

2017

Should Freedom from Domestic Violence and the Enforcement of Restraining Orders be Considered a Basic Human Right?: A Comparison of United States Law and International Norms

Sierra N. Kresin

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

 Part of the [Law Commons](#)

Recommended Citation

Kresin, Sierra N., "Should Freedom from Domestic Violence and the Enforcement of Restraining Orders be Considered a Basic Human Right?: A Comparison of United States Law and International Norms" (2017). *Law School Student Scholarship*. 896.
https://scholarship.shu.edu/student_scholarship/896

Introduction

This article examines the differences between American law and International Human Rights law to determine whether freedom from domestic violence should be considered a basic human right and whether new law is needed in the United States to protect that right. Part I looks at the U.S. Supreme Court case *Castle Rock v. Gonzales*, in which the Supreme Court held that although Jessica Gonzales had a restraining order against her husband, the Colorado police could not be held liable for Mr. Gonzales kidnapping his three daughters or for their consequent deaths. The Court held that the government is generally not responsible for the violence of private actors; even though Ms. Gonzales had a court issued restraining order against her husband and had reported the kidnapping to the police multiple times, the Supreme Court found that she did not have a procedural due process right to the enforcement of her restraining order.

Part II of this article examines international cases that are similar to the *Gonzales* case, in which international courts have found that a government's failure to protect citizens from known private threats of violence violates their basic human rights. After losing in the U.S. Supreme Court, Ms. Gonzales took her case to the Inter-American Commission on Human Rights, which is an international court of human rights, where she successfully sued the United States; this case is examined in Part III.

Part IV of this article then looks at the global impact of the *Gonzales* decision at the Inter-American Commission on Human Rights by examining a Kenyan case in which Kenyan police were found liable for neglecting, omitting, refusing, and otherwise failing to conduct prompt, effective, and professional investigations into the rape and defilement of over 160 young girls throughout Kenya.

Part V of this article then examines ways in which local cities throughout the United States have responded to the *Gonzales* decision, and the U.S. Supreme Court's deviation from international human rights standards, by enacting local ordinances and statutes declaring that freedom from domestic violence is a basic human right. Lastly, Part VI considers possible solutions to the failure of the federal government to recognize that domestic violence should be considered a violation of the most basic human rights.

Part I – *Castle Rock v. Gonzales*

In the 2005 Supreme Court case *Town of Castle Rock v. Gonzales*, Jessica Gonzales had obtained a restraining order from the state of Colorado against her abusive husband.¹ The restraining order required that he remain at least 100 yards away from the home where his wife and three daughters resided. Mr. Gonzales was, however, permitted to take the children to a dinner once a week at an agreed upon visitation time.² Several weeks after the order was issued, Mr. Gonzales took his daughters while they were playing outside the home without notifying his wife.³ Throughout the evening, Ms. Gonzales called the police multiple times seeking assistance in locating her daughters, ensuring their safe return, and enforcement of her restraining order.⁴ However, the police took virtually no action, despite the fact that Mr. Gonzales later called Ms. Gonzales to inform her that he had the children with him at an amusement park in Denver, Colorado.⁵ At approximately 3:20 AM the following morning, Mr. Gonzales pulled up to the Castle Rock police station and began firing shots at officers. A shoot-out ensued, after which the

¹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

² *Gonzales*, 545 U.S. 748.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

bodies of Jessica Gonzales's three daughters were found in the back of Mr. Gonzales's truck, riddled with bullets.⁶

Jessica Gonzales sued the Town of Castle Rock under the Due Process Clause of the 14th Amendment, which provides that a state may not deprive a person of life, liberty, or property without due process of law.⁷ In order to have a claim under the Due Process Clause, an individual must have a property interest in police enforcement of the restraining order; Ms. Gonzales argued that she had such an interest. As the Supreme Court stated, to have a property interest, "a person (1) must have more than (a) an abstract need or desire, or (b) a unilateral expectation of a property interest; and (2) must, instead, have a legitimate claims of entitlement to the interest."⁸ The Supreme Court also noted that "[p]roperty interests are not created by the Federal Constitution... they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."⁹ In this case, the applicable state law from which Ms. Gonzales claimed her property interest arose was Colo. Rev. Stat. § 18-6-893.5(5) (1999).¹⁰

The restraining order obtained by Jessica Gonzales pursuant to the Colorado statute included preprinted language that directed a peace officer to use "every reasonable means" to enforce a restraining order.¹¹ However, the Supreme Court held that this did not make enforcement of the restraining order mandatory for the following three reasons. First, a well-established tradition of police discretion had long coexisted with apparently

⁶ *Gonzales*, 545 U.S. 748.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Gonzales*, 545 U.S. 748.

¹¹ *Id.*

mandatory arrest statutes. Second, it would be hard to imagine that a police officer would not have some discretion to determine that, despite probable cause to believe that a restraining order had been violated, the circumstances of the violation or the competing duties of that officer or that officer's agency counseled against enforcement in a particular instances. Lastly, the practical necessity for discretion was particularly apparent in a case such as the case at hand, where the suspected violator was not present and his whereabouts were unknown.¹² Furthermore, the applicable Colorado state statute being interpreted by the Supreme Court provided that "a peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining order is not to be held civilly or criminally liable unless he has acted in bad faith and with malice or has violated the rules adopted by the Colorado Supreme Court."¹³

Because of their reading of these statutes, the Court held that Jessica Gonzales had no constitutionally-protected property interest in the enforcement of her restraining order, and was therefore unable to claim that the Castle Rock police department had violated her right to due process.¹⁴ To have a property interest in a benefit as abstract as enforcement of a restraining order, "a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."¹⁵ The Colorado statute created no such clear and explicit entitlement.

Part II – International Cases Finding State Liability

¹² *Id.*

¹³ *Id.*

¹⁴ *Gonzales*, 545 U.S. 748.

¹⁵ *Id.*

Contrary to the Supreme Court's repeated rulings that the United States government has no duty to protect individuals from private violence¹⁶, many international courts, such as the European Court of Human Rights, have found that states are liable for failure to protect individuals from private violence. There are two requirements to find states legally responsible for such failures: 1) the State "knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party," and 2) the State "failed to take reasonable steps within the scope of its powers, which might have had a reasonable possibility of preventing or avoiding the risk."¹⁷

A. *Velásquez Rodríguez v. Honduras*

Several other cases heard by the Inter-American Commission on Human Rights (IACHR) and committees for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have found other States to be liable for the failure to protect citizens from a clear risk of private violence. One such case is *Velásquez Rodríguez v. Honduras*, which was heard before the IACHR in 1988.¹⁸ This case involved the kidnapping and disappearance of approximately 150 people in Honduras who were considered by the State to be dangerous to national security.¹⁹ However, Honduran officials either denied the disappearances entirely or claimed that they were incapable of preventing or investigating them.²⁰

¹⁶ See generally *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

¹⁷ Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 Colum. Human Rights L. Rev. 19 (2008).

¹⁸ *Velásquez Rodríguez v. Honduras*, 36 Loy. L.A. Int'l & Comp. L. Rev. 1913, 1919 (2014).

¹⁹ *Velásquez*.

²⁰ *Id.*

The IACHR found in this matter that Honduras had violated many articles of the American Convention on Human Rights.²¹ First, Honduras violated Article 4, which ensures the right to life, because “the practice of disappearances in Honduras often involved secret executions and concealment of bodies, [which] is a flagrant violation of the right enshrined in Article 4.”²² The Commission also found a violation of Article 5, which ensures the right to humane treatment, because investigations into the forced disappearances, as well as testimony from victims, suggested that the victims were usually subject to “cruel, inhumane, and degrading treatment during their detainment.”²³ Lastly, the Commission found a violation of Article 7, which ensures the right to personal liberty, because “the kidnapping of a person is an arbitrary deprivation of liberty, and an infringement of the right to be brought without delay before a judge....”²⁴ The Commission awarded reparations in the form of both pecuniary damages and continued investigation into the fates of those who disappeared.²⁵

B. *A.T. v. Hungary*

Another case finding State liability is *A.T. v. Hungary*, a case heard by a CEDAW committee.²⁶ The petitioner, A.T., had been subjected to severe domestic violence by her common law husband and the father of her two children.²⁷ However, she did not go to a shelter because one of her children had severe brain damage that a shelter would not be

²¹ *Id.*

²² *Velásquez*, at 1919-20.

²³ *Id.*, at 1920.

²⁴ *Id.*, at 1921.

²⁵ *Id.*, at 1923-24.

²⁶ *A.T. v. Hungary*, Views of the Committee on the Elimination of Discrimination Against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Thirty-Second Session, at 1 (2005).

²⁷ *Id.*, at 1.

equipped to handle.²⁸ In proceedings regarding the husband's access to the family home following the petitioner's decision to change the locks to prevent him from gaining access, the district court found in his favor, and the decision was upheld by the Budapest Regional Court on appeal.²⁹ Petitioner then instituted criminal proceedings against her husband, which were unreasonably prolonged.³⁰

Therefore, Petitioner later sued the State of Hungary, alleging that it had "failed to provide effective protection from her... husband, neglecting its 'positive' obligations under the [CEDAW] Convention and supporting the continuation of domestic violence against her."³¹ She also argued that the lengthy criminal proceedings against her husband, the lack of protection and/or restraining orders under current Hungarian law, and the fact that her husband had not spent any time in custody constituted violations of her rights under the Conventions on the Elimination of All Forms of Discrimination Against Women.³²

In its decision, the Committee held that a delay of over three years in criminal proceedings amounted to an "unreasonably prolonged delay," especially considering the fact that the petitioner had been at risk of irreparable harm, had received threats to her life, and had no possibility of obtaining temporary protection from a restraining order while the proceedings were in progress.³³ The Committee noted that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of

²⁸ *A.T. v. Hungary*, Views of the Committee on the Elimination of Discrimination Against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Thirty-Second Session, at 2 (2005).

²⁹ *A.T. v. Hungary* (Communication No. 2/2003), United Nations Committee on the Elimination of Discrimination Against Women, at 1 (2005).

³⁰ Communication No. 2/2003, at 1.

³¹ *Id.*

³² *A.T. v. Hungary*, at 3.

³³ Communication No. 2/2003, at 2.

rights or to investigate and punish acts of violence....”³⁴ On this basis, the Committee found that Hungary had failed to fulfill its obligations under the CEDAW Convention, and had therefore violated the rights of the petitioner.³⁵

C. *Goekce v. Austria*

A domestic violence case involving the State of Austria was brought before the Convention on the Elimination of All Forms of Discrimination Against Women in 2007.³⁶ *Goekce v. Austria* was brought by two Austrian organizations, the Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice, that protect and support victims of gender-based violence.³⁷ A former client of the Intervention Centre and victim of domestic violence, Şahide Goekce, was shot and killed by her husband in front of her children.³⁸ The police had denied two previous requests that her husband be detained despite the fact that they knew he owned a handgun and that he had threatened to kill his wife on several occasions.³⁹

³⁴ *A.T. v. Hungary*, at 11.

³⁵ *Id.*, at 12.

³⁶ *Goekce v. Austria*, Views of the Committee on the Elimination of Discrimination Against Women, Thirty-Ninth Session, at 1 (2007).

³⁷ *Goekce*, at 1-3.

³⁸ *Id.*, at 4.

³⁹ *Id.*, at 3.

The complaint argued that the State of Austria violated Articles 1⁴⁰, 2⁴¹, 3⁴², and 5⁴³, of the Convention on the Elimination of All Forms of Discrimination Against Women for failing to take “all appropriate measures to protect Goekce’s right to personal security and life.”⁴⁴ The complaint also alleged that the State had failed to treat Mr. Goekce as a violent and dangerous offender in accordance with criminal law.⁴⁵ Furthermore, the complaint asserted that the Austrian Federal Act for the Protection against Violence within the Family did not provide adequate means to protect women from highly violent persons, especially in cases of recurrent violence and death threats.⁴⁶ Lastly, the complaint noted “that women are far more affected than men by the failure of public prosecutors to take domestic violence seriously.... Women are also disproportionately affected by the practice of not... punishing offenders in domestic violence cases appropriately.”⁴⁷

⁴⁰ Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

⁴¹ Article 2 of the CEDAW Convention provides:

“State Parties [must] condemn discrimination against women in all its forms... [by refraining] from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation... [by taking] all appropriate measures to eliminate discrimination against women by any person, organization or enterprise... [and by taking] all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women....”

⁴² Article 3 of the CEDAW Convention provides that “States Parties shall take... all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms....”

⁴³ Article 5 of the CEDAW Convention provides that States take all appropriate measures “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices... which are based on the idea of the inferiority or the superiority of either of the sexes....”

⁴⁴ Goekce, at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

The Committee first noted that “[u]nder general international law and specific human rights conventions, States may... be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence....”⁴⁸ The Committee found that Austria had violated Şahide Goekce’s rights to life and physical and mental integrity under Articles 1, 2, and 3 of the Convention.⁴⁹ Its findings were based on the fact that the police knew or should have known that Goekce was in serious danger, particularly because her husband had shown that he had the potential to be a very dangerous and violent criminal.⁵⁰ Therefore, the Committee held that the Austrian police were accountable for failing to exercise due diligence to protect Goekce.⁵¹

D. *González, Monreal, and Monárrez v. United Mexican States*

In 2009, the Inter-American Commission on Human Rights both filed and heard a case against Mexico for the disappearance and murders of three women— González, Monreal, and Monárrez.⁵² The murders had occurred in the city of Juárez, a border town between the United States and Mexico where gender-based violence, including the abduction, rape, and murder of young women was a regularity in the 1990s.⁵³ The bodies of these three women, two of whom were minors, had been discovered in November 2001 in a cotton field known as Campo Algodonero.⁵⁴ The IACHR found that Mexico had violated its human rights obligations under the American Convention of Human

⁴⁸ *Goekce*, at 21.

⁴⁹ *Id.*, at 22.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Campo Algodonero: Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez v. United Mexican States*, Organization of American States– Inter-American Commission on Human Rights (2007).

⁵³ *Campo Algodonero*, at 13.

⁵⁴ *Id.*, at 7-8.

Rights including the right to life under Article 4, the right to humane treatment under Article 5, and the rights of the child under Article 19.⁵⁵ The Commission ordered Mexico to satisfy several remedial measures including— the construction of a national memorial, renewed investigations into the disappearances of the women, reparations of over \$200,000 to each of the families, and the prevention of any recurrence of similar human rights violations through the use of coordinated policies and resources “to guarantee that cases of violence against women are adequately prevented, investigated, and punished...”⁵⁶

E. Summary

All of these cases involved the failure of governments to make reasonable efforts to protect their citizens from known threats of violence. Furthermore, in all of these cases, sovereign States were held liable in international courts for their failure to protect citizens from the violence of private actors. In the *Velásquez* case, Honduras was held liable for the disappearance of 150 people.⁵⁷ In *A.T. v. Hungary*, a CEDAW committee found that a three-year criminal proceeding constituted an unreasonable delay, especially given the fact that restraining orders were unavailable in Hungary to provide temporary relief to a battered woman during criminal proceedings.⁵⁸ In the *Goekce* case, Austria was found liable for the death of Ms. Goekce after failing to respond to her requests that her husband be detained for threatening to kill her.⁵⁹ Lastly, in the *Campo Algodonero* case,

⁵⁵ *Id.*

⁵⁶ *Id.*, at 21.

⁵⁷ *Velásquez*, at 1919.

⁵⁸ Communication No. 2/2003, at 2.

⁵⁹ *Goekce*, at 5.

Mexico was found liable for failing to prevent and investigate the regular abduction, rape, and murder of young women in the city of Juárez throughout the 1990s.⁶⁰

Despite these international cases, the U.S. government has found no duty to protect individuals from private violence, even where there was a clear threat and an opportunity for law enforcement to act to try to avoid harm.⁶¹ In the Supreme Court case *DeShaney v. Winnebago*, a father had been under investigation by the Winnebago County Department of Social Services (DSS) for child abuse. However, the county did not remove the child from the father.⁶² When the father later beat his son so severely that he was deemed to be profoundly retarded, the boy and his mother brought a substantive due process claim, alleging that the county DSS had deprived the boy of his liberty by failing to intervene and protect him against a risk of violence of which they knew or should have known.⁶³ The Supreme Court disagreed, holding:

Nothing in the language of the Due Process Clause of the Fourteenth Amendment requires a state to protect the life, liberty, and property of its citizens against invasion by private actors. The Due Process Clause is phrased as a limitation on a state's power to act, not as a guarantee of certain minimal levels of safety and security.... 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. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression.⁶⁴

These differences between American law and International Human Rights law raise the question— Should American law include the right to freedom from domestic violence in light of international human rights norms? When the Jessica Gonzales finally appealed

⁶⁰ *Campo Algodonero*.

⁶¹ See generally *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). See also *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

⁶² *DeShaney*, 489 U.S. 189 (1989).

⁶³ *Id.*

⁶⁴ *Id.*

her case to the Inter-American Commission on Human Rights, the Commission issued a verdict against the United States, finding that freedom from domestic violence should be considered a basic human right.⁶⁵

Part III – *Gonzales* at the Inter-American Commission on Human Rights

In 2011, Jessica Gonzales (now Lenahan) sued the United States at the Inter-American Commission on Human Rights after failing to find relief from the United States Supreme Court.⁶⁶ Ms. Lenahan’s counsel, who included the American Civil Liberties Union, argued that the United States had violated the American Declaration on the Rights and Duties of Man⁶⁷ by failing to exercise due diligence to protect Jessica Lenahan and her daughters from domestic violence.⁶⁸ The petitioner further alleged that the state of Colorado never duly investigated the killing of Ms. Lenahan’s daughters in order to clarify the circumstances of their deaths and that the United States government did not “provide her with an adequate remedy for the failures of the police.”⁶⁹ Although eleven years had passed since the passing of Jessica Lenahan’s daughters, she still did not know the cause, time, and place of their deaths.⁷⁰

The IACHR found that the United States had violated its obligations as a signatory of the American Declaration on the Rights and Duties of Man.⁷¹ First, the Commission concluded that by issuing a restraining order, the state recognized the necessity to protect Ms. Lenahan and her daughters, but it failed to fulfill this duty with

⁶⁵ *Jessica Lenahan (Gonzales) et al v. United States*, Inter-American Commission on Human Rights, Report No. 80/11 (2011).

⁶⁶ *Lenahan*, at 1.

⁶⁷ The American Declaration on the Rights and Duties of Man was the world’s first international human rights treaty and was adopted by the nations of the Americas in Bogotá, Colombia in 1948.

⁶⁸ *Lenahan*, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*, at 43.

due diligence: “The state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order at issue...”⁷² The Commission found that this failure was a violation of Article II of the American Declaration, which ensures equal protection and non-discrimination, because there had been a historical problem with the enforcement of protection orders by police⁷³— a problem that has disproportionately affected women.⁷⁴ In finding an Article II violation, the Commission underscored “that all States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination.”⁷⁵

The Commission further found that the failure of the United States to adequately organize its state structure to protect women and children from domestic violence also constituted a violation of Ms. Lenahan’s daughters’ right to life under Article I, and their right to special protection as children under Article VII of the American Declaration.⁷⁶ The Commission noted that because children have a right to special protection under Article VII, States have a duty to apply due diligence and to act expeditiously to protect children from right to life violations; this requires “that the authorities in charge of

⁷² *Lenahan*, at 43.

⁷³ *Id.*, at 43. See also, U.S. Department of Justice Attorney General’s Task Force on Domestic Violence: Final Report, at 8 (noting that the problem of family violence in the United States has existed for generations but has only recently begun to receive the attention it deserves) and pages 18-19 (recommending that family violence should be recognized and responded to as a criminal activity, and that law enforcement officials, prosecutors, and judges should develop coordinated responses to family violence) (1984).

⁷⁴ *Lenahan*, at 43. See also, U.S. Department of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, at 6 (noting that of about 623,000 violent crimes committed by an intimate partner in 2007, 554,000 were against female victims while only 69,000 were against male victims; the number of female victims was about 8 times that of male victims) (2007).

⁷⁵ *Lenahan*, at 44.

⁷⁶ *Id.*, at 44.

receiving reports of missing persons have the capacity to understand the seriousness of the phenomenon of violence... and to act immediately.”⁷⁷

In the Gonzales (Lenahan) case, the police appear to have assumed that the girls would be safe because they were with their father. However, there is extensive international recognition of the link between domestic violence and fatal violence against children committed by parents that the Colorado police officers should have been aware of.⁷⁸ The Commission found no protocols and/or directives in place to guide the Colorado police officers on how to respond to missing children in the context of protection orders and domestic violence.⁷⁹

Lastly, the Commission found that the United States had violated Article XVIII of the American Declaration, which provides that all persons are entitled to judicial remedies when they have suffered human rights violations.⁸⁰

The Inter-American has affirmed for many years that it is not the formal existence of such remedies that demonstrates due diligence, but rather that they are available and effective.⁸¹ Therefore, when the State apparatus leaves human rights violations unpunished and the victim’s full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law.⁸²

⁷⁷ *Id.*, at 44. Citing, *Campo Algodonero*, at 62 para. 285 (ordering the Mexican State to strengthen its institutional capacity to fight the existing pattern of impunity regarding cases of violence against women in the city of Juárez “through the use of effective criminal investigation that receive a consistent judicial follow-up, thus guaranteeing adequate punishment and reparation”) (2007).

⁷⁸ *Lenahan*, at 44-45. Citing the United Nations Study on Violence Against Children (which confirms that the most violence acts against children are usually carried out by people they know and should be able to trust, such as parents), available at <http://www.unviolencestudy.org/>.

⁷⁹ *Lenahan*, at 45.

⁸⁰ *Lenahan*, at 46. Citing, *Maria da Penha v. Brazil*, Inter-American Commission on Human Rights, Report No. 54/01, para. 37 (2000).

⁸¹ *Lenahan*, at 46. Citing, *Wayne Smith, Hugo Armendatriz, et al. v. United States*, Inter-American Commission on Human Rights, Report No. 81/10, para. 62 (holding that it is a fundamental role for the courts of a state in ensuring and protecting basic human rights and concluding “that when a state fails to provide an adequate and effective remedy to a violation of a fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration”) (2010).

⁸² *Lenahan*, at 46. Citing, Organization of American States– Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Domestic Violence in the Americas*, at 11 para. 26 (providing that a “State’s duty to provide judicial remedies [to victims of domestic violence] is not fulfilled

Due to the fact that the United States did not provide Jessica Lenahan with an effective judicial remedy for the non-enforcement of her protection order or a diligent investigation into the deaths of her daughters, the United States violated Article XVIII.⁸³

According to the Inter-American Commission, “gender-based violence is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women’s rights.”⁸⁴ In this vein, the international and regional systems have noted the strong link between discrimination, violence, and due diligence, and have therefore determined that “a State’s failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law.”⁸⁵ These principles of international law have even been applied to hold States liable for failures to protect women from domestic violence by private actors;⁸⁶ this is in direct opposition to the Supreme Court holdings in *DeShaney and Gonzales*, which held that the State does not have a duty to provide services to the public for protection against private actors.⁸⁷ Since domestic violence has been recognized at the international level as a human rights violation that is one of the

merely by making those remedies available to victims on paper; instead, those remedies must be adequate to remedy the human rights violations denounced”) (2007).

⁸³ *Lenahan*, at 47.

⁸⁴ *Id.*, at 30. Citing United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 (expressing concern that violence against women is an obstacle to the achievement of equality, development, and peace; affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women; recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women; and recognizing that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men) (Dec. 20, 1993).

⁸⁵ *Lenahan*, at 30. See generally, CEDAW Committee, Communication 2/2003, *Ms. A.T. v. Hungary* (Jan. 26, 2005); IACHR, Report No. 28/07, *Claudia Ivette González and Others* (Mexico) (Mar. 9, 2007); I/A Court H.R., *Case of González et al. (“Cotton Field”) v. Mexico* (Nov. 16, 2009).

⁸⁶ *Lenahan*, at 30. See generally, IACHR, Report No. 54/01, *Maria Da Penha Maia Fernandes* (Brazil) (April 16, 2001).

⁸⁷ See generally, *DeShaney*, 489 U.S. 189.

most pervasive forms of discrimination, why has the United States, as a leader in the international community, failed to also make this recognition and to assume the responsibility of diligently protecting its citizens from domestic violence?⁸⁸

Part IV– Domestic Court Finding State Liability

Just one year after the *Lenahan* decision, the *equality effect*, an international non-profit organization committed to women’s and girls’ human rights issues, initiated the “160 Girls” project in Kenya.⁸⁹ The purpose of the project was to hold Kenyan police accountable for their failure to enforce defilement⁹⁰ laws and for neglecting their duty to protect girls in Kenya from this egregious form of violence.⁹¹ The initiative was known as the “160 Girls” project because at the time of its inception, Ripples International, a plaintiff in the case, had rescued over 160 defilement victims who needed access to justice.⁹²

The incidence of rape in Kenya had reached epic proportions by 2011. Statistics show that every thirty minutes, a girl/women was raped in the country.⁹³ Furthermore, young girls were especially vulnerable, with nearly one in three Kenyan girls between the ages of thirteen and twenty-four having experienced sexual violence.⁹⁴ The petitioners of

⁸⁸ *Lenahan*, at 30. Citing United Nations General Assembly, *Elimination of Domestic Violence against Women*, U.N. Doc. A/Res/58/147 (Feb. 19, 2004).

⁸⁹ Fiona Sampson and Sasha Hart, “160 Girls” *Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya*, at 1 (2014).

⁹⁰ Section 8 of Kenya’s Sexual Offenses Act of 2006 criminalizes “defilement,” providing, “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” The Act also provides recommendations for the appropriate length of imprisonment based on the age of the child defiled. Section 40 of the Act also provides that it is up to the sole discretion of the Attorney General as to whether police investigations should be discontinued.

⁹¹ Sampson and Hart, at 2.

⁹² *Id.*

⁹³ Report of the IPU Kenya Delegation on 111th Assembly of the Inter-Parliamentary Union held in Geneva, Switzerland, at 4720 (2004).

⁹⁴ United Nations Children’s Fund Kenya Country Office, Division of Violence Prevention, National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya

the “160 Girls” case had all been victims of defilement, as well as other forms of sexual violence and child abuse, between the years 2008 and 2012.⁹⁵ Although the petitioners had made reports of the acts of defilement at various police stations, the officers neglected, omitted, refused, or otherwise failed to conduct prompt, effective, and professional investigations into the complaints.⁹⁶ They also often failed to even record the complaints in the police occurrence book, to visit the crime scenes, or to interview witnesses.⁹⁷

Fortunately for these victims, *equality effect*’s legal team and social workers at the shelter in Meru documented these police failures.⁹⁸ The evidence submitted with the complaint was over 502 pages in length and detailed the specific police treatment of the girls.⁹⁹ The plaintiffs were eleven girls, ranging in age from five to fifteen years old, who had made complaints to police stations regarding their defilement at the hand of family members, neighbors, employers, and even a police officer.¹⁰⁰ The evidence included an affidavit of C.K., a five-year-old girl, who had been raped by her uncle.¹⁰¹ When Ripples International had brought this incident to the attention of the police, the police had asked for money in order to intervene.¹⁰² In another case included in the evidence, when fifteen-

National Bureau of Statistics, *Violence Against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood*, at 7 (2012).

⁹⁵ *C.K. (A Child) (Through Ripples International as Her Guardian and Next Friend) and Others v. Commissioner of Police/Inspector General of the National Police Service and Others*, Kenya Law Reports, at 3 (Republic of Kenya, High Court at Meru 2013).

⁹⁶ *C.K. v. Commissioner*, at 3.

⁹⁷ *Id.*

⁹⁸ Sampson and Hart, at 3.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *C.K. v. Commissioner*, at 3.

¹⁰² Sampson and Hart, at 3.

year-old F.K. became pregnant after being raped by her neighbor, the police told her that they could not investigate her rape or arrest the perpetrator until the baby was born.¹⁰³

The petition alleged that by failing to investigate the claims of these young girls, the police had violated their rights under the Kenyan Constitution, as well as other regional and international human rights treaties.¹⁰⁴ These rights included: “the right to and freedom from discrimination, the right to security of the person, and the right to access justice.”¹⁰⁵ The petition cited directly to the *Lenahan* case.¹⁰⁶

On May 27, 2013, the High Court of Kenya ruled in the girls’ favor.¹⁰⁷ The Court found that the police were directly responsible for the psychological harms flowing from the mistreatment the girls had received by the police; these harms were also found to amount to a violation of the girls’ constitutional rights.¹⁰⁸ The Court also noted that the inaction by the police had rendered them indirectly responsible for the harms inflicted upon the girls by their rapists:¹⁰⁹

Police unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigations to the said complaints. That failure caused grave harm to the petitioners and also created a climate of impunity for defilement as perpetrators were let free.¹¹⁰

The Court found that the failure to conduct these investigations violated several provisions of national law. First, the police violated both express and implied provisions

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *C.K. v. Commissioner*, at 6.

¹⁰⁷ *Id.*, at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *C.K. v. Commissioner*, at 6.

of Article 27 of the Kenyan Constitution,¹¹¹ which guarantees the rights to equal protection before the law and equal benefit of the law.¹¹² Article 27 also provides:

Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.... The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹¹³

The Court also found a violation of Article 244 of the Kenyan Constitution, which requires that the National Police Service “strive for the highest standards of professionalism, prevent corruption, promote accountability, “comply with constitutional standards of human rights and... train staff to the highest possible standards of competence and integrity....”¹¹⁴

Based on its holding, the Court ordered the National Police Service to conduct thorough investigations into each of the cases.¹¹⁵ Furthermore, the Court ordered the police to take the appropriate measures to implement Article 244 of the Kenyan Constitution, which requires that police respect and comply with human rights standards.¹¹⁶ Such holdings and remedies are consistent with the other cases discussed in this article that involved state liability for failure to protect women and girls from private citizens, such as *Velásquez Rodríguez v. Honduras* and *Campo Algodonero v. Mexico*, both of which were heard by the Inter-American Commission on Human Rights.¹¹⁷

Based on the cases above in which both domestic and international courts around the world have held that freedom from domestic violence is a basic human right and that

¹¹¹ *Id.*, at 9. See also, The Constitution of Kenya, Article 27 (2010).

¹¹² The Constitution of Kenya, Article 27(1) (2010).

¹¹³ The Constitution of Kenya, Article 27(3)-(4) (2010).

¹¹⁴ The Constitution of Kenya, Article 244 (2010).

¹¹⁵ Sampson and Hart, at 4.

¹¹⁶ *Id.*, at 4. See also, The Constitution of Kenya, Article 244 (2010).

¹¹⁷ See *Velásquez* and *Campo Algodonero*.

States are responsible for diligently protecting their citizens from such violence, it is reasonable to question how the United States could possibly be ignoring and inhibiting this progress that is now demanded in international law.

Part V – Local Ordinances in the United States

Although the United States Supreme Court has failed to recognize that freedom from domestic violence is a basic human right and to hold states and police accountable for neglecting to enforce restraining orders and diligently protect their citizens, several cities throughout the United States have stepped up and demanded justice for victims of domestic violence by passing local ordinances on the subject. The first city to pass such a resolution was Cincinnati, Ohio, which recognized the prevalence of domestic violence and declared that “freedom from domestic violence is a fundamental human right” and that “state and local governments bear a responsibility to continue securing this human right on behalf of their citizens.”¹¹⁸ In 2012, Baltimore, Maryland followed suit, “FOR the purpose of joining world leaders and leaders within the United States in recognition of domestic violence as a human rights concern and declaring that the freedom from domestic violence is a fundamental human right.”¹¹⁹

Since 2011, at least twenty-six U.S. towns and cities have passed ordinances or resolutions declaring that domestic violence is a human rights concern and that freedom from domestic violence is a basic human right.¹²⁰ Some of these cities include Buffalo,

¹¹⁸ Cincinnati, Ohio Resolution 47 (signed October 5, 2011) *available at* <http://www.lawschool.cornell.edu/womenandjustice/upload/1b-Cincinnati-OH.pdf>.

¹¹⁹ Baltimore, Maryland, Council Bill 12-0034R (adopted March 19, 2012) *available at* <http://www.lawschool.cornell.edu/womenandjustice/upload/2b-Baltimore-MD.pdf>.

¹²⁰ Cornell University Law School Global Gender Justice Clinic, Columbia Law School Human Rights Institute, and University of Miami School of Law Human Rights Clinic, *Freedom from Domestic Violence as a Fundamental Human Right Resolutions, Presidential Proclamations, and Other Statements of Principle*, *available at* <http://www.lawschool.cornell.edu/womenandjustice/DV-Resolutions.cfm>.

New York; Miami-Dade, Florida; Miami Springs, Florida; Montgomery County, Alabama; Seattle, Washington; Washington, D.C.; Austin, Texas; Boston, Massachusetts; Jacksonville, Florida; and Chicago, Illinois.¹²¹ However, as no legal action has yet been taken on the basis of these ordinances; therefore, it is still unknown what impact they will have. In 2015 President Obama issued a proclamation affirming the “basic human right to be free from abuse.”¹²² Unfortunately, the United States Supreme Court has taken no action to make this near-globally accepted notion a reality in the United States. Furthermore, the Supreme Court struck down Congress’s attempt to enact legislation on this issue in *United States v. Morrison* (discussed further below).

Part VI – Solutions

Justice Stevens’ dissent in *Gonzales*, which Justice Ginsberg joined, argued that although the Federal Constitution’s Due Process Clause did not create a property interest to police protection from domestic violence,¹²³ “federal law imposes no impediment to the creation of such an entitlement by Colorado law.”¹²⁴ The dissent made a great analogy: If Jessica Gonzales had entered into a contract with a private security firm, that firm would have been obliged to provide protection to her family.¹²⁵ Furthermore, Ms. Gonzales’ interest in that contract would undoubtedly constitute a “property” interest within the meaning of the Due Process Clause.¹²⁶ Therefore, by entering a restraining order to protect Ms. Gonzales, the Colorado judge created the functional government

¹²¹ *Freedom from Domestic Violence as a Fundamental Human Right Resolutions, Presidential Proclamations, and Other Statements of Principle.*

¹²² President Barack Obama, Presidential Proclamation – National Domestic Violence Awareness Month (2015) available at <https://www.whitehouse.gov/the-press-office/2015/09/30/presidential-proclamation-national-domestic-violence-awareness-month>.

¹²³ *Gonzales*, 545 U.S. 748, 773. See also *DeShaney*, 489 U.S. 189 (1989).

¹²⁴ *Gonzales*, 545 U.S. 748.

¹²⁵ *Id.*

¹²⁶ *Id.*

equivalent of such a private contract, thereby granting Ms. Gonzales entitlement to mandatory protection by the local Colorado police; that state-created right would also qualify as a “property” interest entitled to constitutional protection.¹²⁷

Viewing a civil restraining order as a contract between the government and the plaintiff requiring the government to do its due diligence to protect the plaintiff is a strong alternative argument to the Supreme Court’s previous finding in *DeShaney*, in which the Court held the government has no duty to protect individuals from private violence, even where there was a clear threat.¹²⁸ The issuance of the restraining order by a judge creates a government duty of protection because it creates a property interest in such protection.

Another possible solution would be for the United States to follow the worldwide trend and pass a federal statute declaring that freedom from domestic violence is a basic human right. However, Congress has attempted to pass one similar law in the past, and it was met with mixed reactions from courts.¹²⁹ The Violence Against Women Act of 1994 (VAWA), a part of the Violent Crime and Law Enforcement Act of 1994, was passed “in recognition of the severity of the crimes associated with domestic violence, sexual assault and stalking.”¹³⁰ The bill marked the first comprehensive federal legislative package designed to criminalize and end violence against women.¹³¹ The VAWA included provisions on rape and battering that focused both on prevention and victim services.¹³² The bill included the first federal criminal law against battering and also required that

¹²⁷ *Id.*

¹²⁸ *DeShaney*, 489 U.S. 189.

¹²⁹ *History of the Violence Against Women Act*, Legal Momentum– The Women’s Legal Defense and Education Fund, available at <https://www.legalmomentum.org/history-vawa>.

¹³⁰ *History of the Violence Against Woman Act*.

¹³¹ *Id.*

¹³² *Id.*

every state afford full faith and credit to restraining orders and orders of protection issued anywhere in the United States.¹³³ The passage of the VAWA caused a paradigm shift regarding how issued of violence against women were addressed in the United States.¹³⁴

Congress asserted that its power to pass this law stemmed from both the Commerce Clause¹³⁵ and the Fourteenth Amendment.¹³⁶ At the time the VAWA was being drafted, the controlling precedent regarding the Commerce Clause suggested that “Congress had the power to regulate activities... [that] had a substantial effect on commerce.”¹³⁷ Congress believed that domestic and sexual violence qualified under this test given the fact that domestic violence alone cost between \$5 and \$10 billion a year in health care and criminal justice.¹³⁸ Congress further believed that it had the power to pass this Act under the Enforcement Clause of the Fourteenth Amendment, which allows Congress to ban state actions that it has found to be violative of the Fourteenth Amendment.¹³⁹

¹³³ *Id.*

¹³⁴ *History of the Violence Against Women Act.*

¹³⁵ The Commerce Clause refers to Article 1, Section 8, clause 3 of the United States Constitution, which gives Congress the power to pass laws in order to regulate commerce among the several states.

¹³⁶ The Fourteenth Amendment is directly applicable to the states. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Fourteenth Amendment then gives Congress the power to enforce this Amendment upon that states and their actions.

¹³⁷ *History of the Violence Against Women Act.* See also *United States v. Lopez*, 514 U.S. 549 (1995). The *Lopez* case involved the Congressional enactment of the Gun-Free School Zone Act of 1990, which was passed by Congress using its power under the Commerce Clause to prohibit the possession of firearms in school zones. The Act was found to be unconstitutional because it exceeded Congress’s power under the Commerce Clause, which only grants Congress the power to regulate the use of channels and instrumentalities of interstate commerce, and other activities that have a substantial relation to or a substantial effect upon interstate commerce.

¹³⁸ *History of the Violence Against Women Act.*

¹³⁹ The Heritage Guide to the Constitution, Essays on Amendment XIV– The Enforcement Clause, available at <http://www.heritage.org/constitution/#!/amendments/14/essays/175/enforcement-clause>. One

Unfortunately, the Violence Against Women Act no longer provides federal criminal relief for the victims of gender-motivated violence.¹⁴⁰ This federal remedy, which provided federal relief to victims of gender-based violence, was struck down as unconstitutional in the Supreme Court case *United States v. Morrison*.¹⁴¹ The 5-4 majority rejected the civil rights remedy of the Violence Against Women Act on the grounds that gender-based violence is itself not “economic” in nature; therefore, Congress did not have the power to pass this Act under the Commerce Clause.¹⁴² The majority also rejected the claim that Congress had the power to pass the Act under the Enforcement Clause of the Fourteenth Amendment on the ground that the civil rights remedy of the Violence Against Women Act was aimed at redressing harm inflicted by private actors, as opposed to state actions.¹⁴³

Chief Justice Roberts, writing for the majority, noted, “If the allegations here are true, no civilized system of justice could fail to provide... a remedy.... But under our federal system, that remedy must be provided by the Commonwealth of Virginia, and not by the United States.”¹⁴⁴ On the other hand, Justice David H. Souter, dissenting, argued

specific purpose of the Fourteenth Amendment when it was passed in 1866 was to ensure that Congress had adequate power to adopt the Civil Rights Act. That act prohibited state legislation (specifically, the notorious "Black Codes") that denied blacks certain rights afforded to whites. Since the heart of the Fourteenth Amendment was aimed at ending discrimination, the Supreme Court declared that Congress may ban state actions that it finds to be violative of the Fourteenth Amendment. However, there must be a qualifying "state action." The Enforcement Clause of the Fourteenth Amendment gives Congress no authority to legislate with respect to the private sector because, according to the Supreme Court, there can be no Fourteenth Amendment violation without state action.

¹⁴⁰ *History of the Violence Against Women Act*.

¹⁴¹ *Id.* See also *United States v. Morrison*, 529 U.S. 598 (2000). The facts of *United States v. Morrison* are as follows: In 1994, while enrolled at Virginia Tech, Christy Brzonkala alleged that Antonio Morrison and James Crawford, who were varsity football players at Virginia Tech, raped her. She filed a complaint under Virginia Tech's Sexual Assault Policy. Morrison was found guilty of sexual assault. However, after an appeal through the university's administrative system, Morrison's punishment was set aside, as it was found to be "excessive." Brzonkala then sued Morrison, Crawford, and Virginia Tech in Federal District Court, alleging that Morrison's and Crawford's attack violated the Violence Against Women Act.

¹⁴² *Morrison*, 529 U.S. 598, 613.

¹⁴³ *Id.*, at 624.

¹⁴⁴ *Id.*, at 627.

that the Violence Against Women Act contained a "mountain of data assembled by Congress...showing the effects of violence against women on interstate commerce."¹⁴⁵ Unfortunately, Justice Roberts' statement has proven to be untrue in the years following the *Morrison* case; students at universities across the country are filing lawsuits against their schools for mishandling and rejecting their sexual assault claims.¹⁴⁶

Since the Supreme Court has held that the issuance of a restraining order does not create a "property" interest that is entitled to constitutional protection¹⁴⁷ and that Congress does not have the power to pass a law criminalizing gender-motivated violence at the federal level,¹⁴⁸ what other solutions are available to victims of domestic violence seeking redress for the government's failure to protect them? As stated in Part V of this article, local cities can continue to pass ordinances and statutes declaring that freedom from domestic violence is a basic human right. Better yet, states could pass such laws."¹⁴⁹

¹⁴⁵ *Morrison*, 529 U.S. 598, 628.

¹⁴⁶ Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, THE NEW YORK TIMES (Sept. 21, 2015) (explaining that according to recent surveys, more than one fourth of undergraduate women at large universities reported that they had been sexually assaulted, and that many women did not report such assaults because they did not think that they would be taken seriously). See also Jed Rubenfeld, *Mishandling Rape*, THE NEW YORK TIMES (Nov. 15, 2014) (explaining that colleges are now in the business of conducting rape trials, but they are not competent to handle this job:

[T]he federal government in 2011 mandated a ramped-up sexual assault adjudication process at American colleges, presumably believing that campuses could respond more aggressively than the criminal justice system. So now colleges are conducting trials, often presided over by professors and administrators who know little about law or criminal investigations. At one college last year, the director of a campus bookstore served as a panelist. The process is inherently unreliable and error-prone. At Columbia University and Barnard College, more than 20 students have filed complaints against the school for mishandling and rejecting their sexual assault claims.)

See generally Adam Banner, Esq., *College Football, Sexual Assaults, and University Accountability*, HUFFPOST CRIME (Aug. 12, 2014) (explaining numerous incidences in which college athletes were charged with sexual assault but were not adequately punished. Also noting that the universities' policies of internally investigating sexual assault allegations only foster "the protection of student athletes, rather than the protection of the entire student population").

¹⁴⁷ *Gonzales*, 545 U.S. 748.

¹⁴⁸ *Morrison*, 529 U.S. 598.

¹⁴⁹ State laws recognizing that freedom from domestic violence should be considered a basic human right would have much more power than the local ordinances currently in existence because local ordinance would not be enforced if appealed to a higher court.

Another solution is a federal consent decree. In 2011, the Department of Justice investigated the Puerto Rico, New Orleans, and Maricopa County police departments, finding that they engaged in patterns or practices of discriminatory, unconstitutional policing, including gender-biased policing in their response to domestic and sexual violence.¹⁵⁰ The Justice Department entered into consent decrees with the Puerto Rico, New Orleans, and Maricopa County police departments, requiring them to respond to and investigate reports of domestic violence and sexual assault professionally, effectively, and in a manner free of gender-based bias.¹⁵¹ Unfortunately, as the DOJ has only investigated and entered into consent decrees with these three counties, this response is inadequate in addressing police failures across the country.

One last solution for victims of domestic violence in the United States would be for the U.S. to respect its international treaty obligations. As a signatory of the American Declaration on the Rights and Duties of Man¹⁵² and a member of the Inter-American Commission on Human Rights,¹⁵³ the United States has an obligation to respect and implement all decisions of the IACHR.¹⁵⁴ In 2011, the IACHR found that the United

¹⁵⁰ *DOJ Issues New Guidance for Police in Domestic Violence and Sexual Assault Cases: Police Departments Asked to Examine Gender-Bias and Victim Treatment*, American Civil Liberties Union, Dec. 15, 2015, available at <https://www.aclu.org/news/doj-issues-new-guidance-police-domestic-violence-and-sexual-assault-cases>.

¹⁵¹ *DOJ Issues New Guidance for Police in Domestic Violence and Sexual Assault Cases* (2015).

¹⁵² The American Declaration on the Rights and Duties of Man was the world's first international human rights treaty and was adopted by the nations of the Americas in Bogotá, Colombia in 1948.

¹⁵³ The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States, whose mission is to promote and protect human rights in the American hemisphere, available at <http://www.oas.org/en/iachr/mandate/what.asp>.

¹⁵⁴ Article VI of the United States Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Therefore, obligations created by treaties signed by the United States must be respected because treaties are also the supreme law of the land, equal to the Constitution itself.

States had violated the basic human rights of Jessica Lenahan (Gonzales) and her daughters.¹⁵⁵ In its decision, the IACHR also made recommendations to the United States and required their implementation.¹⁵⁶ These recommendations included: 1) investigation into the deaths of Ms. Lenahan's three daughters; 2) investigation into the failures that took place relating to the enforcement of Ms. Lenahan's restraining order as a guarantee of their non-repetition; 3) reparations to Jessica Lenahan (Gonzales); 4) the adoption of "*multifaceted legislation at the federal and state levels*, or to reform existing legislation, making mandatory the enforcement of protection orders and other precautionary measure to protect women from imminent acts of violence, and to create effective implementation mechanisms"¹⁵⁷ (emphasis added); and 5) to design protocols at the federal and state levels that specify the proper procedures for the investigation by law enforcement officials into reports of missing children in the context of a restraining order violation.¹⁵⁸

Unfortunately, thus far, the United States has failed to fulfill its duties and reparations imposed by the Inter-American Commission on Human Rights:¹⁵⁹ "[T]he US lacks any coordinated mechanisms to communicate how its human rights commitments and obligations should shape domestic policy.... The failure to communicate these standards [to government actors and law enforcement] and their importance for policy compounds the likelihood that serious violations will persist."¹⁶⁰ By honoring its treaty obligations under the American Declaration on the Rights and Duties of Man, its

¹⁵⁵ Lenora M. Lapidus, *Bring Women's Human Rights Home*, American Civil Liberties Union (Mar. 8, 2013) available at <https://www.aclu.org/blog/bring-womens-human-rights-home?redirect=blog/womens-rights-reproductive-freedom/bring-womens-human-rights-home>.

¹⁵⁶ Lapidus.

¹⁵⁷ Lenahan, at 53.

¹⁵⁸ *Id.*

¹⁵⁹ Lapidus.

¹⁶⁰ Lapidus.

membership in the Inter-American Commission on Human Rights, and by implementing the recommendations of the IACHR, the United States would go a long way toward ensuring the accountability of police officers and other government officials, thereby creating greater protection against violence for women across the country.¹⁶¹ Women that have been granted restraining orders by a court of law should be able to rely on police to enforce those orders and should know that if the police fail to diligently do so, the government will hold them accountable.¹⁶²

Part VII – Conclusion

Even if the Supreme Court does not interpret the Constitution to impose an obligation on government officials to protect citizens from known threats of violence committed by private actors,¹⁶³ international human rights law does.¹⁶⁴ As a signatory of many human rights treaties and as a leader in preventing and responding to gender-based violence around the world, the United States has a duty to provide the same human rights standard to its own citizens. Although Congress does not have the power to pass such a law (except through constitutional amendment, which is extremely rare), U.S. obligations under international human rights treaties must be implemented into local domestic violence hearings and trials to ensure that courts at the local, state, and federal levels are finding gender-based violence to be a human rights violation and that law enforcement officials are accountable for failing to diligently prevent such violence.

¹⁶¹ Lapidus.

¹⁶² Lapidus.

¹⁶³ See generally *Gonzales*, 545 U.S. 748, and *DeShaney*, 489 U.S. 189.

¹⁶⁴ Lapidus.