyta* should have "styled the claim as a procedural deprivation (of her liberty interest in personal security and emotional well-being) and alleged that the real harm was that the teacher determined that she was a prostitute without first holding a hearing on the question."[215]

However, just because *Abeyta* could be styled as a procedural due process claim, it does not mean that it is logical to do so; nor does it mean the result in *Abeyta* would be different. In Judge McConnell's hypothetical, the plaintiff in *Abeyta* would have to show that being called a "prostitute" was authorized by state policy and not "a result of a random and unauthorized act by a state employee."[216] The teacher's actions in *Abeyta* were obviously random and not state policy. Therefore, a remedy in state court would be all that the Due Process Clause requires; the plaintiff would be denied an opportunity to sue in federal court.[217]

Gonzales' narrow holding—that a court-ordered protection order containing mandatory language requiring enforcement, based on specific objective criteria, created a constitutionally protected property interest—does not endlessly expand state liability. It does not create stifling police procedure. It does not allow the skirting of substantive due process precedent, such as the Court's decision in *DeShaney*. It does provide enhanced protection to battered women and their children by ensuring

209. Bd. of Regents v. Roth, 408 U.S. 564, 591 (1972).
210. *Id.* at 1129.
211. 77 F.3d 1253 (10th Cir. 1996).
212. *Abeyta*, 77 F.3d at 1254.
213. *Id.*
214. *Id.* at 1256.
215. *Gonzales*, 366 F.3d at 1130 (McConnell, J., dissenting).
216. Parratt v. Taylor, 451 U.S. 527, 541 (1981).
217. *Developments in the Law*, *supra* note 151, at 1566.

that every request for the enforcement of a protection order is evaluated in the same way.

V. CONCLUSION

On November 1, 2004, the Supreme Court agreed to hear the State's appeal of the Tenth Circuit's decision in *Gonzales*.[218] Lawyers for the state want to portray the decision as potentially bankrupting "municipal governments for their inevitable instances of 'less than perfect' law enforcement."[219] "[L]ess than perfect" is an obvious understatement.[220]

As the Court in *DeShaney* recognized, procedural due process rights provide a remedy where substantive due process falls short. In using procedural due process, *Gonzales* provides a framework for citizens to have their protection order enforcement requests evaluated, as well as providing a sufficient cause of action against police and municipalities for arbitrarily refusing enforcement. The holding does not violate the constitutional concept of "negative rights," nor does it needlessly expand state liability.

The substantial step taken in *Gonzales* also sends a broad message to police and municipalities that courts, as well as the legislature, consider domestic violence as a serious problem and are committed to its eradication. With a potential federal lawsuit involved, state officials may think twice before ignoring a request for enforcement of a protection order. Procedural due process, in the words of Justice Douglas, "spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[221]

Michael Mattis[*]

218. Linda Greenhouse, *Justices to Mull Rights of Those Seeking Police Protection*, N.Y. TIMES, Nov. 2, 2004, at A21.

219. *Id.*

220. *Id.*

221. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

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