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**Every Reasonable Means:
Due Process and the (Non)enforcement of
a Restraining Order in *Gonzales v. Town
of Castle Rock***

Amber Fink*

“It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”¹

“I don’t lose three children and not do something about it. [The lawsuit] is the only way . . . my best shot to make a change, to make the world a little safer.”²

Introduction

At 5:30 pm on June 22, 1999, Rebecca, Katheryn, and Leslie Gonzales were still alive.³ Their father, Simon Gonzales, picked them up from the front yard of their mother’s house in Castle Rock, Colorado.⁴ This was not a striking or unusual event on its face, except that by this action Simon violated the provisions of the permanent restraining order issued against him on behalf of Ms. Gonzales and the three girls several weeks earlier.⁵ Jessica Gonzales, mother of the three girls, aged ten, nine, and seven, called the Castle Rock Police Department at 7:30 pm to report her children missing.⁶ Upon their arrival at her house, Jessica showed the police a copy of the restraining order.⁷ The police told her that

* J.D. expected 2007, University of Minnesota Law School. The author would like to thank her mother, her JLI colleagues, and Pat.

1. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

2. *Gonzales v. Castle Rock*, CBS NEWS, 60 MINUTES (Mar. 20, 2005), <http://www.cbsnews.com/stories/2005/03/17/60minutes/main681416.shtml> (quoting Jessica Gonzales).

3. *Gonzales v. Castle Rock*, 125 S. Ct. 2796, 2800-02 (2005); *Gonzales v. Castle Rock*, 366 F.3d 1093, 1096-98 (10th Cir. 2004).

4. 125 S. Ct. at 2801.

5. *Id.*; see also 366 F.3d at 1096.

6. 125 S. Ct. at 2801.

7. *Id.*

nothing could be done; that she should call again later.⁸ She then verified that her husband had taken the children, and called the police again.⁹ She called once more, and the police still did nothing.¹⁰ Given no response to her requests for aid, she called for the fifth time. Finally, she went to the station herself, at 12:50 in the morning, where an officer took an incident report and then went on a late-night dinner break.¹¹ At 3:20 am, Simon arrived at the police station and was killed after he opened fire; all three of his daughters were found dead in the cab of his truck.¹² During the ten hours that had lapsed since Simon Gonzales violated his restraining order, and in the eight hours since the police became aware of his violation, Simon murdered Rebecca, Katheryn, and Leslie.

Jessica brought an action under section 1983 of the Civil Rights Act,¹³ asserting that Castle Rock and its police department violated her procedural and substantive due process rights in their failure to enforce the restraining order properly.¹⁴ The United States District Court for the District of Colorado dismissed her case for failure to state a claim.¹⁵ In 2002, the United States Court of Appeals for the Tenth Circuit reversed, holding that Jessica did possess a cognizable procedural—but not a substantive—due process property interest in enforcement of the restraining order.¹⁶ In 2005, the Supreme Court decided that in those hours before the Gonzales daughters' death, the police had no mandatory duty to enforce the restraining order against Simon Gonzales. The Court indicated that the Tenth Circuit was mistaken in the belief that Jessica held a due process property interest in police enforcement of the order for protection.¹⁷ Several factually-similar cases have already predictably adhered to the *Gonzales* reasoning.¹⁸ As a result, plaintiff redress for the failure

8. *Id.*

9. *Id.* at 2801-02.

10. *Id.*

11. *Id.* at 2802.

12. *Id.* at 2800-02; *see also* 366 F.3d at 1097-98.

13. 42 U.S.C. § 1983 (2004).

14. *Gonzales v. Castle Rock*, 307 F.3d 1258, 1260 (10th Cir. 2002).

15. *See id.* at 1266.

16. *Id.*; *see also Gonzales*, 366 F.3d 1093.

17. 125 S. Ct. at 2810.

18. *See Caldwell v. City of Louisville*, No. 3:01CV-195-S, 2005 WL 2290589 (W.D. Ky. Sept. 19, 2005) (dismissing plaintiff's claim, finding case at bar to be factually indistinguishable from *Gonzales*); *Starr v. Price*, 385 F. Supp. 2d 502 (M.D. Pa. 2005) (holding that plaintiff did not have a protected property interest in enforcement of protective order after *Gonzales*; protective order contained the

of police to enforce protective orders is threatened with extinction.

This Article challenges the holding of *Gonzales v. Town of Castle Rock* and its successors by exposing its analytical weaknesses, and implores other courts to challenge the holding as well. Part I provides a background on domestic violence and protection orders generally. Part I also discusses procedural due process rights formulated and guaranteed by the Constitution and courts and sheds light on the Fourteenth Amendment framework as it relates to protective orders. Finally, Part I examines Colorado law related to the type of restraining order at issue in *Gonzales*. Part II examines the holding and supporting analysis of *Gonzales*, as well as its referenced legal authority. Part III critiques the *Gonzales* Court's reasoning using the same case law relied upon in *Gonzales*, and the Colorado legislative history, which is surprisingly absent within the majority opinion. Part IV explains why a focused critique of *Gonzales* matters.

I. Background

A. Domestic Violence

Domestic violence accounts for 1,300 deaths nationwide every year.¹⁹ On average, nearly four women are murdered by their romantic partners every day,²⁰ and 33% of all women murdered in this country die by the hands of a romantic partner.²¹ Additionally, children under thirteen constitute 23% of murder victims killed by a family member, while comprising only 3% of non-family murder victims.²² Actual enforcement of protective orders lessens these tragedies,²³ while failure to enforce an

mandatory language "shall" to arrest and seize weapons). *But see* Hudson v. Hudson, No. 04-2662-DP, 2005 WL 2253612 (W.D. Tenn. Sept. 14, 2005) (finding that officers had mandatory duty to arrest violator of protective order when probable cause is present).

19. INTIMATE PARTNER VIOLENCE: FACT SHEET, NAT'L CTR. FOR INJURY PREVENTION & CONTROL (2005), <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm>.

20. Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 20, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278) [hereinafter NNEDV Brief].

21. Proclamation No. 7717, 68 Fed. Reg. 59,079 (Oct. 8, 2003).

22. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS 1 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

23. *See* AM. BAR ASS'N, COMM'N ON DOMESTIC VIOLENCE, REPORT NO. 114 TO THE HOUSE OF DELEGATES 2, 5 available at http://www.abanet.org/adminlaw/annual2005/council_agenda/114Resolution.pdf (discussing results of a study illustrating that higher rates of arrest for protective order violations were linked to a decrease in re-abuse rates for victims); Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S

existing order increases the recipient's risk of danger.²⁴

Seventy-three percent of family violence victims are female.²⁵ Females comprise 84% of spousal abuse victims, and 86% of abuse victims from a boyfriend or girlfriend.²⁶ Moreover, according to the Department of Justice, 75% of the persons who commit family violence are male; males constituted 83% of spousal murderers and 75% of murderers killing a boyfriend or girlfriend.²⁷

Females are more likely than males to be victimized by their partners. In 2004, 21% of offenders victimizing women were described as intimates and 34% were described as strangers, while only 4% of offenders victimizing males were intimate partners, and 50% were strangers.²⁸ While one-third of female murder victims were killed by their partner, only 3 to 4% of male victims were murdered by an intimate.²⁹ These factors compelled the Department of Justice (DOJ) to proclaim that, "intimate partner violence should be considered first and foremost a crime against women, and prevention strategies should reflect this fact."³⁰

According to statistics compiled by the DOJ, 13% of spousal

L.J. 213, 215 (1988) ("[E]vidence shows that arrest substantially reduces the number of domestic assaults and murders."); cf. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158, 167 (2003) ("[T]he provision of legal services significantly lowers the incidence of domestic violence.").

24. See Press Release, Legal Momentum, *Castle Rock Decision Puts Violence Victims at Risk* (June 27, 2005), <http://www.legalmomentum.org/news/pr06-27-05.shtml> ("Without proper police enforcement, protective orders are merely pieces of paper that may even serve to incite abusers' anger."); Press Release, Nat'l Crime Victim Bar Ass'n, National Crime Victim Bar Association Asks Supreme Court to Rule in Favor of Victims on Protective Orders (Feb. 11, 2005), <http://www.ncvc.org/vb/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=39534> ("[E]very time a protective order is violated without consequence to the offender, a victim is more likely to face escalated violence and even death—and other victims lose faith in the legal instrument designed to protect them."); see NNEDV Brief, *supra* note 20, at 4 ("[U]nlike ordinary citizens without a protective order, a victim of domestic violence who seeks a protective order risks enhanced danger from her batterer. When law enforcement views a protective order as a mere suggestion, it enhances the likelihood of further violence.").

25. U.S. DEP'T OF JUSTICE, *supra* note 22, at 1.

26. *Id.* at 1.

27. *Id.* at 14.

28. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME CHARACTERISTICS 1-2 (2005), http://www.ojp.usdoj.gov/bjs/cvict_c.htm.

29. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE 3 (2004), <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm>.

30. U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 55 (2000), <http://www.ncjrs.org/pdffiles1/nij/181867.pdf>.

abuse victims did not report the crime because they believed it was “not important to the police,” while only 3% of incidents involving children and 6% of incidents involving other family members were not reported because the crime was not deemed important to the police.³¹ When asked why they chose not to report partner abuse to the police, 61.5% of women said the police would not have believed them, and nearly all said they did not think the police could do anything about the assault.³² Additionally, 11.7% of female victims indicated that they did not report their assaults to the police out of fear of the perpetrator, while just 1.9% of male victims felt similarly.³³ Finally, 17% of female victims of intimate partner physical assault obtained a protective order against the offender after the most recent incident, while only 3.5% of men physically assaulted did so.³⁴

B. Protective Orders

A protective order, when enforced, is one of the most effective tools in ensuring the safety of protected persons.³⁵ Thirty-one states, including Colorado, have enacted domestic violence provisions which require law enforcement to arrest a person who violates a protection order.³⁶ Yet despite mandatory arrest laws and the success of arrest in quelling violence, police often do not follow these provisions and enforce restraining orders as required by law.³⁷

Without enforcement, a protection order can do little to stop the persons against whom they are issued from committing further violence,³⁸ and can even provoke further violence against those seeking them.³⁹ Separation violence is a substantial concern in

31. U.S. DEP'T OF JUSTICE, *supra* note 22, at 26.

32. U.S. DEP'T OF JUSTICE, *supra* note 30, at 51.

33. *Id.* at 50.

34. *Id.* at 52.

35. See AM. BAR ASS'N; Buel, *supra* note 23.

36. See, e.g., MISS. CODE ANN. § 99-3-7(3)(a) (Supp. 2004) (“[a]ny law enforcement officer shall arrest”); N.H. REV. STAT. ANN. § 173-B:9 (2001 & Supp. 2004) (“[p]lace officers shall arrest the defendant”); WIS. STAT. ANN. § 813.12 (West Supp. 2004) (“[a] law enforcement officer shall arrest”), § 813.125 (“[a] law enforcement officer shall arrest”); see also NNEDV Brief, *supra* note 20, at n.16.

37. See Buel, *supra* note 23, at 217-18; AM. BAR ASS'N, *supra* note 23, at 5.

38. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, LEGAL SERIES BULL. No. 4, ENFORCEMENT OF PROTECTIVE ORDERS 1 (2002), available at <http://www.ovc.gov/publications/bulletins/legalseries/bulletin4/1.html> (stating that protective orders “are effective only when the restrained party is convinced the order will be enforced”).

39. See *supra* note 24.

the process of obtaining a protective order,⁴⁰ as “[a]busers often react violently to the issuance of a protective order barring them from contact with their victims”⁴¹ According to the American Bar Association:

[p]rotective orders only reduce the risk of further violence if the restrained party is convinced they will be enforced. If protection orders are not enforced by law enforcement and the courts, they are nothing more than pieces of paper that actually increase the victim’s risk. Reliance on protection that does not actually exist places victims in even greater danger than if they’d never obtained a protective order.⁴²

The issuance of a protective order evokes a potentially volatile combination of respondent’s anger and petitioner’s reliance. Subsequent failure of enforcement in these circumstances leads to correspondingly disastrous consequences.

C. Procedural Due Process

The Fourteenth Amendment of the Constitution provides that “[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law”⁴³ Jessica Gonzales brought a claim under 42 U.S.C. § 1983, which allows a party to bring an action upon a showing that he or she was deprived of a right secured by the Constitution or federal law by a person acting under the color of state law.⁴⁴ Procedural due process enables “a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.”⁴⁵

40. Mary R. Lauby, *Regarding Town of Castle Rock v. Jessica Gonzales*, STATEMENT OF EXEC. DIR., (Jane Doe, Inc., Boston, MA), June 27, 2005, at 3, available at <http://www.janedoe.org/about/2005%2006%2007%20Gonzales%20US%20SC%20decision.pdf>.

41. NNEDV Brief, *supra* note 20, at 27.

42. AM. BAR ASS’N, *supra* note 23, at 3.

43. U.S. CONST. amend. XIV, § 1.

44. See 42 U.S.C. § 1983; *Sameri Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991); *Starr v. Price*, 385 F. Supp. 2d 502, 506 (M.D. Pa. 2005). Section 1983 of Title 42 of the U.S. Code provides in part:

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, suit in equity, or other proper proceeding for redress”

42 U.S.C. § 1983.

45. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972) (holding

The Supreme Court has rejected the traditional dichotomy of "rights" and "privileges" in the context of due process guarantees,⁴⁶ and has noted that interests in property are "not limited to a few rigid, technical forms,"⁴⁷ but instead "extend well beyond actual ownership of real estate, chattels or money."⁴⁸ The Supreme Court accordingly has found protected property interests in benefits ranging from those which can be captured in monetary terms,⁴⁹ to more unquantifiable interests such as education,⁵⁰ drivers' licenses,⁵¹ and causes of action.⁵²

In order to claim a property interest in a benefit, an individual must not only desire or unilaterally expect such an interest, but must have "a legitimate claim of entitlement to it."⁵³ The Constitution itself does not contain substantive property rights.⁵⁴ Instead, these claims of entitlement are created by independent sources of state law such as "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."⁵⁵ The constitutional right to due process, however, is provided for, and procedural adequacy is determined by, constitutional guarantee.⁵⁶

For a "legitimate" and thus cognizable interest to exist, the state law or provision purportedly creating the entitlement must

that a professor had no property interest in reemployment where no state statute or university policy so dictated).

46. See *Roth*, 408 U.S. at 572; *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

47. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (holding that a professor at a state college possessed property interest in continued employment; the claim supported by rules of the college providing the benefit and mutual understanding of benefit akin to implied contract); see also *Roth*, 408 U.S. at 577.

48. *Roth*, 408 U.S. at 572.

49. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (continued public employment); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 338-39 (1969) (garnished wages); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (tax exemption).

50. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

51. See *Bell v. Burson*, 402 U.S. 535, 539 (1971).

52. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); see also *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (professional licenses); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (government utility services).

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

54. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); see also *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Roth*, 408 U.S. at 576.

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

56. See *Loudermill*, 470 U.S. at 541 (Burger, C.J., dissenting) (quotation omitted) ("While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.").

contain:

particularized standards or criteria guid[ing] the State's decisionmakers. If the decisionmaker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest.⁵⁷

Conversely, the presence of mandatory language, coupled with "specified substantive predicates to limit discretion,"⁵⁸ creates a protected interest.⁵⁹

While traditionally the due process clause does not require that the government protect the life, liberty, or property of individuals from adverse actions by other private individuals,⁶⁰ courts have found that protective orders that satisfy the mandatory language and substantive criteria requirements can create a property interest in police enforcement.⁶¹ In *Siddle v.*

57. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (internal quotations omitted) (citations omitted) (holding that interstate transfer of plaintiff prisoner did not implicate the Due Process Clause since the transfer guidelines contained no standards governing the exercise of discretion in making such a decision; "the prison Administrator's discretion to transfer an inmate is completely unfettered").

58. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (internal quotations omitted).

59. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 375-76 (1987) (citation omitted) (asserting that the mandatory language of "shall," in connection with specific criteria that must be met in order to deny parole, creates presumption of release; discretion may "signify that 'an official must use judgment in applying the standards set him [or her] by authority'" and that "the presence of official discretion in this sense is not incompatible with the existence of a liberty interest . . ."); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) ("[T]he repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest."); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (structure of statute and word "shall" provides measure of constitutional protection); *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (asserting that property interest arises when "the regulatory language is so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process").

60. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that state employees possessed no constitutional duty to protect a son from his father after hearing reports of abuse: the claim "is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him appropriate procedural safeguards").

61. *See Hudson v. Hudson*, No. 04-2662-DP, 2005 WL 2253612 (W.D. Tenn. Sept. 14, 2005); *Siddle v. City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264 (E.D. Pa. 1990) ("[A] court order may create a property right. If it did not, much of the work of this, or any other court, would be nugatory . . ."); *Campbell v. Campbell*, 682 A.2d 272, 274 (N.J. Super. Ct. Law Div. 1996); *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983).

City of Cambridge,⁶² the court held that a protective order secured pursuant to state law created “a property right which incurs a duty on the part of the government.”⁶³ The Ohio statute at issue mandated that “any officer of a law enforcement agency *shall* enforce a protection order issued . . . by any court in this state in accordance with the provisions of the order.”⁶⁴ The court in *Coffman v. Wilson Police Department*⁶⁵ held that the state statute regarding protective orders did not create a property interest in protection because the statute used “may,” not “shall,” in the context of arrests upon violation of the order.⁶⁶ However, the *Coffman* Court did hold that the court order itself created an interest since police “shall” enforce it—“shall” being a mandatory term.⁶⁷

While the decision to arrest involves individual judgments as to the existence of probable cause, courts have repeatedly asserted that probable cause “is measured against an objective standard,”⁶⁸ and is judged by whether “the facts and circumstances within [an officer’s] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”⁶⁹

62. 761 F. Supp. 503 (S.D. Ohio 1991).

63. *Siddle*, 761 F. Supp. at 509-10 (“[A] protected property interest can be created by state law. In this case, the protective order is such an interest. Once such a substantive right attaches, the procedural arm of the Due Process Clause requires that the government refrain from depriving the individual of the right without due process.”).

64. OHIO REV. CODE ANN. § 3113.31(F)(3) (2003) (emphasis added).

65. *Coffman*, 739 F. Supp. 257.

66. *Id.* at 264.

67. *Id.* (“The word ‘shall’ is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation.”). For discussion on the use of the word “shall” in Colorado law, see *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113, 1119 (Colo. 1994) (“The phrasing of this mandate in the terms of ‘shall’ provides a mandatory constitutional right . . .”); see also *Hernandez v. District Court*, 814 P.2d 379, 381 (Colo. 1991) (“The term ‘shall’ deprives the trial court of any discretion to deny . . .”); *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (internal quotations omitted) (asserting that the “word ‘shall,’ when used in a statute, involves a mandatory connotation and hence is the antithesis of discretion or choice”).

68. *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (holding that arrest of defendant was supported by probable cause under Fourth Amendment and Wyoming law).

69. *Beck v. State*, 379 U.S. 89, 91 (Ohio 1964) (holding that probable cause was not present when officer had only a picture of defendant and knew he had a prior record for similar offenses, and no other evidence that defendant had committed a crime); see also *Carroll v. United States*, 267 U.S. 132, 162 (1925) (whether facts and circumstances “warrant a man of reasonable caution in the belief” that a crime has been committed); *Guffey v. Wyatt*, 18 F.3d 869, 872 (10th Cir. 1994) (“Probable cause to arrest ‘exists if facts and circumstances within the arresting officer’s

An officer's subjective understanding or belief that probable cause was present does not establish probable cause.⁷⁰ In the context of protective orders, courts have found that the objectivity of probable cause determinations does not negate the mandatory duty to arrest, as the orders lay down specific and substantive criteria delineating their violation, and the subsequent arrest procedure that must follow.⁷¹

D. Colorado Law

Colorado became a mandatory arrest state in 1994, with the passage of House Bill 92-1253, codified as Colorado Revised Statute section 18-6-803.5.⁷² The statute expanded Colorado's definition of "domestic violence" to include the "invasion of home or property or threat thereof,"⁷³ updated its data registry system,⁷⁴ and repealed the requirement that protected parties show a copy of their order to officers.⁷⁵ The Colorado legislature also shielded arresting officers from liability to alleviate concerns over the mandatory arrest requirement.⁷⁶ These alterations in the content and function of protective orders came on the heels of the enactment of the federal Violence Against Women Act of 1994,⁷⁷

knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense."); *United States v. McCormick*, 468 F.2d 68, 73 (10th Cir. 1972) (concluding probable cause determined "in relation to the circumstances as they would have appeared to prudent, cautious and trained police officers").

70. *Florida v. Royer*, 460 U.S. 491, 507 (1983); *see also Beck*, 379 U.S. at 97 ("If subjective good faith alone were the test [for probable cause], the protections of the Fourth Amendment would evaporate . . .").

71. *See Hudson v. Hudson*, No. 04-2662-DP, 2005 WL 2253612 (W.D. Tenn. Sept. 14, 2005) (holding that arrest is operational, not discretionary); *Campbell v. Campbell*, 682 A.2d 272, 274 (N.J. Super. Ct. Law Div. 1996) (holding that a statute mandating arrest upon probable cause that a violation of the order occurred allows no discretion); *Matthews v. Pickett County*, 996 S.W.2d 162, 164 (Tenn. 1999); *Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983) (holding that the duty to arrest a violator of protective order was not discretionary pursuant to mandatory language and legislative intent and that a requirement that arrest be supported by probable cause did not negate this).

72. COLO. REV. STAT. §§ 18-6-803.5(3)(b) (2004), 803.6(1) (2004); *see also* Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327, 2327-29 (1994).

73. Fuller & Stansberry, *supra* note 72, at 2328.

74. COLO. REV. STAT. § 18-6-803.7(2)(a) (2005).

75. COLO. REV. STAT. § 14-4-102(9) (2005); *see* Fuller & Stansberry, *supra* note 72, at 2329 ("[I]n the past, failure to provide a copy of the restraining order has led to hesitation from police to enforce the order for fear of an illegal arrest.").

76. COLO. REV. STAT. § 18-6-803.5(5) (2005); *see* Fuller & Stansberry, *supra* note 72, at 2329 ("[S]hielding arresting officers from liability is expected to reduce concerns about enforcing the mandatory arrest requirements.").

77. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108

which requires all fifty states to enforce one another's civil protection order under the Constitution's Full Faith and Credit Clause,⁷⁸ and makes it a crime for a person to cross state lines with the intent to violate a protective order.⁷⁹

Colorado Revised Statute section 18-6-803.5 recognizes the crime of violation of a protection order,⁸⁰ and peace officers' mandatory duties to enforce the same.⁸¹ Section 18-6-503.5 asserts that protective orders serve to "protect the protected person from imminent danger to life or health," and provides that "a peace officer shall use every reasonable means to enforce a protection order."⁸² Specifically, 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 protection order; and (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.⁸³

Moreover, a peace officer who arrests or otherwise attempts to enforce a protection order, "shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado Supreme Court."⁸⁴

Colorado courts issue protection orders pursuant to several statutory provisions, including temporary orders in marriage dissolution cases.⁸⁵ Colorado restraining orders contain similar language to their statutory counterparts, including the provision that law enforcement officials must use every reasonable means to enforce the restraining order, and shall arrest in the existence of

Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C. (1994)).

78. 18 U.S.C. § 2265 (2006).

79. 18 U.S.C. § 2262 (2006); *see also* U.S. DEPT' OF JUSTICE, NAT'L INST. OF JUSTICE, ANNUAL REPORT TO CONGRESS: DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION (1996), *available at* <http://www.ojp.usdoj.gov/ocom/94Guides/DomViol/chap3.htm>.

80. COLO. REV. STAT. § 18-6-803.5(1) (2005); *see also* COLO. REV. STAT. § 13-14-102(12) (2005) (stating that "[t]he duties of peace officers enforcing the civil protection order shall be in accordance with section 18-6-803.5").

81. The title of section 18-6-803.5 is labeled: "Crime of violation of a protection order-penalty-peace officers' duties" (emphasis added).

82. § 18-6-803.5(3)(a).

83. § 18-6-803.5(3)(b).

84. § 18-6-803.5(5).

85. COLO. REV. STAT. § 14-10-108 (2004).

facts amounting to probable cause, or seek a warrant when arrest is impractical.⁸⁶ A standard Colorado restraining order was issued against Simon Gonzales.⁸⁷

II. *Gonzales v. Town of Castle Rock*

Gonzales v. Town of Castle Rock held that Jessica Gonzales did not have a constitutionally protected property interest in enforcement of the restraining order issued against her husband.⁸⁸ The *Gonzales* Court decided not to defer to the Tenth Circuit's determination,⁸⁹ and began its analysis by asserting that a benefit fails to constitute a protected entitlement if government officials "may grant or deny it in their discretion."⁹⁰ Mandatory language aside, the Court stated that the language in the Colorado statute in question and the accompanying protection order do not truly make enforcement of restraining orders mandatory.⁹¹ Justice Scalia, who authored the *Gonzales* majority opinion, emphasized the long history of police discretion that has co-existed with purportedly mandatory statutes.⁹² The Court cited *Chicago v. Morales*⁹³ in support of this proposition and asserted that "[i]t is

86. *Gonzales v. City of Castle Rock*, 125 S. Ct. 2796, 2801 (2005). The Colorado restraining order issued to Jessica Gonzales noted that the reverse side of the order contained, "IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS." The reverse side contained the following, "NOTICE TO LAW ENFORCEMENT OFFICIALS," which stated in part:

YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.

Id.

87. *Id.*

88. *Id.* The Court framed the question as follows: "[W]hether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated." *Id.*

89. *Id.* at 2804. The Court recognized that a presumption of deference is usually given to federal court views as to the law of a state within its jurisdiction, but decided that deference was inappropriate here—a contentious point, but one that will not be analyzed in this Article.

90. *Id.*

91. *Id.* at 2805-06.

92. *Id.*

93. 527 U.S. 41 (1999) (involving a gang loitering ordinance that said that a police officer "shall order" persons to disperse in certain circumstances).

... simply 'common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances."⁹⁴ Were enforcement truly required, Colorado would have needed to create a stronger indication that police enforcement was mandated, than it did in the statutory language as currently written.⁹⁵ This is especially true, the Court asserted, where the violator is not present or his whereabouts have not been determined.⁹⁶ The *Gonzales* opinion cited *Donaldson v. Seattle*⁹⁷ to lend support to the proposition that "there is a vast difference between a mandatory duty to arrest and a mandatory duty to conduct a follow up investigation A mandatory duty to investigate would be completely open-ended as to priority, duration and intensity."⁹⁸

Even if enforcement could be seen as mandatory, the Court still shed doubt upon whether Jessica Gonzales is entitled to such enforcement. Since her alleged entitlement stems from Colorado's statutory scheme, the Court reasoned that an indication of such an entitlement would appear in the statute itself.⁹⁹ The Court found no such indication.¹⁰⁰ Finally, the Court asserted that even if Colorado did create an entitlement in enforcement of the restraining order, the vague and indirect nature of the entitlement may not suffice as a cognizable property interest for due process purposes.¹⁰¹ The Court pointed out that "the right to have a restraining order enforced does not 'have some ascertainable monetary value,' even as our '*Roth*-type property-as-entitlement cases' have implicitly required."¹⁰² In finding no cognizable property interest in enforcement of Jessica's Gonzales' protective order, the Court failed to consider any kind of process due.

III. *Gonzales v. Town of Castle Rock*, Revisited

The analysis through which the *Gonzales* majority reaches its

94. 125 S. Ct. 2796, 2806 (2005) (quoting 527 U.S. at 47, 62). Despite use of the word "shall" in the *Morales* ordinance, the *Gonzales* Court explained that the Supreme Court in *Morales* "rejected out of hand the possibility that 'the mandatory language of the ordinance . . . afforded the police no discretion.'" *Id.* (emphasis omitted).

95. 125 S. Ct. at 2806.

96. *Id.*

97. 831 P.2d 1098, 1104 (Wash. App. 1992).

98. *Id.* at 1104 (quoted in 125 S. Ct. at 2806).

99. 125 S. Ct. at 2806.

100. *Id.*

101. *Id.* at 2809-10.

102. *Id.* at 2809 (quoting Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000)).

holding breaks down upon a close reading. Scalia's assertion of police discretion and his use of *Chicago v. Morales*,¹⁰³ although not discussed in depth, are actually very instructive to the current analysis. In *Morales*, the Supreme Court dealt with an ordinance that required a police officer to order dispersal of whomever he reasonably believed to be a criminal street gang member loitering in a public place with one or more persons, and making failure to obey such an order a violation. The Court held that statute to be unconstitutionally vague because it failed to provide fair notice to potential violators of prohibited conduct, and because it failed to establish minimal guidelines for police enforcement.¹⁰⁴

The *Morales* Court asserted that there are no guidelines in the ordinance for directing a person to disperse if they are in any area with an alleged gang member; the ordinance directs the police to order a person to leave without first asking about their possible purposes in the area.¹⁰⁵ Concerned that the ordinance impacts a lot of innocent conduct, the Court turned its attention to the language conferring discretion on the police, namely in the definition of loitering, as "[remaining] in any one place with no apparent purpose."¹⁰⁶ The Court concluded that the ordinance unconstitutionally provided "absolute discretion to police officers to determine what activities constitute loitering."¹⁰⁷

The Court also cites *Kentucky Department of Corrections v. Thompson*, which held that Kentucky prison regulations delineating categories of visitors who could be excluded from visitation did not create a protected liberty interest in receiving visitors.¹⁰⁸ Specifically, the regulations lacked "explicitly mandatory language,"¹⁰⁹ and instead stated that visitors "may" be excluded whether they fell within the category of exclusion or not.¹¹⁰ According to the *Thompson* Court, "the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials."¹¹¹

Both cases are easily distinguished from *Gonzales*. *Gonzales* regards the governance of mandatory enforcement of restraining orders, which is different from providing unbridled discretion to

103. 527 U.S. 41 (1999).

104. *Id.* at 60.

105. *Id.* at 60.

106. *Id.* at 61 (internal quotations omitted).

107. *Id.* (internal quotations omitted).

108. 490 U.S. 454, 465 (1989).

109. *Id.* at 463 (internal quotations omitted); see *supra* note 59.

110. *Id.* at 457 n.2.

111. *Id.* at 465.

police officers to define a vague statutory term as in *Morales*. The Colorado statute specifically delineates when arrest is mandatory, and leaves minimal discretion to police officers. When enforcing Colorado restraining orders, police are to make arrests upon probable cause that the restrained person has violated *any* part of the order.¹¹² The order itself lays out specific mandates. In Jessica Gonzales' case, the original order stipulated that Simon Gonzales was not to come within 100 yards of Jessica's property and the Gonzales children; the modified order provided that he only see the children on alternate weekends, for two weeks during the summer, and for a mid-week dinner visit *upon arranged notice*.¹¹³ These guidelines are distinctly objective, and stand in clear contrast to a police officer's determination of what constitutes "no apparent purpose" in the *Morales* ordinance.

Moreover, the language of the Colorado statute and accompanying restraining order mandate enforcement by including the word "shall," language that was absent in *Thompson*. Provisions of section 18-6-803.5, defining the duty of officers in regard to the violation of a restraining order, states that the police "shall use every reasonable means to enforce a restraining order,"¹¹⁴ and "shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person . . ." ¹¹⁵ Colorado courts have repeatedly held that "shall," as language of a statute, describes a mandatory obligation outside of the scope of discretion.

Directly contrary to this line of Colorado case law, the Court cites *Donaldson v. Seattle* to assert that "a true mandate" of police enforcement would require a stronger indication than "shall use every reasonable means to enforce a restraining order," (or even "shall arrest").¹¹⁶ However, in contrast to the long-term protective orders demarcated in Colorado's statute, *Donaldson v. Seattle* involved a portion of Washington's statutory scheme involving on-scene arrest of domestic abusers. The statute provided that police officers "shall"¹¹⁷ arrest domestic violence perpetrators upon probable cause. The court in *Donaldson* found that the statute

112. COLO. REV. STAT. § 18-6-803.5(3)(b)(I) (2005).

113. *Gonzales v. Town of Castle Rock*, 366 F.3d 1093, 1097 (2004).

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

115. § 18-6-803.5(3)(b).

116. *Gonzales v. Castle Rock*, 125 S. Ct. 2796, 2806 (2005) (internal quotation omitted).

117. The statute reads: "When a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers . . ." REV. CODE WASH §10.99.030(6)(a) (2005).

“clearly establishes a mandatory duty to arrest,”¹¹⁸ but distinguished that duty from any obligation to conduct a follow-up investigation.¹¹⁹ The court based its reasoning on the fact that the mandatory arrest provision only applied for a four-hour period following notification of the incident. In the Colorado court’s words, “an outer limit on the mandatory arrest duty shows that the act is focused on addressing the situation when the officer confronts an abuser in the house and not creating an on-going duty to conduct a mandatory investigation.”¹²⁰ In other words, the emphasis of Washington’s statutory scheme “is on prompt intervention and removal of the abuser, not on long-term protection.”¹²¹

A permanent protective order, in contrast, is designed for exactly that—long-term protection. The *Gonzales* Court asserts that “even in the domestic violence context,”¹²² it is not clear that mandatory arrest provisions apply to violators not present on the scene.¹²³ However, the text of the Colorado statute suggests otherwise since it mandates that police officers use “every reasonable means to enforce a protection order,”¹²⁴ and requires arrest *and* pursuit of a warrant to arrest if immediate arrest is impractical. This suggests that an on-going duty to arrest is a reasonable means to enforce the order, and continues as long as there exists probable cause for arrest.¹²⁵ There is no time limitation imposed on these duties. In sum, the purposes behind the Washington and Colorado statutes are different in scope and aim, which is reflected by the different commanding language comprising both. In this way *Donaldson* is of little support in the *Gonzales* case.

The Court highlights the idea that every reasonable means entails the use of discretion to choose among available alternatives to enforcement, which argues against the existence of a protected property interest.¹²⁶ However, courts have before held that a property interest in enforcement of a restraining order can and does extend to reasonable efforts to enforce. In *Siddle v. City of Cambridge*, the court asserted that, in protective order situations,

118. *Donaldson v. Seattle*, 831 P.2d 1098, 1103 (Wash. App. 1992).

119. *Id.* at 1103-04.

120. *Id.* at 1104.

121. *Id.*

122. 125 S. Ct. 2796, 2807 (2005).

123. *Id.*

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

125. COLO. REV. STAT. § 18-6-803.5 (2005).

126. 125 S. Ct. at 2807.

“[a] police department must be reasonable in its efforts to protect the individual’s safety.”¹²⁷ The language of the Colorado statute is clear: law enforcement must use every reasonable means to enforce the protective order, including arrest and seeking a warrant. The police do not hold the discretion to do *nothing*. The discretion that *does* lie with either the police (to arrest the person in violation of an order), or a court (to issue a warrant based on a determination of probable cause), is minimal, as it is based on objective criteria.¹²⁸ The Colorado statute further removes subjectivity from the enforcement of an order by mandating that a police officer assume that information received from Colorado’s domestic violence registry is accurate, and requires that officers enforce an order even if it is not recorded in the registry.¹²⁹

Throughout its opinion, the Court pays little attention to the legislative history of Colorado’s domestic violence statutes.¹³⁰ This is unfortunate, because the legislative history of the Colorado statute demonstrates the state legislature’s intent to make enforcement mandatory.¹³¹ While asserting that arrest is not truly mandatory, the Court quotes the American Bar Association (ABA) Standards for Criminal Justice for support:

[F]or a number of reasons, including their *legislative history*. . . it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to make an arrest. As to third parties in these states, the full-enforcement statutes simply have no effect, and their significance is further

127. 761 F. Supp. 503, 509 (S.D. Ohio 1991).

128. See *supra* notes 69-71.

129. COLO. REV. STAT. § 18-6-803.5(3)(c) (2004). The statute states:

In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

Id.

130. The Colorado Supreme Court has asserted that its “primary task in construing a statute is to ascertain and give effect to the intent of the General Assembly.” *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987).

131. As stated in legislative hearings over the statute:

[T]he entire criminal justice system must act in a consistent manner, which does not now occur. *The police must make probable cause arrests*. The prosecutors must prosecute every case. Judges must apply the appropriate sentences

So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal. And so we hope that House Bill 1253 starts us down this road.

Gonzales v. Castle Rock, 307 F.3d 1258, 1265 (10th Cir. 2002) (quoting *Colo. H.B. 1253: Hearing Before the Colo. H. Judiciary Comm.*, at 3 (Feb. 15, 1994)).

diminished.¹³²

First, this language is taken from a 1980 edition of the ABA standards, published fourteen years before the Colorado statute and years before many other mandatory enforcement statutes were enacted.¹³³ As Colorado's domestic violence statute illustrates, significant changes were made to the processes surrounding restraining orders and their enforcement in 1994. The legislative history of section 18-6-803.5 demonstrates that this was done so that restraining orders would better combat domestic violence—and specifically, by the mandatory arrest of violating persons.¹³⁴ The ABA quote lists legislative history as a marker of intent, stressing that the legislative history of a statute has a bearing on whether enforcement is truly mandatory. In the case of Colorado, its legislative history replies in the affirmative, explicitly asserting the mandatory nature of the enforcement provisions.

Secondly, protected persons in restraining orders stand in a different position from what the ABA calls “third parties” to mandatory enforcement statutes. Restraining orders are unique in that they provide individualized protection to persons in need of protective services, dissimilar from arrest statutes concerning crimes affecting the public at large. When the Court suggests that the mandatory language of Colorado's restraining orders “is not perceptibly more mandatory” than a Colorado statute that mandates police chiefs to “pursue and arrest any person fleeing from justice in any part of the state,”¹³⁵ it ignores the main difference between protective orders and generalized law enforcement. Protective orders by nature are directed at specialized parties that are not deemed merely “third parties” to enforcement measures regarding any crime. Protected parties are persons who have sought out individualized protection against

132. *Gonzales v. Castle Rock*, 125 S. Ct. 2796, 2806 (2005) (quoting AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE §§ 1-4.5, 124-25 (2d ed. 1980) (emphasis added)).

133. Fuller & Stansberry, *supra* note 72, at 2327.

134. *Id.* at 2327 (“The 1994 Colorado legislative session produced several significant domestic abuse bills that strengthened both civil and criminal restraining order laws and procedures for victims of domestic violence.”); Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670 (2004) (stating that the purposes of mandatory arrest statutes in the 1990s were to “counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion; mandatory arrest policies would increase police response and reduce batterer recidivism”).

135. 125 S. Ct. at 2806 (quoting COLO. REV. STAT. § 31-4-112 (2004)).

another specified person, not against the public at large.

The Court ignores this integral aspect of the protective order when it claims that even if the Colorado statute made enforcement mandatory, that would not necessarily mean that Jessica herself gained an entitlement to enforcement of the mandate, as “[t]he serving of public rather than private ends is the normal course of the criminal law”¹³⁶ In contrast to statutes regarding criminal acts or, as the Court brings up, prison guidelines, restraining orders provide for individualized protection, protection that is not merely incidental to government’s general police enforcement duty. Jessica Gonzales had to go to court and prove that she needed a restraining order before a judge, and the judge’s order contained findings that Simon Gonzales was a danger to the Gonzales family specifically, not the public at large.¹³⁷ Upon this finding, Jessica Gonzales and her children attained status under the order as “protected persons.”¹³⁸

To put it another way, Simon Gonzales was not prohibited from entering any other person’s dwelling upon their permission; he *was*, however, prohibited from entering the dwelling of Jessica Gonzales, even with her permission. Thus the criminal act requiring arrest is one *created* by the order, and not a crime for which anyone else could be arrested. While Simon Gonzales may have posed a danger to the general public, the issuance of a restraining order against him regarding the rest of the *Gonzales family* involves a process aimed directly and uniquely between one individual and another, distinct from public law enforcement in general.

When the Court belies the notion that Colorado’s statutory scheme invested Jessica with a protected interest, it points to the absence of language indicating that the protected person can request or demand that an arrest be made.¹³⁹ However, it would be unnecessary or even antithetical to a statutory *mandate* of enforcement that the statute include language allowing the protected person to request or demand arrest. Arrest is made upon probable cause, which can be furnished by citizen

136. *Id.* at 2808.

137. *Gonzales v. Castle Rock*, 366 F.3d 1093, 1096 (10th Cir. 2004). The restraining order against Simon Gonzales stated that “the court . . . finds that physical or emotional harm would result if you are not excluded from the family home.” COLO. REV. STAT. § 14-10-108 (2004).

138. COLO. REV. STAT. § 18-6-803.5. Section (1.5)(a) continues to define “protected person” as “the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.”

139. 125 S. Ct. at 2808.

information, but not provided merely by a citizen's request or demand for arrest. When arrest is mandatory upon the finding of probable cause, the views or desires of the protected person or any other citizen are irrelevant. Even as—or especially because—protective orders are specifically designed to guard protected persons, protected persons cannot change their terms once they are issued by the court.¹⁴⁰ Thus their requests or demands, once the order is issued, do not factor into the requirement to arrest.

The Court further asserts that, even were it to believe that the Colorado statute created a protected interest in enforcement, it is not certain whether an entitlement to enforcement of a restraining order, as opposed to traditional forms of property, could constitute a property interest recognized by the Due Process Clause.¹⁴¹ This argument contradicts the last thirty years of constitutional jurisprudence, as the progression of protected property interests have encompassed much more than traditional monetary forms.¹⁴² As the dissenting opinion in *Gonzales* points out:

[T]he enforcement of a restraining order is not some amorphous, indeterminate thing. Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day.¹⁴³

Finally, the Court intimates that the benefit of enforcement is incidental and indirect in nature, and thus does not amount to a deprivation in property.¹⁴⁴ As already discussed, however, enforcement of a personalized restraining order is not merely incidental or indirect to the protected person's interests; on the contrary, it is arguably one of the most important benefits in their life at the time.

Though the Court never reached this point, we can answer the question of what process was due with confidence. The restraining order against Simon Gonzales expressly states that he

140. 366 F.3d at 1096. The terms of the order in *Gonzales* stated:

If you violate this order thinking that the other party or a child named in this order has given you permission, **you are wrong**. . . . The terms of this order cannot be changed by agreement of the other party or the child(ren). Only the court can change this order.

Id.

141. 125 S. Ct. at 2809.

142. *See, e.g., supra* note 49.

143. 125 S. Ct. at 2820 (Stevens, J., dissenting).

144. 125 S. Ct. at 2810.

was entitled to a mid-week dinner visit upon reasonable, arranged notice.¹⁴⁵ Simon did not provide notice before taking the girls from their front yard.¹⁴⁶ Jessica Gonzales showed police officers her protection order,¹⁴⁷ even though under Colorado law, she was not required to show the order when requesting enforcement.¹⁴⁸ When Jessica conclusively determined that Simon in fact had taken the children, and located where he had taken them,¹⁴⁹ she again informed the police, providing further probable cause for the police to arrest Simon.¹⁵⁰ By the terms of Colorado protective orders, upon even *one* violation of the order, law enforcement maintained a duty to arrest Simon Gonzales.¹⁵¹

IV. Why Critiquing and Challenging *Gonzales* is Essential

The holding of *Gonzales* brings with it costly consequences. Several months after *Gonzales*, the United States Court for the Middle District of Pennsylvania and the Western District of Kentucky dismissed on summary judgment two factually similar cases, *Starr v. Price*¹⁵² and *Caldwell v. City of Louisville*.¹⁵³ These cases held that under *Gonzales*, the petitioners in *Starr* and *Caldwell* had no entitlement to enforcement of their protective orders.¹⁵⁴ In other words, the effects of *Gonzales* are already surfacing. Inevitably, more and more persons will be denied their day in court to litigate this issue, and still more will suffer the effects of *Gonzales* through potentially lax enforcement of restraining orders designed to protect them, at least on paper.

Moreover, what is often well-known, but unspoken in *Gonzales*, is that most protection orders are issued in protection of female petitioners, who comprise the overwhelming majority of domestic abuse victims. In essence, the Supreme Court of the United States decided that petitioners—being mostly women—do not possess a protected property interest in enforcement of their protective orders, and that mandatory enforcement of protective orders is actually less than mandatory. Thus, by recognizing such

145. 307 F.3d 1258, 1266 (10th Cir. 2002).

146. *Id.*

147. 125 S. Ct. at 2801.

148. See Fuller & Stansberry, *supra* note 72, at 2327.

149. See CBS NEWS, *supra* note 2.

150. 125 S. Ct. at 2802.

151. COLO. REV. STAT. § 18-6-803.5(3)(b) (2005).

152. 385 F. Supp. 2d 502 (M.D. Pa. 2005).

153. No. 3:01CV-195-S, 2005 WL 2290589 (W.D. Ky. Sept. 19, 2005).

154. 385 F. Supp. 2d at 510-12; 2005 WL 2290589, at *2.

interests as employment, utility services, professional licenses, and tax exemptions as entitlements protected by procedural due process, the Court prioritizes these interests over women's bodily integrity and safety.

Mandatory enforcement of protective orders can also be accomplished without over-burdening police. The federal government's 2005 renewal of the Violence Against Women Act (VAWA) appropriated over fifty-six million dollars specifically to increase law enforcement response to domestic violence,¹⁵⁵ and the VAWA Grants to Encourage Arrest Policies provides money to local jurisdictions looking to strengthen enforcement of protective orders.¹⁵⁶ Police departments around the country are already undertaking stricter enforcement, and are finding reductions in the rates of post-protective order violence¹⁵⁷ and homicide.¹⁵⁸ Overall, protective orders can and do lessen the risk to victims of abuse, when used in practical yet consistent and committed ways within the law enforcement community.

Conclusion

Gonzales v. Town of Castle Rock decided at least two things. It held that one woman in Colorado did not possess a constitutionally protected property interest in enforcement of her restraining order. By the nature of and numbers surrounding

155. 42 U.S.C. § 3793(a)(18) (2006). As part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress appropriated \$225,000,000 in STOP (Services/Training/Officers/Prosecutors) grants for the fiscal year 2007. *Id.* States must allocate at least twenty-five percent of STOP grant allotments to law enforcement specifically. 42 U.S.C. § 3796gg-1(c)(3)(A) (2006); see SEN. JOSEPH R. BIDEN, JR., SUBCOMM. ON CRIME, CORR., AND VICTIMS' RIGHTS, TEN YEARS OF EXTRAORDINARY PROGRESS: THE VIOLENCE AGAINST WOMEN ACT 10-11 (2004).

156. 42 U.S.C. § 3796hh(b)(1) (2006) (stating that the purpose of grant appropriations are to "implement proarrest programs and policies in police departments, including policies for protection order violations"). To qualify for the grants, local governments must certify that their laws "encourage or mandate arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order." *Id.* at (c)(1)(B). The grant appropriation is currently set at \$75,000,000 for fiscal years 2007 through 2011. 42 U.S.C. § 3793(a)(19) (2006); see BIDEN, *supra* note 155, at 11.

157. See BIDEN, *supra* note 155, at 25 (citing a recent study finding that the arrest and confinement of protective order violators reduced expected ensuing aggression by thirty percent); NNEDV Brief, *supra* note 20, at 21 (discussing results of a study that found decreased rates of re-abuse in states with a higher percentage of violator arrest).

158. Nat'l Crime Victim Bar Ass'n, *supra* note 24, at 2 (noting that the Orange County, Florida Sheriff's Department credits enhanced response to order violations and consistent arrest of violators with a thirty-eight percent reduction in the rate of domestic violence-related homicide).

domestic abuse in this country, it also inevitably decided the fate of thousands of people's lives in this country—mostly lives of women.

The Supreme Court decided that neither explicit textual commands nor significant legislative history supporting those mandates were weighty enough to support the claim that the Castle Rock police department should have enforced the restraining order against Simon Gonzales within the dictates of Colorado's statutory scheme. It has been illustrated in the judgments that have come down since *Gonzales*, that protective orders are in danger of becoming largely ineffective, and the protection that abused women, men, and children are offered is diminishing. A case with similar facts to *Gonzales* will occur again, and tragically, a plea for recognition of a right to enforcement of a protective order will be unsuccessful because of the Supreme Court's myopic holding. Thus, lower court enforcement of the *Gonzales* precedent will silence the pleas of countless abused persons seeking enforcement of protective orders.

