

**COMMENT: THE SUPREME COURT’S ATTACK ON
DOMESTIC VIOLENCE LEGISLATION—DISCRETION,
ENTITLEMENT, AND DUE PROCESS IN *TOWN OF
CASTLE ROCK V. GONZALES***

Kathleen K. Curtis[†]

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[†] J.D. Candidate 2007, William Mitchell College of Law; B.A., *magna cum laude*, English Literature, Concordia College, 2004. The author extends her thanks to Bill and Colleen Curtis for their encouragement and support.

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I. INTRODUCTION

In a just society, we pledge to act together to ensure that each individual is safe from harm. In a just society, we support individuals in systems that are working to protect victims and to prevent the violence. In a just society, we support the professionals who are trying to stop the violence. In a just society, we come together with a common goal of making sure that everyone is safe. In a just society—I think we have to say this over and over and over—we are not going to tolerate the violence and we are going to be a part of the fundamental change of attitude that is going to stop the cycle of violence.¹

The late Minnesota Senator Paul Wellstone and his wife Sheila were passionate advocates for ending domestic violence both in Minnesota and throughout the nation. Senator Wellstone played a key role in the passage of federal legislation such as the Violence Against Women Act,² while his wife Sheila spoke extensively about the importance of ending violence in the home.³ Minnesota has long been a state on the leading edge of innovative solutions to domestic violence issues.⁴ A 1984 study conducted in Minneapolis compared the effectiveness of mandatory arrest to the traditional police methods of mediating the dispute or making the abuser

1. Sheila Wellstone, Address at the Hennepin County Medical Center (Oct. 25, 1995), *available at* http://www.wellstone.org/swinstitute/news_archive.aspx (follow "Sheila Wellstone Speaking About Domestic Violence, 1995" hyperlink).

2. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-55 (1994) (codified as amended in U.S.C. titles 8, 16, 28, 42).

3. Jeffrey L. Edleson & Oliver J. Williams, *In Memory of Paul and Sheila Wellstone*, 9 VIOLENCE AGAINST WOMEN 139, 142 (2003), *available at* <http://www.mincava.umn.edu/wellstone.shtml>.

4. See Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLIN L. REV. 115, 136-37 (1991) (discussing the Duluth study); Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUNDATION REPORTS (1984), *available at* <http://www.policefoundation.org> (follow "Publications" hyperlink; then follow "Electronic Library" hyperlink; then follow "The Minneapolis Domestic Violence Experiment" hyperlink).

leave the house for a period of time.⁵ The study concludes that arrests most effectively prevent further domestic violence and it became a catalyst for a shift in national policy, including a recommendation from the U.S. Attorney General that mandatory arrest should be the standard policy for law enforcement officials.⁶ Today, Minnesota is one of thirty-one states that mandate arrest upon violation of a domestic violence protection order.⁷

The enforcement of laws mandating arrest for violation of restraining orders suffered a severe setback, however, with the Supreme Court's recent decision in *Town of Castle Rock v. Gonzales*.⁸ Jessica Gonzales brought a claim against the Town of Castle Rock, Colorado after police failed to enforce a restraining order against her husband.⁹ The Supreme Court reversed the Tenth Circuit's holding and ruled that the protective order issued by a Colorado judge pursuant to state statute did not create an entitlement to which due process protections attach.¹⁰ Domestic violence advocates in Colorado and across the country have responded to the decision with great concern, citing it as an invitation for the legal system to once again ignore domestic violence crimes.¹¹

In the effort to avoid imposing section 1983 liability on the Town of Castle Rock, the Court took an unnecessary step. The Court ruled that Gonzales did not have an entitlement to protection because the mandate in the Colorado statute was necessarily discretionary in terms of the enforcement actions required of police.¹² That determination is not only contrary to existing jurisprudence on the interpretation of mandatory statutory language, but it is also contrary to the legislative intent that drove mandatory language in statutes to prevent domestic violence.

5. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1669 (2004) (examining the Minneapolis police study).

6. *Id.*

7. Brief Amici Curiae of National Network to End Domestic Violence et al. in Support of Respondent at 12-13, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 353608 (citing MINN. STAT. § 518B.01, subd. 14 (2002)).

8. 125 S. Ct. 2796 (2005).

9. *Id.* at 2800.

10. *Id.* at 2810-11.

11. Sarah M. Buel, *For Battered Women, a Chilling Court Ruling*, AUSTIN AM-STATESMAN, July 15, 2005, at A15, available at http://www.utexas.edu/law/news/2005/071505_buel.html.

12. *Town of Castle Rock*, 125 S. Ct. at 2806.

This Comment analyzes the Supreme Court's decision in light of the critical impact it will have on domestic violence statutes across the nation. First, the Comment examines the development of strict domestic violence statutes throughout the country.¹³ Next, it explores the particular history of Jessica Gonzales's claim against Castle Rock and the claim's disposition through the Tenth Circuit.¹⁴ The Comment then scrutinizes the Supreme Court's decision in light of the current domestic violence legislation's goal of moving away from police discretion.¹⁵ Finally, the Comment concludes with an investigation of the potential impact that this case will have on the interpretation and enforcement of Minnesota's Domestic Abuse Act and similar laws around the country.¹⁶

II. DEVELOPMENT OF DOMESTIC VIOLENCE PREVENTION STATUTES

A. *Intimate Abuse: The Silent Crisis*¹⁷

1. *Law Enforcement Lacks a Framework to Respond to Domestic Abuse*

Spousal abuse has been a part of human society at least since the Roman Empire.¹⁸ In early American culture, spousal abuse was

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. The historical analysis presented in this section is provided merely to understand the importance of the movement towards mandatory arrest and prosecution policies. The history of intimate violence in human society has been thoroughly studied by several authorities. See, e.g., LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960* (1988); LINDA MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* (2003); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982). Additionally, the paper refers to victims as female and perpetrators as male. That usage is not intended to undermine the experience of men as victims or women as abusers, but to view domestic abuse through the lens of Jessica Gonzales's experience.

18. See Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 2 (2005) (noting the phrase "rule of thumb" originated in the Roman rule that a husband could beat his wife with a stick, so long as it was no thicker than his thumb); Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work This Time?*, 31 PEPP. L. REV. 709, 714 (2004) ("In the year of

generally accepted and excused as part of the husband's right to govern his home.¹⁹ By the 1920s, spousal abuse had been criminalized in all states.²⁰ However, marital rape was notably excluded from criminalization.²¹ Despite the widespread criminalization of wife beating at the turn of the twentieth century, the legal system remained largely unwilling to become involved in domestic disputes.²²

Domestic violence, while recognized as criminal, was socially tolerated as a private family matter well into the latter part of the twentieth century.²³ Reports of domestic abuse generally received low priority from police departments.²⁴ If police did respond to a report of domestic abuse, they nonetheless were unlikely to make an arrest.²⁵ Few domestic abusers were ever actually arrested; of those that were arrested, even fewer were ever prosecuted.²⁶ The legal system's response to domestic abuse functioned not only to ignore the victims of domestic violence but also to tacitly approve of intimate abuse as part of American culture.²⁷

As the feminist movement began gaining ground on issues of equal pay and reproductive rights, it also began to focus on the social scourge of intimate abuse.²⁸ Survivors of domestic abuse began organizing methods for women to escape abusive situations without state involvement.²⁹ That grassroots movement grew into

753 B.C., Ancient Rome created the Laws of Chastisement that permitted husbands to strike their wives as a method of preventing the wife from exposing her husband to criminal and civil liability.”).

19. See, e.g., Asmus et al., *supra* note 4, at 116 (describing nineteenth century American court rulings that acknowledged a husband's right to physically “chastise” his wife). For a discussion of how American courts rationalized the acceptability of spousal abuse, see *State v. Oliver*, 70 N.C. 60, 61-62 (1874).

20. Asmus et al., *supra* note 4, at 116 (examining the criminalization of domestic abuse); Rizer, *supra* note 18, at 3-4 (same).

21. Rizer, *supra* note 18, at 4.

22. See, e.g., Sack, *supra* note 5, at 1661-62 (discussing the failure of law enforcement to respond to domestic abuse).

23. *Id.* at 1662.

24. *Id.* at 1663.

25. *Id.*

26. *Id.* at 1663-64.

27. See *id.* at 1664; see also Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 7 (1999) (describing unspoken acceptance of domestic violence based on lack of law enforcement response).

28. See Sack, *supra* note 5, at 1666-67 (examining the feminist movement's role in domestic violence legislation).

29. *Id.* at 1666.

an effort to effect systemic change.

2. *Development of Civil Protection Orders to Combat Domestic Abuse*

One of the key legislative reforms advocated by the movement to end violence against women was the use of civil protective orders.³⁰ Protective orders empower victims of domestic abuse to begin the process of separating from their abusers.³¹ Civil protective orders also provide women some measure of relief from abuse without pursuing criminal charges against her abuser.³² By the mid-1990s, every state had enacted laws for civil protective orders.³³ Today, every state has civil protection orders tailored to domestic violence cases, as well as criminal enforcement provisions for protective order violations.³⁴ The federal government also recognized the importance of civil protection orders as part of its 1994 Violence Against Women Act.³⁵ By 2002, every state had enacted legislation criminalizing violations of civil protection orders.³⁶

Critically important to the success of protective orders is their

30. *Id.* at 1667. For a discussion of the evolution of domestic violence policy in Minnesota, see Asmus et al., *supra* note 4.

31. Sack, *supra* note 5, at 1667. The process of empowerment begins by separating the victim from the abuser. See PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990), available at <http://www.ncjrs.org/pdffiles/171666.pdf> (noting protection orders provide "[i]mmediate relief to domestic violence victims").

32. Finn & Colson, *supra* note 31, at 43. For a variety of reasons, women are often reluctant to pursue criminal charges or leave their abusers. White, *supra* note 18, at 720 (noting a variety of reasons her clients provided for choosing not to leave their abusers). Victims may be financially dependent on their abusers and, therefore, unwilling to jeopardize their source of familial income. *Id.* Some women simply feel that leaving their abusers will ultimately increase the abuse. *Id.*

33. Sack, *supra* note 5, at 1667; see also Epstein, *supra* note 27, at 12 (discussing civil protection orders).

34. Brief Amici Curiae of National Network to End Domestic Violence et al., *supra* note 7, at 12. See, e.g., MINN. STAT. § 518B.01 (2004).

35. Violence Against Women Act (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (1994). "[T]hese laws condition state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders." Epstein, *supra* note 27, at 12. The Supreme Court overruled portions of VAWA in 2000 as beyond the scope of congressional commerce power. See *United States v. Morrison*, 529 U.S. 598 (2000).

36. Sack, *supra* note 5, at 1667.

enforcement.³⁷ The majority of women seeking protective orders do so only after repeated violence and serious threats.³⁸ After obtaining an order, women are empowered to seek permanent escape from a violent relationship.³⁹ Studies have found that police-reported abuse decreased by eighty percent among battered women with permanent protective orders.⁴⁰ Protective orders that are not enforced may create a dangerously false sense of security for victims.⁴¹ Realistically, most abusers will not stop tormenting their victims merely because a victim has an order directing the abuser to do so; therefore, the effectiveness of protective orders stems from their swift and certain enforcement.⁴²

3. *Litigation Catalyzed Increased Enforcement of Protection Orders*

Initially, many police agencies remained reluctant to enforce restraining orders in domestic abuse situations.⁴³ A few key cases created a strong incentive to enforce protective orders, however, when courts determined that the respective city could be held liable for failing to enforce protective orders.⁴⁴

Tracey Thurman suffered years of abuse before ultimately obtaining a protective order against her husband in May 1983.⁴⁵ Twice during the month of May Thurman sought a warrant for her husband's arrest and on both occasions the Torrington, Connecticut police instructed her to return later.⁴⁶ On June 10,

37. See Finn & Colson, *supra* note 31, at 43 (noting lack of enforcement is a serious limitation on the utility of protection orders).

38. Brief Amici Curiae of National Network to End Domestic Violence et al., *supra* note 7, at 24.

39. *Id.* at 24-25.

40. *Id.* at 25 (citing Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 593 (2002)).

41. *Id.* at 25-26.

42. *Id.* at 26; see also Adele Harrell & Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214 (Eve S. Buzawa & Carl G. Buzawa eds., 1996), reprinted in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 49, 50-51 (Nat'l Inst. of Justice & Am. Bar Ass'n eds., 1998), available at <http://www.ncjrs.org/pdffiles/171666.pdf>.

43. See Sack, *supra* note 5, at 1667-68.

44. See *id.* at 1667 (discussing *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984)); see also *Sorichetti ex rel. Sorichetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985). But see *Ricketts v. City of Columbia*, 36 F.3d 775 (8th Cir. 1994) (refusing to recognize claims of domestic violence victims against the police); *McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989) (same).

45. *Thurman*, 595 F. Supp. at 1525.

46. *Id.* On May 27, Thurman was told by police to return on May 31, after

1983, Thurman's estranged husband came to her sister's house where she was staying and demanded to see her.⁴⁷ When police finally arrived, twenty-five minutes after Tracey Thurman called them, they found Charles Thurman standing over his wife, who had been repeatedly stabbed, holding a bloody knife.⁴⁸ In the presence of the police officer, Thurman kicked his wife in the head, retrieved their small child from the house, and dropped him on his mother's bloody body.⁴⁹ Only when Thurman threatened his wife as she lay on the ambulance stretcher did police finally arrest him.⁵⁰ Tracey Thurman and a number of other women sued the City of Torrington alleging that the police's unofficial policy of responding differently to domestic disputes⁵¹ violated the Equal Protection Clause of the Fourteenth Amendment.⁵² The federal district court concluded that Thurman and her co-plaintiffs had alleged sufficient facts to support their claim.⁵³ A federal jury ultimately awarded Thurman \$2.3 million, forcing government officials to finally recognize the importance of creating a coordinated response to domestic violence.⁵⁴

Like Tracey Thurman, Josephine Sorichetti obtained a protective order against her husband only after years of abuse.⁵⁵ When her husband threatened her and her infant daughter Dina as Josephine delivered Dina for a court-ordered visitation, Josephine immediately reported the threat to police.⁵⁶ The next day, a lieutenant with whom Josephine spoke informed her that the protection order was "only a piece of paper" that meant nothing.⁵⁷ Later that evening, after Sorichetti had filed her complaint, Frank Sorichetti's sister found Dina severely injured after her father had attacked her with a fork, knife, and screwdriver, and had attempted

Memorial Day weekend. On May 31, she was told that the only police officer who could help her was on vacation. *Id.*

47. *Id.*

48. *Id.* at 1525-26.

49. *Id.* at 1526.

50. *Id.*

51. The plaintiffs alleged that police took domestic disturbance calls less seriously than they did reports of stranger violence. *Id.*

52. U.S. CONST. amend. XIV, § 1.

53. *Thurman*, 595 F. Supp. at 1526.

54. Sack, *supra* note 5, at 1667-68 (discussing the *Thurman* case).

55. *Sorichetti ex rel. Sorichetti v. City of New York*, 482 N.E.2d 70, 72 (N.Y. 1985).

56. *Id.* at 73.

57. *Id.*

to saw off her leg.⁵⁸ Josephine Sorichetti commenced a lawsuit against New York City for the police's failure to enforce the terms of the protective order following her husband's threats.⁵⁹ The court held that the protective order, coupled with the police's knowledge of her husband's prior abuse, created a special relationship between Sorichetti and the police.⁶⁰ The police therefore were obligated to respond to Sorichetti's request for help.⁶¹ A jury awarded Sorichetti \$2 million, providing yet another wake-up call to officials who had failed to create an effective system for responding to reports of domestic abuse.⁶²

Despite the significant legislative and judicial responses to domestic abuse through protective order statutes, the criminal justice system remained reluctant to take action. Among police and prosecutors, domestic violence was perceived as a family problem in which the government should not interfere.⁶³ Advocates thus had to seek alternative means of addressing the domestic violence crisis in American culture.

B. *Mandatory Arrest and Prosecution Laws*

Legislators responded to the perceived reluctance of police and prosecutors to become involved in domestic abuse situations by limiting prosecutorial and police discretion. Mandatory arrest and "no-drop" prosecution policies⁶⁴ were developed to ensure intimate abuse received the same response from law enforcement as stranger violence.⁶⁵ Some of the most significant research that led

58. *Id.* at 74.

59. *Id.*

60. *Id.* at 75.

61. *Id.* at 76.

62. Sack, *supra* note 5, at 1668 (discussing the *Sorichetti* suit).

63. See Epstein, *supra* note 27, at 13 (examining the apathy of the criminal justice system towards domestic violence).

64. No-drop policies essentially require prosecutors to pursue criminal charges against domestic abusers, regardless of whether the victim cooperates with the prosecution. Sack, *supra* note 5, at 1672. This approach developed to encourage arrests because police are more likely to arrest offenders if they think the offender may be prosecuted. *Id.* at 1673. Additionally, it reduced the risk that a batterer could intimidate his victim into not pressing charges because the decision of whether to pursue the case was outside the control of the victim. *Id.* That disempowerment of the victim in the prosecution process is one of the chief criticisms of no-drop policies. *Id.* at 1681. For a critique of mandatory arrest and prosecution policies, see Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 595 (1999).

65. The Minnesota Legislature passed the Domestic Abuse Act in 1979. 1979

to these aggressive responses to domestic abuse originated in Minnesota.

1. *The Duluth Model*

A key 1982 experiment utilizing a multi-agency approach to respond to domestic abuse occurred in Duluth, Minnesota.⁶⁶ The “Duluth Model” coordinated the responses of police, corrections officers, probation officers, prosecutors, judges, human services providers, and victim advocates in domestic abuse cases.⁶⁷ The result of the coordinated response was an increased arrest and prosecution rate and a high participation rate in abuser rehabilitation programs.⁶⁸ The Duluth Model is now utilized internationally to quell domestic violence.⁶⁹

2. *Mandatory Arrest*

The Minneapolis police department conducted a groundbreaking experiment in 1984 regarding police responses to domestic abuse.⁷⁰ Researchers Lawrence W. Sherman and Richard A. Berk developed an experiment in which police officers responding to domestic violence calls would handle the call in one of three ways, randomly determined prior to the officer’s arrival at the scene.⁷¹ The officers could arrest the abuser, send the abuser away from the home for a period of time, or attempt to mediate the dispute.⁷² Abusers who were arrested had a ten percent re-offense rate within a six-month period, while those who were sent away from the home had a twenty-four percent repeat rate.⁷³ The researchers concluded that mandatory arrests were more effective

Minn Laws c. 214, § 1 (current version at MINN. STAT. § 518B.01 (2004)). The Act mandated police to arrest batterers and provided other tools for effective state intervention. Asmus et al., *supra* note 4, at 125-26.

66. The program is called the Duluth Domestic Abuse Intervention Project. Asmus et al., *supra* note 4, at 128.

67. *Id.*

68. *Id.*

69. *Id.* at 129; Minnesota Program Development, Inc., *Recent Research: Countering Confusion About the Duluth Model* (Oct. 15, 2005), <http://duluth-model.org> (follow “Recent Research: Countering Confusion About the Duluth Model” hyperlink) (last visited Feb. 7, 2006).

70. See Sack, *supra* note 5, at 1669 (examining Minneapolis police experiment).

71. Sherman & Berk, *supra* note 4, at 2-3.

72. *Id.* at 2.

73. *Id.* at 6.

than traditional police methods of handling domestic abuse.⁷⁴ The results of the Minneapolis study became a catalyst for reforming law enforcement's response to domestic violence.

Following the Minneapolis study, the U.S. Attorney General issued a report advocating the use of mandatory arrest policies throughout the country.⁷⁵ Within a decade, fifteen states instituted mandatory arrest policies.⁷⁶ Mandatory arrest schemes freed abuse victims from bearing the burden of deciding whether to pursue charges and also eliminated police discretion from the decision.⁷⁷ Such statutes also provided increased short-term safety to victims of domestic abuse by removing the abuser from the abusive situation.⁷⁸ While some researchers now question the efficacy of mandatory arrest schemes,⁷⁹ multiple studies have demonstrated that mandatory arrest deters repeat domestic abuse better than other police strategies.⁸⁰

3. *No-Drop Prosecution Policies*

Mandatory arrest statutes necessitated a coordinated response from prosecutors' offices. Many prosecutors responded with no-drop prosecution policies.⁸¹ In many instances of personal violence, prosecutors give deference to the victim's decision whether to pursue charges.⁸² In situations of domestic abuse, victims are often hesitant to press charges.⁸³ As a result, few domestic assaults were ever charged or prosecuted prior to the implementation of mandatory arrest statutes and no-drop policies.⁸⁴ By implementing no-drop policies and removing the victim from the decision to prosecute, prosecutors experienced a significant

74. *Id.* at 6-7.

75. Sack, *supra* note 5, at 1669.

76. *Id.* at 1670.

77. *Id.*

78. *Id.* at 1671.

79. See, e.g., Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, reprinted in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 54-55 (Nat'l Inst. of Justice & Am. Bar Ass'n eds., 1998), available at <http://www.ncjrs.org/pdffiles/171666.pdf>.

80. Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 984-85 (1994) (examining methodology and results of several mandatory arrest studies).

81. Sack, *supra* note 5, at 1672.

82. See *id.* at 1672-73.

83. *Id.* at 1655, 1673 (examining the prosecution of domestic abuse cases).

84. *Id.* at 1663-65.

increase in the number of domestic abuse cases that advanced to the courtroom.⁸⁵ Studies also indicated that as prosecution and conviction rates increased, recidivism rates decreased.⁸⁶ The aggressive, coordinated response of prosecutors and police to domestic violence has not only raised awareness of the problem,⁸⁷ but may also have helped reduce repeat abuse.⁸⁸

The aggressive mandatory arrest and prosecution statutes in place today reflect a substantial paradigm shift in how law enforcement and legislators view domestic violence.⁸⁹ Traditional police resistance to arrests in domestic violence cases has largely been superseded by strict statutory requirements for handling domestic abuse.⁹⁰ Increased utilization of civil protection orders and mandatory enforcement mechanisms has improved law enforcement officials' handling of domestic violence and has empowered victims of domestic violence to end the cycle of abuse. Unfortunately, those critical measures for combating domestic violence may soon lose their efficacy as a result of the Supreme Court's decision in *Town of Castle Rock*.⁹¹

III. HISTORY OF JESSICA GONZALES'S CLAIM

A. *Factual and Procedural Background*

Jessica Gonzales's story is a familiar one to domestic violence advocates. Her estranged husband, Simon Gonzales, attempted suicide once early in the marriage when his wife said she planned to divorce him.⁹² She waited seven years before she filed for divorce in December 1998.⁹³ On May 21, 1999, as part of her

85. *Id.* at 1673.

86. David A. Ford & Mary Jean Regoli, *The Indianapolis Domestic Violence Prosecution Experiment*, NAT'L INST. JUST. REP. (1993), reprinted in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 62-63 (Nat'l Inst. of Justice & Am. Bar Ass'n eds., 1998), available at <http://www.ncjrs.org/pdffiles/171666.pdf>.

87. See Sack, *supra* note 5, at 1672-73 (noting increased arrest rates have altered community perceptions of police response to domestic abuse).

88. *Id.* at 1673-74.

89. See *id.* at 1722-23.

90. See *id.* at 1670-71.

91. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

92. Jason Blevins, *Dad Attacks Police, Dies; 3 Daughters Found Slain in Pickup*, DENVER POST, June 24, 1999, at A1.

93. *Id.*

divorce proceedings, she obtained a temporary restraining order from a Colorado trial court because she believed herself and her children to be in danger.⁹⁴ The order commanded her husband not to “molest or disturb” the peace of her or their children.⁹⁵ It also contained a preprinted notice to law enforcement officials that police officers “shall use every reasonable means to enforce this restraining order.”⁹⁶

Simon Gonzales was arrested on May 30, 1999, for trespassing in violation of the protective order.⁹⁷ Because of the continuing threat to Jessica Gonzales’s safety, on June 4, 1999, the court made the temporary restraining order permanent.⁹⁸ The new terms of the permanent order provided Simon Gonzales limited parenting rights, such as the option for a mid-week dinner visit, as arranged by the parties.⁹⁹ The permanent order contained the same admonition to law enforcement to enforce the restraining order as the temporary protective order contained.¹⁰⁰

On June 22, 1999, at around 5:00 p.m., Simon Gonzales took his three daughters from the front yard of Jessica Gonzales’s home.¹⁰¹ Jessica alleged her husband’s visit was not a pre-agreed parenting visit.¹⁰² She was concerned about her daughters and reported their absence to the Castle Rock police at about 7:30 p.m.¹⁰³ Two officers arrived at her house and after reviewing the restraining order, stated that there was nothing they could do.¹⁰⁴ They advised Ms. Gonzales to wait and call the police if the children had not returned by 10:00 p.m.¹⁰⁵ Around 8:30 p.m., Ms. Gonzales contacted her husband on his cell phone.¹⁰⁶ He stated that he had taken the children to an amusement park in Denver.¹⁰⁷ Ms. Gonzales called the police and asked them to determine

94. *Id.*

95. *Town of Castle Rock*, 125 S. Ct. at 2800-01. The Gonzaleses had three children: Rebecca, aged ten, Katheryn, aged eight, and Leslie, aged seven. Blevins, *supra* note 92, at A1.

96. *Town of Castle Rock*, 125 S. Ct. at 2801.

97. Blevins, *supra* note 92, at A1.

98. *Town of Castle Rock*, 125 S. Ct. at 2801.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

whether her husband and children were in fact at the amusement park.¹⁰⁸ The police declined and again advised her to wait until 10:00 p.m. to see if her children returned.¹⁰⁹

At 10:10 p.m., Gonzales again phoned the Castle Rock police to inform them that her children had still not returned.¹¹⁰ The police then told her to wait until midnight.¹¹¹ At midnight, she went to her husband's apartment, and upon not finding him or their children, she called the police at 12:10 a.m.¹¹² When the police did not arrive, she went to the police station and filed an incident report at 12:50 a.m.¹¹³ The officer who took the report failed to take any immediate action to find the children; instead, he went to dinner after Gonzales left the station.¹¹⁴

At 3:20 a.m., bullets began showering the Castle Rock police station.¹¹⁵ Simon Gonzales, who had purchased a gun earlier that evening, had opened fire on the police station in an apparent attempt to commit "suicide by cop."¹¹⁶ Police shot back and killed him.¹¹⁷ When police approached Gonzales, they found the bodies of his three young daughters in his truck, brutally murdered by their own father.¹¹⁸

Jessica Gonzales filed a claim in federal court against the Town of Castle Rock and the three police officers with whom she dealt on June 22, 1999.¹¹⁹ Gonzales sought damages under 42 U.S.C § 1983, alleging that the police had an "official policy or custom of failing

108. *Id.* According to the terms of the restraining order, had the officers concluded that there was probable cause that Gonzales violated the order when he took his daughters from their mother's home, the officers should have issued a warrant for Gonzales's arrest. *See id.* at 2801. When Jessica Gonzales reported his location at the amusement park, the police should therefore have sought to execute the arrest warrant. *See id.* Instead, they did nothing.

109. *Id.* at 2802.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Colorado law prohibits persons against whom a restraining order has been issued from purchasing a gun. *See* COLO. REV. STAT. § 24-33.5-424 (2001). Nevertheless, Gonzales was able to purchase a gun because he lied on his application and the FBI had no record of the state restraining order. M.E. Sprengelmeyer, *Restraining Order Didn't Block Gun Buy*, ROCKY MOUNTAIN NEWS, June 25, 1999, at 5A.

117. *Town of Castle Rock*, 125 S. Ct. at 2802.

118. *Id.*

119. *Id.* at 2802 & n.3.

to respond properly to complaints of restraining order violations.”¹²⁰ Furthermore, she alleged that the custom violated her substantive and procedural due process rights to enforcement of the restraining order.¹²¹ The city and police officers filed a motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6).¹²² The district court granted the motion, finding that Gonzales had not alleged facts supporting a claim for violation of her due process rights.¹²³

B. The Tenth Circuit Court of Appeals’ Analysis

Gonzales appealed the dismissal to the Tenth Circuit Court of Appeals.¹²⁴ The panel affirmed the rejection of Gonzales’s

120. *Id.* at 2802. Section 1983 liability arises when state officials, acting under the color of state law or custom, deprive an individual of her constitutional rights. 42 U.S.C. § 1983. Following the Supreme Court’s decision in *Monell v. Department of Social Services of New York*, a municipality also may be sued for damages under § 1983 when an official acts pursuant to government custom and violates an individual’s rights under the Constitution. 436 U.S. 658, 690 (1978).

121. *Town of Castle Rock*, 125 S. Ct. at 2802. A substantive due process claim arises when one alleges that the State had a categorical obligation that it failed to fulfill. *See* *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (involving a substantive due process claim where petitioner claimed social services had a categorical obligation to protect the child and failed to do so). Gonzales initially claimed the State, by granting her a restraining order, undertook a categorical obligation to protect her, thus creating a substantive due process interest. *See* *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1262-63 (10th Cir. 2002), *reh’g en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev’d*, 125 S. Ct. 2796 (2005). She also claimed she had a property interest in the enforcement of the restraining order subject to procedural due process protections. *Id.* at 1264; *see* *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (clarifying standard for evaluating procedural due process claims). Not surprisingly, Gonzales does not appear to have ever asserted an equal protection claim. Such claims have not succeeded in most jurisdictions. In *Ricketts v. City of Columbia*, the Eighth Circuit Court of Appeals held that the city had not violated the equal protection rights of a domestic violence victim because even if it had a policy of treating domestic assaults differently from stranger violence, the policy was not motivated by an intent to discriminate based on gender. 36 F.3d 775, 782 (1994); *see also* *McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (holding no equal protection violation in domestic assault case); *Bruno v. Codd*, 396 N.Y.S.2d 974, 979 (N.Y. Sup. Ct. 1977) (refusing to dismiss constitutional claims of domestic violence victims against police department), *rev’d* 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff’d*, 393 N.E.2d 976 (N.Y. 1979). *But see* *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526-29 (D. Conn. 1984) (holding domestic violence victim had alleged facts sufficient to support a claim for violation of the equal protection clause).

122. *Town of Castle Rock*, 125 S. Ct. at 2802.

123. *Id.*

124. *Gonzales*, 307 F.3d at 1261. The Tenth Circuit remanded without

substantive due process claims based on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*,¹²⁵ which held that nothing in the Due Process Clause required the State to protect its citizens from the violence of private actors.¹²⁶ The Supreme Court noted two broad exceptions in its *DeShaney* holding where a State might have a duty to protect someone from the violence of a third party.¹²⁷ If the State has a special relationship with the individual, or if the actions of the State created the danger to the individual, the State may have a duty to protect the individual.¹²⁸ In *Gonzales*, the Tenth Circuit declined to review the issue of a special relationship and found that there was no creation of danger by the State, and thus no exception to the *DeShaney* holding applied.¹²⁹

The court reached a different conclusion regarding Gonzales's procedural due process claim. The Tenth Circuit panel, relying on the Supreme Court's decision in *Board of Regents of State Colleges v. Roth*,¹³⁰ determined that the protective order afforded Gonzales a

discussing the issue of immunity for the individual officers. *Id.* at 1266-67.

125. 489 U.S. 189. *DeShaney* was a similarly tragic case. Joshua DeShaney was placed in his father's custody after his parents divorced in 1980. *Id.* at 191. Despite substantial evidence that his father abused him over the course of three years, social services failed to remove Joshua from his father's custody. *Id.* at 192-93. In 1984, Joshua's father beat him so severely that he fell into a coma from which he was not expected to recover. *Id.* at 193. Joshua's mother brought an action against Winnebago County alleging that it had violated Joshua's rights under the Fourteenth Amendment by failing to intervene on his behalf. *Id.* In its seminal decision on substantive due process, the Supreme Court held that "the State had no constitutional duty to protect Joshua against his father's violence" and thus its failure to do so did not constitute a violation of the Due Process Clause. *Id.* at 202.

126. *Gonzales*, 307 F.3d at 1262 (citing *DeShaney*, 489 U.S. at 195). The Court in *DeShaney* held that the Fourteenth Amendment was designed as a limitation of a State's powers, not as a guarantee of safety. 489 U.S. at 195.

127. *DeShaney*, 489 U.S. at 201-02.

128. *See id.*

129. *Gonzales*, 307 F.3d at 1262. The court did not look at the special relationship issue because Gonzales did not suggest that the State's issuance of a protective order created a special relationship under which the State had a duty to protect her. *Id.* The court went through a step-by-step analysis of why the danger creation theory did not apply, particularly because there was no affirmative conduct on the part of the police that increased the Gonzaleses' danger. *Id.* at 1263.

130. 408 U.S. 564 (1972). Roth was hired as a professor of political science at Wisconsin State University-Oshkosh for a fixed term of one year. *Id.* at 566. When he was informed that his contract would not be renewed, he sued the university for violating his procedural due process rights. *Id.* at 568-69. He alleged that the failure of university officials to give him a reason and hearing regarding his non-

property interest and the associated right to procedural due process before being deprived of that interest.¹³¹ The Tenth Circuit reasoned that the use of mandatory enforcement language in the Colorado statute governing protective orders created an “entitlement to enforcement of the order by every reasonable means.”¹³² The court concluded that Gonzales had alleged sufficient facts to pursue a claim that the police violated her constitutional interest in enforcement of the restraining order.¹³³

The Tenth Circuit reconsidered Gonzales’s case en banc upon petition from the City of Castle Rock and the individual police officers involved.¹³⁴ The court did not address Gonzales’s claim of a substantive due process right to government protection.¹³⁵ Instead, it focused its ruling on whether the State had afforded Gonzales an entitlement to protective services that would require procedural due process protection.¹³⁶

The court began by defining the entitlement that had been crafted by Colorado statute for persons such as Gonzales.¹³⁷ In its analysis of procedural due process, the court wrote that the focus should not be on property interests created by the Constitution, but rather on those crafted by state law.¹³⁸ The court stated that “[a] property interest is created when a person has secured an interest in a specific benefit to which the individual has ‘a

retention violated his right to procedural due process. *Id.* at 569. The Court held that because Roth had no interest in future employment, he could not have been deprived of any interest without due process. *Id.* at 578.

131. *Gonzales*, 307 F.3d at 1264-66. The court wrote that a protected 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.” *Id.* (citing *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam)).

132. *Id.* at 1266; *see also* *Siddle v. City of Cambridge*, 761 F. Supp. 503, 509-10 (S.D. Ohio 1991) (holding protective order obtained under state law created property interest subject to due process protections); *Coffman v. Wilson Police Dep’t*, 739 F. Supp. 257, 265 (E.D. Pa. 1990) (finding mandatory enforcement language in protective order created entitlement to enforcement).

133. *Gonzales*, 307 F.3d at 1266.

134. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1096 (10th Cir. 2004), *rev’d* 125 S. Ct. 2796 (2005).

135. *Id.* at 1099 n.3.

136. *Id.* at 1099 (citing *DeShaney v. Winnebago County Dep’t Soc. Serv.*, 489 U.S. 189, 195 n.2 (1989)).

137. *Id.* at 1101.

138. *Id.* at 1099-1100 (citing *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)).

legitimate claim of entitlement.”¹³⁹

The Colorado statute governing protective orders states that a peace officer “shall use every reasonable means to enforce a protective order.”¹⁴⁰ The Colorado Supreme Court interpreted the use of the word “shall” in Colorado statutes to “involve[] a ‘mandatory connotation,’” that “is the antithesis of discretion or choice.”¹⁴¹ The Tenth Circuit concluded that “the use of explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [protected] interest.”¹⁴² The Tenth Circuit concluded that because the “restraining order provided objective predicates which, when present, mandated enforcement of its terms,” the statute coupled with the restraining order created an entitlement subject to due process protection.¹⁴³

The district court found that there is no absolute duty inherent in the mandatory arrest language because a determination of probable cause necessarily precipitated arrest for a violation of a protective order.¹⁴⁴ The Tenth Circuit determined, however, that a probable cause determination is not entirely discretionary in that it can be measured against the objective standard of what a reasonable officer would do in similar circumstances.¹⁴⁵ The court concluded that “an officer’s determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms.”¹⁴⁶

The court also provided a careful analysis of the legislative intent behind Colorado’s statute.¹⁴⁷ Citing a transcript of the legislative hearings, the court held that “[t]he Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders” by creating a mandatory arrest

139. *Id.* at 1101 (quoting *Roth*, 408 U.S. at 577).

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

141. *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1265 (10th Cir. 2002) (citing *Colorado v. Guenther*, 740 P.2d 971, 975 (Colo. 1987)), *reh’g en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev’d* 125 S. Ct. 2796 (2005).

142. *Gonzales*, 366 F.3d at 1102 (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989)).

143. *Id.* at 1105.

144. *Id.*

145. *Id.*

146. *Id.* at 1106.

147. *Id.* at 1107-08.

statute.¹⁴⁸

After establishing that Gonzales had a protected interest in the execution of the protective order, the Tenth Circuit went on to determine whether the Castle Rock police denied her appropriate process.¹⁴⁹ The court held that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁵⁰ The court concluded that, taking the allegations in Gonzales’s complaint as true, “she did not receive any process whatsoever prior to the deprivation of her interest in enforcement of the restraining order.”¹⁵¹ The court defined the process required by an officer under the statute in three steps: (1) the officer must determine whether a valid protection order exists, (2) the officer must determine whether there is probable cause that the order is being violated, and (3) the officer must determine whether the party violating the order has notice of it.¹⁵² The court concluded that the officer’s systematic failure to follow this process constituted a violation of Gonzales’s due process rights.¹⁵³

The Tenth Circuit’s holding affirmed a strong judicial trend towards holding law enforcement accountable for failing to protect victims from domestic violence.¹⁵⁴ Perhaps more critically, the holding recognized the mandatory nature of the procedures defined in domestic abuse statutes. Because the case expanded potential liability for municipalities, it was ripe for consideration by the Supreme Court.¹⁵⁵

IV. THE SUPREME COURT’S DECISION

Justice Antonin Scalia, writing for the majority,¹⁵⁶ acknowledged that the Supreme Court’s decision in *DeShaney* left

148. *Id.* at 1108.

149. *Id.* at 1110.

150. *Id.* at 1111 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations omitted)).

151. *Id.*

152. *Id.* at 1116.

153. *Id.* at 1116-17.

154. *See supra* Part II.A.3.

155. The dissents authored by Tenth Circuit Judges Kelly, McConnell, and O’Brien demonstrate the highly contentious nature of Gonzales’s claims. *See Gonzales*, 366 F.3d at 1118-45.

156. Justice Scalia was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, Souter, Thomas, and Breyer. *See Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005). Justice Stevens authored a dissent in which Justice Ginsburg joined. *See id.* at 2813-25 (Stevens, J., dissenting).

unanswered the question of whether state law created an entitlement to which due process protections attached.¹⁵⁷ While the Court in *DeShaney* appeared to leave open a remedy through procedural due process, Justice Scalia soundly closed it. The Court's decision followed two essential lines of analysis in undermining Gonzales's claim. First, the Court determined that the Colorado statute authorizing the protective order, contrary to its legislative history, did not mandate police enforcement.¹⁵⁸ The Court also held that Gonzales had no entitlement to enforcement of the order because there was no adequate way to evaluate enforcement procedure, and because even if enforcement was mandatory and adequately defined, it did not create a property interest.¹⁵⁹ Therefore, the Court concluded that Gonzales had no due process claim against the City of Castle Rock.¹⁶⁰

A. *Assault on Mandatory Enforcement Provisions*

The Tenth Circuit held that Colorado's statute clearly required enforcement of the order.¹⁶¹ While Gonzales argued that the Supreme Court should give deference to the Tenth Circuit's interpretation of state law, the Supreme Court refused to do so.¹⁶² The Court held that, while the entitlement may stem from state law, "*federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."¹⁶³ Thus, the Court refused to give deference where it did not think the Tenth Circuit's opinion drew upon "a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state-legislative-hearing transcript."¹⁶⁴

157. *Id.* at 2803.

158. *Id.* at 2805.

159. *Id.* at 2807-10.

160. *Id.* at 2810.

161. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101 (10th Cir. 2004).

162. Transcript of Oral Argument at 52, *Town of Castle Rock*, 125 S. Ct. 2796 (No. 04-278); *Town of Castle Rock*, 125 S. Ct. at 2803. During oral argument, Justices Stevens and Ginsburg both asked Respondent Gonzales's attorney why the issue should not have been certified to the Colorado Supreme Court for an interpretation of state law. Transcript of Oral Argument, *supra*, at 23-24, 51-52.

163. *Town of Castle Rock*, 125 S. Ct. at 2803-04 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

164. *Id.* at 2804. As Justice Stevens noted in his dissent, the Court has a longstanding policy of deferring to federal court interpretations of the laws of a state within its jurisdiction. *Id.* at 2814 (Stevens, J., dissenting) (quoting *Phillips v.*

While the Supreme Court criticized the Tenth Circuit's interpretation of Colorado law, it failed itself to do much more than quote language from the restraining order and the statutory text in its analysis of what the Colorado legislature must have meant when it enacted its domestic violence legislation.¹⁶⁵ The Court examined the language of the restraining order and the Colorado statute and concluded that despite its seemingly mandatory nature, enforcement was not truly mandatory.¹⁶⁶ The Court noted that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."¹⁶⁷ The Court concluded that it is simply "common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances."¹⁶⁸ For the Colorado legislature to have intended truly mandatory enforcement, the Court opined that it would have had to utilize language "perceptibly more mandatory" than any other statute providing that police officers "shall" act.¹⁶⁹ The Court emphasized that discretion is necessary where officers are forced to weigh the circumstances of the violation against the officers' competing duties to enforce other laws.¹⁷⁰

As the dissent¹⁷¹ persuasively argued, the majority gave "short

Washington Legal Found., 524 U.S. 156, 167 (1998)). Only in rare cases in which the court of appeals is clearly wrong in its interpretation of state law will the Court fail to show deference. *Id.* Justice Stevens aptly pointed out that the majority did not even attempt to demonstrate the Tenth Circuit was clearly wrong in its interpretation of Colorado law. *Id.* Because the conclusions reached by the Tenth Circuit were reasonable, Justice Stevens concluded they were "worthy of our deference." *Id.* at 2815.

165. *See id.* at 2805-07. While Justice Scalia analyzed the meaning of the statute in light of practical considerations such as when an arrest would be possible, he failed to examine the social history and unique legislative impetus that prompted such statutes in the first place. *See id.* at 2816 (Stevens, J., dissenting) (noting the majority's failure to consider many legislatures' intent to eliminate discretion through passage of domestic violence laws).

166. *Id.* at 2805.

167. *Id.* at 2805-06. In support of that assertion, the Court cited the ABA Standards for Criminal Justice: "[I]t has been recognized that such statutes [that seem to preclude nonenforcement by the police] cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to make an arrest." *Id.* at 2806. (citing AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, 1-4.5 cmt. at 1-124 to 1-125 (2d ed. 1980)).

168. *Town of Castle Rock*, 125 S. Ct. at 2806 (quoting *Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (emphasis added)).

169. *Id.* at 2806.

170. *Id.*

171. Justice Stevens authored the dissenting opinion, in which Justice Ginsburg joined. *Id.* at 2813-25 (Stevens, J., dissenting).

shrift to the unique case of ‘mandatory arrest’ statutes in the domestic violence context.”¹⁷² The legislative history of mandatory enforcement statutes among the states indicates an “unmistakable goal of eliminating police discretion in this area.”¹⁷³ Given the legislative goal underlying mandatory enforcement provisions, the use of “shall” in this statute should be read as distinct from its use in other statutes.¹⁷⁴

Because Colorado case law did not directly address interpretation of this statute, the dissent examined how other courts had interpreted analogous statutes.¹⁷⁵ The New Jersey Superior Court held that a domestic restraining order allows no discretion with regard to arrest.¹⁷⁶ Similarly, the Washington Court of Appeals held that in cases of domestic violence, an officer’s discretion is limited; where the officer has legal grounds for an arrest, the officer has a mandatory duty to make the arrest.¹⁷⁷ The dissent observed that it seemed “brazen for the majority to assume that the Colorado Supreme Court would repudiate this consistent line of persuasive authority from other States.”¹⁷⁸

The majority’s conclusion that Colorado’s “mandatory enforcement” provisions were not in fact mandatory is contrary to the history and intent behind such mandatory provisions.¹⁷⁹ As the dissent aptly noted, the purpose of such statutes was to eliminate police discretion.¹⁸⁰ Domestic violence was criminalized before mandatory arrest statutes were enacted; the problem was in the enforcement of the criminal statutes.¹⁸¹ State legislatures crafted new statutes specific to domestic violence to minimize the abuse of discretion in enforcement.¹⁸² The Court’s dismissal of mandatory enforcement provisions under the guise of discretion defeats the

172. *Id.* at 2816.

173. *Id.*

174. *Id.* at 2818.

175. *Id.* at 2818-19.

176. *Id.* at 2819 (citing *Campbell v. Campbell*, 682 A.2d 272, 274 (N.J. Super. Ct. Law Div. 1996)).

177. *Id.* (citing *Donaldson v. City of Seattle*, 831 P.2d 1098, 1103 (Wash. Ct. App. 1992)). *But see* *Ricketts v. City of Columbia*, 36 F.3d 775, 780 (8th Cir. 1994) (holding police discretion is key aspect of law enforcement).

178. *Town of Castle Rock*, 125 S. Ct. at 2819 (Stevens, J., dissenting).

179. *See* *Rizer*, *supra* note 18, at 5 (discussing the history of mandatory enforcement statutes); *Sack*, *supra* note 5, at 1668-70 (same); *White*, *supra* note 18, at 752-56 (same).

180. *Town of Castle Rock*, 125 S. Ct. at 2817 (Stevens, J., dissenting).

181. *See supra* Parts II.A, II.B.

182. *See Sack*, *supra* note 5, at 1670.

purpose of such domestic violence statutes.

The Supreme Court's interpretation may actually increase the danger to victims of domestic violence.¹⁸³ Mandatory enforcement provisions within protective order statutes provide significantly improved safety to the recipients of protection orders.¹⁸⁴ Failure to enforce protection orders may increase violence against recipients of the orders by creating a false sense of security.¹⁸⁵ The purpose of a protection order is to prevent the restrained individual from inflicting further abuse upon the protected individual; it is implicit that the restrained person has already demonstrated him or herself to be a danger to the protected person. Failing to enforce a restraining order thus fundamentally contradicts the purpose for issuing it. The Court's refusal to recognize enforcement language as mandatory invites police discretion to once again hinder enforcement of protection orders, thus creating further danger to victims of domestic abuse.¹⁸⁶

B. Refusal to Recognize an Entitlement

In addition to undermining the mandatory enforcement language in domestic abuse statutes, the Court advanced two additional arguments for why Gonzales did not have a valid procedural due process claim. Initially, the Court examined what it perceived as the vague enforcement procedure in the statute and concluded that it was too indefinite to create an entitlement subject to due process.¹⁸⁷ The Court also concluded that any benefit Gonzales derived from the order was too incidental to constitute a property interest under the Fourteenth Amendment.¹⁸⁸

The majority failed to see how the statutory enforcement process for protective orders could create an entitlement. Initially, the Court noted that problems arise when an alleged abuser has

183. *See supra* Part II.A.

184. *See* Brief Amici Curiae of National Network to End Domestic Violence et al., *supra* note 7, at 21. A study by the National Center for State Courts suggested that the higher the arrest rate for protective order violations, the lower the re-abuse rates for those who had obtained protective orders. *Id.*

185. *Id.* at 25 (citing Office for Victims of Crime, U.S. Dep't of Justice, *Enforcement of Protective Orders*, LEGAL SERIES BULLETIN NO. 4, at 5 (2002)).

186. *See* Susan L. Pollet, 'Gonzales v. Castle Rock': *Enforcing Orders for Protection*, N.Y.L.J., July 26, 2005, at 4 (discussing reactions to Supreme Court's decision).

187. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2807 (2005).

188. *Id.* at 2809.

left the scene, making an immediate arrest impossible.¹⁸⁹ The Court reasoned that the statute could not reasonably have imposed a duty to continue pursuing an alleged perpetrator; rather, the duty would have to cease at obtaining a warrant for arrest.¹⁹⁰ The Court observed that the indeterminate procedure inherent in the statute “is not the hallmark of a duty that is mandatory.”¹⁹¹

The only procedures the Court gleaned from the statute were to arrest an individual in violation of a protective order or to seek a warrant for the arrest of an individual in violation of a protective order.¹⁹² The majority argued that “the seeking of an arrest warrant would be an entitlement to nothing but procedure,” and as such, would be inadequate to create an entitlement.¹⁹³

As the dissent argued, however, “the crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing.*”¹⁹⁴ Even though enforcement of the restraining order’s provisions does not necessarily have to be accomplished through a single method, it still must be enforced.¹⁹⁵ The dissent drew a parallel to state-sponsored health care.¹⁹⁶ While the provision of health care may involve discretion, “it could not credibly be said that a citizen lacks an entitlement to health care simply because the content of that entitlement is not the same in every given situation.”¹⁹⁷

Fundamentally, questions about the scope of the enforcement obligation are peripheral to determining whether there exists an entitlement to enforcement.¹⁹⁸ The Court has found entitlements to a variety of interests, including public employment,¹⁹⁹ a free education,²⁰⁰ the receipt of government services,²⁰¹ disability benefits,²⁰² and a variety of other government provisions.²⁰³ Some

189. *Id.* at 2807.

190. *Id.*

191. *Id.*

192. *Id.* at 2808.

193. *Id.*

194. *Id.* at 2819-20 (Stevens, J., dissenting).

195. *Id.* at 2820.

196. *Id.*

197. *Id.*

198. *Id.* at 2820 n.13.

199. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101 (10th Cir. 2004) (citing *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972)).

200. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

201. *Id.* (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)).

202. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)).

district courts recognized an entitlement to police enforcement of a restraining order even before the Tenth Circuit did so.²⁰⁴

The Supreme Court's refusal to recognize an entitlement in a statute utilizing mandatory language is inconsistent with its prior decisions.²⁰⁵ The Supreme Court previously held "the use of explicitly mandatory language" in conjunction with some standard to limit discretion "forces a conclusion that the state has created a [protected] interest."²⁰⁶ While it may be true that police have discretion in how to exercise the provisions in the restraining order statute, as the dissent noted, they do not have the discretion to do nothing.²⁰⁷

Furthermore, determinations of probable cause are not entirely discretionary.²⁰⁸ Probable cause determinations are "evaluated against what a prudent, cautious and well trained officer would believe" under the circumstances.²⁰⁹ Any discretion involved therefore should be insufficient to overcome the entitlement given to Gonzales in the restraining order granted under the statute.

The Court's final attack on Gonzales's alleged entitlement involved the question of whether enforcement of a protection order can constitute property. The Court held that, even if the language of the statute did make enforcement mandatory, it did not necessarily create an entitlement in Gonzales.²¹⁰ Criminal laws, including laws that criminalize violations of protective orders, exist

203. *Id.*

204. *Id.* at 1108-09 (citing *Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264 (E.D. Pa. 1990)).

205. See *The Supreme Court, 2004 Term-Leading Cases*, 119 HARV. L. REV. 208, 213-15 (2005) (providing an insightful analysis of how the *Castle Rock* decision departs from the Supreme Court's positivist procedural due process precedent).

206. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1102 (10th Cir. 2004) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (refusing to apply the typical mandatory language framework to cases where a prisoner claims a violation of his or her rights)). The interpretation of mandatory language as creating a property interest outside the realm of prison cases has continued. See *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam).

207. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2819-20 (2005) (Stevens, J., dissenting).

208. See *Gonzales*, 366 F.3d at 1105 (citing *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (applying objective reasonableness standard to officer's determination of probable cause)).

209. Respondent's Brief on the Merits at 28, *Town of Castle Rock*, 125 S. Ct. 1413 (No. 04-278), 2005 WL 353695 (citing *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999)).

210. *Town of Castle Rock*, 125 S. Ct. at 2808.

to serve public rather than private ends.²¹¹ The Court did not find any entitlement of enforcement granted to the “protected person” under the statute.²¹² The only power the statute gave to protected persons was the power to initiate civil contempt proceedings.²¹³ Because the statute was silent about the protected person’s role in enforcement, the Court declined to find an entitlement.²¹⁴

The Court also argued that even if the statute had created an entitlement to some benefit, it did not constitute a property interest under the Due Process Clause.²¹⁵ For an entitlement to qualify as property, it generally must “have some ascertainable monetary value.”²¹⁶ An indirect benefit of the government’s action, the Court held, is insufficient to create a due process concern.²¹⁷

As the dissent argued, however, police enforcement of the restraining order has as much economic value as other government services, such as education or health care.²¹⁸ Because “Colorado law *guaranteed* the provision of a certain service, in defined circumstances, to a certain class of beneficiaries, and respondent reasonably relied on that guarantee,” enforcement of the restraining order created an entitlement in Gonzales.²¹⁹ Analogizing it to a private contract for protection, the dissent contended that the economic value of enforcement was tangible enough to qualify as a property interest under the Due Process Clause.²²⁰

The Court’s dismissal of restraining orders as without economic value ignores its previous assignments of value. A comparison between public provision of a service and the cost of privately obtaining the same service illustrates the value of the entitlement.²²¹ Additionally, as the Tenth Circuit illustrated, the Court has recognized property interests in a variety of government

211. *Id.*

212. *Id.*

213. *Id.* at 2809 (citing COLO. REV. STAT. § 18-6-803.5(7) (2005)).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 2810 (citing *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980)).

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

219. *Id.*

220. *Id.* at 2824 n.19.

221. *See id.* (citing *Goss v. Lopez*, 419 U.S. 565 (1975) (comparing cost of private education with that of public education and finding an entitlement)).

services.²²² It is disingenuous for the Court to refuse to recognize an entitlement here where it has done so in comparable situations.²²³

Ultimately, the Court's holding is very clear about how it views due process claims such as that advanced by Gonzales. As Justice Scalia concluded, the Court is unwilling "to treat the Fourteenth Amendment as a 'font of tort law.'"²²⁴ Rather, the Court advises states to craft their own remedy for holding police departments financially accountable for failing to enforce protective orders.²²⁵ The Court thus refused to recognize any entitlement created by the restraining order and statute. It also went out of its way to interpret Colorado's enforcement provisions as not truly mandatory in nature. Following the *Town of Castle Rock* decision, it is therefore unlikely that victims of domestic violence will have any constitutional recourse for the police's failure to enforce protective orders.

V. IMPACT ON INTERPRETATION AND ENFORCEMENT OF DOMESTIC ABUSE LEGISLATION

The impact of *Town of Castle Rock* will certainly be much broader than just the sphere of domestic violence statutes. The decision, as the majority notes, seeks to limit claims under the Fourteenth Amendment.²²⁶ The decision's effects on the interpretation and enforcement of domestic abuse statutes, however, will be particularly significant.

A. *Interpretation of Mandatory Enforcement Provisions*

Critics of the *Town of Castle Rock* decision were quick to point to the potentially tragic effect the decision could have on enforcement of similar mandatory enforcement laws in other parts of the country.²²⁷ The decision has already resulted in several local decisions that undermine years of advocacy designed to combat

222. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101 (10th Cir. 2004), *rev'd*, *Town of Castle Rock*, 125 S. Ct. 2796.

223. See *The Supreme Court, 2004 Term-Leading Cases*, *supra* note 205, at 214-15.

224. *Town of Castle Rock*, 125 S. Ct. at 2810 (quoting *Parratt v. Taylor*, 451 U.S. 527 (1981)).

225. See *id.*

226. See *id.*

227. See Margaret Graham Tebo, *Castle Rock Ruling Leaves Advocates Looking Toward Home*, 26 A.B.A.J. E-REP. 1, 1 (2005).

domestic abuse.

1. *Early Decisions Following Town of Castle Rock*

In *Starr v. Price*, a federal district court in Pennsylvania considered the case of Joan Starr, mother of Raienhna Bechtel and grandmother of Jacob Bechtel.²²⁸ On March 14, 2002, Raienhna obtained a temporary protective order against her husband Michael following years of abuse.²²⁹ When police responded to a domestic abuse call placed by Raienhna, they seized several weapons from her husband Michael before also removing him from the home.²³⁰ On April 15, 2002, approximately one month after police seized the weapons, Michael went to the police station to request their return.²³¹ The police, contrary to the terms of the final protective order granted to Raienhna on March 18, 2002, returned the weapons.²³² On August 15, 2002, Michael Bechtel used a nine millimeter gun that the police had returned to him to murder his wife, his son, and two other adults.²³³ Joan Starr sued the police station under § 1983 alleging a violation of due process.²³⁴ The court rejected Starr's substantive due process claims under *DeShaney*, but also relied on *Town of Castle Rock* to reverse Pennsylvania precedent established in *Coffman*,²³⁵ thereby refusing to recognize a procedural due process claim against police who failed to enforce a protective order.²³⁶ The court specifically noted that nothing in the Pennsylvania statute eliminated police discretion in enforcing protective orders.²³⁷ Because police had discretion in enforcing the terms of the protective order, the court held it did not create an entitlement to protection.²³⁸

228. 385 F. Supp. 2d 502, 504 (M.D. Pa. 2005).

229. *Id.*

230. *Id.*

231. *Id.* at 505.

232. *Id.*

233. *Id.*

234. *Id.* at 506.

235. *Id.* at 509; *see Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 257 (E.D. Pa. 1990) (holding that court order issued pursuant to Pennsylvania Protection from Abuse Act vested abused spouse with property right protected by the Fourteenth Amendment's Due Process Clause); *see also supra* text accompanying note 132.

236. *Starr*, 385 F. Supp. 2d at 509.

237. *Id.* at 511.

238. *Id.* This case is a particularly clear example of *Town of Castle Rock's* legacy. The police *affirmatively acted* in violation of the terms of the protective order by

Similarly, in *Caldwell v. City of Louisville*, a federal district court in Kentucky refused to find police liable for a procedural due process violation where officers failed to serve an arrest warrant on an abuser before the abuser murdered his girlfriend.²³⁹ The court found the facts in that case substantially indistinguishable from those in *Town of Castle Rock* and therefore dismissed the case with minimal discussion.²⁴⁰

A federal district court in California considered a comparable protection order case outside the scope of domestic violence legislation.²⁴¹ When relations became strained between Pastor and Mrs. Majors and some members of their congregation, Mrs. Majors obtained a restraining order against one of the members.²⁴² Despite repeated violations of the order and repeated requests for assistance by the Majors, the police refused to get involved.²⁴³ The Majors sued the city for failing to respond to their requests, alleging the failure was linked to the police's perception that the dispute was "just a bunch of black folk fighting."²⁴⁴ Relying on the *Town of Castle Rock*, the court rejected the plaintiffs' procedural due process claim because they had no entitlement to enforcement of the protective order.²⁴⁵

The unfortunate result of the Supreme Court's decision in *Town of Castle Rock* has been the dismantling of mandatory enforcement provisions in protective orders. District courts have read the Supreme Court's decision as elevating the standard for interpreting enforcement provisions as mandatory.

2. *Hope in District Court's Divergence from Town of Castle Rock*

Despite *Starr* and *Majors*, one federal court has noted that courts may read *Town of Castle Rock* too broadly by interpreting

giving back the weapon. Nonetheless, the court refused to recognize the plaintiff's claim because the statute was not sufficiently "mandatory" in nature to provide a claim in cases of police action or inaction.

239. No. 3:01CV-195-S, 2005 U.S. Dist. LEXIS 20640, at *4-5 (W.D. Ky. Sept. 19, 2005).

240. *Id.*

241. *Majors v. City of Oakland*, No. C 05-00061 CRB, 2005 U.S. Dist. LEXIS 15726 (N.D. Cal. July 25, 2005).

242. *Id.* at *4.

243. *Id.* at *4-5.

244. *Id.* at *5. The Majors advanced claims of racial discrimination, violations of substantive and procedural due process, equal protection violations, and conspiracy to violate their civil rights. *Id.* at *5-6.

245. *Id.* at *14-15.

the decision to elevate the standard for finding statutory enforcement provisions to be mandatory.²⁴⁶ The Tennessee court chose to distinguish the state's statute from that at issue in *Town of Castle Rock*. In *Hudson v. Hudson*, Jennifer Braddock repeatedly requested police enforcement of a protective order against her estranged boyfriend during the course of two years, but to no avail.²⁴⁷ James Hudson murdered Braddock, her roommate, and a friend before killing himself—all in the presence of the couples' six-year-old son.²⁴⁸ Allegedly, when the police arrived at the scene of the multiple homicides, they left the home before actually verifying the status of any of the victims, considering them "obviously dead" as a result of the "lovers' quarrel."²⁴⁹ Braddock's mother sued the city on behalf of Braddock's minor child for its failure to enforce the protective order.²⁵⁰ Refusing to dismiss the claim, the court distinguished the statute at issue from that in *Town of Castle Rock*.²⁵¹ While the court recognized the Supreme Court's reading of discretion in the Colorado statute at issue in *Castle Rock*, it held that the Tennessee statute "mandates that a police officer arrest someone when there is reasonable cause to believe that he has violated a protective order" and therefore that "the arrest is operational, not discretionary."²⁵²

The Tennessee court's holding offers hope for advocates of domestic violence protection orders. Literally speaking, the Supreme Court's interpretation of Colorado's statute as discretionary in terms of enforcement is applicable only to interpretations of the Colorado statute. While it gives a strong indication of how the Court would rule on similarly worded statutes, the Court's decision allows state statutes to be read as evidencing intent of limiting discretion.²⁵³

246. See *Hudson v. Hudson*, No. 04-2662-DP, 2005 WL 2253612, at *4 (W.D. Tenn. Sept. 14, 2005).

247. *Id.* at *1-2.

248. *Id.* at *2.

249. *Id.*

250. *Id.*

251. *Id.* at *4.

252. *Id.* (citing *Matthews v. Pickett County*, 996 S.W.2d 162, 163 (Tenn. 1999)).

253. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005) ("[A] true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order.'").

3. *Future of Minnesota's Domestic Abuse Act*

Minnesota courts could reasonably follow Tennessee in their interpretation of Minnesota's Domestic Abuse Act.²⁵⁴ The Act provides that officers "shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order"²⁵⁵ The statute also provides that a peace officer acting in good faith to procure an arrest under this statute cannot be held civilly liable.²⁵⁶ The statute's directive that officers "shall arrest" evinces a legislative intent for mandatory police action under Minnesota's canon of statutory construction.²⁵⁷ Based on the text of the Domestic Abuse Act and Minnesota's historically aggressive approach to quelling domestic violence,²⁵⁸ Minnesota courts could follow Tennessee's lead and read Minnesota's statute as distinguishable from Colorado's "indeterminate" law.

Critics might argue that the legislature intended to protect police in their decisions to enforce, or not to enforce, protection orders. In addition to exempting officers from civil liability for enforcing restraining orders in good faith, the statute also provides that an officer who fails to execute a duty under the statute cannot be held responsible under Minnesota Statutes section 609.43.²⁵⁹ That statute provides that a public officer who fails to perform a "mandatory, nondiscretionary" duty is subject to limited criminal liability for that failure.²⁶⁰ Read narrowly, the cross-reference simply eliminates criminal—but not civil—liability for officers who fail to enforce protective orders. Read broadly, the cross-reference might suggest that the duties delineated in the Domestic Abuse Act are not meant to be mandatory or nondiscretionary. Considering the text of the statute and the political background pre-dating it, Minnesota's courts could nonetheless follow Tennessee's lead by interpreting the Domestic Abuse Act's enforcement provisions as

254. MINN. STAT. § 518B.01 (2004).

255. *Id.* § 518B.01, subd. 14(e).

256. *Id.*

257. *Id.* § 645.44, subd. 16 ("'Shall' is mandatory."); *see* State v. Humes, 581 N.W.2d 317, 319 (Minn. 1998) (holding that use of "shall" in a statute mandates specified action); State v. Conger, 687 N.W.2d 639, 644 (Minn. Ct. App. 2004) (same); County of Dakota v. City of Lakeville, 559 N.W.2d 716, 721 (Minn. Ct. App. 1997) (same).

258. *See supra* Part II.B.1-2.

259. MINN. STAT. § 518B.01, subd. 14(i).

260. *Id.* § 609.43, subd.1 (emphasis added).

mandatory.

B. Civil Remedies for Failure to Enforce Protective Orders

While the Supreme Court left some room for states to define the nature of protection order statutes, the decision effectively precluded due process claims against police departments under § 1983. The Court's three-tiered indictment of Gonzales's procedural due process claim clearly indicated its unwillingness to recognize any constitutional claim against a police department that fails to enforce a restraining order.²⁶¹ The Eighth Circuit's precedent had already limited constitutional remedies for victims of abuse prior to the *Town of Castle Rock* decision.²⁶² The realm of constitutional claims for people like Jessica Gonzales, already limited, is now virtually nonexistent.²⁶³

The Supreme Court's decision did not entirely vitiate potential private actions against apathetic police departments. State laws often provide limited tort remedies against the state or municipality. As noted in the *Town of Castle Rock* oral arguments, Gonzales could have sued the police officers in Colorado state court if their failure to respond to her requests for assistance had constituted willful or wanton misconduct.²⁶⁴ Colorado's Governmental Immunity Act, like the Federal Tort Claims Act and comparable acts in most states, substantially limits tort actions against the State, however.²⁶⁵ The Court ultimately argued that if Colorado wanted to provide a remedy against police departments that failed to act, it could do so through explicit exceptions to government liability statutes.²⁶⁶

261. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005).

262. See, e.g., *Ricketts v. City of Columbia*, 36 F.3d 775, 781-82 (8th Cir. 1994) (holding survivors of murdered domestic violence victim did not have an equal protection claim against police department); *Doe v. Hennepin County*, 858 F.2d 1325 (8th Cir. 1988) (holding parents did not have a procedural due process claim against a social services agency that wrongfully removed children from their home).

263. Ms. Gonzales has now brought her claim to an international tribunal, the Inter-American Commission on Human Rights, claiming she has exhausted her remedies in U.S. courts. Robert Sanchez, *International Hearing Sought in Castle Rock Slayings*, DENVER POST, Dec. 28, 2005, at B05.

264. Transcript of Oral Argument at 16-17, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278); see also COLO. REV. STAT. § 24-10-105 (2005).

265. COLO. REV. STAT. §§ 24-10-101 to -120.

266. See *Town of Castle Rock*, 125 S. Ct. at 2810 (noting that while the Fourteenth Amendment does not provide "a system by which police departments

While state legislatures could act to craft civil action remedies as suggested by the Court, the majority of current statutes do not provide any relief for victims like Jessica Gonzales. Colorado's statute, for example, precludes most common law tort liability against the city or State; individuals may be held liable for their conduct, but are also protected by state immunity.²⁶⁷ Additionally, even if one advances a claim that is not prohibited by the statute, any judgment collected would be limited to \$150,000 per injured person per occurrence.²⁶⁸

Minnesota's statute governing municipal liability is far more generous to victims of governmental negligence. Municipalities are fully liable for the common law torts of their employees;²⁶⁹ however, they are exempt from liability for the execution or failure to execute a statute.²⁷⁰ For any claims that do proceed, judgments are limited to a total claim of \$1 million.²⁷¹ For a woman such as Jessica Gonzales, who lost her three young children as a result of the police's apathy, that amount would probably not be sufficient to compensate her for her loss. Jessica Gonzales may not have found complete relief even in a plaintiff-friendly jurisdiction such as Minnesota.

Legislators are left in the difficult position of balancing the need to compensate victims with the need to limit governmental liability. As the Colorado statute on immunity notes, more often than not allowing broad municipal liability may cause greater harm than benefit.²⁷² Perhaps the most effective solution would be to do as the Court recommended and craft a statutory remedy for situations in which the police fail to enforce domestic abuse protection orders.²⁷³ Such legislation could be narrowly tailored to protect victims of domestic violence without exploding municipal liability. Ultimately, "legal regimes focusing on the provision of adequate procedural treatment by police . . . are much more successful in . . . encouraging victims of violence to work within the

are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law").

267. COLO. REV. STAT. § 24-10-106.

268. *Id.* § 24-10-114 (1)(b).

269. MINN. STAT. § 466.02 (2004).

270. *Id.* § 466.03, subd. 5.

271. *Id.* §§ 466.06, 466.04, subd. 1.

272. *See* COLO. REV. STAT. § 24-10-102.

273. *See* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005).

system.”²⁷⁴ While stricter liability may prompt stricter enforcement in the future, the focus should nonetheless be on enforcing domestic abuse statutes before liability arises.²⁷⁵

The power to preserve the Domestic Abuse Act and similar provisions elsewhere ultimately lies with state legislatures. Legislators who fought to enact domestic abuse laws must now fight to ensure their enforcement. While some courts have already interpreted state statutes as discretionary in enforcement, state courts still have the power to define their statutes as mandatory. The Supreme Court, while refusing to defer to the Tenth Circuit’s interpretation of Colorado law, probably would have deferred to the Colorado Supreme Court.²⁷⁶ It therefore lies with the states to rectify the federal court’s dismissal of mandatory arrest provisions in domestic abuse legislation.

VI. CONCLUSION

There is certainly no easy solution to complicated situations such as that of Jessica Gonzales. It is crucial, however, that courts not revert to a time when domestic violence was ignored by police without any recourse for victims. As discussed in Part II, feminist advocates have fought hard to affect a shift in law enforcement policies from disengagement to strict enforcement.²⁷⁷ Civil protection orders coupled with strong enforcement provisions have played a key role in reducing violence against women. Despite stricter laws, however, tragic cases like Jessica Gonzales regularly slip through the system. While the Tenth Circuit recognized the importance of holding municipalities liable for such grossly negligent practices,²⁷⁸ the Supreme Court refused to do so. Justice Scalia’s opinion for the Court thoroughly criticized Gonzales’s claims.²⁷⁹ The Court went too far in its effort to limit government liability, however. The Court’s determination that mandatory language was not actually mandatory undermined thirty years of

274. Brief Amicus Curiae of the National Association of Women Lawyers et al. in Support of Respondent at 9, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278), 2005 WL 328201, at *9.

275. *Id.* at 8-9.

276. See Transcript of Oral Argument at 4-5, *Town of Castle Rock v. Gonzalez*, 125 S. Ct. 2796 (2005) (No. 04-278) (discussing deference owed to circuit court interpretation of state law).

277. See *supra* Part II.

278. See *supra* Part III.B.

279. See *supra* Part IV.

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legislative reforms attempting to protect victims of domestic violence. Further, the Court's explanations for why the protective order could not serve as a property interest were contrary to much of the Court's existing jurisprudence. The ill-fated result of the Court's holding has been the return to a discretionary law enforcement response to domestic abuse. As a district court in Tennessee recognized, however, state courts retain the power to read statutes as sufficiently indicative of mandatory intent to be enforced as such.²⁸⁰ Hopefully, Minnesota's jurisprudence will follow that lead and continue its long history of aggressively combating domestic abuse in pursuit of a just society.

280. Hudson v. Hudson, No. 04-2662-DP, 2005 WL 2253612 (W.D. Tenn. Sept. 14, 2005).