Law and the Public's Health

TOWN OF CASTLE ROCK, COLORADO V. GONZALES: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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This installment of *Law and the Public's Health* reviews the United States Supreme Court's decision in *Town of Castle Rock, Colorado v. Gonzales*[1] and considers its implications for public health policy and practice. The *Castle Rock* case specifically addresses whether the police have a constitutional duty to enforce court-issued restraining orders; in a broader sense, however, the decision focuses on the duty of government law enforcement officials to take action when they are put on notice of a dangerous situation. The question raised by *Castle Rock* goes to the heart of the role of government in the protection of the public's health and welfare and is one that the Supreme Court has considered in the past.

THE *CASTLE ROCK* CASE

This particularly heartbreaking case involved the murder of three young girls by an estranged husband and father. The precipitating event was the failure on the part of a local police department to enforce a court-issued restraining order. In May 1999, Jessica Gonzales received a court order protecting her and her three young daughters from her husband, who was also the girls' father. On June 22, all three girls disappeared in the late afternoon from in front of the Gonzales home, and Jessica suspected that her husband had taken them in violation of the restraining order. Despite direct, confirming evidence (a phone call between Jessica and her husband) that the girls had been taken in violation of the protection order, the Castle Rock Police Department told Jessica that it could do nothing and told her to wait until 10:00 p.m. to see if her husband brought the girls home.

Shortly after 10:00 p.m. Jessica called the police to report that her children were still missing but was again told to wait, this time until midnight. When her children were not returned, she went to the police department after searching for them herself. According to the trial court record, the officer who wrote up Jessica's report "made no reasonable effort to enforce the [restraining order] or locate the three children. Instead, he went to dinner." A couple of hours later, Jessica's husband appeared at the police department and opened fire. After he was killed by return fire, police found the three girls dead in the back of his truck; they had been murdered by their father hours earlier.

In a 7–2 opinion, the Supreme Court ruled that due process principles did not create a constitutional right to police protection, despite the existence of a court-issued restraining order. Writing for the majority, Justice Scalia concluded that even if underlying state law created an individually enforceable right to police assistance in the enforcement of the restraining order (and it did not, according to the Court majority), a restraining order is not the type of "property" interest that triggers due process protections under the federal Constitution. Justice Scalia noted that the Due Process Clause does not protect all government "benefits," especially benefits such as restraining orders, that governments have discretion to grant, deny, and enforce. The Court explained that a tradition of police discretion had long existed across a range of issues, including under what circumstances, if any, police would enforce a restraining order (for example, a police officer could decide that a particular violation of the terms of the order is too minor to justify enforcement). Justice Scalia noted further that even if the Colorado legislature had enacted a statute mandating police enforcement, this would not necessarily convert police enforcement obligations into a separate and individually enforceable legal right, since a right of individual enforcement—even in the face of a corresponding government obligation—must be express.

The dissent in *Castle Rock* found that the restraining order did in fact amount to a personal, enforceable property interest. The dissent argued that the majority was wrong to assert that the private interest in government protection does not resemble a "traditional conception" of property. Looking to the legislative history of a Colorado law requiring police officers to use "every reasonable means" to enforce restraining orders and to the text and purpose of the state's domestic violence legislation, the dissent wrote that the majority failed to recognize that the protection order law was enacted for a narrow class of individuals who are indeed entitled beneficiaries of domestic restraining orders. In its analysis of the underlying state domestic

violence law, the dissent rejected the notion that individuals whose interests are expressly protected by a law must also be able to demonstrate the existence of a separate legal right to enforce their interests before a court will hear their case.

IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

The *Castle Rock* decision addresses the issue of "police powers," the term generally used to describe the inherent authority of state and local governments to require conformance with established standards of conduct. Police powers lie at the heart of the role of government in society, since they form the basis of the government's power to act in numerous venues, from public health and welfare to public safety. In a public health practice context, police powers can take many forms, both preventive and remedial, from licensure and accreditation of health professionals and facilities to the enforcement of civil and criminal statutes against violators through fines or other civil or criminal sanctions.

Government authorities charged with police power duties are typically given considerable discretion to act. In rare instances, however, as in the case of domestic violence, a legislature can decide that a particular situation is so compelling that it limits this discretion to act. Whether the Colorado "mandatory enforcement" statute was such an example, and whether—even if it were—it also accorded protected individuals a corresponding right to legally *demand* assistance, were the issues that lay at the heart of the *Castle Rock* decision. In previous cases, the Supreme Court had similarly found no individual right to demand government protection under laws designed to assist them; the most recent such prior decision (and one with many parallels to *Castle Rock)* was *DeShaney v. Winnebago County Department of Social Services*,[2] in which a social services agency failed to protect a child within the child welfare system from multiple near-fatal beatings by his father.

Underlying the tension between governmental power to act and the existence of an individual right to legally demand governmental action are complex social and cultural ambiguities regarding what Americans want from their government. In most aspects of daily life, we do not want coercion; for example, public health agencies would prefer that Americans exercise and eat well in order to avoid obesity and may attempt to invoke the assistance of industry and leading private figures to press their cause. But the notion of sanctioning parents of obese children is presumably anathema to most people.

This notion that the Constitution empowers but does not obligate government to act has come to be known as the "negative constitution"—i.e., the idea that the Constitution does not require government to provide any services, public health or otherwise. This approach to constitutional law derives its authority from the fact that the Constitution is phrased mainly in negative terms (e.g., the First Amendment prohibits government abridgment of free speech, the Fourth Amendment makes illegal unreasonable searches, and so on). It is this underlying concept of the "negative constitution" that dominates the Supreme Court's framing of cases such as *DeShaney* and *Castle Rock*, which in the Court's view fall into the discretionary powers category and thus do not imbue individuals with the legal right to demand protection. As Chief Justice Rehnquist wrote in the *DeShaney* decision:

> [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 . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State . . . .[3]

Even more than *DeShaney* perhaps, *Castle Rock* involved a law whose express purpose was to protect a specified class of persons—women and their children who were the victims of violence. But the Court followed the *DeShaney* lead, despite the differences in the underlying legal protections at issue. This unwavering commitment to government discretion is also another clear sign that, regardless of whether the issue is government protections or government benefits such as medical assistance or child welfare, the Court is increasingly unwilling to convert broad governmental programs and policies into legally enforceable rights without a clear legislative articulation of such rights. In this regard, the *Castle Rock* decision also has enormous implications for programs such as Medicaid, which purport to create benefit rights in individuals but whose terms of enforcement are equally ambiguous.[4]

The policy and practice lesson to be drawn from all of this is that if a legislature expects unconditional government protections—be it law enforcement or medical care rights—it must write laws that express this unambiguously and it must also unambiguously imbue protected persons with the legal right to seek redress when these protections are not accorded. This requirement of legislative clarity in the creation of

enforceable rights was most recently expressed by then-Judge John Roberts in his United States Supreme Court Senate confirmation hearings in September 2005. How this increasingly rigorous expectation plays out in existing programs such as Medicaid remains to be seen. What is clear, however, is that as public health agencies carry out their broad population-based protection duties, the courts will presume broad discretion to shape the course of official conduct, even in the face of imminent threat.

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REFERENCES

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