WHAT CAN STATES DO TO MAINTAIN VICTIMS' SECURITY, DETER AGGRESSOR'S REPEATED ABUSE, AND MOTIVATE POLICE DEPARTMENTS TO PURSUE CRIMINALS IN THE DOMESTIC VIOLENCE CONTEXT?

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I. Introduction

As a result of *Castle Rock v. Gonzales*,[1] when state police fail to enforce restraining orders by choosing not to arrest those who violate them, despite probable cause, the current remedies available to victims are so restricted, they may be ineffective. In *Gonzales*, the Supreme Court held that under Colorado legislation, a person protected by a restraining order does not have a property right in its enforcement.[2] In other words, victims of violence who hold restraining orders do not have standing to assert a federal claim.[3] If the police fail to respond to a complaint that an abuser is violating his restraining order, the victim may not assert in court that the state deprived her of her Fourteenth Amendment right without due process of law.[4] The Court held that because Colorado did not create a property interest in its legislative scheme, the protected party did not have a constitutionally protected right in the first place.[5] Therefore, when the police asserted their discretion and chose not to arrest the violating party, they did not violate the right to due process.[6] The Court, however, limited its holding to the specifics of Colorado's legislation and did not explicitly decide whether a state could in fact create a property right in a granted restraining order.[7]

Despite the broad language in Colorado's court order and statute, the Supreme Court denied a federal remedy and limited the federal government's role in ameliorating this historic problem.[8] As a result, the Court has forced the states to individually address the pervasive issue. Therefore, state legislatures should reconsider their respective laws to ensure that they provide a fair level of protection to victims of violence. Otherwise, as a result of *Gonzales*, the states have neither empowered the victims to take appropriate actions to find

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[1] 125 S. Ct. 2796 (2005).

[2] *Id.* at 2810.

[3] *Id.* Because the court held that there is no property interest, future parties no longer have standing to make the same federal claim that the respondent did in this case.

[4] On remand, the Tenth Circuit affirmed the district court's opinion, granting a motion to dismiss for failure to state a claim. Gonzales v. City of Castle Rock, 144 F. App'x 746, 746 (2005).

[5] *See generally Gonzales*, 125 S. Ct. at 2796.

[6] *Id.*

[7] "Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for the purposes of the Due Process Clause." *Id.* at 2809.

[8] *See infra* Part II.

safety, nor have they properly motivated the police forces to enforce protective orders. Furthermore, if states do not act and take steps to compensate for the Supreme Court's stance, states also have not satisfied the basic goals of the criminal system: punishment for crimes and deterrence for criminals.[9]

The following analysis will: (1) provide an overview of the public awareness of domestic violence in the United States;[10] (2) review *Castle Rock v. Gonzales*;[11] (3) discuss the implications of *Gonzales* on several states' jurisprudence;[12] and (4) suggest various responses for states to consider to better position victims after *Gonzales*, including state enforcement of already existing mandatory arrest statutes, liability for municipalities that do not comply, and creation of a direct benefit to a protected person when a court issues a restraining order.[13] In the past thirty years, states have made fantastic strides to counter-balance a culture of acquiescence to domestic violence.[14] After *Gonzales*, states must continue to work to help victims of domestic violence because federal courts will not provide remedy for a state's failure to do so.

II. The History of Domestic Violence Awareness and the Current Cultural Context

Domestic violence awareness in the United States can be traced to early in its history.[15] Social activism to prevent this violence gained momentum in the past few decades.[16] Though they were once taboo and hushed, incidents of domestic violence nevertheless influenced the English language and, therefore, exemplified their permanence in our culture.[17] For example, it has been said that when one refers to a "rule of thumb," one is referring to the English common law, which permitted a man to beat his wife with "a whip or a stick no

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[9] Miranda v. Arizona, 384 U.S. 436, 460, 543 (1966). "The most basic function of any government is to provide for the security of the individual and of his property." *Id.* (citing Lanzetta v. New Jersey, 306 U.S. 451, 455) (1939)).

[10] *See infra* Part II.

[11] *See infra* Part III.

[12] *See infra* Part IV.

[13] *See infra* Part V.

[14] *See infra* Part II.

[15] *See infra* note 21.

[16] *See* discussion *infra* notes 31-35.

[17] *See infra* text accompanying notes 18-20.

bigger in diameter than his thumb."[18] The phrase is currently used to refer to a tool or common way to accomplish a task.[19] Debate surrounds the phrase, much like the debate that surrounds the social consequences and pervasiveness of domestic violence in the United States.[20]

References to the truth of the "rule of thumb" story can be dated as early as 1792, as demonstrated by Henry Ansgar Kelly, who explains that the birth of the "rule of thumb" story is only an exaggerated truth based on a few historical sources, not the law.[21] One commentator flatly states that the phrase is only a myth fabricated by feminists.[22] Still others conclude that even though Kelly's argument is convincing, many ordinary people at that time in

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[18] Jennifer Freyd & JQ Johnson, Commentary, *Domestic Violence, Folk Etymologies, & 'Rule of Thumb,'* (1998), *available at* http://dynamic.uoregon.edu/~jjf/essays/ruleofthumb.html.

[19] "A rule of thumb is an easily learned and easily applied procedure for approximately calculating or recalling some value, or for making some determination." Wikipedia, The Free Encyclopedia, *Rule of Thumb*, http://en.wikipedia.org/wiki/Rule_of_Thumb (last visited May 22, 2006).

[20] *Gonzales*, 125 S. Ct. at 2817-20 (discussing the majority's failure to consider the social context in which it decided this case).

[21] Freyd & Johnson, *supra* note 18 (citing Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341 (1994)). Kelly stated that Judge Sir Francis Buller "gave credence in a legal opinion to a 'thumb' standard for permissible wife beating." *Id.*; *see also* State v. Rhodes, 61 N.C. 453 (1868) (stating "the defendant had a right to whip his wife with a switch no larger than his thumb"); State v. Oliver, 70 N.C. 60 (1874) (referring to the rule of thumb, but stating, "We may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina."). *But see* MINN. CTR. AGAINST VIOLENCE & ABUSE, *Herstory of Domestic Violence: A Timeline of the Battered Women's Movement*, tbl. 1 (1999), http://www.mincava.umn.edu/documents/herstory/herstory.html [hereinafter *Herstory of Domestic Violence*] (stating that in Rome, during the reign of Romulus in 753 B.C., wife beating was legal under The Laws of Chastisement). Roman law was incorporated into English Common Law and developed into the "rule of thumb." *Id.*

[22] Christina Hoff Sommers, Noble Lies, *in* WHO STOLE FEMINISM 203, 203-208 (1994), *available at* http://www.canlaw.com/rights/thumbrul.htm (stating that the "rule of thumb" story is "an excellent example of what may be called a feminist fiction.").

> The 'rule of thumb' story is an example of revisionist history that feminists happily fell into believing. It reinforces their perspective on society, and they tell it as a way of winning converts to their angry creed.
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> It is not to be found in William Blackstone's treatise on English common law. On the contrary, British law since the 1700s and our American laws predating the Revolution prohibit wife beating, though there have been periods and places in which the prohibition was only indifferently enforced.

Id. at 203.

history believed that wife beating with an instrument no larger in width than one's thumb was permissible under the law.[23] Whichever position one takes in this debate, the fact that such a debate exists certainly highlights the social crisis at hand. Domestic violence is a problem long engrained in our society.[24]

There are references to domestic violence in the laws of this country early in its history, as well.[25] Although some states reported that wife beating was not legal, other states allowed such actions.[26] In 1824, the Mississippi Supreme Court found in *Bradley v. State* that in order to shield accused husbands and their wives from the public shame that would accompany a prosecution for spousal abuse, the husband should be permitted to hit his wife in a great emergency.[27]

In a democracy, change is classically borne through one's individual vote.[28] However, until 1920, women did not have the right to vote and, therefore, could not directly effect political change.[29]

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[23] "[T]here was a popular (though far from universal) perception as early as 1792 that wife beating was acceptable and that a thumb standard for the instrument was appropriate." Freyd & Johnson, *supra* note 18.

[24] While statistics show that women comprise the majority of victims in domestic violence disputes, men are also the victims in many situations. *See* Neal Miller, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers*, INST. FOR L. AND JUST. (SEE T. 13) at 2 (2004), *available at* http://www.ilj.org/publications/DV_Legislation-3.pdf (stating that "[t]he National Violence Against Women Survey (NVAW) estimated that approximately 1.8 million women and one million men were physically or sexually assaulted by an intimate partner in 1995"); *see also* Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 159 n.2 (2003). Some estimates surmise that more than four million women every year are victims of domestic violence. *See* Lisa Jordan et al., *The Domestic Violence Civil Law Manual: Protection Orders and Family Law Cases* 1 (2001). Because, statistically, estimates report more women than men as victims of domestic violence, hereinafter, the victim will be referred to as a female and the aggressor as a male, though the author recognizes that such a generalization is overly simplistic and does not account for the wide variety of relationships in which domestic violence occurs or where the male is the victim and the female is the aggressor. *Id.*

[25] *See infra* text accompanying notes 26-27.

[26] *See, e.g., Oliver*, 70 N.C. 60 (1874); *Rhodes*, 61 N.C. 453 (1868); Bradley v. State, 1 Miss. 156 (1824); *see also* discussion, *supra* note 21.

[27] 1 Miss. 156, 158 (stating that a husband should be able to "exercise the right of moderate chastisement, in cases of great emergency."); *see also Herstory of Domestic Violence*, *supra* note 21.

[28] Bush v. Gore, 531 U.S. 1046, 1048 (2000) (Stevens, J., dissenting) (stating that the "ruling reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted"); *see also* U.S. CONST. art. II, § 1.

[29] *See* U.S. CONST. amend. XIX. *But see* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (explaining, in dissent, that Justice Holmes would "need more than the Nineteenth Amendment to convince [him] that there are no differences between men and women, or that legislation cannot take those differences into account").

After winning the right to vote and the Civil Rights Movement of the 1950s and 1960s, feminists used the legal and political gains they helped to realize for themselves and African Americans for their own benefit.[30] Starting in the late 1960s and early 1970s, the Battered Women's Movement began a period of substantial development.[31] The feminist movement brought the previously private subject of domestic violence into the forefront and helped change states' laws to protect and provide services and remedies to victims of violence.[32] State legislatures began to enact laws allowing judges to issue restraining orders to attempt to stop spouses from hitting their partners.[33] This remedy allowed a court to issue an injunction that could prevent violence against a domestic spouse by requiring that the aggressive partner refrain from abuse and from contact with the victimized partner.[34] In the 1970's, the Supreme Court also began to recognize that women had the right to equal protection under the Constitution, and this further fueled the feminists' efforts.[35]

Today, despite decades of public awareness efforts and political gains, many individuals still fail to empathize with victims of domestic violence.[36] For some, the situation involving abuse seems very simple: the victim should just leave the relationship.[37] Unfortunately, the

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[30] *See Herstory of Domestic Violence, supra* note 21 ("The women's liberation movement, by claiming that what goes on in the privacy of people's homes is deeply political, sets the stage for the battered women's movement.")

[31] *See id.*; Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 938 (1999).

[32] The Domestic Violence Act of 1976 provided "for temporary exclusion from the house of the violent partner using a civil injunction with the possibility of attaching powers of arrest for subsequent violations." *See Herstory of Domestic Violence, supra* note 21. In addition, by 1981, almost five hundred shelters for battered women were operating in the United States. *Id.*

[33] Michael Mattas, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool? A Discussion of the Tenth Circuit's Decision in* Gonzales v. Castle Rock, 82 DENV. U. L. REV. 519, 519 (2005) (citing Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000)).

[34] *See* Miller, *supra* note 24, at 2 (stating that a restraining order would "enjoin any further violence and, where the parties are not residing together . . . mandate that the abuser stay away from the victim.").

[35] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); *see also* The Equal Rights Amendment ("ERA"), http://www.equalrights amendment.org/overview.htm (last visited Nov. 4, 2006). The ERA was proposed by Congress in 1972 and provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The ERA was never ratified. *Id.*

[36] *See* Nancy Egan, *The Police Response to Spouse Abuse: A Selective, Annotated Bibliography*, 91 LAW LIBR. J. 499, 500 (1999).

[37] *See* Mary Zahm, *Social and Psychological Factors Associated with Domestic Violence,*

decision-making process is not that simple for the actual victims.[38] Psychologists refer to their predicament as the Cycle of Violence, which is a pattern of behavior cyclically repeated in abusive relationships and marked by three distinct phases.[39] During the first stage, the couple is loving and happy.[40] Then, during the second stage, there is a period of increasing tension.[41] The aggressor releases his tension by lashing out at the victim with a physical assault. Afterwards, during the third stage, the aggressor is often apologetic, kind, and loving.[42] The victim becomes hopeful that the violence will not happen again and many times believes that she was the cause of her partner's anger.[43] The cycle then repeats itself. During the following "Honeymoon" stage, which involves love and seduction, the victim who stays in the relationship often recalls all of the reasons that motivated her to become romantically involved with her partner in the first place.[44] However, the cycle continues, and the victim will fear that she will do something to aggravate her partner again.[45] The building tension between the parties may result in another violent episode.[46] As the cycle repeats itself, the "Honeymoon" phase generally becomes shorter and the frequency of the violent episodes increases.[47]

The victim, who often goes through the Cycle of Violence several times, will suffer from a learned helplessness and believe that she cannot escape her abusive partner.[48] Many experts describe the

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http://dl.mass.edu/stoptheviolence/pages/psych.html#mentalh (last visited October 23, 2005).

[38] *Id.*

[39] Lenore Walker, Dynamics of Domestic Violence - The Cycle of Violence, http://www.enddomesticviolence.com/include/content/filehyperlink/holder/The%20Cycle%20of%20Violence.doc) (last visited Jan. 15, 2006) (stating that the three phases of the Cycle of Violence are characterized by: (1) Tension; (2) Explosion; and 3) Love and Contrition); *see also* Zahm, *supra* note 37 (similarly stating that the three phases of the Cycle of Violence are characterized by: (1) Love; (2) Fear; and (3) Hope after a violent encounter that it will not happen again).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Zahm, *supra* note 37.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] State v. Leidholm, 334 N.W.2d 811, 819 (N.D. 1983) (citation omitted). "Learned Helplessness" is defined as:

> [a] state in which [a person] becomes passive and depressed because [s]he believes that there are no actions [she] can take to avoid the aversive stimulus. . . . [She] just gives up trying to avoid it and just takes

victim as having Battered Women's Syndrome, which is marked by the feelings of learned helplessness and low self-esteem.[49]

Experts also suggest that the aggressor could retaliate against the victim as a result of any of her failed attempts to leave the relationship.[50] The abusers want to retain power and control over their victims.[51] When the abusers fear that they are losing power, they can take out those frustrations upon their victim.[52] It is a difficult period for victims because they want to end the violent cycle, but because of their emotional, psychological, and sometimes economic reliance on the aggressor, some women, after attempting to leave abusive relationships, go back to their abusers.[53]

III. A Protected Party Does Not Have a Property Interest in Her Restraining Order and, Therefore, Does Not Have the Right to Police Enforcement

One case involving domestic violence is *Castle Rock v. Gonzales.* The victim, in this case, broke free from the Cycle of Violence she endured in order to secure a restraining order.[54] It is an example of the tragic result that can occur when victims attempt to escape their abusers. *Gonzales* is an important decision for victims of domestic violence because it removed the possibility of federal relief for victims where a state refuses to enforce a restraining order and undermines the reasonable expectations of the victim who has such a court order. In *Gonzales* the Supreme Court retained the right to independently

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> the aversive stimulus. Thus, [she] learns that [she] is helpless against the aversive stimulus.

Learned Helplessness, Psychology Glossary by AlleyDog.com, http://www.alleydog.com/glossary/definition.cfm?term=Learned%20Helplessness) (last visited Jan. 6, 2006); *see also* Kristian Miccio, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the 'Protected Child' in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1099 (1995).

[49] *Leidholm*, 334 N.W.2d at 819.

[50] Sherry Fisher, *Obstacles Still Abound for Battered Women, Says Political Scientist*, Advance on the web (Apr. 21, 2003), http://www.advance.uconn.edu/2003/030421/03042112.htm.

[51] *See* Zahm, *supra* note 37. Abusers exert control in various violent ways, including sexual and physical coercion and threats, intimidation, emotional abuse, and isolation. *Id.*

[52] *See* Fisher, *supra* note 50.

[53] *Id.* Other factors that influence a victim's decision to stay in an abusive relationship include religious or cultural beliefs and the presence of children. *Id.*

[54] *Gonzales*, 125 S. Ct. at 2800-01.

interpret Colorado state law.[55] The Court determined that the protected person does not have a property interest in her restraining order; therefore, she cannot require the local police to enforce it.[56]

A. *The Police Failed to Respond to a Complaint*[57]

During Jessica Gonzales' divorce from her abusive husband, Mr. Simon Gonzales harassed, tormented, stalked, and scared his estranged family.[58] His behavior led a Colorado state trial court to issue a temporary restraining order on May 21, 1999.[59] The court modified the order on June 4, 1999, and provided that Mr. Gonzales could see his three daughters, Rebecca, age 10, Katheryn, age 9, and Leslie, age 7,[60] every other weekend, during a couple of weeks in the summer, and during the week otherwise for dinner if previously arranged by both of the parents.[61] The court also permitted Mr. Gonzales to go to the family home to pick up the children.[62]

On June 22, 1999, at some time in the early evening, Mr. Gonzales took his three girls from the front yard of the family home[63] and brought them to the local Six Flags amusement park in Elitch Gardens, Denver.[64] In defiance of the restraining order, Mr.

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[55] *Id.* at 2804.

[56] *Id.* at 2809.

[57] Under a 12(b)(6) motion to dismiss for failure to state a claim, the court assumes that the facts are true as the party alleged them in the complaint. Therefore, the facts, as stated in Castle Rock v. Gonzales have not been heard or found to be true by a neutral finder of fact. See FED. R. CIV. P. 12(b)(6); *Gonzales*, 125 S. Ct. at 2800. The merits of this case have never been tried, and however sympathetic, ultimately, are not relevant in the case's final disposition. They simply ignite the passions of critics and could drive state legislatures to make changes in the law. It should be noted here that the facts stated have been gathered from various sources. Because the underlying criminal case did not proceed, and the facts, therefore, were not found beyond a reasonable doubt, the facts as presented in this note attempt to strike a fair balance between each party's recollections, as reported in a variety of mediums.

[58] Pam Lambert, et al., *Could Cops Have Saved Her Kids?*, PEOPLE, Apr. 11, 2005, at 91.

[59] *Gonzales*, 125 S. Ct. at 2800; *see also* Brief for the Respondent, *Gonzales*, 545 U.S. 748 (No. 04-278).

[60] *See Gonzales*, 125 S. Ct. at 2801 (stating the children's ages were 10, 9, and 7). *But see* Lambert, *supra* note 58, at 91 (stating that the children's ages were 10, 8, and 7).

[61] *See Gonzales*, 125 S. Ct. at 2801 (citing Gonzales v. Castle Rock, 366 F.3d 1093, 1097 (10th Cir. 2004)).

[62] *Id.*

[63] *Id.*

[64] *See* Joey Bunch, *Case Examines Cops' Liability*, DENV. POST, Mar. 20, 2005, at C01.

Gonzales did not previously arrange with Mrs. Gonzales any plans for the evening.[65] Jessica Gonzales repeatedly called "911," spoke with the local police department, and told them that she believed that her estranged husband took her three daughters from the front yard.[66] At some point, the police department discovered that Mrs. Gonzales and the three girls had a restraining order with visitation exceptions against Mr. Gonzales. However, the police did not believe that Mr. Gonzales was violating the court order.[67] Jessica Gonzales dually claimed that the Castle Rock police department did not attempt to bring her three daughters home, and they did not act sufficiently to locate her estranged husband.[68]

Tragically, around 3:20 the following morning, Mr. Gonzales drove his truck to the Castle Rock police station.[69] Upon arrival, Mr. Gonzales used the gun that he bought that day and shot into the police station.[70] Officers shot back and killed Mr. Gonzales.[71] Shortly thereafter, police officers at the scene found the three Gonzales girls dead in the back of the truck.[72] Mr. Gonzales provoked his own "suicide" and murdered his three daughters.[73]

B. *The Tenth Circuit Interpreted the State Statute as Creating a Property Interest*

Jessica Gonzales brought a claim under 42 U.S.C. § 1983 individually and as the next best friend of her three daughters in the United States District Court for the District of Colorado against the town of Castle Rock.[74] However, the court granted the town's motion

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[65] *See* Anderson Cooper, *360 Degrees* (CNN television broadcast May 16, 2005).

[66] *See Gonzales,* 125 S. Ct. at 2801; *see also* Paula Zahn, *Paula Zahn Now* (CNN television broadcast June 6, 2005); Cooper, *supra* note 65; Peter Jennings, *World News Tonight with Peter Jennings* (ABC television broadcast Mar. 18, 2005).

[67] *See* Nancy Grace, *Nancy Grace* (CNN television broadcast Mar. 21, 2005). Mr. Gonzales was allowed to visit with the children one night during the week pursuant to the order. *Id.*

[68] *See Paula Zahn Now, supra* note 66; *see generally Gonzales,* 125 S. Ct. at 2801-02.

[69] *Gonzales,* 125 S. Ct. at 2802.

[70] *Id.; see also* Toni Locy, *Thousands of Felons Manage to Buy Guns,* USA TODAY, Mar. 29, 2001, at 1A (discussing the breakdown in communications between the FBI and state law, resulting in the sale of a 9mm handgun to Mr. Gonzales when the federal authorities were not aware that there was a Colorado state restraining order issued against him); Bunch, *supra* note 64, at C01.; Jac Wilder VerSteeg, *Cops Get License to do Nothing,* PALM BEACH POST, June 30, 2005, at 18A.

[71] *Gonzales,* 125 S. Ct. at 2802.

[72] *Id.*

[73] *Id.*

[74] Gonzales v. Castle Rock, 307 F.3d 1258, 1260 (10th Cir. 2002) (citing

to dismiss because Jessica Gonzales failed to state an actionable claim.[75]

Jessica Gonzales appealed to the Tenth Circuit, which first heard the case in 2002.[76] The court affirmed the part of the district court's decision in regard to her claim that the city violated her substantive due process rights when the police failed to adequately enforce the restraining order.[77] However, in regard to the claim that both the girls' and her own procedural due process right was violated, the court found that Jessica Gonzales did in fact state a valid claim.[78] Therefore, the panel of the circuit court reversed that part of the decision of the district court.[79] Upon rehearing in 2004, the Tenth Circuit, *en banc*, again reversed the district court's determination that Jessica Gonzales failed to state a valid procedural due process claim.[80] However, the court also determined that the police officers were not personally liable because they had qualified immunity.[81] The town of Castle Rock appealed the Tenth Circuit's decision to the Supreme Court.

C. *The Supreme Court Reversed*

Justice Scalia wrote the opinion for the Supreme Court, Justice Souter wrote a concurring opinion, and Justice Stevens wrote the dissent.[82] Justice Scalia determined that the main issue that the Court would decide was whether a person who holds a restraining order against another has a property interest under the Fourteenth Amendment of the Constitution to have the police enforce that restraining order upon probable cause that the restrained party has violated the order.[83]

While reviewing the facts,[84] the Court took notice of the

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unpublished district court order).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 1263.

[78] *Id.* at 1266.

[79] *Gonzales*, 307 F.3d at 1266.

[80] *Id.* at 1093.

[81] *Id.* at 1096.

[82] *Gonzales*, 125 S. Ct. at 2800. Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Souter, Justice Thomas, and Justice Breyer joined in the majority opinion. *Id.* Justice Breyer joined in the concurring opinion, and Justice Ginsberg joined in the dissent. *Id.*

[83] *Id.*

[84] The Court assumed that Simon Gonzales violated the restraining order in reaching its holding. *See id.* at 2800 n.1.

language of the restraining order that Jessica Gonzales had possessed, as well as the language of the applicable Colorado statute.[85] Furthermore, the Court noted that under Colorado law, a police officer would not be held personally liable unless he proceeded in bad faith, with malice, or in violation of Colorado law.[86]

The Supreme Court held that the Colorado law did not mandate enforcement of a restraining order.[87] Rather, despite its appearance as a mandatory arrest statute, Colorado police could exercise their discretion when deciding whether to enforce the court order.[88] The Court stated that something more is needed to show that the legislature intended to enact a mandatory police response if there was probable cause to believe that the restrained party violated the restraining order.[89]

Justice Scalia reasoned that even if the Court determined that the statute clearly mandated that police officers arrest a person if he violated the restraining order against him, it would not automatically follow that Colorado's law entitles the protected person to enforcement of the restraining order under the Constitution.[90]

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[85] *Id.* at 2801, 2805. The back of the restraining order stated:

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

Id. at 2805 (citation omitted).

[86] *Id.* at 2805 n.7 (referring to COLO. REV. STAT. § 18-6-803.5(5) (1999)). The Court's reasoning focused in part on the words "shall use," "shall arrest," and "shall enforce," which mandates action by current legal standards. *Id.*

[87] *Gonzales*, 125 S. Ct. at 2805.

[88] *Id.* at 2806. At that point, the Court discussed the nature of mandatory arrest statutes and their treatment under current practices. *Id.; see also infra* Part V.A.

[89] *Gonzales*, 125 S. Ct. at 2806 (citing COLO. REV. STAT. §§ 18-6-803.5(3)(a)-(b)) (stating that "a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce the restraining order' (or even 'shall arrest . . . or . . . seek a warrant')").

[90] *Id.* at 2808.

Therefore, because the statute did not specify that the protected person had an entitlement to the enforcement of the restraining order, Colorado could not have created a property interest.[91] This fatal finding undermined Jessica Gonzales's entire argument. Since the Court determined that the state did not create a property interest in its legislative framework, it did not provide an answer to the lingering issues: whether a restraining order could constitute a property interest at all, or whether the police or the state violated the Due Process Clause as a result of inadequate procedure.[92] Therefore, people in Colorado do not have an entitlement to enforcement of the restraining orders granted to them by a Colorado judge and thus must rely on local police departments to enforce the restraining orders at each officer's discretion.[93]

Justice Scalia did not end the analysis at the question presented by the parties on appeal. The Court's decision went on to hypothetically muse about whether such an entitlement to a restraining order, should a state create one in its laws, could ever be a property interest under the Fourteenth Amendment, resulting in protection from government interference without due process.[94] The Justice discussed the issue and stated that a property right in one's restraining order: (1) is not like any other traditional conception of property; (2) is not easily liquidated and does not have an easily computed monetary value; and (3) does not materialize from a new framework of government benefits and therefore is not a direct benefit.[95] The Court's cautionary tone in discussing the unanswered issue leads the observer to believe that even if a state attempted to give a direct benefit to the victimized party and thus bestow a property right upon the individual, it may still not reach the level of entitlement that is required to be protected by the Due Process Clause.

In the concurring opinion, Justice Souter emphasized that

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[91] *Id.* at 2809.

[92] *Id.* at 2810.

[93] *Id.*

[94] *Gonzales*, 125 S. Ct. at 2796, 2809 (stating "[e]ven if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause").

[95] *Id.* at 2809-10 (stating that: (1) "such a right would not . . . resemble any traditional conception of property;" (2) entitlement to enforcement of the order "does not 'have some ascertainable monetary value;'" and (3) the right "arises incidentally, not out of some new species of government benefit or service," and therefore, the nature of the benefit is indirect).

Jessica Gonzales' so-called claim of right was only to procedure.[96] Under the Due Process Clause, one must separate the substantive property interest from the procedure applied when depriving an individual of that interest.[97] A Colorado restraining order bestowed the same so-called substantive right as the procedural right that it created: enforcement of a restraining order.[98] A restraining order does not have a substantive property interest; it is a state-created procedure only.[99] Therefore, to conclude that a property interest existed and find in favor of Jessica Gonzales would be illogical, and it would alter the entire course of the law.[100]

Dissenting, Justice Stevens defined the issue presented in this case differently than the majority. The Justice addressed whether the respondent's right to the police response is like any other government service or the service that a private company could provide and, if so, then it could be considered a property interest.[101] This view changed the dissent's analysis from the majority's point of view.

First, the dissent criticized the majority's approach to the case.[102] It pointed out that the Court did not show deference to the holdings of the lower court in regard to the lower court's interpretation of state law.[103] The majority failed to show that the Tenth Circuit's interpretation of Colorado's statute was either clearly wrong or seriously deficient in some other way.[104] The majority, unlike the

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[96] *Id.* at 2812 (Souter, J., concurring).

[97] *Id.* (noting "in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it" and listing court-recognized property interests, including welfare benefits, public school education, and utility services.)

[98] *Id. But see* discussion regarding "enforcement" as the government benefit that was the right at stake. *Id.* at 2823-24 (Stevens, J., dissenting).

[99] *Gonzales*, 125 S.Ct. at 2812.

[100] *Id.* (Souter, J., concurring) (stating that to find in the alternative "would . . . work a sea change in the scope of federal due process, for [Jessica Gonzales] seeks federal process as a substitute simply for state process").

[101] *Id.* at 2813 ((Stevens, J., dissenting) (identifying the issue of "whether, as a matter of Colorado law, respondent had a right to police assistance comparable to the right she would have possessed to any other service the government or a private firm might have undertaken to provide").

[102] *Id.* at 2814.

[103] *Id.* (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998); Bishop v. Wood, 426 U.S. 341, 346 n.10 (1976)).

[104] *Gonzales*, 125 S. Ct. at 2814 (Stevens, J., dissenting) (citing Brocket v. Spokane Arcades, Inc., 472 U.S. 491, 500 n.9 (1985); Leavitt v. Jane L., 518 U.S. 137, 145 (1996) (*per curiam*)). The dissent points out that "it is certainly *plausible* to construe '*shall* use every reasonable means to enforce a restraining order' and '*shall* arrest,'" as

Court of Appeals, ignored much of the state statute's legislative history to explain the Court's interpretation of the plain language of the statute.[105] The dissent would have found in accordance with the Tenth Circuit and would have deferred to the Circuit Court's reasonable interpretation of the Colorado statute,[106] or, in the alternative, Justice Stevens would have allowed the Colorado Supreme Court to examine the issue itself.[107]

Next, Justice Stevens listed three major flaws in the majority's analysis.[108] The dissent wrote that the Court overlooked the special circumstances in which this type of mandatory arrest statute arises.[109] Therefore, Colorado's court order and statute governing restraining orders should have been differentiated from other mandatory arrest statutes.[110] The case at hand dealt with a situation within the context of domestic violence, an area in which states have been enacting laws for three decades to eliminate the exercise of discretion by local police forces.[111] The clear policy goal of the growing body of legislation addresses the states' intent to empower victims and to

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a mandatory action that the police must complete when a restraining order is violated. *Gonzales*, 125 S. Ct. at 2814 (Stevens J., dissenting). (referring to COLO. REV. STAT. §§ 18-6-803.5(3)(a)-(b) (1999)).

[105] *Gonzales*, 125 S. Ct. at 2814 (Stevens J., dissenting); *see also id.* at 2815 n.2 (Stevens, J., dissenting) (explaining the majority's reason for re-examining the Tenth Circuit's holding and the dissent's view as that which "makes a mockery" of the Supreme Court's precedent). The majority reasoned that the Tenth Circuit failed to "draw upon a deep well of state-specific expertise." *Id.*

[106] *Id.* at 2815.

[107] *Id.*

> Colorado Supreme Court may answer questions of law certified to it by the Supreme Court of the United States or another federal court if those questions "may be determinative of the cause" and "as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Colorado] Supreme Court."

Id. at 2815 n.3 (citing COLO. R. APP. PRO. 21.1(a) (1999)).

[108] *Id.* at 2816.

[109] *Id.*

[110] *Gonzales*, 125 S. Ct. at 2816.

[111] *Id.* The dissent goes on to cite various articles and documents describing the events inciting the movement and trend over the last three decades in state law to increase the protections afforded to victims of domestic violence. The dissent refers to sources including: Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, WIS. L. REV. 1657 (2004); Mark Barenberg, *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993); Fuller & Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327 (1994); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992); Miller, *supra* note 24, *at* 7 n.74, 8 n.90; Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is It Enough?* 1996 U. ILL. L. REV. 533 (1996); Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97 (1995).

provide the statutory support for victims who seek remedies and punishment for those who violate court orders.[112] Simultaneously, it discourages police indifference to domestic violence incidents.[113]

In addition, Justice Stevens observed that the majority did not also address the fact that the Colorado law benefited a specific group of protected people and that the intent of state court's order was to provide protection for those who attain restraining orders.[114] A state judge granted the restraining order to Jessica Gonzales after finding that injury or harm would otherwise result.[115] Therefore, the Justice stated, the benefit to the protected person was direct and created an individual right to police action.[116]

Finally, the dissent asserted that the majority clearly erred when it stated that the interest that Jessica Gonzales claimed was unlike any other accepted notion of property.[117] Justice Stevens would have found that Jessica Gonzales had a valid claim and that the order entitled her to its enforcement.[118] This understanding, according to the dissent, clearly follows Court precedent.[119]

The dissent concluded by disparaging Justice Souter's concurring opinion.[120] Justice Stevens pointed out that Jessica Gonzales had a substantive right to enforcement of the restraining order.[121] Therefore, according to the dissent, the respondent

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[112] *Gonzales*, 125 S. Ct. at 2817-18, 2821 (Stevens, J., dissenting).

[113] *Id.*

[114] *Id.* at 2816. "[T]he crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing*" once they had probable cause to believe that the restrained person violated the restraining order. *Id.* at 2919-20. *But see id.* at 2800 (majority assuming that the police officers had probable cause to believe that Mr. Gonzales did in fact violate the restraining order).

[115] *Id. at* 2821.

[116] *Id.* at 2822.

[117] *Gonzales*, 125 S. Ct. at 2816.

[118] *Id.* at 2822.

[119] *Id.* The dissent explained that the Supreme Court has found "that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* (citing Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 571-72 (1972)). Various cases have stated that a property interest is created in many instances of government services, including disability benefits, public education, utility services, and government employment, as well as entitlement to fair procedure before one's drivers license is revoked and before a state commission may dismiss a person's claim. *See id.* at 2822 (citations omitted).

[120] *Id.* at 2824.

[121] *Id.* at 2824 (Stevens, J., dissenting). The Justice, in dissent, perfected Jessica Gonzales's argument and stated that the "[e]nforcement of the restraining order is a tangible, substantive act." *Id.* The respondent's procedural argument was that she was deprived of her substantive right to enforcement without due process when "the police officers failed to follow fair procedures in ascertaining whether the statutory

asserted that both a substantive and procedural right existed; they were not one and the same, as the concurring opinion suggested.[122]

IV. A New Interpretation of Restraining Orders and the Implications for States

Independent sources, such as state laws, may create property interests, and the Due Process Clause of the Fourteenth Amendment operates to protect individuals from states that attempt to divest that interest without due process.[123] Since each state individually grants property interests through its laws, the Court's holding in *Castle Rock v. Gonzales* will affect each state differently. Its effect will depend upon the language of the states' respective statutory law governing restraining orders and the accompanying case law. To date, every state provides a process for victims of domestic violence to obtain a restraining order.[124] However, each state approaches police response to domestic violence and restraining order violations differently and imposes its own standards to which the police force must adhere when responding to domestic violence calls.[125]

If a restraining order was a property interest, it would most clearly align with government benefits that the law has already identified as property interests.[126] The Supreme Court held in *Board of Regents of State Colleges v. Roth* that a benefit is a property interest when the individual who receives it has more than a simple need, desire, or expectation for it.[127] Rather, a person must have a legitimate right to the benefit.[128] In addition, the Supreme Court, in *Gonzales*, stated that even if a state creates a property interest in its statutory scheme, it remains a question of constitutional law whether that interest amounts to one that should be protected under the Due

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criteria that trigger their obligation to provide enforcement – i.e. an outstanding order plus probable cause that it is being violated – were satisfied in her case." *Id.* Of course, the majority never reached that decision because it found that the Colorado statute never created an entitlement in the first place. *Id.* at 2809.

[122] *Gonzales*, 125 S. Ct. at 2812 (Souter, J., concurring).

[123] *Id.* at 2803 (citing Paul v. Davis, 424 U.S. 693, 709 (1976) (quoting *Roth*, 408 U.S. at 577 and *Phillips*, 524 U.S. at 164).

[124] *See* Miller, *supra* note 24, at 23-24.

[125] *See generally id.*

[126] *See* discussion, *supra* notes 97 and 119.

[127] *Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

[128] *Id.*

Process Clause of the Fourteenth Amendment.[129] In other words, states may try to create a property interest in a restraining order, but the state might not succeed in invoking due process or federal protection.

As a result, *Gonzales* begs inquiry into each of the other state's statutes that seemingly mandates arrest when a person violates a restraining order.[130] The holding in *Gonzales* most affects the states that have legislatively or judicially determined that protected people have a property interest in their restraining orders.[131] Those states that have not passed omnibus legislation in this area are not directly affected by the decision in *Gonzales*.[132]

A. *The Supreme Court's High Standard Will Change Several States' Interpretations of Their Laws Governing Restraining Orders*

In its opinion in *Gonzales*, the Supreme Court did not defer to the Tenth Circuit's interpretation of the state law in its jurisdiction.[133] To benefit from the deference that the Supreme Court affords to a lower federal court's interpretation of the state law, the lower court must base its opinion on a "deep well"[134] of case law and other state-

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[129] *Gonzales*, 125 S. Ct. 2803-04. "Although the underlying substantive interest is created by 'an independent source such as 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." *Id.* (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (citations omitted)).

[130] *See id.* at 2805-06 ("We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.").

[131] This case does not currently affect states that have not enacted omnibus legislation because those states have failed to provide the same high level of rights and protection in situations of domestic violence as other states. In those situations, there is no semblance of a right to enforcement of a restraining order in the first place, and therefore, *Gonzales* has no negative result.

[132] *See supra* note 131. While states that have not passed omnibus legislation will not be directly affected by *Gonzales*, these states should consider whether the laws that they do have in place to help victims of domestic violence are protective enough. *See* discussion, *infra* Part IV.

[133] "We think deference inappropriate here." *Gonzales*, 125 S. Ct. at 2804 (referring to *Jane L.*, 518 U.S. at 145). The Supreme Court normally defers to a Circuit Court when the Circuit Court interpreted the state law in its jurisdiction. *See id.* at 2804.

[134] The Supreme Court in *Gonzales* applied this standard of review to the Circuit Court's holding and determined that because the Circuit Court did not base its decision on a "deep well" of Colorado law, it did not have to defer to the Circuit Court's interpretation of the Colorado statute. *Id.* This standard of review will hereinafter be referred to as the "deep well" standard.

specific authority rather than focusing solely on language in the restraining order, statute, or legislative history.[135] Ultimately, however, the Supreme Court will not defer to a lower court on the issue of whether the state gives a protected person a property interest as it relates to the Due Process Clause of the Fourteenth Amendment.[136]

In-state case law that interprets a restraining order statute as one that bestows a property right may be very important in future cases to overcome the standard of review that *Gonzales* established for cases involving restraining orders. As a result, if a lower federal court makes a decision based upon a "deep well" of precedent of another state's law or otherwise contributes to creating a "deep well," then the Supreme Court could find contrary to its holding in *Gonzales*.

One such state to which a deferential holding might result is Ohio.[137] However, the current record of case law may not constitute a "deep well." In *Siddle v. City of Cambridge*, the District Court stated that a restraining order is a property right, and the government, as a result, has a duty.[138] The court made this statement with little analysis. It simply said that a restraining order that prevents further abuse would be useless unless the protected party has the resources to enforce it.[139] However, the Ohio court disposed of the case by stating that while the restraining order does create a governmental duty, the duty, under Ohio law, is one owed to the public and not an individual.[140] This is the only case in Ohio that explicitly states that a restraining order creates a property right. Based upon the lack of a sufficient analytical record by the Ohio court in *Siddle* or other precedent supporting a duty to an individual under Ohio law in this

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[135] *Id.* The Tenth Circuit did not rely on case law from Colorado at all. Rather, it cited cases in "Federal Courts in Ohio and Pennsylvania and state courts in New Jersey, Oregon, and Tennessee." *Id.* at 2804; *see also id.* at 2804 n.4 (observing that those Colorado cases that the Circuit did refer to it found to be inapplicable). However, the Supreme Court in *Gonzales* also stated that the statute's text may stand alone if it is distinct to that state. *Id.* One reason that the Colorado statute's language was not determinative was that it was not "distinctive to Colorado," and it used "mandatory language that . . . appears in many state and federal statutes"). *Id.* A fair inference is that if the statute's language is a state's unique attempt to create a new type of right, then it may be interpreted in isolation from the state's case law. *Id.*

[136] U.S. CONST. art. III, §§ 1-2. The Supreme Court is the ultimate arbitrator of questions of law arising under the Constitution. *Id.* Here, a question about which entitlements constitute a property right under the Fourteenth Amendment's Due Process Clause falls squarely within the Supreme Court's authority. *Id.*

[137] *See* discussion, *infra* pp. 28-29.

[138] 761 F. Supp 503, 509 (S.D. Ohio 1991).

[139] *Id.*

[140] *Id.* (citing Sawicki v. Ottawa Hills, 37 Ohio St. 3d 222, Syllabus ¶ 2 (1988).

context, the "well" in Ohio seems shallow at best. As a result of falling short of the "deep well" standard, the District Court would not overcome the *Gonzales* burden and a similar outcome to *Gonzales* would likely result.

Both the Tenth Circuit's opinion, *en banc*, and Jessica Gonzales' argument relied upon *Coffman v. Wilson Police Dept.*, 739 F. Supp 257 (E.D. Pa. 1990), for support.[141] The court for the Eastern District of Pennsylvania held that the protected person had a property interest in her restraining order.[142] The *Coffman* court provided a more extensive analysis to support its holding than did the *Siddle* court.[143] The *Coffman* court held that although the Pennsylvania statute did not create an entitlement in the restraining order, the court order did create such an entitlement under the *Roth* standard.[144]

Furthermore, unlike the analysis of Ohio's law, the court describes a "special relationship" under Pennsylvania state law between a police officer and a person in need of assistance.[145] This special duty is an exception to the notion that police officers owe a duty to protect the public as a whole, rather than each individual.[146] The Pennsylvania court, however, recognized that the presence of a

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[141] *Gonzales*, 366 F.3d at 1102, 1109; Brief for the Respondent at 25, *Gonzales*, 366 F.3d 1093 (No. 01-1053).

[142] *See* Coffman v. Wilson Police Dept., 739 F. Supp 257 (E.D. Pa. 1990).

[143] *Compare id.* at 263-66 *with Siddle*, 761 F. Supp at 509.

[144] *Coffman*, 739 F. Supp. at 264.

> An order of court, served upon the Department, that states that the Department shall enforce the order is unambiguous. The word "shall" is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation. Although, in the context of *Roth*, property interests generally arise from sources other than judicial orders, it is in no way remarkable that an order could create an entitlement.

Id.

The court compares this judicially created property interest in a restraining order to employment contracts, which have been held to constitute property. *Id.* (citing *e.g.* Perry v. Sindermann, 408 U.S. 593, 601-03 (1972)).

[145] *Id.* (citing *e.g.* Socarras v. City of Philadelphia, 552 A.2d 1171 (Pa. Commw. Ct. (1989)). The court provided an example: "[A] police officer who passes a disabled vehicle stranded on a median has breached a duty to stop and investigate where a departmental directive requires that officers render assistance to stranded motorists." *Id.* Pennsylvania recognizes that a special relationship is present when: (1) "the police possess statutory authority to regulate a hazardous situation;" (2) "have knowledge of the situation;" and (3) "have the ability to rectify the problem." *Id.* (citing Mindala v. Am. Motors Corp., 543 A.2d 520, 527 (Pa. 1988). Notwithstanding the fact that the party meets the test, it is overcome if the police can prove that they do not have the ability to rectify the problem. *Id.* at 265 n.10 (citing *Am. Motors Corp.*, 543 A.2d. at 527).

[146] *Id.* at 264.

"special relationship" does not automatically create a substantive right.[147] The court merely uses this analysis of state law to bolster the argument that a definite *Roth* entitlement existed in the court order.[148] Although the plaintiff did not have an absolute right of enforcement, she did have a property right to "reasonable police response."[149] Another Pennsylvania court followed this lead and found that court orders granting a person an order of protection do in fact give that person an entitlement under the *Roth* standard.[150]

Since *Gonzales*, one Pennsylvania district court did not follow the precedent set in *Coffman*.[151] In *Starr v. Price*, basing its reasoning on *Gonzales*, the court said the holding in *Coffman* is contrary to the Supreme Court's decision in *Gonzales*; therefore, *Coffman* does not accurately reflect the current state of the law in Pennsylvania.[152]

Using the framework set forth in *Gonzales*, the Pennsylvania court found that the statute in question did not contain any more definitive, clear language than did the Colorado statute.[153] This decision does not create binding precedent in Pennsylvania. However, given the fact that a district court decided this case after *Gonzales*, it probably would be given more deference. Therefore, like Ohio, there may not be a "deep well" of Pennsylvania law with which to argue that a different standard should be used to review its law and determine whether it would stand despite *Gonzales*. Arguably, the new interpretation given Pennsylvania's law in *Starr* would negate any argument that protected people in that state could proffer.

B. *The Implications for New Jersey after Gonzales*

In *Gonzales*, the dissent cites to *Campbell v. Campbell*, a case decided by the Superior Court of New Jersey.[154] The case concerned

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[147] *Id.*

[148] *Id.*

[149] *Coffman*, 739 F. Supp. at 264.

[150] *See* Burrella v. Philadelphia, No. 00-884, 2003 U.S. Dist. LEXIS 25170 (Dec. 17, 2003) (involving inadequate police response when a plaintiff who attained a restraining order against a police officer shot the protected person in the chest and then killed himself shortly after getting the restraining order).

[151] *See* Starr v. Price, 385 F. Supp. 2d 502 (2005).

[152] *See id.* at 511.

[153] "The Act, just like the Colorado law in question in *Castle Rock*, creates no connection between the protected class of individuals and a right to police enforcement. *Id.* (referring to 23 PA. CONS. STAT. ANN. § 6105 (2005) (a provision that lists law enforcement's duties under the PFA Act)) (emphasis added).

[154] *Gonzales*, 125 S. Ct. at 2819 (Stevens, J., dissenting) (citing Campbell v. Campbell, 294 N.J. Super. 18 (1996)). There, the court determined "whether police

a domestic situation in which the estranged husband was present at his wife's home despite the fact that she had a restraining order against him.[155] The police responded but did not arrest him for violating a restraining order.[156] Instead, they told the estranged husband that he had to leave, and they stayed at the residence until he complied.[157] After the police officers left, the estranged husband went back to his wife's home and shot her.[158] The court noted that the police may not have had actual knowledge of the restraining order prior to the incident involved in the case. However, the court found that the police did have constructive knowledge of the restraining order because the court had filed it with the police department.[159]

This case clarified the subsequent liability for police officers who respond negligently to domestic violence disputes. Under New Jersey law, police response to domestic disputes is mandatory,[160] and the police officer must arrest the violating person.[161] According to the *Campbell* court, under New Jersey law, a special relationship exists between the police and the protected party.[162] Police officers are not entitled to immunity under any New Jersey statutes; therefore, the victim was entitled to sue the police officers for damages.[163]

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officers are immune under the New Jersey Tort Claims Act . . . for failure to make an arrest under a domestic violence order." *Campbell*, 294 N.J. Super. at 20 (citing N.J. STAT. ANN. 59:10A-6 (2005)).

[155] *Id.* at 20-21.

[156] *Id.* at 21.

[157] *Id.*

[158] *Id.*

[159] *Campbell*, 294 N.J. Super. at 22 (stating that "[w]hether or not the police officers had actual knowledge of the restraining order is irrelevant" because when the order was filed with the police department, the police were "charged with the knowledge of the order.").

[160] *Id.* at 24 (referring to N.J. STAT. ANN. 2C:25-31 (2005)). "Where a law enforcement officer finds that there is probable cause that a defendant has committed contempt of an Order entered pursuant to the provisions of . . . 2C:25-1 *et seq* . . . the defendant shall be arrested and taken into custody by a law enforcement officer." *Id.* (citations omitted).

[161] *See id.* at 24-25 (discussing whether a police officer has immunity for failure to arrest under N.J. STAT. ANN. § 59:5-5 (2005)).

[162] *See id.* at 25-26. "This court finds that by virtue of the court order, the police, as officers charged with its enforcement, promised to protect the plaintiff and that that promise created a special relationship between the plaintiff and the police officers which exempts it from the immunity statute." *Id.* at 26. *Compare* Lee v. Doe, 232 N.J. Super. 569 (App. Div. 1989) *with* Williams v. State, 34 Cal. 3d 18 (Cal. 1983) (where in California, when a police officer stops to help a motorist, no special relationship is created).

[163] *See Campbell*, 294 N.J. Super. at 22-28.

The restraining order itself, along with the officers' actual or

In *Macaluso v. Knowles*, however, another New Jersey court held that the decision in *Campbell* was erroneous.[164] The *Macaluso* court held that the state actor should have immunity because New Jersey law does not *explicitly state* a special relationship exception to a state actor's immunity under the statutory framework.[165] Therefore, New Jersey law requires the police to arrest a person who violates a restraining order upon a showing of probable cause. As a result, one of the reasons that police were not held liable in *Campbell* is no longer persuasive.[166] Regardless, the first reason articulated by the *Campbell* court to explain why immunity would not attach still stands: the legislature intended to make arrest mandatory when a restrained party violates a restraining order with failure resulting in matters related to domestic violence.[167]

In the light of *Campbell* and *Macaluso*, a protected person's ability to sue in New Jersey for failure to make an arrest is not clear.[168] Furthermore, while the New Jersey statute mandates arrest, no definite tool exists for people who suffer to sue for damages.[169] Unlike Colorado's laws, New Jersey police officers must arrest the restrained party if they have probable cause to believe that he has violated the restraining order.[170] Under New Jersey law, a police

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> constructive knowledge of the order, the history of prior incidents of domestic violence, and plaintiff's objections to presence of the defendant at the premises demonstrate that a high risk situation was presented, which required the police officers to enforce the arrest provision of the Prevention of Domestic Violence Act.

Id. at 28.

[164] Macaluso v. Knowles, 341 N.J. Super 112, 116 (App. Div. 2001).

[165] *Id.* at 117 (citing Rochinsky v. State Dep't of Transp., 110 N.J. 399, 408 (1988) ((quoting N.J. STAT. ANN. § 59:2-1 (1972) cmt. n.4 and Blunt v. Klapproth, 309 N.J. Super. 493, 507, 707 A.2d 1021 (App. Div. 1998), *cert. denied*, 156 N.J. 387 (1998)) (citing Tice v. Cramer, 133 N.J. 347, 356 (1993))).

[166] *See Campbell*, 294 N.J. Super. at 25-26 (discussing the special relationship between the police and the protected person, a second reason to conclude that state actors do not have immunity in cases of domestic violence).

[167] *Id.* at 24-25.

> [T]he immunity statute [N.J.S.A. 59:5-5] appears to be in direct conflict with N.J.S.A. 2C:25-31, which requires a police officer to make an arrest when there is probable cause to believe that there is a violation of the domestic violence order. The Legislature has made it clear that a police officer must enforce a domestic violence order and all other laws which protect domestic violence victims.

Id.

[168] *See Women Want Action When Abuser Defies Laws*, HERALD NEWS, July 12, 2005, at B01. While some believe that New Jersey's laws are sufficiently more protective than Colorado's law, others are not as sure. *Id.*

[169] *Id.*

[170] N.J. STAT. ANN. 2C:25-31 (2005).

officer does not have discretion to grant or deny the enforcement of a restraining order, and, therefore, a New Jersey court could find that a "deep well" supports that mandate, despite *Gonzales*.[171] Thus, the issue that ultimately lost the case for Jessica Gonzales in *Gonzales* could be overcome under New Jersey law. Protected people in New Jersey may have an entitlement to their restraining orders.[172]

Whether restraining orders in New Jersey could amount to a property interest under the Due Process Clause of the Fourteenth Amendment is a different issue.[173] No New Jersey court has stated that people have a property interest in their restraining orders.[174] To have entitlement to a benefit, the benefit must be "direct."[175] In addition, the Supreme Court, in discussing Colorado's restraining orders, described an entitlement in a restraining order as an "indirect benefit."[176]

In its explanation, the Court in *Gonzales* compared the indirect nature of a restraining order to the decision in *O'Bannon v. Town Court Nursing Center*.[177] There, the Court determined that while the patients at the nursing home had the right to receive Medicare and

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[171] Supreme Court precedent dictates that "a benefit is not a protected entitlement if government officials may grant or deny it at their discretion." *Gonzales*, 125 S. Ct. at 2803 (referring to Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454 (1989)).

[172] *But see id.* at 2806 ("Even in the domestic-violence context, however, it is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested.").

[173] *See generally id.* (separating the two issues in the reasoning behind the decision). Note that the Court in *Gonzales* went beyond the case at hand and stated: "We conclude . . . that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband." *Id.*

[174] *But cf. Siddle*, 761 F. Supp 503 (S.D. Ohio 1991) and *Coffman*, 739 F. Supp 257 (E.D. Pa. 1990) (both finding that the protected person had a property interest in their restraining order).

[175] *Gonzales*, 125 S. Ct. at 2910 (citing O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980)). "The Government cannot withdraw these direct benefits without giving the patients notice and an opportunity for a hearing on the issue of their eligibility for benefits." *Id.* at 786-87 (citations omitted).

[176] *Id.* at 2810 (citing generally *O'Bannon*, 447 U.S. 773). "[W]hile the withdrawal of 'direct benefits' (financial payments under Medicaid for certain medical services) triggered due process protections, . . . the same was not true for the 'indirect benefits' conferred on Medicaid patients when the Government enforced 'minimum standards of care' for nursing home facilities." *Id.* (citing *O'Bannon*, 447 U.S. at 787). According to the Court, a property interest in a restraining order would only arise "*incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed – to wit, arresting people who they have probable cause to believe have committed a crime." *Id.* at 2809.

[177] *Id.* at 2810.

Medicaid benefits and could receive care in a live-in facility under the programs, they did not have the right to continued care at a *particular* home.[178] Thus, when the state de-certified the particular home as a Medicare and Medicaid participant, it was only indirectly that it affected the patients' rights to their benefits.[179] Those patients could still use their legally entitled benefits at another facility.[180]

The Court stated that a restraining order is more like an indirect benefit than a direct benefit because the right that the party asserts is enforcement of the restraining order.[181] Besides constituting only an indirect benefit, the restraining order is only a procedural entitlement.[182] A procedural entitlement alone, without an accompanying substantive right does not support the standing one would need to bring a claim in court.[183] Alone, the procedural entitlement to seek an arrest warrant cannot result in the creation of a property interest.[184]

Neither New Jersey's statutes nor its case law makes the entitlement to a restraining order more direct or obvious than did Colorado. It seems that New Jersey has a similar framework to Colorado. Therefore, New Jersey restraining orders, according to the Supreme Court, probably would be considered indirect benefits. Thus, as they are statutorily crafted, they cannot amount to a property interest nor would they be afforded procedural protection under the Fourteenth Amendment.[185]

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[178] *O'Bannon*, 447 U.S. at 785.

[179] *Id.*

[180] *Id.*

[181] *Gonzales*, 125 S. Ct. at 2809.

[182] *Id.* at 2808 (referring to Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

[183] *Id.* (citing *Lujan*, 504 U.S. at 573 n.8 (stating, "We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.")).

[184] *Id.*

[185] Based on the reasoning of the Court in *Gonzales*, the history of cases that describe that which constitutes a property interest, and the lack of a "deep well" of case law in states, even if states amend their statutes to explicitly give a victim a property interest in his or her restraining order, it probably would never amount to the level of the types of property interests that the Fourteenth Amendment protects.

V. States Should Take Immediate Action to Achieve Their Policy Goals and Protect Victims of Domestic Violence[186]

After *Gonzales*, victims of domestic violence have few choices to gain safety for themselves and their children if the police refuse to arrest their restrained partners. If states do not act to change their laws, these victims will face increased hardships when trying to free themselves from abusive relationships. The victims, who already face psychological barriers when leaving abusive partners, do not have the legal system to fall back on for support.

There currently are no consequences for the police if they do not enforce the court order in most states.[187] States that already have mandatory arrest statutes should continue to practice mandatory arrests upon probable cause of a violation of a restraining order. In addition, states should institute policies that both positively motivate police response in situations involving domestic violence and hold the individual police officers and the municipality civilly liable for any damages that result from failure to respond. States should consider these measures and any other creative approach they can craft to continue the national movement to help victims of violence.

A. *States Should Interpret Mandatory Arrest Statutes as Court Orders and Require Mandatory Arrest*

In *Gonzales*, the Court concluded that the Colorado legislature did not require mandatory arrest for the violation of a restraining order.[188] Justice Scalia pointed out that the practice of police discretion exists despite the unambiguous nature of mandatory arrest statutes.[189] Not only did Scalia cite to the ABA Standards for Criminal Justice to lend support to the Court's analysis,[190] the opinion also

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[186] The American Civil Liberties Union ("ACLU") holds a similar position. "The ACLU said the ruling makes clear that state legislatures must pass laws ensuring that police will take domestic violence restraining orders seriously. 'We urge state legislatures to act with due haste to protect women and their families from harm,' said Lenora Lapidus, director of the ACLU Women's Rights Project." Karen Abbott, *Justices Back Castle Rock*, ROCKY MOUNTAIN NEWS, June 28, 2005, at 36A. In the article, however, the ACLU does not state any explicit recommendations. *Id.*

[187] *See, e.g.*, discussion, *supra* Part IV.B. (describing the lack of liability under the N.J. Torts Claim Act).

[188] *Gonzales*, 125 S. Ct. at 2805.

[189] *Id.* at 2805-06.

[190] *Id.* at 2806 (quoting 1 ABA Standards for Criminal Justice 1-4.5, commentary, pp. 1-124-1-125 (2d ed. 1980).

recalled *Chicago v. Morales*, where the Court disqualified the notion that a mandatory arrest statute stripped the police of all discretion.[191] Here, the Justice stated that, as a matter of practicality, police discretion would be necessary when the offender is not actually present to be arrested and his physical location is not known.[192]

While Justice Scalia correctly pointed out that courts have not historically held mandatory arrest statutes to be mandatory in general, Justice Scalia glossed over the history of mandatory arrest statutes in the domestic violence context.[193] In the beginning of the Battered Women's Movement, activists thought that implementing mandatory arrest statutes[194] would require police departments that had policies against arrest in situations involving domestic violence to take the situations more seriously.[195] Some states adopted this theory and continue to implement it today.[196] As of 2004, twenty-one states, including Colorado and the District of Columbia, required a police

> In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police . . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . They 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 diminished.

Id.

[191] *Id.* (citing Chicago v. Morales, 527 U.S. 41, 62 (1999) (striking down a loitering statute under the Fourteenth Amendment because its terms were too vague).

[192] *Id.* While the court recognizes that in cases of domestic violence, mandatory arrest statutes have been treated differently than in situations not involving domestic violence, the Court holds the position that "it is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested." *Id.* at 2807. *Gonzales*, 125 S. Ct. at 2807.

[193] *See Gonzales*, 125 S. Ct. at 2818-19 (Stevens, J., dissenting) (arguing that the majority completely ignored the context presented in the case and the trends in states to mandate arrest to solve "the problem of underenforcement in domestic violence cases").

[194] The term, mandatory arrest statute, describes statutes that require that the police officer arrests a person if the law is violated. *See id.* at 2805. However, states generally allow some threshold level of police discretion. *See* O'Connor, *supra* note 31, at 942.

[195] Pamela Blass Bracher, *Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 161 (1996) (reporting that as a matter of policy, police officers, rather than making arrests, should act as a mediatory between the parties by "removing the abuser from the home, removing the victim from the abuser's home, or explaining the ramifications of arrest, such as lost wages, bail costs, and court appearances, to the victim. By adopting a non-arrest policy, law enforcement officials institutionalized insensitivity towards battered women.").

[196] Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558-60 (1990).

officer to arrest an offender if the officer had probable cause to believe that the person violated a restraining order.[197] The decision in *Gonzales* could render each of these mandatory arrest statutes practically meaningless to future victims. Unfortunately, the Supreme Court's current understanding of mandatory arrest in domestic violence situations contradicts the clear pattern of state legislation during the last thirty years.

Whether a particular state wishes to impose a mandatory arrest statute in cases of domestic violence should be a matter of state policy. States already treat cases of domestic violence differently than other areas of the law. For example, states individually determine whether Battered Women's Syndrome, which, by definition, applies uniquely to battered women, is valid evidence to mitigate culpability and to determine the reasonableness of the force used in one's own self defense.[198] Despite the long-standing imperative that self defense applies only in cases of imminent danger,[199] some states ignore the requirement of imminence in cases involving Battered Women's Syndrome and allow a subjective standard to be used to determine whether the woman's use of force in defense was reasonable, regardless of whether the threat was imminent.[200] Others require some appearance of imminence and do not allow a battered woman to kill her sleeping abusive husband in self defense.[201]

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[197] *See* Miller, *supra* note 24. These states, with some limitations, include: Alaska, Arizona, Colorado, Connecticut, District of Columbia, Iowa, Kansas, Louisiana, Maine, Mississippi, Nevada, New Jersey, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, Washington, and Wisconsin. *Id.* at n.86 (citing ALASKA STAT. § 18.65.530; ARIZ REV. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b(a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. § 236.12(2), KAN. STAT. ANN. § 22-2307(b)(1); LA. REV. STAT. ANN. § 46-2140(1)-(2); ME. REV. STAT. ANN. TIT. 19-A § 4012(5); MISS. CODE ANN. § 99-3-7(3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. § 2C:25-21; N.Y. CRIM. PROC. LAW. § 140.10(4)(c); OHIO REV. CODE ANN. § 2935.032(A)(1)(a); OR. REV. STAT. § 133.055(2)(a); R.I. Gen. Laws § 12-29-3; S.C. CODE ANN. § 16-25-70; S.D. CODIFIED LAWS ANN. §§ 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2; VA. CODE ANN. § 19.2-81.3; WASH. REV. CODE ANN. § 10.31.100(2); WIS. STAT. ANN. § 968.075(3)).

[198] *See* Victoria Nourse, *Self Defense and Subjectivity*, 68 U. CHI. L. Rev. 1235, 1279 n.212 (2001).

[199] *See* MODEL PENAL CODE, § 3.04(1) (1962) ("the use of force upon or toward another person is justifiable when the actor believes that such force is *immediately necessary* for the purpose . . . of protecting himself against the use of unlawful force by such other person") (emphasis added).

[200] *See Leidholm*, 334 N.W.2d at 818 (where a battered wife killed her husband while he was sleeping and the court permitted her assert Battered Women's Syndrome in her own defense despite a lack of imminent danger).

[201] *See* State v. Norman, 378 S.E.2d 8 (N.C. 1988); State v. Stewart, 763 P.2d 572 (Kan. 1988).

Restraining orders should be treated differently than other mandatory arrest statutes because they are court orders. Such an order is usually the result of a hearing during which a judge makes the finding that a restraining order is appropriate. While prosecutorial discretion is generally given deference to alleviate separation of powers concerns,[202] restraining orders do not present the same issue.[203] In fact, restraining orders are a great example of exactly how the different branches of government can work together. The legislative branch drafts laws that criminalize assault and impose both civil and criminal penalties for domestic violence. The judicial branch orders an injunction requiring individuals to refrain from protected activity, the violation of which results in mandatory arrest as required by the legislature. Finally, should an individual violate the court order, the police must enforce the court order by arresting the offender. The executive branch is not compromised because it retains prosecutorial discretion, a power that deserves great deference.[204]

Through the police powers, states determine the criminal codes within their borders.[205] States can make mandatory arrest statutes to enforce their laws and can treat theses statutes as they wish in the context of domestic violence. The *Gonzales* majority, despite its obvious skepticism for such policies, should not attempt to influence the states' decisions or undermine the clear history of a state's treatment of its domestic violence statute and policy. The Supreme Court should also require the police to enforce the laws under the standard set by the individual state legislatures.[206]

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[202] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988).

[203] *But see* David M. Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 886 n.266 (1999).

[204] *Id.; see also* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 866-70 (1994).

[205] US CONST. amend. X; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[206] Here, it should be noted that while there currently is and has historically been great support for state sponsored mandatory arrest policies in the context of domestic violence, there is also criticism. *See generally* Holly Maguigan, *Wading into Professor Schneider's 'Murky Middle Ground' Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 427 (2003) (describing the disparate impact that mandatory arrest statutes have on people of color or living in "bad" neighborhoods).

B. *States Should Use Traditional Motivating Techniques and Institute Municipal Liability*

States originally enacted mandatory arrest statutes to counteract the under-enforcement of restraining orders.[207] However, particular factors that motivate individuals, here the police, vary depending upon the person.[208] Because states' police forces form society's front line in the prevention and punishment of domestic violence, they are the key players in the ultimate success of the Battered Women's Movement. It is vital to the success of the movement that states sufficiently motivate the police to enforce restraining orders.

States need to motivate their police departments and stress the importance of respecting and upholding a judge's order. First, if a state can institute policies that seize the factors that currently motivate police action and channel those factors to motivate the officer to properly enforce restraining orders, then *Gonzales* may not be as great a problem for victims of domestic violence as previously suggested.[209] Furthermore, after consideration of the history of domestic violence[210] and the goals of the last forty years of state jurisprudence,[211] states must consider that the commonly recognized motivational factors[212] may not be adequate to accomplish current policy goals. Therefore, states can institute a policy of municipal liability to ensure that it motivates each police department to take situations of domestic violence seriously.

Generally, the strongest factors that motivate public employees are a feeling of community service, teamwork in accomplishing tasks, and a sense of job stability.[213] These factors already drive police

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[207] *See supra* note 193.

[208] *See generally* Carole L. Jurkiewicz, *Generation X and the Public Employee*, 29 PUB. PERS. MGMT. 1, 55 (2000) (comparing the factors that motivate Baby Boomers and Generation X'ers and concluding that the incentives that matter to each group are relatively similar when they are pertinent to each person's particular stage of life. Examples of groups include new employees, young families, empty-nesters, and close to retirement employees).

[209] *See supra* Part I.

[210] *See supra* Part II.

[211] *See supra* notes 30-35.

[212] *See infra* Part V.B.1.

[213] *See* Jurkiewicz, *supra* note 208 (citing D. Flynn & S. Tannenbaum, 8 *Correlates of Organizational Commitment: Differences in the Public and Private Sectors*, J. BUS. & PSYCHOL. 1, 103 (1993); E. Maidani, *Comparative Study of Herzberg's Two-Factor Theory of Job Satisfaction Among Public and Private Sectors*, 20 PUB. PERS. MGMT. 4, 441 (1991); E. Solomon, *Private and Public Sector Managers: As an Empirical Investigation of Job*

officers to perform on the job, but in the past, they have not adequately motivated the police to consider restraining order violations important.[214] As a result, states must either find new ways to leverage these common motivators or identify other tools to motivate the police to carefully approach situations involving the violation of restraining orders and to arrest the violator upon probable cause. New incentive plans would positively reinforce the municipalities by intrinsically rewarding the officers who adhere to the court order and arrest those who violate a restraining order.

States, in addition to the leverage of intrinsic motivators, can consider imposing an economic penalty on a municipality that does not follow a court order or comply with state policy regarding restraining orders. Police departments should be liable if they fail to arrest upon probable cause of a violation when a mandatory arrest statute is in place. When a police department breaches its special relationship, which arises by virtue of a restraining order filed with the department, and fails to affirmatively protect the victim, the victim should be able to hold both the police officer and the municipality liable for any resulting damages.

New Jersey is an example of a state whose case law reflects the concept of a special relationship that a restraining order creates between the police department and the victim.[215] Even though actual liability in New Jersey is not clear, other states do support such liability.[216] All states must consider such policies to ensure that their

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Characteristics and Organizational Climate, 71 J. APPLIED PSYCHOL. 2, 247 (1986); J. Nalbandian & J. Edwards, *The Values of Public Administrators: A Comparison with Lawyers, Social Workers, and Business Administrators, Review of Public Personnel Administrators*, 4, 114 (1983); H. Rainey, *Reward Preferences Among Public and Private Managers: In Search of the Service Ethic*, 16 AM. REV. PUB. ADMIN. 4, 228 (1982); J.W. Newstrom, W. Reif, & R. Monczka, *Motivating the Public Employee: Fact vs. Fiction*, 5 PUB. PERS. MGMT. 67 (1976); P. Clark & J. Wilson, *Incentive Systems: A Theory of Organizations*, 6 ADMIN. SCI. Q. 129 (1961)); *see also* James R. Lindner, *Understanding Employee Motivation*, 36 J. of Extension 3 (1998), *available at* http://www.joe.org/joe/1998june/rb3.html (last visited Jan. 10, 2006) (discussing the various academic theories of motivation).

[214] *See supra* note 193 (acknowledging "under-enforcement" of restraining orders).

[215] *See supra* Part III.B. (discussing *Campbell* and the New Jersey Tort Claims Act).

[216] *Gonzales*, 125 S. Ct. at 2810 n.15.

> The state cases cited by the dissent that afford a cause of action for police failure to enforce restraining orders . . . vindicate state common-law or statutory tort claims. . . . See Donaldson v. Seattle, 65 Wn. App. 661, 881 P.2d 1098 (1992) (city could be liable under some circumstances for *per se* negligence in failing to meet statutory duty to arrest); Matthews v. Pickett County, 996 S.W.2d 162 (Tenn. 1999) (county could be liable under Tennessee's Governmental Tort Liability Act where restraining order created a special duty); Campbell v.

police departments arrest individuals who violate a restraining order and to help eradicate the apathy toward domestic violence that is prevalent nationwide.

VI. Conclusion

It is a crime to engage in domestic violence. The states, pursuant to their police powers, notify people about the behaviors that they prohibit and then provide sufficient penalties if people violate the criminal code. These penalties deter people from committing crimes and punish those who act out. However, the arduously crafted criminal system fails when criminals are not arrested by the police. Furthermore, the criminal system crumbles when the federal government does not respect the states' province and authority governing police powers and criminal codes.

After *Gonzales*, victims do not have the right to enforce their restraining order as property, and, therefore, the criminal system does not deter aggressors from violating these court orders. To compound the problem, there is a long-standing cultural bias against these victims. Moreover, while all states acknowledge that there needs to be a remedy, police officers are not motivated to enforce the restraining orders in most states because there is no individual or municipal liability. As a result of *Gonzales*, states' criminal systems are vulnerable in domestic violence contexts. It is the states' responsibility to respond after the Supreme Court's holding.

Deterrence and punishment can take the form of civil sanctions or criminal penalties, and, depending upon the situation, one alternative can be more just than another. The states, through their legislatures, have balanced the competing interests and have crafted laws that allow the issuance of restraining orders against the aggressors in domestic violence cases. Unfortunately, some states have failed to follow through on initiatives made possible by the Battered Women's Movement.

In a domestic violence situation, the aggressor conditions the victim into a state of helplessness. If restraining orders do not take

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Campbell, 294 N. J. Super. 18, 682 A.2d 272 (1996) (rejecting four specific defenses under the New Jersey Tort Claims Act in negligence action against individual officers); Sorichetti v. New York, 65 N. Y. 2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985) (city breached duty of care arising from special relationship between police and victim); Nearing v. Weaver, 295 Ore. 702, 670 P.2d 137 (1983) (statutory duty to individual plaintiffs arising independently of tort-law duty of care).

Id.

the control away from the aggressor and bestow it to the victim, then states are not adequately addressing the cultural and pervasive problem of domestic violence. Without proactivity, the state abandons these domestic violence victims, leaving them without the ability to threaten their attackers with arrest if the abuse continues.

As a result of *Gonzales*, restraining orders do not empower victims. Victims are fearful of their attackers because there is no guarantee that the victim can have her protective order enforced. To responsibly respond to the new crisis, states need to act swiftly. States can ensure that the progress made during the past few decades in the Battered Women's Movement is not in vain. States must act to give power back to the victims of domestic violence. Police must respect the legislatures and judges, and if the state mandates arrest, then police should comply. States must properly motivate their police departments to treat violations of restraining orders as crimes and encourage police to enforce the court order. Furthermore, states could impose municipal liability to cities whose agents do not properly respond and where damages result. Police departments are the front line of crime prevention and penalty enforcement in the United States. As a nation, we demand respect for our Finest, our police officers, and we likewise should demand similar respect for our victims.