FILED
United States Court of Appeals
Tenth Circuit

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PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JESSICA GONZALES, individually and as next best friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales and Leslie Gonzales,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK; AARON AHLFINGER; R. S. BRINK; MARC RUISI, Officers of the Castle Rock Police Department,

Defendants-Appellees.

COLORADO MUNICIPAL LEAGUE; COLORADO COUNTIES, INC.; and COLORADO ASSOCIATION OF CHIEFS OF POLICE,

Amici Curiae.

No. 01-1053

ON REHEARING EN BANC
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 00-D-1285)

Brian J. Reichel, Attorney, Thornton, Colorado, for Plaintiff-Appellant.

Thomas S. Rice, Senter Goldfarb & Rice, L.L.C. (Eric M. Ziporin, Senter, Goldfarb & Rice, L.L.C. and Christina M. Habas, Bruno, Bruno & Colin, P.C., with him on the brief), Denver, Colorado, for Defendants-Appellees.

Carolynne White, Staff Attorney, Colorado Municipal League; Thomas J. Lyons, Hall & Evans, LLC, Denver, Colorado; and Julie C. Tolleson, Kennedy & Christopher, PC, Denver, Colorado, on the brief for Amici Curiae.

Before **TACHA**, Chief Judge, **SEYMOUR**, **EBEL**, **KELLY**, **HENRY**, **BRISCOE, LUCERO**, **MURPHY**, **HARTZ**, **O'BRIEN**, and **McCONNELL**, Circuit Judges.

SEYMOUR, Circuit Judge.

This civil rights case asks us to decide whether a court-issued domestic restraining order, whose enforcement is mandated by a state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment. The district court held it does not and dismissed the action under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief could be granted. A panel of this court reversed.

support her claims." *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Only where it appears beyond a doubt that a plaintiff cannot prove any set of facts entitling her to relief, can a motion to dismiss be granted. *Id.* With these precepts guiding our review, the complaint sets forth the following tragic facts.

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order limiting her husband's ability to have contact with her and their daughters, aged ten, nine and seven. The restraining order was issued by a state court in accordance with COLO. REV. STAT. § 14-10-108, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." Aplt. Appx. at 29. The restraining order further stated "the court . . . finds that physical or emotional harm would result if you are not excluded from the family home," and directed Mr. Gonzales to stay at least 100 yards away from the property at all times. *Id.* *See also* COLO. REV. STAT. § 14-10-108(2)(c) (party can be excluded from family home upon a showing that physical or emotional harm would otherwise result).

Neither parent nor the daughters could unilaterally change the terms of the order because it explicitly states:

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

SUSAN WENDALL WHICHER & CHERYL LOETSCHER, HANDBOOK OF COLORADO FAMILY LAW, ch. IV, F-12 at 2 (3d ed. 1996) (emphasis in original) (hereinafter "Restraining Order").[1]

The order also contained explicit terms directing law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining

order, and they "shall take the restrained person to the nearest jail or detention facility . . . ." *Id.*

Upon the trial court's issuance of the temporary restraining order, and pursuant to COLO. REV. STAT. § 18-6-803.7(2)(b), the order was entered into the state's central registry for such protective orders, which is accessible to all state and local law enforcement agencies. On June 4, 1999, the order was served on Mr. Gonzales. On that same date, upon "having heard the stipulation of the parties, and after placing the parties under oath and examining the parties as to the accuracy of the Stipulation . . . and finding that [the] Stipulation [was] in the best interests of the minor children," Aplt. Appx. at 30, the state court made the restraining order permanent. The temporary order's terms were slightly modified to detail Mr. Gonzales' rights to parenting time with his daughters on alternative weekends, and for two weeks during the summer. The order also allowed Mr. Gonzales "upon reasonable notice . . . a mid-week *dinner* visit with the minor children. Said visit shall be arranged by the parties." *Id.* (emphasis added). Finally, the order allowed Mr. Gonzales to collect the girls from Ms. Gonzales' home for the purposes of parental time. However, all other portions of the temporary restraining order remained in force, including its command that Mr. Gonzales was excluded from the family home and that he could not "molest or disturb the peace" of Ms. Gonzales or the girls. *Id.* at 29.

Despite the order's terms, on Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m., Mr. Gonzales abducted the girls while they were playing outside their home. Mr. Gonzales had not given Ms. Gonzales advanced notice of his interest in spending time with his daughters on that Tuesday night, nor had the two previously agreed upon a mid-week visit. When Ms. Gonzales realized her daughters were missing, she suspected that Mr. Gonzales, who had a history of erratic behavior and suicidal threats, had taken them. At approximately 7:30 p.m., she made her first phone call to the Castle Rock police department requesting assistance in enforcing the restraining order against her husband. Officers Brink and Ruisi were sent to her home. Upon their arrival, she

showed them a copy of the restraining order, and asked that it be enforced and her children returned to her immediately. In contradiction to the order's terms, the Officers "stated that there was nothing they could do

Ms. Gonzales subsequently brought this action on behalf of herself and her deceased daughters against the City of Castle Rock, Colorado, and Castle Rock police officers Aaron Ahlfinger, R.S. Brink, and Marc Ruisi. Pursuant to 42 U.S.C. § 1983, she claimed her due process rights were violated by the officers' failure to enforce the restraining order against her husband. She also alleged the city maintained a custom and policy of failing to respond properly to complaints of domestic restraining order violations and tolerated the non-enforcement of such protective orders by police officers, resulting in the reckless disregard of a person's right to police protection granted by such orders.

The district court granted the defendants' motion to dismiss, finding Ms. Gonzales failed to state a claim under the Fourteenth Amendment for the deprivation of either substantive or procedural due process.[2] On appeal, the panel affirmed the district court's dismissal of Ms. Gonzales' substantive due process claim, but reversed as to the district court's procedural due process determination. The panel held the restraining order, coupled with the Colorado statute mandating the enforcement of such orders, *see* COLO. REV. STAT. § 18-6-803.5(3), established a protected property interest in the enforcement of the restraining order which could not be taken away by the government without procedural due process. *Gonzales*, 307 F.3d at 1266. The panel concluded, therefore, that Ms. Gonzales' procedural due process claim could proceed.

The city and police officers timely filed a petition for rehearing *en banc*, seeking review of the panel's conclusion that Ms. Gonzales stated a procedural due process claim. This court granted the petition, and asked the parties to address the following questions: (1) whether COLO. REV. STAT. § 18-6-803.5(3) in combination with the restraining order issued by the Colorado court created a property interest entitled to due process protection and, (2) if so, what process was due.

II

Contrary to the assertions of the city and officers, as well as those of our dissenting colleagues, the issue before this *en banc* court is distinct from the substantive due process claim dismissed below. Defendants and the dissenters assert that if this court concludes Ms. Gonzales has a protected property right in the enforcement of the restraining order, we will have "carved out an exception contrary to *DeShaney* and the general rule that the state does not have an affirmative duty to protect individuals from private third parties." Aple. Br. at 6. However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation" under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). *DeShaney*, 489 U.S. 189, 195 n.2 (1989). As we discuss *infra*, *Roth* clarified that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

When the due process clause is "invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. Only

understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. A property interest is created when a person has secured an interest in a specific benefit to which the individual has "a legitimate claim of entitlement." *Id.* The interest must be more than an "abstract need or desire" or a "unilateral expectation of" the benefit. *Id*. The Court has accordingly identified property rights protected under the procedural due process clause to include continued public employment, *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972), a free education, *Goss v. Lopez*, 419 U.S. 565, 574 (1975), garnished wages, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), professional licenses, *Barry v. Barchie*, 443 U.S. 55, 64 (1979), driver's licenses, *Bell v. Burson*, 402 U.S. 535, 539 (1971), causes of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), and the receipt of government services, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (utility services); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits).

At least two other courts have addressed whether a court order creates a *Roth*-type entitlement subject to procedural due process protections. Directly applicable here is *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990), in which the court found the mandatory language in a restraining order created a "property interest in police enforcement that is cognizable under *Roth*." *Id.* at 264. In *Flynn v. Kornwolf*, 83 F.3d 924 (7th Cir. 1996), the plaintiffs contended the specific terms of a court order created in them an entitlement to employment. After examining the order's terms, the Seventh Circuit disagreed, concluding that the order's language was not of a mandatory nature limiting the employer's discretion regarding the termination of certain positions. *Id.* at 927 (citing *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1406 (7th Cir. 1994)). In doing so, the Seventh Circuit analyzed the court order pursuant to the analysis employed in cases determining whether a state statute creates a property interest.

In order for an entitlement to exist, the underlying state law or order must contain

particularized standards or criteria [guiding] the State's decision makers. *If the decision maker* is not required to base its decisions on objective and defined criteria, but instead *can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected interest.* *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (emphasis added) (citation and internal quotations omitted). Conversely, "the use of explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [protected] interest." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (internal quotations omitted). *See also Bd. of Pardons v. Allen*, 482 U.S. 369, 379-81 (1987) (mandatory language in regulation, coupled with specific criteria which must be met in order to deny benefit, creates presumption of entitlement); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) ("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"); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12 (1979) (structure of regulatory provision together with word "shall" requires decision maker to take specific action unless particular criteria is met). Hence, where a court order commands the grant of a government benefit or service through the use of mandatory language and objective predicates limiting the discretion of official decision makers, a protected property interest exists.[2] We therefore examine the restraining order to determine whether its "language is so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam).[3]

At the outset, we emphasize that Ms. Gonzales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights. The restraining order was granted to Ms. Gonzales based on the court's finding that "irreparable injury would result to the moving

addition, COLO. REV. STAT. § 14-10-109 dictates that "[t]he duties of police officers enforcing orders issued pursuant to . . . 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S. . . . . " COLO. REV. STAT. § 14-10-109. Section 18-6-803.5 provides:

> (3)(a) Whenever a restraining order is issued, the protected person shall be provided 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 the 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.
> (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 restraining order whether or not there is a record of the restraining order in the registry.

COLO. REV. STAT. § 18-6-803.5(3) (2002). This language is similar to that which appears in the restraining order.[5] In this context, we disagree with the dissenters' assertions that because the police are not named parties in the restraining order, they are therefore not bound to enforce its terms. *See* Kelly, J., dissent at 12; O'Brien, J., dissent at 8-9, 15-16. Surely the dissenters do not mean that police officers in Colorado are at liberty to ignore the terms of court orders, especially where such orders clearly direct police enforcement and are issued pursuant to legislation anticipating the same. *See* COLO. REV. STAT. § 18-6-803.5(a)&(b). Other states, in clarifying the duties of police officers in these situations, have by no means sanctioned an officer's failure to enforce

terms appearing in a restraining order and mandated by statute. *See, e.g.*, *Matthews v. Pickett County*, 996 S.W.2d 162, 164 (Tenn. 1999) (in state tort action, officers were required to arrest offending party upon reasonable cause that party was violating restraining order where order as well as statute mandated arrest in such situations); *Campbell v. Campbell*, 682 A.2d 272, 275 (N.J. Super. Ct. Law Div. 1996) (officer not immune from liability in negligence action where legislature "made it clear that a police officer must enforce a domestic violence order and all other laws which protect domestic violence victims"), *rejected in part on other grounds by Macaluso v. Knowles*, 775 A.2d 108, 111 (N.J. Super. Ct. App. Div. 2001); *Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983) (while restraining order was not addressed to police, they nonetheless had duty pursuant to statute to enforce terms of order when they had probable cause to believe order had been served and filed and named party had violated order).

The district court concluded that any duty imposed upon police officers to enforce restraining orders is triggered only upon an officer's probable cause determination that the restraining order was being violated. According to the district court, because an officer's probable cause determination implicitly requires the use of judgment and discretion, no absolute duty is derived from the language mandating arrest and hence no protected property right existed. The district court is incorrect.

There can be no question that the restraining order here mandated the arrest of Mr. Gonzales under specified circumstances, or at a minimum required the use of reasonable means to enforce the order. Those circumstances were defined by the restraining order which told the police what its objective terms were and commanded that an arrest occur upon an officer's probable cause determination that the order was being violated and that Mr. Gonzales had notice of the order. The restraining order here specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay away from Ms. Gonzales and her daughters. Thus, the restraining order provided objective predicates which, when present, mandated enforcement of its terms. *See Olim*, 461 U.S. at 249; *Crown Point I*,

LLC v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211, 1216-17 (10th Cir. 2003); *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 2000); *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D

Supreme Court concluded parole guidelines created a liberty interest in parole where the guidelines mandated release upon the parole board's finding of certain factors. *Allen*, 482 U.S. at 381. While the parole board did have discretion within the Court's latter definition of the term to determine whether a prisoner satisfied the release criteria, such discretion did not extinguish the protected interest. So too in the instant case, where a court has specified the objective circumstances in which the police officer is required to act.

An officer must certainly exercise a measure of judgment and discretion in determining whether probable cause exists. However, in making that decision, the officer is bound to "facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information [which] are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense." *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994

under the Fourteenth Amendment. *Cf. Lewis*, 523 U.S. at 854-55 (substantive due process context). The officers here, however, were not faced with the necessity of making an instant judgment in a rapidly evolving situation. More importantly, they were not given carte blanche discretion to take no action whatsoever. The restraining order and its enforcement statute took away the officers' discretion to do nothing and instead mandated that they use every reasonable means, up to and including arrest, to enforce the order's terms.

Nor do we believe the language commanding that the officers use "every reasonable means to enforce this restraining order," Restraining Order at 2, undermines the order's mandatory nature. First, the order's more general command of enforcement by "every reasonable means" does not negate its more specific command that officers shall make arrests or obtain arrest warrants when certain requirements are met.[7] Second, the order's language commanding that officers use every reasonable means to enforce the order simply indicates there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest. Such a position is not unprecedented. Courts finding an entitlement in the enforcement of protective orders have defined the property interest in terms of a reasoned police response or reasonable protection. *See Siddle v. City of Cambridge*, 761 F.Supp. 503, 510 (S.D. Ohio 1991) ("when a protective order exists . . . there is a governmental duty to protect the individual, the scope of which is a reasonable protection given the resources of the governmental agency responsible"); *Coffman*, 739 F.Supp. at 266 (nature of property right in restraining order is a "reasoned police response"). Hence, while the police officers may have some discretion in how they enforce a restraining order, this by no means eviscerates the underlying entitlement to have the order enforced if there is probable cause to believe the objective predicates are met. After all, states are afforded vast discretion in how to educate their children, but the existence of such discretion did

not prevent the Supreme Court from concluding that the ultimate receipt of the benefit – a free education – was a protected entitlement. *See Goss*, 419 U.S. at 573-74.

The state's intent in creating a protected interest in the enforcement of restraining orders is highlighted by the legislative history for the statute, which emphasizes the importance of the police's mandatory enforcement of domestic restraining orders. *See* COLO. REV. STAT

Most significantly, the legislature included in the statute a provision which states that

> [a] peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in

agency *shall* enforce a protection order issued . . . by any court in this state in accordance with the

mandatory statute, its legislative history, and the grant of immunity to officers for the erroneous enforcement of restraining orders provides added weight to our conclusion. For us to hold otherwise would render domestic abuse restraining orders utterly valueless.[9] Likewise, we find inapposite Judge McConnell's citation to *Reno v. Flores*, 507 U.S. 292 (1993), to illustrate his proposition that Ms. Gonzales is merely trying to recharacterize a substantive due process claim into a procedural due process one. In *Flores*, the Court first determined that illegal immigrant juveniles did not have a substantive due process liberty interest, pending a deportation hearing, to be released to someone other than a family member or legal guardian. *Id*. at 302-03. Because the juveniles had no liberty interest, their facial challenge to allegedly flawed INS procedures could not support their asserted procedural due process claims. *Id.* at 308-09. In contrast to the plaintiffs in *Flores*, Ms. Gonzales possesses a protected interest in the enforcement of the restraining order as granted by the state. Nor is she challenging the substance of COLO. REV. STAT. § 18-6-803.5(3), which provides guidance to officers as to the process they should employ when determining whether to enforce a restraining order. *See infra*, section B. Therefore, *Flores* is inapplicable here.

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth*, 408 U.S. at 577. There can be no doubt Ms. Gonzales and her daughters relied on the enforcement of the restraining order to go about their daily lives. Nor can there be any doubt, if the alleged facts are proven, that their reliance was arbitrarily undermined by the officers' failure to enforce the restraining order, resulting in an unspeakably tragic outcome.

B

Having established that Ms. Gonzales has a protected interest in the enforcement of the restraining order, we must now turn our focus to whether Ms. Gonzales has stated a claim that she was denied "an appropriate level of process." *Farthing*, 39 F.3d at 1135.[10]

The due process clause of the Fourteenth Amendment raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision

[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Fuentes, 407 U.S. at 81-82 (citing *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)). Second, the city and officers' reliance on *Parratt* is misplaced.

Under *Parratt*, a plaintiff cannot raise a § 1983 procedural due process claim where the loss of property resulted from the random and unauthorized actions of a state actor which made the provision of pre-deprivation process impossible or impracticable, and an adequate state post-deprivation remedy exists. *Parratt*, 451 U.S. at 540-41, 543. *See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available"). Conversely, when the deprivation is caused by established state procedures, the existence of an adequate remedy at state law does not extinguish a procedural due process claim. *See Logan*, 455 U.S. at 435-37. *See also Zinermon v. Burch*, 494 U.S. 113, 136-39 (1990).

In *Logan*, the Court held that the plaintiff suffered a procedural due process violation because established state procedures erroneously deprived him of his property interest in bringing a cause of action. *Logan*, 455 U.S. at 437. The Court distinguished the case from *Parratt*, noting that the plaintiff's deprivation was not random and unauthorized, but instead the result of an "'established state procedure' that destroy[ed] his entitlement without according him proper procedural safeguards." *Id.* at 436.

asserts the deprivation was the result of a custom and policy of the City of Castle Rock not to enforce domestic abuse protective orders. In accordance with

respond properly to complaints of restraining order violations" and "the City's police department maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to protective orders, and provides for or tolerates the non-enforcement of protective orders by its police officers . . . ." Aplt. Appx. at 12.[12]. . . ." Aplt. Appx. at 12. Based on these allegations, Ms. Gonzales has asserted that the deprivation of her property right was not the result of random and unauthorized acts, but instead was pursuant to an official policy or custom of the city. Just as the plaintiff in *Logan* could not be deprived of his property right by a defective state procedure that afforded him no process, neither may Ms. Gonzales' property right be denied by the city's alleged custom of refusing to enforce restraining orders. In concert with *Logan*, and based on Ms. Gonzales' complaint against the City of Castle Rock and the individual officers, her procedural due process claims are therefore not precluded by *Parratt*.

Courts dealing with the convergence of *Monell* claims and *Parratt* defenses have held accordingly. For example, in *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), the court held that

> [w]here a municipal officer operates *pursuant to a local custom or procedure*, the *Parratt/Hudson* doctrine is inapposite: actions in accordance with an "official policy" under *Monell* can hardly be labeled "random and unauthorized," . . . . [W]here employees are acting in accord with customary procedures, the "random and unauthorized" element required for the application of the *Parratt/Hudson* doctrine is simply not met.

Id. at 165 (citations omitted). Likewise, in *Wilson v. Civil Town of Clayton*, 839 F.2d 375 (7th Cir. 1988), the court stated:

[w]hen it is the Town itself that is being sued, and the suit is allowed under *Monell* because the action was executed in accordance with "official policy," the tortious loss of property can never be the result of a random and unauthorized act. Therefore, a

complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite.

Wilson, 839 F.2d at 380. *See also Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991) (when plaintiff brings municipal liability action claiming established state procedures deprived him of property interest, *Parratt* not applicable); *Matthias v. Bingley*, 906 F.2d 1047, 1058 (5th Cir. 1990) ("rationale of *Parratt* . . . does not apply when the challenged actions comply with City policy"); *Sullivan v. Town of Salem*, 805 F.2d 81, 86 (2d Cir. 1986) (if conduct of official was pursuant to town policy, *Parratt* not applicable); *Sanders v. Kennedy*, 794 F.2d 478, 482 (9th Cir. 1986) (*Parratt* does not apply in § 1983 action against individual officers and chief of police where plaintiff alleged property damage incurred during course of arrest was result of official policy, practice or custom); *McKee v. Heggy*, 703 F.2d 479, 482-83 (10th Cir. 1983) (where record suggested plaintiff's seized car was sold by police department pursuant to customary procedures treating seized vehicles as abandoned, city could be held liable for violation of procedural due process claims).

Thus, when the issue is a deprivation resulting from a municipal policy, not the random acts of rogue officers, neither the city nor individual officers can seek refuge under *Parratt*. *See Matthias*, 906 F.2d at 1058 (city not shielded by *Parratt* from § 1983 liability for acts in compliance with city policy); *McKee*, 703 F.2d at 482-83 (same); *Amons v. Dist. of Columbia*, 231 F. Supp. 2d 109, 114 (D.D.C. 2002) (same); *Brooks*, 84 F.3d at 165-66 (individual officers sued in individual and official capacities may not rely on *Parratt* where deprivation is result of local custom or procedure); *Alexander v. Ieyoub*, 62 F.3d 709, 712-13 (5th Cir. 1995) (same); *Sullivan*, 805 F.2d at 86 (same). Therefore, the assertions of the city and officers that pre-deprivation process was impossible and post-deprivation proceedings adequate are inapposite here.

The district court dismissed Ms. Gonzales' complaint as deficient under FEDw 8mc 5lueprivat0006 T

or of what the City's policy actually is. In general, however, we note that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Mathews*, the Supreme Court highlighted the "truism that '[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). "The hearing 'need not be elaborate;' indeed, 'something less than a full evidentiary hearing is sufficient.'" *Benavidez v. City of Albuquerque*, 101 F.3d 620, 627 (10th Cir. 1996) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)). For example, in *Memphis Light*, 436 U.S. at 16 & n.17, the Supreme Court held due process satisfied when prior to the termination of utility services, the customer had an opportunity to informally consult with and present her case to a designated employee of the company who had authority to correct any billing mistakes. Likewise, in *Goss* the Court held that

> before a student could be suspended from school, he had to be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these *rudimentary precautions* against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Goss, 419 U.S. at 581 (emphasis added).

Judge McConnell implies that Ms. Gonzales did receive some form of a hearing from the officers and hence her complaint cannot be construed as challenging the lack of process she received, but, instead, is a challenge to the results of that hearing. Dissent, McConnell, J., at 6. We wholly disagree that Ms. Gonzales' repeated phone calls to the police department and the officers' seemingly outright dismissal of her claims constitutes "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. According to Ms. Gonzales' complaint, in effect no one was listening.

In specifically determining what process is due a plaintiff, a court must balance

three distinct factors: First, the private interest that will be affected by the official action;

what additional procedural safeguards could have been employed by the police officers. *See* COLO. REV. STAT. § 18-6-803.5. In our earlier discussion, we held the restraining order's specific terms, mandatory language, and objective predicates limiting decision maker discretion, created a protected property interest in the enforcement of the domestic abuse protective order granted to Ms. Gonzales. The statute, while absent the specificity of the restraining order, nonetheless guides officers as to the process they should provide a holder of a restraining order before depriving that individual of his or her enforcement rights.

The statute directs police officers to determine whether a valid order exists,[13] whether probable cause exists that the restrained party is violating the order, *see* COLO. REV. STAT. § 18-6-803.5(3)(b)(I), and whether probable cause exists that the restrained party has notice of the order. *See* COLO. REV. STAT. § 18-6-803.5(3)(b)(II).[14] If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

These steps, while admittedly abbreviated, appropriately acknowledge the exigent circumstances which accompany a request to enforce a domestic abuse protection order and are sufficiently flexible to meet the demands of that particular situation. *See Morrissey*, 408 U.S. at 481. While this procedure obviously does not provide Ms. Gonzales with the opportunity for a full court hearing, it is not essential that it does so. *See Benavidez*, 101 F.3d at 627 (something less than full evidentiary hearing can be sufficient to satisfy procedural due process). Regardless of its brevity, the procedure provides the opportunity to present a request for enforcement to the police and to have it adequately and sufficiently examined prior to any official decision to deny enforcement. Of equal importance, if followed, the process would minimize the risk of the arbitrary, erroneous or mistaken deprivation of an individual's right to have a protection order enforced. *Mathews*, 424 U.S. at 335. By completing the three steps laid out in the

statute, the wrongful denial of Ms. Gonzales' right could have been prevented, and three lives potentially spared.

Nor does the identified procedure amount to a substantial burden upon the interests of police departments and municipalities. Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties. Under the balancing test required by *Mathews*, and reading the allegations of Ms. Gonzales' complaint in the light most favorable to her, we therefore determine the scales tip in her favor. Ms. Gonzales' interest in having the restraining order enforced was substantial, and without question the officers' alleged failure to provide her with any meaningful process prior to refusing to enforce the court order erroneously deprived her

never "heard" nor seriously entertained her request to enforce and protect her interests in the restraining order. Alternatively, if one considers that the process to which she was entitled was a bona fide consideration by the police of a request to enforce a restraining order, she was denied that process as well. According to Ms. Gonzales' allegations, the police never engaged in a bona fide consideration of whether there was probable cause to enforce the restraining order. Their response, in other words, was a sham which rendered her property interest in the restraining order not only a nullity, but a cruel deception.

Based on the well-pleaded facts of Ms. Gonzales' complaint, we hold that she has adequately stated a procedural due process claim upon which relief can be granted. She had a property interest in the enforcement of the restraining order which was allegedly taken from her without due process of law. Her § 1983 action can therefore proceed.

III

We must next address whether the individual officers, acting pursuant to the official policy or custom of the City of Castle Rock, were entitled to the defense of qualified immunity. *Sullivan*, 805 F.2d at 87. Under the doctrine of qualified immunity, a government actor is not subject to liability unless it is "sufficiently clear that a reasonable official would have understood that his conduct violated the right." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001). *See also Lybrook v. Members of the Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1337 (10th Cir. 2000); *Liebson v. N. M. Corr. Dep't*, 73 F.3d 274, 276 (10th Cir. 1996).

"Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier*, 242 F.3d at 923 (citing *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). In the instant case, we cannot hold that a reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a

constitutionally protected property interest. No Supreme Court or Tenth Circuit case has so held. Nor have we found any other circuit court cases addressing this specific question. Somewhat analogous cases from the Sixth and Eleventh Circuits have held that comprehensive state child welfare statutes created liberty interests in personal safety and the freedom from harm which gave rise to procedural due process protections. *See Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987) (en banc). Likewise, two district courts, addressing facts similar to those in the present case, held that protective orders or their supporting statutes created a property interest in enforcement. *See Siddle*, 761 F. Supp. at 509; *Coffman*, 739 F. Supp. at 264. Nevertheless, this precedent is insufficient to clearly establish the law for this circuit. Officers Ahlfinger, Brink and Ruisi are thus entitled to the affirmative defense of qualified immunity.

The same cannot be said for the City of Castle Rock. It is well established that municipalities cannot avail themselves of the qualified immunity doctrine. *See Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993); *Dill v. City of Edmond*, 155 F.3d 1193, 1212 (10th Cir. 1998). Ms. Gonzales can proceed with her § 1983 action against the city.

IV

Accordingly, we **REVERSE** the district court's dismissal of Ms. Gonzales' procedural due process claim, and **REMAND** for further proceedings in accordance with this opinion.

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KELLY, Circuit Judge, joined by **TACHA**, Chief Circuit Judge, and **O'BRIEN**, Circuit Judge, concurring in part and dissenting in part.

charitably could be described as gross negligence. However, I do not agree that the Fourteenth Amendment elevates what is essentially a case of negligence by a state actor into a constitutional violation. Accordingly, I respectfully dissent from the court's constitutionalization of state law.

I agree that the individual officers are entitled to qualified immunity, but disagree that a protected property interest exists "in the enforcement of the terms of [a] restraining order." Ct. Op. at 14. The court reaches its conclusion based upon the restraining order and the Colorado statutes upon which it is based, particularly Colo. Rev. Stat. § 18-6-803.5(3) (2002). Colorado has enacted a statute making it a misdemeanor to knowingly violate a protective order, and then specified peace officers' and prosecutors' non-exclusive duties in enforcing the statute as well as the protective order itself. Colo.

reversing a district court, we should hesitate to take judicial notice of (or supplement the record with), ostensibly dispositive materials not before the district court.

B. Due Process

The panel decision correctly rejected the substantive due process claims on the authority of DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989), which held "that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," id. at 197, absent a special relationship between the State and the victim or some role of the State in creating the danger. Gonzales, 307 F.3d at 1262-63; see also Duong v. County of Arapahoe, 837 P.2d 226, 229 (Colo. Ct. App. 1992) (rejecting claim that county defendants breached a constitutional duty by failing to protect wife from husband where a permanent restraining order had been issued and the judge specifically requested security) (citing Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986)[2] Id. at 722-23. The same can be said about employing procedural due process to create an expansive guarantee of state protective services.). Neither exception applies in this case, and although the facts alleged plainly state a claim for gross negligence, not every common law duty supports a federal due process violation.

The Plaintiff, however, invokes a different source of due process protection by claiming a property interest in the enforcement of her protective order, which she argues could not be deprived without an opportunity to be heard. However improbable it may be that Ms. Gonzales sought only a hearing on the decision not to enforce the protective order–rather than enforcement itself–I take her argument at face value and analyze her case under our procedural due process precedents.[3] Defendants argue that the panel's decision on the procedural due process claim is discordant with DeShaney because "a private individual need not have a special relationship with the state, nor must he show the state created or enhanced the danger to establish a Fourteenth Amendment violation . . . . Instead, the individual only need cite a state law containing mandatory

language and then assert that a property interest has been denied without the benefit of procedural due process." Aplees. Reh'g Br. at 6. Given that this statute primarily sets out a criminal offense and then contains procedure on how the offense is to be prosecuted, I agree.

In Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972), the Supreme Court

mandatory directives as contained in the protective order. It concludes by negative inference that the failure to enforce the protective order results in a denial of a property interest for which due process protections are required. See Sandin v. Connor, 515 U.S. 472, 480-81 (1995); Hewitt v. Helms, 459 U.S. 460, 472 (1983); Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999). Even though the court has shifted its primary focus from the statute to the protective order, the statute very much matters because the form protective order contains a notice provision (on the back) that essentially repeats the statute.

Where an individual claims a property or liberty interest based upon a state statute or regulation containing mandatory language, that language must "requir[e] that a particular result is to be reached upon a finding that the substantive predicates are met." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 464 (1989); see also Sandin, 515 U.S. at 481 (describing liberty interest under this approach as an enforceable expectation that mandatory language and substantive predicates "would produce a particular outcome"). Where discretion is not limited, the language is not mandatory for purposes of this analysis, and a property or liberty interest is not created. See Olim, 461 U.S. at 249-50 (no liberty interest in limiting prison transfers where regulations described procedure but did not place substantive limits on discretion). Stated another way, if a particular result is not *required*, no liberty or property interest is created. See Thompson, 490 U.S. at 464.

When the statute is viewed as a whole, it is apparent that it does not require a particular result in every case and necessarily involves discretion. This is a criminal statute that not only defines the crime of violation of a protective order, but also specifies how enforcement, including arrest and prosecution, may occur. A general directive in subsection 3(a) requires that "[a] peace officer shall use every reasonable means to enforce a restraining order." Colo. Rev. Stat. § 18-6-803.5(3)(a). Enforcement of a protective order at this level is necessarily procedural–peace officers do not decide guilt or innocence, nor do they confer substantive benefits, including the right to be free of the

activities proscribed by the statute. See id. Subsection 3(b) then elaborates on but one means of enforcement–arrest–and then contains a totally unremarkable probable cause requirement. Id. § 18-6-803.5(3)(b). It requires a peace officer to arrest a restrained person on probable cause that a protective order is being violated and the restrained person has notice of the order. Id. Even then it gives discretion to an officer to merely seek a warrant "if an arrest would be impractical under the circumstances." Id. The statute acknowledges means of enforcement other than arrest. See id. § 18-6-803.5(5) (containing an exculpatory provision for a peace officer "arresting a person for violating a protection order *or otherwise enforcing a protection order*") (emphasis added). At best, these provisions are specifications of procedure, not the creation of substantive rights inuring to the benefit

29; Colo. Rev. Stat. § 14-10-108(6). The restraining order was modified and made "permanent" in another temporary order not part of a final decree. App. 30. Colo. Rev. Stat. § 14-10-108(5)(b)–(c). Whether we call it "a property interest in the enforcement of the terms of [a] restraining order," Ct. Op. at 14, or a property interest in "the government service of enforcing the objective terms" of a protective order, id. at 32, the interest

As noted, although the court emphasizes the language contained in the protective order (against a backdrop of the statute), its analysis differs little from the panel opinion because both rely upon the statute's seemingly mandatory terms. See Ct. Op. at 21. If anything, the language in the protective order in effect complicates the analysis. First, the fact that the form of order contained a "Notice to Law Enforcement Officials"

§ 14-10-108(2) ("either *party* [spouse] may request the court to issue a temporary injunction . . . [e]njoining a *party* . . . [e]xcluding a *party* . . . .") (emphasis added).

The conclusion that Ms. Gonzales had a property interest in the enforcement of the terms of the protective order strongly implies that law enforcement was bound *by the order* also. This is untenable. For obvious reasons, the law is very specific when it comes to the legal effect of an injunction or temporary restraining order:

> **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and *is binding only upon the parties to the action*, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise.

Colo. R. Civ. P. 65(d) (emphasis added); accord Fed. R. Civ. P. 65(d). By operation of law, the defendants as non-parties were not bound by this temporary restraining order, nor could they be said to be acting in active concert or participation with either party in this case. The restraining order in this case cannot do service for a mandatory affirmative injunction that names the Defendants and the tasks they must accomplish. That Ms. Gonzales did not have an entitlement to action by law enforcement under the terms of the order is buttressed by Colorado's statutory recognition that the "violation of a protective order" is committed not by a failure of law enforcement to take specific action, but when a person subject to an order's provisions "contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises." Colo. Rev. Stat. § 18-6-803.5(1). Indeed, the back of the form also informs a *restrained party* that violation of

such an order "will . . . constitute contempt of court," consistent with a remedy envisioned by the statute. See Colo. Rev. Stat. 18-6-803.5(7).

Thus I fully agree with Judge O'Brien:

> Any process to which Ms. Gonzales was due based upon the decretal, and therefore enforceable, language of the TRO (and centuries of jurisprudence) has nothing to do with law enforcement officers. It is the right to an appropriate remedy against a contumacious party, judicially imposed after a hearing. That process was never denied Ms. Gonzales.

O'Brien, J., dissent at 9. The court rejects our observations about the limits of a restraining order as a source of constitutional tort liability as tantamount to suggesting "that police officers in Colorado are at liberty to ignore the terms of court orders, especially where such orders clearly direct police enforcement and are issued pursuant to legislation anticipating the same." Ct. Op. at 21 n.9. The court follows this with citations to cases illustrating that other states "have by no means sanctioned an officer's failure to enforce terms appearing in a restraining order and mandated by statute." Id. The cases all involve applications of state law (negligence or statutory negligence) and immunity defenses. Of course, police officers in Colorado are not at liberty to ignore the terms of statutes or court orders, but whether *state* tort law would recognize a legal duty of care for which damages may be awarded is a wholly separate question from (1) whether the officers were bound by the order and could be held to answer in contempt for any violation, and (2) whether the terms of the

DeShaney foreshadowed an argument that state statutes (and perhaps orders incorporating those statutes) might create an entitlement to receive protective services. DeShaney, 489 U.S. at 195 n.2. Sandin suggests limits on recognizing a liberty interest based upon mandatory language and substantive conditions contained in a state statute or regulation. The Court indicated that such an approach "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public," but concluded that it is "less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison." Sandin, 515 U.S. at 481-82. This court concludes that the approach has not been foreclosed "in non-prison settings," Ct. Op. at 18 n.6, and applies it here, but a more nuanced approach ought to be considered. After all, the Court abandoned this approach because it focused more on the statutory language rather than the nature of the alleged deprivation and "in practice [was] difficult to administer and . . . produce[d] anomalous results." Sandin, 515 U.S. at 481, 483 n.5. This is apparent when one considers the apparently mandatory duties of the police chief who "shall apprehend any person who shall be found committing any offense or

of Police note that the term “shall” is used throughout the statute to describe the procedural requirements attendant to arrest and prosecution, and that each of these acts of criminal procedure could subject local governments and individual peace officers to liability for civil damages and attorney’s fees under 42 U.S.C. §§ 1983 and 1988.[4] Amici correctly focus this court’s attention on the numerous procedural requirements in this statute, prompting the questio

as in Sandin, the purpose of the section of the statute relied upon by this court is to guide law enforcement in the administration of a criminal offense. To be sure, the statute evinces serious concerns about protected persons, but not to the exclusion of protecting the public, other law enforcement priorities, and peace officers themselves.

Finally, the court decides what process is due here. An officer must determine whether a valid order exists, and whether there is probable cause to believe that the restrained person has notice of the order and is violating it. Ct. Op. at 46. If the officer will not enforce the order, "the person claiming the right should be notified of the officer's decision and the reason for it." Id. Because I would not find a property interest, it is unnecessary to comment on the utter impracticality of requiring law enforcement officers to conduct pre-deprivation hearings in the course of their other duties. See Archie v. City of Racine

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McCONNELL, J., joined by **TACHA**, C.J., and **KELLY** and **O'BRIEN**, JJ., concurring in part and dissenting in part.

Jessica Gonzales's complaint sets forth claims under the Due Process Clause of the Fourteenth Amendment without distinguishing between the procedural and substantive components of that provision. The district court analyzed the complaint separately under both procedural and substantive due process standards, and dismissed the complaint in both respects. The majority affirms dismissal of the substantive due process claim, but reverses as to the procedural claim. The majority devotes the bulk of its opinion to determining "whether a court-issued domestic restraining order, whose enforcement is mandated by a state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment." Maj. Op. 2. I dissent on the ground that, even assuming the restraining order coupled with the statute creates a property interest protected by the Due Process Clause, Ms. Gonzales's complaint raises only a substantive and not a procedural claim.

When a plaintiff asserts that a protected liberty or property interest has been infringed by action of the executive branch (such as police officers), the Supreme Court holds that the primary test for whether the action violates substantive due process is whether it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).[2] Only when a plaintiff asserts that government action is procedurally unfair – usually for lack of a hearing – does the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976), invoked by the majority (Maj. Op. 43-44), apply. *Mathews* is a far different, and less restrictive, test for a plaintiff to satisfy than the "shocks the conscience" test.

The question is whether the facts, as alleged, constitute a procedural due process claim. I think they do not. The "touchstone of due process" – both substantive and procedural – "is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), quoted in *Lewis*, 523 U.S. at 845. But a procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 845-46.

Although the majority employs the language of procedural due process, Ms. Gonzales's complaint contains no reference to procedural issues in any form. She does not complain that she was denied a "right to be heard," *Mathews*, 424 U.S. at 333, or that the police conduct was "procedurally unfair," Maj. Op. 33 n.13. She makes no allegations regarding "*the manner* by which the police allegedly deprived [her] of her interest in enforcement of the restraining order." Maj. Op. 36 n.15 (emphasis in original). She does not allege that if she had been given the opportunity of presenting her views to the decisionmakers, it would have affected the outcome. The language of procedural unfairness comes from the majority opinion, not from the complaint. Ms. Gonzales's complaint is that the police officers arbitrarily and for no legitimate reason failed to enforce the protective order. *See* Complaint, ¶¶ 21, 28 (The Defendants' "actions were

of unjustified governmental action.

problem was with the result.[4] This is in marked contrast to the Supreme Court's procedural due process cases, on which the majority relies (Maj. Op. 15-16): *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Barry v. Barchie*, 443 U.S. 55 (1979); *Bell v. Burson*, 402 U.S. 535 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Mathews v. Eldridge*, 424 U.S. 319 (1976). In each of these cases, the consequence of finding a procedural due process violation would be to require the government to provide some type of hearing, either in advance of the deprivation or within a reasonable time thereafter. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 *U. Pa. L. Rev.* 1267 (1975). The litigation did not hinge, as here, on whether the results were justified, but on whether the plaintiffs had the opportunity to be heard by the appropriate officials.

The majority is remarkably vague about what kind of "hearing" Ms. Gonzales should have received. *See* Maj. Op. 42-43 ("we note that 'due process is flexible and calls for such procedural protections as the particular situation demands'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The majority suggests that "the restraining order enforcement statute provides direction in answering the question of what additional procedural safeguards could have been employed by the police officers." Maj. Op. 45. According to the majority, these "safeguards" consist of (1) determining whether a valid order exists, (2) determining whether probable cause exists that the restrained party has notice of the order and is violating it, and (3) notification of the officer's decision and the reason for it. *Id*. at 46. The first two are plainly irrelevant: neither the existence of the order nor the existence of probable cause has ever been disputed. That leaves the third: informing Ms. Gonzales of the officers' "decision." It seems to me that, if the police had told Ms. Gonzales they were not going to take action, Ms. Gonzales would have precisely the same constitutional claim she does now– only

somewhat easier to prove. Surely the majority does not mean to suggest that the "procedural safeguard" Ms. Gonzales was entitled to was being informed that she would get no help.[5]

These suggestions thus confirm the non-procedural character of Ms. Gonzales's

have styled the claim as a procedural deprivation (of her liberty interest in personal security and emotional well-being) and alleged that the real harm was that the teacher determined that she was a prostitute without first holding a hearing on the question. Similarly, in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), this Court rejected a substantive due process claim by a therapist at a mental hospital who was killed by an inmate as the result of a decision by hospital administrators to close a special unit for the criminally insane, because the decision "was not the result of reckless and 'conscience shocking' conduct." *Id.* at 576. Again, however, today's opinion would allow the plaintiff to get around *Lewis* by alleging a procedural defect, for example, that the hospital administrators ought to have engaged in a more thorough consideration of the dangers of closing the special unit.

In *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court gave short shrift to a plaintiff's attempt to reformulate an essentially substantive due process claim in procedural terms. In that case, the Supreme Court rejected the plaintiff's substantive due process claim that a child had a fundamental right to be free from custody when freedom from custody might be in the child's best interest. *Id*. at 305-06. The plaintiff also characterized the argument as a procedural due process claim by arguing that the government's procedures failed to make a case-by-case determination of the best interest of the child when it decided whether to keep a child in custody. The Supreme Court rejected the attempt to disguise a substantive claim as a procedural one: "Respondents contend that this procedural system is unconstitutional because it does not require the [INS] to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other 'responsible adult.' This is just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Id*. at 308.

The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction between the two components of due process and

to expand greatly the liability of state and local governments. Sympathetic though we are, and should be, to persons in Ms. Gonzales's unhappy situation, we are not authorized under the Fourteenth Amendment to do what she asks.

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O'BRIEN, Circuit Judge, dissenting, with whom **TACHA**, Chief Circuit Judge, and **KELLY**, Circuit Judge, join:

The majority opinion ignores guiding principles announced in *DeShaney*,[1] *leaving us both adventurous and alone*,[2] *dramatically separated from other circuits.*[3] *This decision rests on tenuous grounds and invites litigation in even more dubious cases. For those reasons, I dissent and join the dissents of Judge Kelly and Judge McConnell.*

Superficially bowing to Supreme Court precedent, the majority acknowledges the futility of the substantive due process arguments. But the veneer of procedural due process applied in its stead hardly obscures the obvious–the method is an artifact of substantive due process; perverse, because, surreptitiously, it achieves the very result DeShaney decried. No matter how fervently we desire mankind to be honest, life to be fair, and the laws to be obeyed, our hopes are not entitlements for which individuals may exact a monetary remedy from state entities and actors when reality does not meet expectations.

And in reality's penetrating light there can be no doubt; Ms. Gonzales is not seeking a remedy for a pretermitted hearing. Irrespective of Colorado tort law, she wants

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

489 U.S. at 195-96. The Court emphasized the need for rational analysis in emotionally laden cases:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

Id. at 202-03.

With unmistakable clarity, the Court said "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so–though calamitous in

hindsight–simply does not constitute a vi

process rights." Majority Op., p. 14. It says that is so because "where a court order commands the grant of a government benefit or service through the use of mandatory language and objective predicates limiting the discretion of official decision makers, a protected property interest exists." *Id.*, pp. 17-18.[5] *It emphasizes "that Ms. Gonzales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights." Id.*, p. 14. If the court order is of such significance, that significance must be measured by its terms, recognizing that in an adversarial system courts do not create rights but adjudicate and declare the rights of the litigants under existing law.

The "TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 14-10-108, C.R.S." (TRO) is directed only to the Respondent, Simon James Gonzales. Nothing in the decretal portion of the TRO (or any other portion of the TRO itself) is directed to any individual or entity of the law enforcement community. A copy of the TRO is attached. Below the date and judge's signature appears a caveat: "PLEASE NOTE: IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS ON REVERSE." The "Notice To Law Enforcement Officials" contained on the reverse paraphrases the Colorado Statutes. The permanent order, entered in the divorce (a separate case) and stipulated to by the parties, extended and slightly modified the family violence TRO. It allowed Mr. Gonzales parenting time, but contained no more explicit terms about enforcement. No law enforcement entities or individuals were parties to the family violence case or the companion divorce case. The order did, indeed, "define Ms. Gonzales' rights," but whatever substantive rights were declared or established by the court could only be in relation to her husband, the only other party to the litigation. Those are the substantive rights due process must serve. The attendant process for enforcement of such rights is well known to courts and litigants alike—resort to the court for orders in aid of execution or to exercise its contempt powers; remedies that have their own procedural due process requirements. Any process

to which Ms. Gonzales was due based upon the decretal, and therefore enforceable,

panoply of due process protections.[2] That method not only fails to meet *Roth's* promise that federal courts will look to state law as the fountainhead of constitutionally protected property interests, but invites unintended consequences.[3] If the TRO (with its reference to the Colorado statutes–a fact the majority considers significant) is entitled to full faith and credit along with the judicial baggage it now carries, the extraterritorial effect may not be universally extolled. For example, if the beneficiary of a restraining order traveled to Las Vegas, Nevada, pursued there by the restrained spouse in violation of the order, the Las Vegas police, with little, if any, knowledge of Colorado law might not proceed with the vigor the majority demands. In consequence of such ignorance and indolence they might be sued and the City of Las Vegas as well, on a claim of indifference (just as the City of Castle Rock finds itself in this case). For instance, the syllogistic approach would logically and equally be applicable to Colo. Rev. Stat. § 31-4-112, which provides:

> The marshal or chief of police, or any member of the police force **shall suppress** all riots, disturbances, and breaches of the peace, **shall apprehend** all disorderly persons in the city, and **shall pursue and arrest** any person fleeing from justice in any part of the state. He **shall apprehend** any person in the act of committing any offense against the laws of the state or ordinances of the city and, **forthwith and without any warrant**, bring such person before a municipal judge, county judge, or other competent authority for examination and trial pursuant to law.

(Emphasis added.)

I see no language imposing a duty, or establishing rights amounting to an entitlement, in Colo. Rev. Stat. § 18-6-803.5 that is not also found in Colo. Rev. Stat. § 31-4-112. In fact, Colo. Rev. Stat. § 31-4-112 admits to less police discretion. So the syllogism should yield uniform results across the regulated spectrum, perhaps uncomfortably. When po

to behave, if no one was injured the officers might simply dispatch them to their respective homes to sleep it off. Most would agree that prudent husbandry of police resources, good community relations, and a dollop of common sense would not always require the considerable inconvenience and expense occasioned by arrest, transportation, and booking when a citation or a warning would suffice–in spite of clear statutory direction to the contrary. Apparently, the police can now be hauled into federal court if, with the benefit of hindsight, it appears their judgment was flawed and one of the miscreants sent home to ruminate decided instead to resume hostilities. Under the majority decision, the victim would have an "entitlement to enforcement" of the statute (apprehension of the disorderly) because the statute contains "objective predicates" which "mandate the outcome" and "limit discretion." Majority Op., pp. 17-18.

In like vein, Colo. Rev. Stat. § 8-4-123 provides:

> contact the county sheriff to have the employee removed from the premises. The county sheriff **shall remove** the employee and any personal property of the employee from the premises upon the showing to the county sheriff of the notice of termination of the license to occupy the premises and agreement pursuant to which the license to occupy the premises was granted.

(Emphasis added.) The statute clearly states a purpose, at least in part, to protect patients. The only predicate for the sheriff's required act (removal) is seeing the notice of termination and the underlying agreement. Does the mandatory statutory language coupled with a limitation on discretion create an entitlement to enforcement, and *ipso facto* a property right, for a resident injured by a holdover staffer whenever the sheriff doesn't act, acts ineptly or too slowly? When, as the statute says, the sheriff is shown the notice and the agreement, does that end the debate, or would the sheriff be permitted additional inquiry? What kind of hearing might be required and who could participate? And what are the collateral effects?

The majority emphasizes that the TRO triggered the requirements of Colo. Rev. Stat. § 18-6-803.5(3). But the fact that a judge made a threshold determination triggering the statutory provisions does not alter the analysis. The state court did not order anyone in the law enforcement community to do anything; it simply paraphrased the statutes in a form notice on the back of the order. Even if it had, independently and specifically, ordered enforcement the only remedy for a breach would be contempt of court. It could not create a private cause of action. The issue is not determined by the court order, but by statute and its resolution bottoms in legislative intent. Even if we presume the Colorado Legislature intended for the law enforcement community to heed its command, that does not imply a purpose to create a private cause of action or other entitlement amounting to a property right. *See infra*, n.15.

Qualified immunity has now been substantially eroded, if not eliminated, in all cases based upon mandatory and directive language contained in a statute. The law enforcement community is now on notice–"shall" means "shall"–and we shall brook no nonsense.

Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment. With the loss of immunity from liability goes the loss of immunity from suit. The rippling effects of what we have done here are obscured by narrow focus–the need for a global approach to the issue of legislative purpose is evident.[4]

How far might this reasoning take us? Colo. Rev. Stat. § 12-47-301(4)(a) requires that "[a]ll sheriffs and police officers **shall see to it** that every person selling alcohol beverages within their jurisdiction has procured a license to do so." (Emphasis added.) Would that provision make state actors liable to the victim of a drunk (or underage) driver who obtained alcohol from an unlicensed vendor?

We must look to the entire fabric of Colorado law to determine if specific enforceable rights, qualifying as property, were created by enactment of the statute.[5] If we are to determine whether the Colorado Legislature intended to confer a property right to the holder of a restraining order, a logical starting point is to examine its pronouncements with regard to public liability under state tort law. The Colorado Governmental Immunity Act (the Act), enacted in 1972 in response to the Colorado Supreme Court's abrogation of sovereign immunity in *Evans v. Board of County Comm'rs of El Paso County*, 482 P.2d 968 (Colo. 1971), is distinct and significant, not only because it comprehensively defines and details the circumstances of governmental immunity, but because it explicitly limits those public duties which may be a basis of governmental liability.

> The purpose of the Act is to include, within one article **all** the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort or could lie in tort **regardless** of whether that may be the type of action or the form of relief chosen."

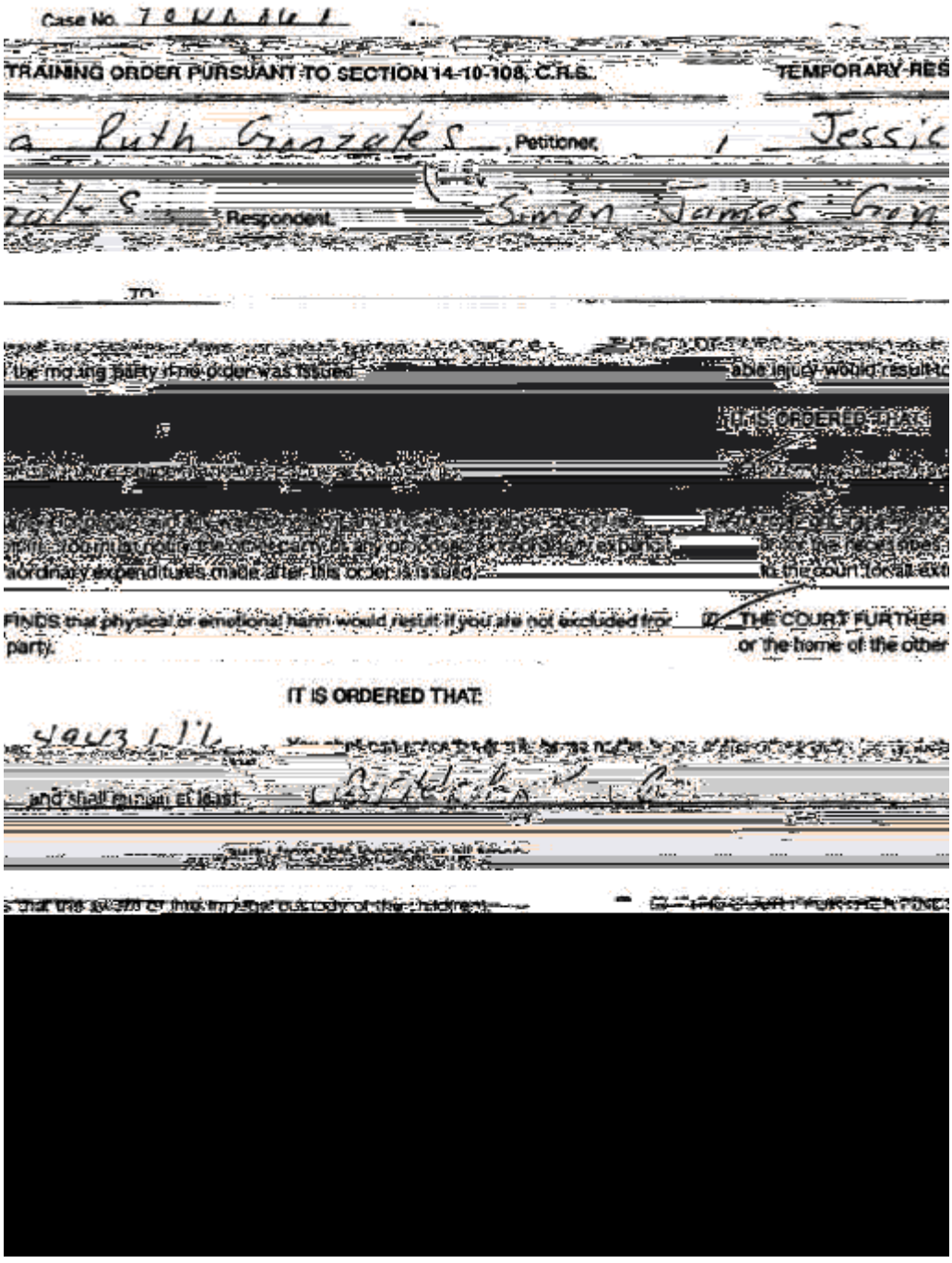
Colo. Rev. Stat. § 24-10-102 (emphasis added). Thus, in 1972 the Colorado General Assembly created, of whole cloth, "a statutory scheme whereby claimants with rights to particular causes of action can seek recovery." *Colorado State Claims Bd. of Div. of Risk Mgmt. v. DeFoor*, 824 P.2d 783, 792 (Colo.), *cert. denied*, 506 U.S. 981 (1992).[6] In his

concurring opinion, Justice Rovira quoted the Act's language, cited above, and concluded a "claimants' right to pursue an action against the state is derived solely from the statutory

thoughtful and comprehensive opinion closely tracking *DeShaney* and precluding § 1983 liability in cases claiming substantive due process rights. *Henderson v. Gunther*, 931 P.2d 1150 (Colo. 1997).

The Colorado legislature's inclusion of the word "shall" simply cannot overcome the pervasive understanding at the time the statute was enacted that law enforcement is not liable for failing to protect citizens from the deliberate actions of third parties, except in very distinct circumstances. *Id*. And, regardless of its intent, the legislature could not create an actionable right against the police by the enactment of this statute without also amending the Act.[9] The claimed entitlement is not property; it comes so packaged in spite of legislative intent, not because of it. This result is the product of judicial choice.

Against this backdrop, *Sandin* is instructive. 515 U.S. at 482-84. *Sandin* held a prison regulation primarily designed to guide correctional officials in the administration of a prison did not confer a liberty interest on inmates, but attached procedural protections "of quite a different nature." *Id*. at 482. The Court eschewed the methodology employed by the majority here, finding it "shift[s] the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation." *Id*. The Court identified at least two "undesirable effects" resulting from sole reliance on the language of a particular regulation or statute. First, it creates disincentives for the codification of "procedures in the interest of uniform treatment," even though the regulations may enhance front-line performance in light of competing interests that must be balanced, i.e., the safety of the staff and inmate population. *Id*. Second, to avoid the creation of a protected interest, "[s]tates may . . . [have] scarcely any regulations, or . . . [confer] standardless discretion on correctional personnel." *Id*. In addition, the Court noted "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id*.;


Case No.

TRAINING ORDER PURSUANT TO SECTION 14-10-108, C.R.S. TEMPORARY RES

Petitioner,

Respondent.

TO:

the moving party if no order was issued

IT IS ORDERED THAT:

FINDS that physical or emotional harm would result if you are not excluded from party.

IT IS FURTHER

or the home of the other

IT IS ORDERED THAT:

and shall remain at least

No. 01-1053 - Gonzales v. City of Castle Rock

HARTZ, Circuit Judge, dissenting, with whom **TACHA**, Chief Circuit Judge, and **KELLY**, Circuit Judge, join:

The other dissents (with which I agree) have covered the issues well, so I can be brief.

First, Judge O'Brien has demonstrated that to construe the Colorado statute as mandatory produces results that could not have been intended by the legislature. The better reading of the statute is that it is directory, a hortatory expression by the legislature. Professor Kenneth Culp Davis examined "full enforcement" statutes—statutes commanding that law enforcement officers "shall" enforce the criminal law—in his classic book

decision. The procedures are to ensure, to the extent appropriate in the circumstances, that the decisionmaker has relevant information for the tasks of finding facts and determining what action is proper in light of those facts. Here, the decisionmaker, a law enforcement officer, needs information to decide (1) whether there is probable cause to believe that the subject of a protective order has violated the order and (2) if so, what is the best response to the violation (an arrest, a warning, or whatever). Given the limited time in which the officer must act, an adversary evidentiary hearing—the gold standard of procedural due process—is not feasible.

In my view, all that procedural due process could require in this context is an opportunity (1) to present evidence of a violation of the order and (2) to argue why an arrest is the proper response to the violation. Ms. Gonzales was given that opportunity. The tragedy is that the decisionmakers did not heed her pleas. But no amount of procedural due process can guarantee that a decisionmaker will make the right decision. Contrary to the analysis of the majority opinion, which sets forth a three-step process for how officers must decide whether to arrest someone, procedural due process is not concerned with how neutral decisionmakers "process" information within their own minds. As Judge McConnell explains, errors by decisionmakers raise questions only of substantive due process.

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[1]In connection with their motion to dismiss, defendants provided the district court a copy of the front side of Ms. Gonzales' temporary restraining order, as well as a subsequent court order. Aplt. Appx. at 29. However, the back of the temporary restraining order was not included. Pursuant to FED. R. EVID. 201(b), (c), we may take judicial notice of the back of the restraining order form which is accessible in SUSAN WENDALL WHICHER & CHERYL LOETSCHER, HANDBOOK OF COLORADO FAMILY LAW, ch. IV, F-12 at 2 (3d ed. 1996). *See, e.g., Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n.6 (10th Cir. 1995) (court took judicial notice of government reports and documents not contained in record below). In order to make the record on appeal complete, however, we asked Ms. Gonzales to provide the court with the back side of the order, which she has done. *See* Aplt. Supp. Appx. at 3 (filed April 19, 2004).

[2]Because the district court found Ms. Gonzales failed to state a claim upon which relief could be granted, the court did not address the individual officers' request for dismissal on

the basis of qualified immunity, or the city's request for dismissal on the grounds Ms. Gonzales could not establish municipal liability.

[3]The *en banc* court was not asked to address the district court's dismissal of Ms. Gonzales' substantive due process claim and the panel's affirmance thereof. Hence, that portion of the panel opinion remains undisturbed.

[4]The cases Judge O'Brien cites in his dissent for the argument that our opinion ignores *DeShaney*'s guiding principles, are only of limited support. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002); *Henderson v. Gunther*, 931 P.2d 1150 (Colo. 1997). *Collins*, *Jones*, and *Henderson* all specifically address questions regarding substantive rather than procedural due process. While the court in *Jones* rightly rejected the plaintiff's reliance on *Roth* for the proposition that violation of a state statute could give rise to a substantive due process claim, it did not provide any further discussion on whether the state statute at issue had in fact created a protected property interest subject to

prevail on merits). In the instant case, the restraining order's

(analyzing property interest created by contract with state without considering whether GIA limits remedies); *Langley v. Adams County*, 987 F.2d 1473 (10th Ci

[2] In rejecting a substantive due process claim on grounds anticipating DeShaney, the First Circuit cautioned against "an expansive guarantee of state protective services." Estate of Gilmore, 787 F.2d at 720.

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

[1] I dissent only with respect to the majority's reversal of the district court's dismissal of Ms. Gonzales's procedural due process claim. In all other respects, I concur.

[2]There is no need to reflect here on whether the egregious dereliction of the Castle Rock police department (assuming the allegations of the complaint to be true) meets this high standard, because Ms. Gonzales

1990) (rejecting a procedural due process cl

[5] The majority tells us, "[o]ur conclusion that the domestic abuse restraining order, whose enforcement is mandated by statute, creates a constitutionally protected entitlement, is supported by case law from other jurisdictions." Majority Op., p. 30. Indeed, two district court opinions did so hold. *Siddle v. City of Cambridge, Ohio,* 761 F.Supp. 503 (S.D. Ohio 1991); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990). But *Flynn v. Kornwolf*, 83 F.3d 924 (7th Cir. 1996), is quite another matter. In that case, plaintiffs claimed the court order appointing them to the position of court attendants bestowed a property right in spite of contrary Wisconsin law. The district court and the Seventh Circuit concluded otherwise. The court's use of the "explicitly mandatory language" in evaluating an administrative order dealing with court personnel is hardly analogous to this situation,

> judges have limited discretion to terminate the plaintiffs' employment at the judges' will. *See Fittshur,* 31 F.3d at 1406. Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections.
>
> Because neither Racine County Ordinance § 17-1 *et seq.* nor the court order gave the plaintiffs a property interest in their employment, the defendants were free to terminate them "whenever and for whatever reasons [they] so desire [d]." *Wilcox v. Niagara of Wisconsin Paper Corp.,* 965 F.2d 355, 358 (7th Cir. 1992). The district court properly dismissed the plaintiffs' complaint for failure to state a claim.

Id. at 926-27.

[6]*Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1569 (10th Cir. 1993). *See discussion infra*, n.7.

[7]*Roth*'s holding that the Fourteenth Amendment's procedural protection applies only to life, liberty and property interests may have been a retreat from a prior and more expansive reading, which extended procedural protection to "important interests," *Bell v. Burson*, 402 U.S. 539 (1971) and "grievous loss," *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (Burger, J. and Black, J., dissenting) (quoting *Joint AntiFascist Refugeee Comm. v. McGrath*, 341 U.S. 123, 168 (1951)). Clearly the l Tft13.02 ≮

meaning of applicable law also suffices." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (footnote omitted).

[1] The statute merely establishes a process–enforcement by every *reasonable* means, and to arrest upon information *amounting to probable cause* that the restraining order has been violated. Both "reasonable means" and "probable cause" are phrases distinctly familiar for their evaluative component, the discretionary element they imply and the deference given to decision makers in the field. If the restraining order had restricted the husband from calling the home and he called one time and immediately hung up, would the police be required to arrest and book him even if they determined he had mistakenly pushed the wrong automatic dialing button and promptly hung up upon discovering his error? If the restraining order established a 100-yard separation distance and investigating officers determined that he inadvertently came within 299 feet and there were no aggravating facts, would an arrest be nevertheless required? If the answer can reasonably be "no" the discretionary element is manifest and the debate becomes one of degree, not of kind. The fact that these officers did nothing is no more significant than if they had acted, but too slowly or ineptly–both courses might be negligence; neither is actionable as a "procedural due process" violation.

[2] This is the lesson of *Sandin v. Conner*, 515 U.S. 472, 482-84 (1995) (Ginsberg, J., dissenting).

[3] This case imposes liability in a manner the state legislature could not have intended not

officer in the jurisdiction in which the defendant resides or may be found commanding such sheriff or peace officer to take custody of the defendant.

* * * *

(4) The sheriff or peace officer to whom the warrant is directed pursuant to subsection (3) of this section

regard, I fail to see how the "legislative history" relied upon by the majority informs the debate. The testimony of interested parties at a hearing in one house of a bicameral assembly hardly telegraphs legislative intent. And second- or third-hand newspaper accounts are even less revealing.

[9] *See infra*, n.12.

[10] *Sandin* expressly abandoned the syllogistic approach only for prisoner liberty interest claims, leaving the issue open in other cases, much like *DeShaney* left open procedural due process issues. But if principle is to account for anything, *Sandin* demands our attention.

[11]*See Macaluso v. Knowles*, 775 A.2d 108, 116 (N.J. Super. App. Div.2001) (no special relationship exception to Tort Claims Act in New Jersey), *overruling Campbell v. Campbell*, 682 A.2d 272 (N.J. Super. L. Div. 1996) (cited by the majority for the proposition that state law analysis admits police officer liability for failure to enforce domestic violence restraining order); *Nearing v. Weaver*, 670 P.2d 137, 143 n.8 (Or. 1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause. The court noted, "[i]t would, of course, be desirable if legislatures were to indicate their intention to allow or to withhold the right of those injured by violations of statutes passed for their benefit to recover damages from the violator, if not in each individual statute, than by enacting some general formula . . . ." (internal citations omitted)). The Colorado legislature did so, to no avail.

In *Campbell*, the Superior Court of New Jersey, Law Division, Civil Part, Union County, said:

> A second reason why this immunity for failure to make an arrest is inapplicable is that the restraining order established a "special relations