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Robert Michael Kline

CONSTITUTIONAL LAW: IS THERE A PROTECTED INTEREST IN PROTECTION (OR ARE COURT ORDERS MERELY SUGGESTIONS)?

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

*Robert Michael Kline**

Respondent's husband abducted his three little girls, ages 10, 8, and 7, and shot each of them in the head at close range.[1] He committed this abhorrent and tragic triple murder despite the fact that Respondent had obtained a restraining order commanding him to stay away from the girls.[2] Accordingly, Respondent claimed the town of Castle Rock, Colorado violated the Due Process Clause[3] and brought an action under 42 U.S.C. § 1983,[4] alleging that the town's police department tolerated the non-enforcement of restraining orders and that such actions were either willful, reckless, or grossly negligent.[5] The district court granted the town's

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* To my wife, Olguita, whose inexhaustible love and patience provide constant inspiration.

1. For an article describing the tragedy see Gonzalez v. Castle Rock, Mar. 20, 2005, http://www.cbsnews.com/stories/2005/03/17/60minutes/main681416.shtml.

2. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2801-02 (2005). Respondent obtained a restraining order from a state trial court in conjunction with her divorce proceedings. *Id.* Respondent's husband subsequently abducted Respondent's three daughters from outside the family home. *Id.* After Respondent realized that the children were gone, she called the police several times throughout the night in a futile effort to have the restraining order enforced. *Id.* At 3:20 a.m., Respondent's husband arrived at the police station and opened fire; officers returned fire, killing him instantly. *Id.* Police soon discovered that he had murdered all three daughters and left them in the cab of his pickup truck. *Id.*

3. U.S. CONST. amend. XIV, § 1.

4. 42 U.S.C. § 1983 (2000). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

5. *Gonzales*, 125 S. Ct. at 2802.

motion to dismiss.[6] The court of appeals, however, reversed, holding that Respondent had a legitimate procedural due process claim.[7] On rehearing en banc, a divided court reached the same conclusion,[8] but the United States Supreme Court reversed and HELD, that Respondent did not, under the Fourteenth Amendment of the United States Constitution,[9] have a property interest in police enforcement of the restraining order against her husband.[10]

The Fourteenth Amendment's Due Process Clause provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law."[11] The Supreme Court's interpretation of the clause prohibits the federal government from depriving any person of life, liberty or property without first giving that person notice and an opportunity to be heard.[12] Consequently, the first element of a procedural due process claim that alleges a deprivation of property is the identification of a property interest.[13] In cases involving tangible property, a property interest is usually easy to ascertain.[14] When the property interest is not readily identifiable, however, procedural due process cases become more complicated.[15] As a result, there has been much discussion about what should constitute a property interest requiring procedural due process.[16]

In *Board of Regents of State Colleges v. Roth*,[17] the Supreme Court

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6. *Id.*

7. Gonzales v. City of Castle Rock, 307 F.3d 1258, 1266 (10th Cir. 2002).

8. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1095 (10th Cir. 2004) (en banc). In *DeShaney v. Winnebago County Department of Social Services*,489 U.S. 189 (1989), the Supreme Court determined that the Constitution does not require a state to protect its citizens from a third party. *See Gonzales*, 366 F.3d at 1099. Subsequently, respondent did not have a valid substantive due process claim. *Id.* Nevertheless, *DeSahaney* left open the possibility of a claim based on procedural due process. *See id.*

9. U.S. CONST. amend. XIV.

10. *Gonzales*, 125 S. Ct. at 2810.

11. U.S. CONST. amend. XIV, § 1.

12. *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863) (holding that "[c]ommon justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence").

13. *See* Lehr v. Robertson, 463 U.S. 248, 256 (1983) (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895-96 (1961)); Morrissey v. Brewer, 408 U.S. 471, 482-83 (1972) (establishing that when the Due Process Clause is invoked in a novel context, the Court can properly evaluate the adequacy of the State's process only after the precise nature of the interest has been identified).

14. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (challenging a replevin procedure that allowed a third party to seize items that the appellant had purchased on credit).

15. *See* Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (analyzing whether there was a property interest in a citizen's statutory entitlement to welfare benefits).

16. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 534-38 (2002) (describing the evolution of the Supreme Court's interpretation of what constitutes a property interest as contemplated by the Due Process Clause of the United States Constitution).

17. 408 U.S. 564 (1972).

examined the notion of intangible property interests.[18] In *Roth*, the respondent was hired as an assistant professor for a fixed term of one year.[19] When he was not rehired the following year, he brought an action alleging that the decision violated his procedural due process rights.[20] The district court granted summary judgment for the respondent[21] and the court of appeals affirmed.[22] The United State Supreme Court, however, reversed.[23]

In coming to its decision, the Court stated that "the range of interests protected by procedural due process is not infinite."[24] The Court then defined property interests by noting that "[t]o have a property interest in a benefit, a person clearly must . . . have a legitimate claim of entitlement to it."[25] The Supreme Court went on to point out that property interests are not created by the Constitution.[26] Instead, they are created and "defined by existing rules or understandings that stem from an independent source such as state-law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[27] Thus, even though the respondent had an "abstract concern" in being rehired, he did not have a property interest in continued employment at the university, absent specific contractual terms providing a right to re-employment for the next year.[28] Although the Court did not find that respondent had a property interest,[29] *Roth* did serve to establish the benchmark that future courts would look to in determining whether an individual had a protected interest for procedural due process purposes.[30]

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18. *See id.* at 577 (describing characteristics of an intangible property interest).

19. *Id.* at 566.

20. *Id.* at 568-69. The president of the university did not give respondent any reason for the decision, nor an opportunity to challenge the decision. *Id.* at 568. The terms of respondent's one year contract did not require the president to use any procedure in making his decision. *Id.*

21. Roth v. Bd. of Regents, 310 F. Supp. 972, 983 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972).

22. Roth v. Bd. of Regents, 446 F.2d 806 (7th Cir. 1971) (holding that the substantial adverse effect of nonretention on career interests of professor warranted letting him explore reasons for nonretention and that a minimal opportunity to test them in a hearing was an appropriate protection of a due process right), *rev'd*, 408 U.S. 564 (1972).

23. *Roth*, 408 U.S. at 579.

24. *Id.* at 570.

25. *Id.* at 577.

26. *Id.*

27. *Id.*

28. *Id.* at 578.

29. *Id.* at 579.

30. *See id.* at 577-78 (establishing the legitimate claim of entitlement standard). Subsequently, the Court acknowledged a number of entitlement property interests protected by the Due Process Clause including continued public employment, Perry v. Sinderman, 408 U.S. 593, 602-03 (1972); a free education, Goss v. Lopez, 419 U.S. 565, 574 (1975); and the receipt of government utility services, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978).

Roth, therefore, defines property as an "entitlement."[31] The inherent difficulty in the definition rests in the fact that the quoted language from *Roth* lends itself to two conflicting approaches.[32] On the one hand, an entitlement could be defined by the importance the individual places on the interest; that is, if an individual relies on a government benefit in her daily life, then it should be deemed a property interest that cannot be arbitrarily undermined.[33] The *Roth* Court, however, also concluded that an entitlement is determined by an "independent source such as state law" and the "rules or understandings" that it creates.[34] Accordingly, this view suggests that an entitlement only exists if there is a "reasonable expectation to continued receipt of a benefit."[35] The Supreme Court has generally followed this second approach.[36]

In *O'Bannon v. Town Court Nursing Center*,[37] the Supreme Court further narrowed the definition of property interest by restricting the approach elucidated in *Roth*.[38] In *O'Bannon*, patients at a nursing home claimed they had a right to a hearing before a state or federal agency could revoke the home's authority to provide them with care paid for by the government.[39] In response to the patients' claim, the *O'Bannon* Court acknowledged that the government cannot withdraw direct benefits from an individual without due process, but also determined that residents of the nursing home were only indirectly and incidentally affected by government action aimed towards a third party.[40]

The *O'Bannon* Court further explained that even though government action may have an adverse impact on certain individuals, if that impact is incidental and indirect, it cannot amount to a deprivation of any property interest.[41] Analyzing the case using the *Roth* standard, the *O'Bannon* Court found that such an indirect result could not constitute a legitimate claim of entitlement.[42] Thus, the direct/indirect impact test refined the definition of protected entitlement interest first set forth in *Roth*.

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31. *Roth*, 408 U.S. at 577; *see also* CHEMERINSKY, *supra* note 16, at 537 (discussing the ramifications of *Roth*'s entitlement view to property).

32. CHEMERINSKY, *supra* note 16, at 537 (same).

33. *Id.*

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

35. CHEMERINSKY, *supra* note 16, at 537.

36. *Id.* at 537-38.

37. 447 U.S. 773 (1980).

38. *Id.* at 787-88.

39. *Id.* at 775. In *O'Bannon*, residents of a retirement home brought a procedural due process claim suggesting that they had been deprived of a property interest when the home was decertified, resulting in the loss of its government funding. *Id.* at 777.

40. *Id.* at 786-87.

41. *Id.* at 787.

42. *Id.*

Three years after *O'Bannon*, the Supreme Court added another element that must be satisfied before an entitlement interest may be recognized.[43] In *Olim v. Wakinekona*,[44] the Supreme Court decided whether the transfer of an inmate from a Hawaii state prison to a California state prison implicates a protected interest within the meaning of the Due Process Clause.[45] The Court held that even though a state creates a protected interest by putting substantive limits on official discretion, Hawaii's prison regulations did not place any substantive limitations on the prison administrator's discretion to transfer a prisoner.[46] That is, if the decisionmaker can deny the requested relief for any constitutionally permissible reason, as opposed to being required to base his decision on "objective and defined criteria," then the state has not created a protected entitlement requiring due process.[47] As a result, a benefit is not a protected entitlement if government officials may deny it at their discretion.[48]

In failing to find a protected interest in the enforcement of the restraining order, the instant Court adopted the *Olim* rationale by emphasizing the fact that police officers could use discretion in determining how to enforce the restraining order.[49] Specifically, the Court observed that police officers could enforce the order either by arresting the husband, or by seeking an arrest warrant; thus, the instant Court asserted that enforcement could be accomplished in a variety of ways.[50] According to the Court, if the means of enforcement were indeterminate, the police officer's duty was discretionary and could not be considered mandatory.[51]

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43. *See* Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (inquiring into the substantive limitations placed on official discretion).

44. *Id.* at 238.

45. *Id.* at 240. Respondent was serving a life sentence for a murder conviction in a maximum security state prison in Hawaii. *Id.* There, he was identified as a security risk and deemed a disruptive inmate because he prevented the prison from effectively conducting certain programs. *Id.* at 241. As a result, he was transferred to Folsom State Prison in California. *Id.*

46. *Id.* at 249.

47. *Id.*; *see also* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462-63 (1989) (holding that regulations containing explicitly mandatory language create a protected interest).

48. *See, e.g.*, Bd. of Pardons v. Allen, 482 U.S. 369, 377-78 (1987) (holding that mandatory language in a regulation, in conjunction with specific criteria that have been met in order to deny a benefit, creates a presumption of entitlement); Hewitt v. Helms, 459 U.S. 460, 472 (1983) (holding "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest").

49. *See* Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803-08 (2005) (determining the degree of police discretion tolerated under Colorado law). Even though *Olim, Allen,* and *Hewitt* addressed liberty interests in a prison setting, the methodology used in those cases has also been "employed in claims of property interests protected by the Due Process Clause." *Gonzales*, 366 F.3d at 1102 n.6 (quoting Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam)).

50. *Gonzales*, 125 S. Ct. at 2807-08.

51. *Id.*

The instant Court's determination that enforcement of the restraining order was discretionary also came from the order's directive to law enforcement personnel.[52] In light of the restraining order's language, the Court did not believe that the provisions of the Colorado law made enforcement of restraining orders mandatory.[53] Even though the Colorado statute used the words "shall arrest" and "shall enforce," the Court nevertheless determined that, in light of other "seemingly mandatory legislative commands" that had not been construed literally, the statute afforded the police discretion in deciding whether to enforce the restraining order.[54] The Court thus decided that in order to make enforcement mandatory the Colorado legislature would have needed stronger language in the statute.[55]

The instant Court also looked to *O'Bannon* to support its finding that Respondent did not have a cognizable property interest in the enforcement of her restraining order.[56] The instant Court suggested that the benefit Respondent would have received from police enforcement of the restraining order was only incidental or indirect.[57] In explaining this point,

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52. *Id.* at 2804-05. The language on the restraining order effectively restated the language contained in Colorado's applicable restraining statute, which provides:

> (a) Whenever a protection 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 protection 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 protection order; and (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order. (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

COLO. REV. STAT. § 18-6-803.5(30) (2005).

53. *Gonzales*, 125 S. Ct. at 2806.

54. *Id.*

55. *Id.* The Court pointed out that other statutes incorporating the word "shall" were clearly meant to afford the police discretion. *Id.* As an example, the Court pointed out a Colorado statute that tells municipal police chiefs that they "'shall pursue and arrest any person fleeing from justice in any part of the state'" and that they "'shall apprehend any person in the act of committing any offense . . . and, forthwith and without any warrant, bring such person before a . . . competent authority for examination and trial.'" *Id.* (citing COLO. REV. STAT. § 31-4-112 (2004)). The Court stated it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Id.* (quoting Chicago v. Morales, 527 U.S. 41, 62 n.32 (1999)).

56. *Gonzales*, 125 S. Ct. at 2810.

57. *Id.*

the Court stated that Respondent's alleged property interest did not arise out of "some new species of government service."[58] Rather, the alleged property interest arose out of arresting people who police have probable cause to believe have committed a criminal offense; this, the Court asserted, is a discretionary function that government actors have always carried out.[59]

Furthermore, the Court indicated that if the legislature had intended to give the Respondent the sort of statutory entitlement envisioned in *Roth*, then the statute would have explicitly reflected it.[60] The statute gave the Respondent the power to initiate contempt proceedings if the order was issued in a civil action, and request initiation of contempt proceedings if the order was issued in a criminal action. However, the statute made no mention of the Respondent's ability to request, or more importantly, to demand, that an arrest be made.[61] The lack of explicit authorization giving the Respondent the ability to force the police's hand was instrumental in the Court's decision.[62]

The instant Court, however, failed to explain why the state statute must explicitly authorize the respondent to initiate enforcement in order to establish a protected property interest.[63] While *Roth* does require that a claimant have a "legitimate claim of entitlement" before a protected interest can be established,[64] this standard appears to afford the Court significant latitude in recognizing property interests.[65] In the instant case, the Court did not show that legitimate claims of entitlement have only come from statutes that explicitly provide the individual with an entitlement.[66] In fact, the Court quoted the language in *Roth* asserting that property interests are "defined by existing rules or understandings that stem from an independent source such as state law."[67]

In the instant case, the independent source of state law is the Colorado

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58. *Id.* at 2809.

59. *Id.*

60. *Id.* at 2808. The Court suggests that even though the statute does reference "protected person[s]" several times, the statute makes these references in connection with matters other than enforcement. *Id.*

61. *Id.* at 2809.

62. *See id.* (rationalizing that Respondent's interest stemmed from a statute which was silent about any power to demand an arrest).

63. *See id.* (asserting merely that the creation of an entitlement cannot "simply g[o] without saying").

64. Roth v. Bd. of Regents, 408 U.S. 564, 577 (1972).

65. CHEMERINSKY, *supra* note 16, at 536-38.

66. *See Gonzales*, 125 S. Ct. at 2807-09 (reasoning that no explicit entitlement exists, without explaining why such a finding is conclusive).

67. *Id.* at 2803.

restraining order statute.[68] Furthermore, it does not seem unreasonable to assert that there is an understanding that protected persons are entitled to enforcement of a restraining order that has been issued with the purpose of protecting them.[69] One might wonder what the purpose of the law is if the protected person is not entitled to protection.[70] Surely the victim of domestic abuse who petitions a court for a restraining order does not do so with the expectation that he or she will go unprotected.[71] Taken in this light, the restraining order must create a reasonable expectation that a legitimate claim of entitlement to its enforcement exists.[72] Furthermore, it remains unclear why the instant Court felt Respondent must be explicitly authorized to initiate enforcement when the statute itself compels enforcement.[73]

The Court also failed to acknowledge that it is implicit in the statute that if police seek an arrest warrant when "an arrest would be impractical under the circumstances,"[74] rather than arrest the individual who is in violation of the order, they are still obligated to arrest the individual at the first reasonable opportunity.[75] More importantly, the Court did not acknowledge that the restraining order may have called for mandatory enforcement in the sense that the police had to do *something* when offered probable cause that the restraining order had been violated.[76] The language of the statute mandated that police either arrest the husband, or seek a warrant for his arrest; the option not to act was apparently impermissible within the language of the statute.[77]

Additionally, the Court gave inadequate weight to the legislative history of domestic violence statutes when concluding that enforcement of

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68. *Id.* at 2804-05.

69. *Id.* at 2821 n.16 (Stevens, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.* at 2822.

73. *Id.* at 2821.

74. *Id.* at 2819 (quoting COLO. REV. STAT. §18-6-803.5(3)(B) (1999)).

75. *See id.* at 2820 (Stevens, J., dissenting) (arguing that the statute was motivated by distrust of police discretion in the domestic violence context).

76. *Id.* at 2819-20 (Stevens, J., dissenting). Law enforcement officers might have a small amount of discretion in how they enforce a restraining order, but this does not diminish the underlying entitlement to enforcement. *Gonzales*, 366 F.3d at 1107 (majority opinion). States are given tremendous discretion in how to educate their children, but the Supreme Court still determined that the ultimate receipt of the benefit, in the form of a free education, was a protected entitlement. *Id.* (citing Goss v. Lopez, 419 U.S. 565, 573-74 (1975)).

77. *Gonzales*, 125 S. Ct. at 2819-20 (Stevens, J., dissenting). *See also* Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 703 (1994) (discussing the problems battered women face in the legal system).

the restraining order was discretionary.[78] Despite the fact that the Supreme Court has determined that the word "shall" is used in laws to express what is mandatory,[79] the instant Court looked to other statutes where the word "shall" had been interpreted to afford police discretion in the enforcement of certain laws.[80] The legislative history of domestic violence statutes, however, makes it clear that the statutes were created with the express purpose of compelling police officers to enforce restraining orders.[81]

The instant Court could have made an effort to distinguish *O'Bannon*.[82] Specifically, the statute in the instant case identified Respondent and her

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78. *Gonzales*, 125 S. Ct. at 2819 (Stevens, J., dissenting). The Colorado General Assembly passed omnibus legislation aimed at domestic violence in 1994. *Id.* at 2817-18. In doing so, Colorado joined a nationwide movement of states that targeted the crisis of police underenforcement of domestic violence. *Id.*; *see also* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662-63 (discussing police officers' tendency to assign domestic violence calls low priority or ignore them entirely); Krause, *supra* note 77, at 703 (discussing the problems battered women face in the legal system).

79. *See* Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (discussing the customary use of "shall" as language used in command); *see also* Mallard v. U.S. Dist. Ct., 490 U.S. 296, 302 (1989) (categorizing "shall" along with "must" as command expressions); BLACK'S LAW DICTIONARY 958 (abridged 6th ed. 1991) ("As used in statutes . . . ['shall'] is generally imperative or mandatory . . . The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."). *Cf.* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

80. *See Gonzales*, 125 S. Ct. at 2806 (examining the tendency to tolerate discretion despite the presence of mandatory language).

81. *See generally* Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondent, Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (No. 04-278) (reasoning that the intent of the laws is to serve as a barrier, and thus requires arrest upon violation). Several jurisdictions around the country have held that enforcement of restraining orders is mandatory. *Id.* at 10-16. The legislative history of the Colorado statute also indicates that the enforcement of restraining orders did not leave police with discretion in their enforcement. *Id.* at 9-10. Furthermore, the Violence Against Women Act of 1993 (VAWA), Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994), signaled "Congress' recognition of domestic violence as a national problem." *Id.* at 17. *See generally* S. REP. NO. 103-138 (1993); H.R. REP. NO. 103-395 (1993); S. REP. NO. 102-197 (1991); S. REP. NO. 101-545 (1990) (demonstrating Congress's concern with the national domestic violence problem). "When considering VAWA, Congress heard ample evidence that protective orders are rendered ineffective by non-enforcement." Brief for National Network to End Domestic Violence, *supra*, at 18-19. As a result of its investigations and work on this issue, Congress decided that any "burden" imposed on law enforcement by policies requiring enforcement of protective orders was one worth shouldering to protect victims of domestic violence and their children. *Id.* at 18. A protective order that is issued after notice and a hearing, and is consistent with the State's policy for safeguarding against future domestic violence, thus distinctly secures a benefit that supports a claim of entitlement under the Due Process Clause of the Fourteenth Amendment. *Id.* at 8.

82. *See* O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 787 (1980) (finding that the impact was merely incidental/indirect, unlike the instant case).

daughters as "protected persons."[83] As such, the benefit to Respondent and her daughters should be viewed as integral to both the statute and the court order, rather than incidental or indirect. The instant Court, in relying on *O'Bannon*, did not differentiate between restraining orders and criminal laws of general applicability.[84] With laws of general applicability, the community at large receives the primary benefit, whereas the individual receives only an incidental benefit arising from enforcement of the law; in the case of restraining orders, however, the protected person identified in the order receives the primary benefit from its enforcement.[85]

Despite the instant Court's apparent reliance on binding precedent, it seems as though policy considerations were the instrumental factor that led to the instant Court's holding. Although the instant Court was presented with a significant amount of evidence proving that the non-enforcement of domestic restraining orders leads to more serious occurrences of domestic violence,[86] the instant Court seemed more concerned with a slippery slope argument—one that would potentially "bankrupt municipal governments for their inevitable instances of less than perfect law enforcement."[87] This latter policy concern seems premature, as a modicum of fair process would conceivably protect the Respondent's interest from arbitrary deprivation.[88]

The instant Court should have used *Roth*, *O'Bannon*, and *Olim* as tools to support finding a protected interest in the enforcement of Respondent's restraining order, for any other holding renders domestic abuse restraining orders completely worthless. Nevertheless, the Supreme Court marginalized several of the instant facts in order to resist a holding that some predicted would subject municipal governments to endless litigation.[89] By further

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83. COLO. REV. STAT. § 18-6-803.5(1.5)(a) (2005) ("'Protected person' means the person or persons . . . for whose benefit the protection order was issued.").

84. *See generally Gonzales*, 125 S. Ct. at 2796 (failing to distinguish restraining orders from laws of general applicability).

85. *Id.*

86. Brief for National Network to End Domestic Violence, *supra* note 81, at 17.

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

88. *Gonzales*, 125 S. Ct. at 2824-25 (Stevens, J., dissenting). Also, in *Roth v. Board of Regents*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting), Justice Marshall noted that:

> It can scarcely be argued that government would be crippled by a requirement that the reason [for nonenforcement] be communicated to the person most directly affected by the government's action. . . . As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

Id.

89. *See* Breaden Marshall Douthett, *The Death of Constitutional Duty: The Court Reacts to*

limiting the boundaries of property interests, the Court sacrificed the very ideal sought by those who possess restraining orders: safety from harm and assurance of government protection. Unfortunately, this decision demonstrated the Court's unwillingness to recognize legitimate property interests. More importantly, it indicated the Court's preference to eviscerate duly issued court orders, rather than afford the victims of domestic violence even a scintilla of security.

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the Expansion of Section 1983 Liability in DeShaney v. Winnebago County Department of Social Services, 52 OHIO ST. L.J. 643, 651 (1991) (discussing the reluctance of courts to create law which burdens the state with new tort duties).