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Introduction: Jessica Lenahan (Gonzales) v. United States of America: Implementation, Litigation, and Mobilization Strategies

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INTRODUCTION: *JESSICA LENAHAN (GONZALES) V. UNITED STATES: IMPLEMENTATION, LITIGATION, AND MOBILIZATION STRATEGIES**

CAROLINE BETTINGER-LOPEZ**

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INTRODUCTION

My sincere thanks to the American University Washington College of Law *Journal of Gender, Social Policy & the Law* and the Women in the Law Program for inviting me to offer this keynote address, and especially to Madi Ford and Angie McCarthy for their impressive organization of today’s event. Congratulations to the Journal on its 20th Anniversary! It is an honor to be here with such an esteemed group of colleagues and students at a law school that is sincerely committed to women’s rights, human rights, and social justice.

Today’s symposium, *Lenahan (Gonzales) v. United States of America: The Domestication of International Law*, is devoted to a landmark case—a

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first on many fronts, as I will describe in a moment. In August 2011, the Inter-American Commission on Human Rights—the body of the Organization of American States responsible for the protection and promotion of human rights¹—issued a decision in the case of *Jessica Lenahan (Gonzales) v. United States*,² finding the United States responsible for human rights violations against Jessica Lenahan, a domestic violence victim, and her three deceased children. The Commission rebuked the U.S. Supreme Court’s 2005 decision in an earlier iteration of the case, *Town of Castle Rock v. Gonzales*, which held that Ms. Lenahan (then Gonzales) had no personal entitlement under the procedural component of the Fourteenth Amendment Due Process Clause to police attention, let alone enforcement of her domestic violence restraining order, due to the discretionary nature of enforcement.³

I have had the privilege of representing Jessica Lenahan over the past eight years during the course of her legal journey, and collaborating with Ms. Lenahan and her family on advocacy that has arisen from her domestic and international cases. As anyone who has met her can attest, Jessica Lenahan is a true inspiration, whose resilience and fortitude in the face of adversity are striking. She is tremendously honored that this symposium is focused on her case, and has asked me to send her warm regards to everyone in the room.

I. *TOWN OF CASTLE ROCK V. GONZALES*: FACTUAL BACKGROUND AND THE U.S. FEDERAL COURTS⁴

Many of you are familiar with the facts of Jessica Lenahan’s tragic case, which occurred against the backdrop of a national problem of enormous proportions. In 1999, Jessica Gonzales, her husband Simon Gonzales, and their children were working class residents of Castle Rock, Colorado, a

1. Statute of the Inter-American Commission on Human Rights art. 1(1), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

2. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

3. See *Town of Castle Rock v. Gonzales (Castle Rock IV)*, 545 U.S. 748, 748-49 (2005). A note about naming: following the tragedy described herein, Jessica Gonzales subsequently remarried and changed her last name to Lenahan. I will refer to her in this Article as both “Jessica Gonzales” and “Jessica Lenahan,” depending on the name she was using at a given point in time.

4. This section and the following section are adapted from Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 22-29 (2008) [hereinafter Bettinger-Lopez, *Human Rights at Home*]. For a video interview with Jessica Lenahan in which she tells her story in her own words, see Univ. of Miami Sch. of Law Human Rights Clinic, Am. Civil Liberties Union & Columbia Law Sch. Human Rights Inst., *Domestic Violence & Human Rights: Jessica Lenahan v. the United States of America*, YOUTUBE (Oct. 24, 2011), <http://www.youtube.com/watch?v=UvPtMCr14J4>.

largely white, upper middle class town about thirty-five miles from Denver whose population in 2000 numbered approximately 20,000.⁵ Simon Gonzales had a history of abusive and erratic behavior, and by early 1999 he was growing increasingly unpredictable and threatening toward his family. In May and June 1999, Jessica Gonzales obtained two domestic violence restraining orders (one temporary, one permanent) against Simon Gonzales as part of a divorce action.⁶ The orders required Mr. Gonzales to stay away from Jessica Gonzales and their three daughters, Leslie, 7, Katheryn, 8, and Rebecca, 10. The permanent order, dated June 4, 1999, allowed for Simon Gonzales to visit with the children on alternate weekends, for two weeks during the summer, and for one “mid-week dinner visit” at a time prearranged by the parties.⁷ A preprinted notice to law enforcement on the back of the restraining order quoted Colorado’s mandatory arrest law, which states that “[a] peace officer shall use every reasonable means to enforce a restraining order” and that upon finding probable cause of a violation of the restraining order, “[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of [the] restrained person.”⁸ Pursuant to the terms of the order, Jessica and Simon Gonzales agreed that he could visit with the girls for dinner each Wednesday night.⁹

On the evening of Tuesday, June 22, 1999, Simon Gonzales abducted Leslie, Katheryn, and Rebecca while they were playing in their front yard.¹⁰

5. See *Castle-Rock, Colorado*, CITY-DATA.COM, <http://www.city-data.com/city/Castle-Rock-Colorado.html> (last visited Oct. 9, 2012).

6. See *Lenahan*, Case 12.626, Report No. 80/11, ¶ 62. See generally Temporary Restraining Order, *Gonzales v. United States*, Inter-Am. Comm’n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to Exhibits, Dec 2005, “Temporary Restraining Order”); Permanent Restraining Order, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm’n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007) [hereinafter Permanent Restraining Order], available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to Exhibits, Dec 2005, “Permanent Restraining Order”).

7. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 63; Permanent Restraining Order, *supra* note 6.

8. COLO. REV. STAT. § 18-6-803.5(3)(a)-(b) (1999); see also *Lenahan*, Case 12.626, Report No. 80/11, ¶ 64.

9. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 63; Declaration of Jessica Ruth Lenahan (Gonzales), *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm’n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to Exhibits, Dec. 2006, “E: Declaration of Jessica Ruth Lenahan (Gonzales)”).

10. Final Observations Regarding the Merits of the Case 6-39, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm’n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007) [hereinafter Merits Brief], available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to “Gonzales Merits Brief, March 24, 2008”).

Ms. Gonzales contacted the Castle Rock Police Department (CRPD) nine times over the course of nearly ten hours to report the abduction and restraining order violation and to seek help in locating her children and arresting Mr. Gonzales.¹¹ Her increasingly desperate calls and in-person pleas went unheeded, despite Colorado's mandatory arrest law and the fact that Mr. Gonzales had seven run-ins with the CRPD—many domestic violence-related—in the preceding three months.¹² At 8:43 p.m., Jessica Gonzales made cell phone contact with Simon Gonzales and learned that he was with the children at Elitch Gardens Amusement Park in Denver, approximately forty miles from Castle Rock. When she communicated this information to the CRPD, the investigating officer “advised her to inform the Court that her husband had violated their divorce decree, because, based on the information she was offering, he did not consider the restraining order violated.” He closed the conversation by telling her that “at least you know where the kids are right now.”¹³

Nearly ten hours after Jessica Gonzales's first call to the police, Simon Gonzales, armed with a gun he had purchased that evening, arrived at the police station, got out of his truck, and opened fire. The police shot and killed him, and then discovered the bodies of Leslie, Katheryn, and Rebecca Gonzales inside the truck.¹⁴ Their bodies contained numerous

11. Jessica Lenahan alleges she had nine contacts with the CRPD, while the IACHR found that “the record before the Commission shows that Jessica Lenahan had eight contacts with the CRPD during the evening of June 22, 1999 and the morning of June 23, 1999. The eight contacts included four telephone calls she placed to the CRPD emergency line; one telephone call she placed to the CRPD non-emergency line at the request of a dispatcher; one phone call from a CRPD officer; a visit by two CRPD officers to her house after the first call; and a visit by her to the CRPD station. During each of these contacts, she reported to the police dispatchers that she held a restraining order against Simon Gonzales, that she did not know where her daughters were, that they were children, and that perhaps they could be with their father.” Whether Ms. Lenahan had eight or nine points of contact is insignificant for the larger point here. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 71; see also Merits Brief, *supra* note 10, at 69-70.

12. Merits Brief, *supra* note 10, at 18.

13. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 74. A subsequent review of police records revealed that after this incident, the CRPD Dispatcher entered into the computer that Jessica Gonzales's children “had been found,” and that there was “NCA” (no criminal activity), even though Mr. Gonzales had clearly violated a restraining order and was prohibited by law from being with the children. See also Merits Brief, *supra* note 10, at 33-35.

14. See *Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 70-81; Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with Request for an Investigation and Hearing on the Merits 7-20, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to “Petition to Inter-American Commission on Human Rights, Dec. 2005”); see also Merits Brief, *supra* note 10; Observations Concerning the September 22, 2006 Response of the United States Government 5-34, *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07,

bullet holes that autopsy reports later indicated were of different sizes and had entered from multiple angles. Moreover, Simon Gonzales was standing next to the truck during the shootout, and photos from local newspapers indicate that the truck's doors and windows were riddled with police bullets during the exchange of gunfire.¹⁵ The Colorado authorities conducted an investigation into the police officers' use of deadly force upon Simon Gonzales.¹⁶ Their investigatory report summarily concluded, without supporting evidence, that the children had been murdered by their father with a gun he had purchased earlier that evening. Despite Ms. Gonzales's repeated requests, no subsequent investigation into the girls' deaths took place. I will note that after poring over thousands of pages of documents responsive to public records requests, our team found no evidence indicating that Colorado authorities ever investigated or determined whether the bullets found inside the girls' bodies came from Simon Gonzales's gun, the CRPD officers' guns, or both.¹⁷

Jessica Gonzales filed a Section 1983 lawsuit¹⁸ against the police in federal court, alleging violations of the procedural and substantive components of the Fourteenth Amendment's Due Process Clause. Her procedural due process claim rested on the assertion that the restraining order, coupled with Colorado's mandatory arrest law, entitled her to a response from the police—in essence, a property right that could not be denied to her without fair procedure. She also argued that the police violated her children's substantive due process rights when they failed to take reasonable steps to protect her children from the real and immediate risk posed by their father.¹⁹ Before reaching discovery, the district court

OEA/Ser.L./V/II.128, doc. 19 (2007), available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to "Brief to Inter-American Commission on Human Rights, Dec 2006").

15. See Jason Blevins, *Dad Attacks Police, Dies; 3 Daughters Found Slain in Pickup*, DENVER POST, June 24, 1999, at A1; Merits Brief, *supra* note 10, at 36.

16. See *Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 82-85; Eighteenth Judicial District Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3326, Gonzales v. United States, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), available at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs (follow hyperlink to Gonzales Merits Brief, March 24, 2008, "C: 18th Judicial Critical Incident Team Shooting of Simon Gonzales Castle Rock PD Case #99-3226").

17. See *Lenahan*, Case 12.626, Report No. 80/11, ¶ 85; see also Merits Brief, *supra* note 10, at 33-37.

18. Section 1983 creates a federal remedy against a state official for the violation of federal rights. See 42 U.S.C. § 1983 (2000).

19. See *Gonzales v. City of Castle Rock (Castle Rock I)*, No. Civ.A.00 D 1285, 2001 WL 35973820, at *1 (D. Colo. Jan. 23, 2001) (dismissing plaintiff's due process claims under 42 U.S.C. § 1983 for failure to establish the existence of a protectable due process interest created by the restraining order).

dismissed both claims.²⁰

On appeal, the Tenth Circuit Court of Appeals, sitting en banc, reversed the district court's dismissal of the procedural due process claim, but affirmed the dismissal of the substantive due process claim. In rejecting the substantive due process claim, the Tenth Circuit relied on *DeShaney v. Winnebago County Department of Social Services*,²¹ a U.S. Supreme Court case holding that the government, in most circumstances, has no duty to protect individuals from private acts of violence.²² *DeShaney* concerned the failure of child protection services to respond to calls from a child's mother expressing concern over potential abuse by the child's father. Ultimately, the father inflicted grave injury upon his son Joshua. The Tenth Circuit analogized the case to *Castle Rock*, which involved the failure of the police to respond to a domestic violence victim's claims that her restraining order had been violated and her children kidnapped.

Upon appeal by the Town of Castle Rock, the Supreme Court granted certiorari on the procedural due process claim. In June 2005, Justice Scalia, writing for the 7-2 majority, reversed the Tenth Circuit's decision and held that Ms. Gonzales had no personal entitlement under the Due Process Clause to police enforcement of her restraining order.²³ Despite the Colorado legislature's repeated use of the word "shall" in the mandatory arrest law, the Court explained, "[w]e do not believe that these protections of Colorado law truly made enforcement of restraining orders *mandatory*."²⁴ It was also unclear, the Court opined, whether the preprinted notice on the back of Ms. Gonzales's restraining order required the police to arrest Mr. Gonzales, seek a warrant for his arrest, or enforce the order in some other way. This uncertainty, according to the majority, was further evidence of police discretion over enforcement.²⁵ The Court also refused to assume that the statute was intended to give victims "a personal entitlement to something as vague and novel as enforcement of restraining orders," rather than simply protect the public interest in

20. *See id.* at *5.

21. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding that the Due Process Clause does not impose an affirmative obligation on the state to "guarantee . . . certain minimal levels of safety and security" for individuals at risk of private, third-party violence).

22. *See Gonzales v. City of Castle Rock (Castle Rock III)*, 366 F.3d 1093 (10th Cir. 2004) (finding that the Colorado Police's refusal to enforce the Gonzales restraining order violated procedural due process).

23. *See Castle Rock IV*, 545 U.S. 748, 768 (2005) (reversing the 10th Circuit's holding that the enforcement of a restraining order constituted a property interest sufficient to trigger a procedural due process claim).

24. *Id.* at 760.

25. *See id.* at 763 ("Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague.").

punishing criminal behavior.²⁶ Finally, the Court reasoned, even assuming Ms. Gonzales had overcome these obstacles, “it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a ‘property’ interest for purposes of the Due Process Clause.”²⁷ “In light of today’s decision and that in *DeShaney*,” the Court concluded, “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”²⁸ Rather, the Court asserted, aggrieved individuals in such situations must seek relief via state common-law or statutory tort claims.²⁹

In his dissent, Justice Stevens, joined by Justice Ginsburg, chided the majority for ignoring the clear language and intent of the Colorado statute, which, like other domestic violence mandatory arrest statutes nationwide, was passed in response to a persistent pattern of non-enforcement of domestic violence laws. The express language of the statute, the dissent asserted, was “unmistakable[ly]” intended to remove police discretion over whether to arrest perpetrators:

Regardless of whether the enforcement called for in this case was arrest or the seeking of an arrest warrant (the answer to that question probably changed over the course of the night as the respondent gave the police more information about the husband’s whereabouts), the crucial point is that, under the statute, the police were required to provide enforcement; *they lacked the discretion to do nothing*. . . . Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day.³⁰

The statute’s mandate, the dissent concluded, “undeniably create[d] an entitlement to police enforcement of restraining orders”³¹ and required enforcement for the benefit of “‘a specific class of people’—namely, recipients of [such] orders.”³² In concluding that the arrest was mandated for the benefit of the community at large, the dissent reasoned, the majority

26. *See id.* at 766.

27. *Id.* While nontraditional property such as civil service jobs or entitlements to welfare benefits have previously been recognized as property under the Due Process Clause, enforcement of a restraining order was fundamentally different because, the Court reasoned, arresting someone who violated a restraining order had no ascertainable monetary value to the victim and thus provided only an “indirect or incidental” benefit to the holder of the restraining order. *Id.* at 767.

28. *Id.* at 768.

29. *See id.* at 769.

30. *Id.* at 784-85 (Stevens, J., dissenting).

31. *Id.* at 785.

32. *Id.* at 786.

had divorced the statute from its obvious context in an overly formalistic analysis.³³

Finally, the dissent opined, the majority drew a false distinction between an entitlement to police protection and entitlements to other government services protected by the Due Process Clause, such as public education and utility services, when it suggested that an entitlement to police enforcement of a restraining order is simply not the sort of “concrete” and “valuable” property that the Due Process Clause protects.³⁴ The dissenters concluded that Ms. Gonzales had an entitlement to police enforcement of her protective order, and because the state had failed to give her any process whatsoever in depriving her of this entitlement, she had “clearly allege[d] a due process violation” under the Fourteenth Amendment of the United States Constitution.³⁵

In reversing the Tenth Circuit’s decision, the Supreme Court denied Jessica Gonzales the opportunity to engage in a meaningful discovery process. She never had the opportunity to collect evidence from Castle Rock, depose witnesses, or go to trial. Crucially, for Ms. Gonzales, this meant that she might never uncover information pertaining to the time and place of her daughters’ deaths, including information identifying the bullets found inside Simon Gonzales’s truck and the girls’ bodies.

The Supreme Court’s decision in *Castle Rock v. Gonzales* prompted a swift, intense, and united reaction across a range of sectors. Domestic violence advocates and women’s and civil rights lawyers decried the decision as misinterpreting the Constitution and lamented its potential to remove needed legal protections for victims.³⁶ The decision, they said, sent the wrong message to batterers and law enforcement, and risked creating a culture of impunity for lazy, rogue, or misguided officers. Advocates expressed outrage that the Supreme Court would characterize an individual’s entitlement to enforcement of her restraining order as “vague and novel,” considering the prevalence of legal protections for victims in the United States, and the express language of and clear legislative history behind mandatory arrest laws, including that of Colorado.³⁷ Meetings were

33. *Id.* at 779.

34. *Id.* at 790.

35. *Id.* at 792.

36. See AM. CIVIL LIBERTIES UNION, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 25-26 (2006); see also Linda Greenhouse, *Justices Rule Police Do Not Have Constitutional Duty to Protect Someone*, N.Y. TIMES, June 28, 2005, at A17 (“Organizations concerned with domestic violence had watched the case closely and expressed disappointment at the outcome. Fernando LaGuarda, counsel for the National Network to End Domestic Violence, said in a statement that Congress and the states should now act to give greater protection.”).

37. See Bettinger-Lopez, *Human Rights at Home*, *supra* note 4 (discussing

scheduled to discuss legislative, litigation, and public policy strategies, as well as plans for engagement with state and local officials about *Castle Rock*'s implications.³⁸ It was a critical moment for advocates to discuss how to best respond to the unmistakable message that the general public might take away from the case: that domestic violence restraining orders were not worth the paper they were printed on.

Advocates generally agreed, however, that legally speaking, *Castle Rock* marked the end of the line for Jessica Gonzales. After a Supreme Court decision rejecting her claims, what other remedy could she have?

I remember calling Jessica Lenahan and her mother Tina Rivera to discuss the Supreme Court's devastating decision. While expressing profound disappointment—in the most personal way one could imagine—they quickly shifted their gaze forward. “What’s next?” they asked. I remember being shocked that this family, who had already been through the unimaginable, had the fortitude and resilience to even imagine a “next.” I also had great anxiety about how I would break it to them that we had reached the end of the line, legally speaking. When I began to say, with my U.S. lawyer hat on, “There is no next; we’ve exhausted all remedies,” Ms. Lenahan and her mother responded, “Of course there is—we can’t just let this rest!” If it wasn’t for Jessica Lenahan and Tina Rivera’s persistence and vision, we would not all be seated here today talking about this historic human rights case. There is an important take-away for law students and lawyers here: listen to your clients. They generally know better than anyone what’s best for themselves, and they can make critical contributions to your legal or advocacy strategy and challenge you to think outside the box.

II. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: AN ALTERNATE LEGAL AVENUE

In fact, a little-known but promising legal avenue was available to Jessica Lenahan. The Washington, D.C.-based Inter-American Commission on Human Rights (IACHR) is an autonomous organ of the Organization of American States (OAS) that was created in 1959 “to promote the observance and defense of human rights” in OAS Member States, including nearly all countries in North and South America and the Caribbean.³⁹ Composed of seven independent human rights experts, the

protections available for victims of domestic violence).

38. *See id.*

39. Statute of the Inter-Am. Commission on Human Rights. art. 1(1), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec., OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979) (establishing the Inter-American Commission on Human Rights and setting forth its nature and purposes). For an overview of the IACHR and its utility for U.S.-based advocacy, see generally Caroline Bettinger-Lopez, *The Inter-American Human Rights*

Inter-American Commission, along with the Inter-American Court of Human Rights (a panel of seven judges based in San José, Costa Rica), considers claims of human rights violations and issues written decisions on state responsibility. The Commission and Court, which together form the Inter-American human rights system, are largely unfamiliar to U.S. lawyers and advocates. In other parts of the Western Hemisphere, however, civil society and lawyers regularly use the system to hold governments accountable for corruption, abuse, negligence, and violence committed by both state actors and private individuals. Having exhausted her domestic remedies, Ms. Lenahan could petition the Commission for relief, claiming that the United States was responsible for human rights violations resulting from the Castle Rock Police Department's inaction and the Supreme Court's decision against her.⁴⁰

Because the federal government has not ratified any Inter-American human rights treaties, human rights complaints against the United States are brought before the Commission under the American Declaration on the Rights and Duties of Man and the OAS Charter.⁴¹ Unlike contemporary human rights treaties, the Declaration, drafted in 1948, does not contain a "general obligations" clause, which requires states to respect, ensure, and promote guaranteed rights and freedoms through the adoption of appropriate or necessary measures.⁴² However, I would argue, signatories

System: A Primer, CLEARINGHOUSE REVIEW, Spring 2009.

40. The Inter-American human rights system requires that petitioners "exhaust domestic remedies" before appealing to the Inter-American Commission for relief. Petitioners must exhaust all available legal remedies to them or show why certain legal avenues, while technically available, would have been futile. Rules of Procedure of the Inter-Am. Comm'n H.R., art. 31, OAS/Ser.L/V/II.4 rev.12 (2008). The Inter-American Court of Human Rights is not a venue available to Ms. Gonzales, because the U.S. has not acceded to the jurisdiction of the Inter-American Court. See Dep't of Int'l Law, Org. of Am. States, *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (B-32), OAS.ORG, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Oct. 1, 2012) (showing that the United States has signed but not ratified the American Convention on Human Rights, which created the Inter-American Court of Human Rights).

41. See generally American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conference of Am. States, O.A.S. Off. Rec., OEA/Ser.L/V/II.23 doc.21 rev.6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 17 (1992) [hereinafter American Declaration] (affirming and enumerating basic human rights and protections); Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force December 13, 1951) (founding the Organization of American States on principles of liberty, equality, justice, and continental cooperation); Statute of the Inter-American Commission on Human Rights art. 1(2)(b), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979) (defining human rights as those set forth in the American Declaration).

42. Cf., e.g., Organization of American Convention on Human Rights, Nov. 22, 1969, art. 1, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 145 [hereinafter American Convention] (providing that State Parties will respect and ensure the rights recognized therein, by new legislation if needed); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2, S. Exec. Doc. E, 95-2, at 24, 999 U.N.T.S. 171, 173

to the Charter (including the United States) are legally bound by the Declaration's provisions,⁴³ and the Commission has consistently applied "general obligations" principles when interpreting the wide spectrum of civil, political, economic, social, and cultural rights set forth in the Declaration.⁴⁴ Moreover, Inter-American jurisprudence directs governments to provide special protections to particularly vulnerable groups, such as children,⁴⁵ the mentally ill,⁴⁶ undocumented migrant workers,⁴⁷ indigenous communities,⁴⁸ and domestic violence victims.⁴⁹

(1978) (binding State Parties to respect and ensure the rights recognized therein, including a right to and enforcement of remedies for rights violations); United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 4, U.N. Doc. A/RES/61/106 (Mar. 30, 2007) (confirming that State Parties will ensure and promote the human rights of persons with disabilities via, inter alia, appropriate affirmative measures).

43. *But see* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45, 47 (July 14, 1989) [hereinafter Advisory Opinion OC-10/89] (explaining that the American Declaration defines the rights to which the OAS Charter refers and may therefore be of legal effect, because the OAS Charter must be interpreted consistent with the American Declaration where human rights are concerned). *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19, ¶ 56 (2007) (finding that the Declaration "constitut[es] a source of legal obligation for OAS member states, including in particular those states that are not parties to the American Convention"); *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm'n H.R., Report No. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987) ("The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights is governed by the Charter of the OAS.").

44. *See* *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 124 (2002) (explaining that the Commission considers the evolving body of international human rights laws when deciding a case brought under the American Declaration); *see also* Advisory Opinion OC-10/89, *supra* note 43, ¶ 37 ("[T]o determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration.").

45. *See* *Villagrán-Morales v. Guatemala* (Case of the "Street Children"), Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 195, 196 (Nov. 19, 1999).

46. *See* *Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 123-49 (July 4, 2006).

47. *See* *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 27, 2003).

48. *See* *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 83, 248 (Mar. 29, 2006); *see also* *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (June 17, 2005) (similarly asserting that the state must effectively protect the rights of indigenous peoples in light of their special vulnerabilities); *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶¶ 169 (2004) (finding that the state must provide special safeguards to ensure that indigenous groups can meaningfully participate in the state's legal system); *Dann*, Case 11.140, Report No. 75/02, ¶ 126 (recognizing that states have a sacred commitment to protect indigenous peoples because of historical discrimination and humanitarian principles).

When an aggrieved individual has exhausted her domestic legal remedies or has nowhere to turn for relief in her home country, she may submit a human rights petition to the Inter-American Commission on Human Rights. The petitioner can ask the Commission to consider whether the alleged harm and the denial of a domestic remedy constitutes a violation of international human rights law, as articulated in the American Declaration, the American Convention on Human Rights, and other human rights instruments.

In most cases, the Commission ultimately issues a “merits report”—i.e., a decision—in a case. If the Commission deems the state responsible for a human rights violation, the Commission outlines the general contours of a remedy that will both make the victim whole and create law and policy reforms to prevent future repetition of the harm.⁵⁰ This remedy is presented at the end of a merits report in the form of one or more recommendations to the State. While no enforcement mechanism exists to ensure state compliance with the Commission’s merits reports, these reports do carry significant moral and political weight and contribute to international standard-setting.⁵¹

49. See *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 54-56 (2001) (determining that Brazil failed in its obligation to protect women by not prosecuting perpetrators of domestic violence).

50. See, e.g., *Tracey v. Jamaica*, Case 12.447, Inter-Am. Comm’n H.R., Report No. 61/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 52 (2006) (recommending a re-trial of the charges against Mr. Tracey in accordance with the fair trial protections under the American Convention and the adoption of legislation to ensure that indigent criminal defendants are afforded their right to legal counsel and are not coerced into confessions of guilt); see also *Cipriano v. Guatemala*, Case 11.171, Inter-Am. Comm’n H.R., Report No. 69/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 132 (2006) (listing four remedies, ranging from domestic prosecution of the individual perpetrators to systemic reforms to avoid future recurrences); *Diniz v. Peru*, Case 12.001, Inter-Am. Comm’n H.R., Report No. 66/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 146 (2006) (recommending that Brazil fully compensate the victim in both moral and material terms, by publicly acknowledging responsibility for violating her human rights, by granting her financial assistance to begin or complete higher education, by providing a monetary sum to compensate the victim for moral damages, and by making the legislative and administrative changes needed to create effective anti-racism laws).

51. See generally Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW* 339-48 (Malcom Langford ed., 2008) (summarizing the Commission’s organization, procedures, and jurisprudence); Dinah L. Shelton, *The Inter-American Human Rights System*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 127 (Hurst Hannum ed., 4th ed. 2004) (providing an overview of the Inter-American system, including the Inter-American Court of Human Rights). In cases involving state parties that have ratified the Optional Protocol to the American Convention on Human Rights, and thus acceded to the jurisdiction of the Inter-American Court on Human Rights, the Commission can submit a case to the Court. The Court will consider the case and ultimately issue an order that is legally binding and directly enforceable. Because the United States is not a party to the American Convention or its Optional Protocol, however, the Inter-American Court of Human Rights is not an available venue to

When Jessica Lenahan learned of the Inter-American human rights system, she was hopeful that framing her case as a human rights violation could give her a forum to seek redress for her personal tragedy and initiate important legislative and policy reforms in the United States. Yet she and her lawyers, including myself, were wary of a system that has weaker “teeth” and far less credibility in the United States than a domestic court.

III. *JESSICA LENAHAN (GONZALES) V. UNITED STATES*: THE INTER-AMERICAN COMMISSION’S LANDMARK DECISION

At Jessica Lenahan’s urging, my colleagues at the ACLU and I filed a petition against the United States before the Inter-American Commission, claiming: (1) human rights violations by the Castle Rock Police Department for failing to protect Ms. Lenahan and her children; and (2) human rights violations by the U.S. courts, which failed to provide her with a remedy. The petition challenged the core principle of U.S. law (embodied in *DeShaney v. Winnebago County*) that government generally has no duty to protect individuals from private acts of violence. Over seventy individuals and organizations submitted eight amicus briefs and two expert reports in support of Ms. Lenahan, ranging in subject from, e.g., appropriate standards for police response to domestic violence in the United States and abroad, to a forensic scientist’s assessment of Colorado law enforcement investigations (or lack thereof) after the tragedy, to the effects of domestic violence, and law enforcement response thereto, on minority women and children.⁵²

With the support of six generations of law students, domestic violence survivors, academics, lawyers, community-based and national advocates, policymakers, and many others, we engaged in advocacy before the Inter-American Commission for six long years. In that time, the Commission granted us two hearings (in March 2007 and October 2008) in which Ms. Lenahan testified. As I mentioned before, because her Section 1983 case had gone up to the Supreme Court on a motion to dismiss, she had never had her so-called “day in court”; the opportunity to testify before the Commission was therefore especially meaningful to her, as was the opportunity to look attorneys from the U.S. State Department, U.S. Department of Justice, and the Town of Castle Rock (all of whom collectively represented the U.S. Government at the hearings) in the eye.

petitioners in cases against the U.S. Instead, the Commission is the end of the line for U.S. petitioners. *Id.*

52. For links to the amicus briefs and expert reports, see *Jessica Gonzales v United States: Case Documents & Amicus Briefs*, COLUM. L. SCH., <http://www.law.columbia.edu/human-rights-institute/initiatives/interamerican/gonzales/gonzalesdocumentsamicus> (last visited Oct. 10, 2012).

Ms. Lenahan's mother, Tina Rivera, and her son, Jessie Rivera, submitted declarations to the Commission and attended one hearing, which made the process meaningful at the family level.

On August 17, 2011, the Commission issued its landmark decision, finding the United States responsible under of the American Declaration on the Rights and Duties of Man for human rights violations suffered by Ms. Lenahan and her children, and recommending remedies at both the individual and policy levels.⁵³ The violations⁵⁴ found by the Commission included:

- Articles I and VII, which establish the rights to life and to special protections for children. The Commission found that the Castle Rock police violated these rights because they knew or should have known that the girls' lives were at risk and failed to take steps to protect the Lenahan girls from their father's acts of violence.⁵⁵
- Article XVIII, which establishes that all persons are entitled to access to judicial remedies to ensure respect for legal rights. The Commission found that the United States violated the rights of Jessica and her children by failing to "adequately and effectively organize its apparatus to ensure the implementation of the restraining order."⁵⁶
- Article II, which establishes the right to equality and the obligation not to discriminate. The Commission found that the United States had an affirmative obligation to prevent and eradicate violence against women and that the State's failure in this regard constituted sex discrimination. Notably, the Commission found, "[t]he systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence[] constituted an act of discrimination . . . and a violation of their right to equality before the law under Article II of the American Declaration."⁵⁷ The Commission placed the "systemic failure" in Jessica's case in the context of an inappropriate historical response by law enforcement in the United

53. See generally American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, May 2, 1948, OEA/Ser.L/V/I.4 Rev. XX; Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force December 13, 1951); Statute of the Inter-American Commission on Human Rights, art. 1(1), O.A.S. Res. 447 (IX-0/ 79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

54. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 170, 199 (2011).

55. *Id.* ¶ 170.

56. *Id.* ¶ 177.

57. *Id.* ¶ 170.

States to domestic violence, and emphasized the disproportionate impact of this response on women, especially women from ethnic and racial minorities and low-income groups.⁵⁸

The Commission also made clear that “[s]tates must hold public officials accountable—administratively, disciplinarily or criminally—when they do not act in accordance with the rule of law.”⁵⁹

The Commission recommended several individual and policy remedies in its decision. On an individual level, it urged the United States to conduct “a serious, impartial and exhaustive investigation” into both the systemic failures by the Castle Rock Police Department and into the cause, time, and place of the deaths of the girls.⁶⁰ Additionally, the Commission urged the United States to provide “full reparations” to Jessica and her son.⁶¹

On the policy level, the Commission recommended that the United States adopt legislation, resources, regulations, training, and model protocols concerning the enforcement of domestic violence restraining orders, protection measures for children, and law enforcement investigation into missing children in the domestic violence context.⁶² Finally, the Commission urged the United States to adopt “public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children’s full protection from domestic violence acts.”⁶³

The *Lenahan* case marks several firsts. It is the first time the Inter-American Commission on Human Rights has decided a women’s rights case against the United States. It is the first time the Commission has considered the nature and extent of the U.S. Government’s affirmative obligations to protect individuals from private acts of discriminatory violence—an idea that, as previously mentioned and as I will discuss further in a moment, is generally frowned upon by the U.S. Supreme Court. It is also the first time any human rights body has ruled on the United States’ international legal obligations towards an identified domestic violence survivor.

The Commission’s decision in *Lenahan* challenges us to shift the way in which we view domestic violence from a private, behind-closed-doors affair—think of the local newspaper headline following the tragedy: “Man Dies in Shootout; Daughters Found Dead; Family Was Troubled, Friends

58. *Id.* ¶ 161.

59. *Id.* ¶ 178.

60. *Id.* ¶ 201.

61. *Id.*

62. *Id.*

63. *Id.*

Say,” which makes no mention of the government’s role or responsibility to respond to incidents like the Gonzales tragedy—to what is arguably the most public of crimes: a human rights violation, which is something we typically associate with far-away places and mass atrocities for which the government is responsible, through action or omission. The shift from the private to public sphere allows us to reframe domestic violence as a systemic societal epidemic demanding government action and accountability. We need only look at the shocking statistics on domestic violence in the United States to understand the practical urgency of this reframing: approximately one in four American women are abused by their partners,⁶⁴ thirty percent of female homicide victims are murdered by their intimate partners,⁶⁵ and fifty percent of all homeless women and children are fleeing domestic violence.⁶⁶

The *Lenahan* case, and the international jurisprudence it echoes, also challenge our country’s longstanding jurisprudence and legislation on private violence, including acts of violence against women and children, domestic violence, and non-discrimination. Consider the Supreme Court’s decision in *DeShaney v. Winnebago County*, described above, which held that the government generally has no constitutional duty to protect individuals from private acts of violence under the Fourteenth Amendment Due Process Clause.⁶⁷ Or the Court’s decision in *United States v. Morrison*, which struck down as unconstitutional a private right of action for victims of gender-motivated crimes, such as domestic and sexual violence, against their abusers.⁶⁸ Or *Washington v. Davis*, which held that a plaintiff must prove discriminatory motive on the state actor’s part to prevail on an equal protection claim.⁶⁹ Also consider state governmental immunity laws, which in many states effectively prevent plaintiffs from bringing actions in tort against state officials unless they can prove willful

64. See THE COMMONWEALTH FUND, HEALTH CONCERNS ACROSS A WOMAN’S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN’S HEALTH 27 (1999), available at <http://www.commonwealthfund.org/Publications/Fund-Reports/1999/May/Health-Concerns-Across-a-Womans-Lifespan--The-Commonwealth-Fund-1998-Survey-of-Womens-Health.aspx> (finding that 31% of women experienced domestic abuse in their lifetime); Will Dunham, *Quarter of U.S. Women Suffer Domestic Violence*: CDC, REUTERS, Feb. 7, 2008, available at <http://www.reuters.com/article/2008/02/07/us-violence-domestic-usa-idUSN0737896320080207> (citing a Center for Disease Control study finding that 23.6 percent of women report having been a victim of “intimate partner violence” at some point in their lives).

65. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (Tina Dorsey & Tom Hester eds., 2000).

66. Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420, 421 (1991) (citing a 1990 report prepared for the Ford Foundation).

67. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989).

68. *United States v. Morrison*, 529 U.S. 598, 628 (2000).

69. *Washington v. Davis*, 426 U.S. 229, 240, 244 (1976).

or wanton misconduct (which essentially amounts to intent, a nearly impossible standard to meet in most cases), as was the case for Jessica Gonzales in Colorado.⁷⁰

By contrast, international law holds the United States and its agents, like all other countries, to well-established international human rights standards on state responsibility to exercise due diligence to affirmatively prevent, investigate, and punish human rights violations and protect and compensate victims.⁷¹ And international law demands state accountability when such standards are not upheld.⁷²

Last year, the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo, issued a report documenting her findings from her mission to the United States. Clearly referring to *Castle Rock* and its predecessors, Manjoo observed “a lack of legally binding federal provisions providing substantive protection against or prevention of acts of violence against women,” which, “combined with inadequate implementation of some laws, policies and programmes, has resulted in the continued prevalence of violence against women and the discriminatory treatment of victims, with a particularly detrimental impact on poor, minority and immigrant women.”⁷³

IV. THE QUESTION OF IMPLEMENTATION

The *Lenahan* case and the Special Rapporteur’s report, both of which have made global headlines, raise complex questions about the interrelationship of apparently-conflicting domestic and international normative frameworks and the evolution of the affirmative obligations concept under international human rights law (namely, the governmental duty to protect and prevent private acts of violence). But perhaps most confounding is the question of implementation. The Commission’s and Special Rapporteur’s recommendations are just that: recommendations. They are not enforceable in any traditional sense. Indeed, in past cases

70. See, e.g., COLO. REV. STAT. § 24-10-118(2)(a) (2012).

71. See, e.g., Velásquez Rodríguez Case, Inter-Am. Comm’n H.R., Judgment of September 10, 1996, available at <http://www.unhcr.org/refworld/docid/3ae6b66d18.html>; Lenahan v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 115-21 (2011); see also Godínez Cruz Case, Inter-Am. Comm’n H.R., Judgment of January 20, 1989, available at <http://www.unhcr.org/refworld/docid/3ae6b66448.html> (outlining the affirmative duties of both member and non-member states of the Organization of American States to protect human rights).

72. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 120.

73. Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Mission to the U.S.*, U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011); Press Release, Special Rapporteur on Violence Against Women, Special Rapporteur on Violence Against Women Finalizes Fact Finding Mission to the United States of America (Feb. 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10715&LangID=E>.

from the Commission, the U.S. Government has frequently ignored the recommendations. So how do the recommendations of the IACHR and the Special Rapporteur get implemented at the domestic level, in the absence of a cognizable enforcement mechanism? A cynic might phrase the question another way: without any domestic enforcement mechanism, why bother with a human rights approach to effect change on social justice issues in the United States?

I would challenge the cynics that there are many reasons why we should bother. But to do so, one must think outside the box—both about the role and limitations of the law and one’s role as a lawyer. Indeed, domestic implementation of human rights norms, especially in the area of violence against women and domestic violence in the United States (traditionally “private spheres”), requires lawyers to think creatively, and in many cases, to remove ourselves from a traditional understanding of rights and remedies.

I want to spend a moment discussing what implementation of the *Lenahan* decision in the United States might look like, and some steps that have already been taken in that direction. Since the decision in August 2011, Ms. Lenahan and her family, alongside her counsel (which now includes the University of Miami School of Law Human Rights Clinic, the ACLU, and the Columbia Law School Human Rights Clinic) and domestic violence advocates, scholars, and students across the country, have embarked upon the implementation phase of this long-term project. We seek reparations for Jessica Lenahan and her family on an individual level, and we hope to carry forward the decision’s promise to advance human rights for domestic violence survivors in the United States and beyond.

The individual reparations have been a long, uphill battle, as the federal government asserts that no domestic mechanism at the state or federal level exists to make payments recommended by an international human rights body, such as the IACHR, directly to victims; and the state of Colorado has thus far not responded to the Commission’s decision. We continue to attempt progress on this issue, but without any precedent or statutory mechanism to secure such reparations in the United States, it is not easy going.

We have had more success on the policy remedies front. Just last year, the Department of Justice (DOJ) Civil Rights Division conducted comprehensive investigations of the New Orleans Police Department (NOPD) and the Puerto Rico Police Department (PRPD).⁷⁴ The DOJ found

74. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter NEW ORLEANS REPORT], available at http://www.justice.gov/crt/about/spl/nopd_report.pdf; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011) [hereinafter PUERTO RICO REPORT], available at <http://www.justice.gov/crt/>

the NOPD to engage in a pattern or practice of unconstitutional gender-biased policing in their failure to respond adequately to allegations of sexual assault and domestic violence.⁷⁵ Similarly, the DOJ found that the PRPD has a “longstanding failure to effectively address domestic violence and rape,” which, along with its institutional deficiencies, “may rise to the level of a pattern and practice of violations of the Fourteenth Amendment and the Safe Streets Act.”⁷⁶ Never before, to my knowledge, has the DOJ initiated an inquiry or investigation into law enforcement’s discriminatory response to sexual assault and domestic violence.

In July 2012, the DOJ entered into a historic consent decree with the City of New Orleans that requires the NOPD to make broad changes in policies and practices so as to, *inter alia*, prevent discriminatory policing based on race, ethnicity, gender and sexual orientation.⁷⁷ Amongst these changes is an overhaul of the way in which the NOPD responds to domestic violence and sexual assault calls for service. The NOPD agreed “to prioritize victim safety and protection at each stage of its response to a report of domestic violence and provide . . . clear guidelines for on-scene and follow-up investigation.”⁷⁸ The agreement also calls for supervisory oversight of officers’ response to domestic violence and increased trainings on domestic violence that incorporate recommendations by the International Association of Chiefs of Police (IACP) for best practices for law enforcement in responding to domestic violence.⁷⁹ This development suggests that the DOJ is poised to take on similar investigations and to enter into similar consent decrees, and that the *Lenahan* decision could be leveraged for this purpose.

V. RECENT DEVELOPMENTS IN IMPLEMENTATION OF THE *LENAHAN* DECISION

Twice in 2012, a group of women’s, civil, and human rights advocates met with the DOJ to discuss formalizing the protocols the DOJ used in the NOPD and PRPD investigations into guidance that can be disseminated nationwide. Perhaps surprisingly, the DOJ has issued such guidance on

about/spl/documents/prpd_letter.pdf.

75. See NEW ORLEANS REPORT, *supra* note 74, at 12.

76. See PUERTO RICO REPORT, *supra* note 74, at 58.

77. Press Release, U.S. Dep’t of Justice, Office of Public Affairs, Justice Department Announces Consent Decree with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department (July 24, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-ag-917.html>.

78. Consent Decree ¶ 213, *United States v. New Orleans*, No. 12-1924 (E.D. La. July 24, 2012), available at http://www.laed.uscourts.gov/general/Notices/12cv01924_Doc7.pdf.

79. *Id.* ¶¶ 217, 219-21.

racially-biased policing but never on gender-biased policing!⁸⁰ We are hopeful that in the near future, the DOJ will publish guidance that describes federal constitutional and statutory prohibitions on discriminatory policing of domestic and sexual violence, as well as areas of law enforcement misconduct that may violate the law.

At the local level, law students have been at the forefront of drafting and advocating for resolutions passed by the Cincinnati⁸¹ and Baltimore City Councils⁸² and the Miami-Dade County Commission⁸³ declaring that freedom from domestic violence is a fundamental human right and that government has the obligation to secure this right on behalf of residents. The Baltimore and Miami-Dade County resolutions specifically cite to the *Lenahan* decision and the findings of the Special Rapporteur on Violence Against Women. The Miami-Dade County resolution, which my students drafted, specifically states that it “shall serve as a charge to all local government agencies to incorporate these principles into their policies and practices.”⁸⁴ The next step is for advocates to work with policymakers to brainstorm where and how this incorporation of human rights principles at the local agency level functions.

As discussed in a recent article in *Clearinghouse Review* co-authored by women’s rights practitioners and academics,⁸⁵ the *Lenahan* decision is also a powerful source of authority for federal civil rights litigation, state tort and constitutional litigation, and family court litigation involving domestic and sexual violence. The decision “sets forth—and offers a way to teach judges about—the emerging global consensus that violence against women violates victims’ human rights,” writes Professor Julie Goldscheid.⁸⁶ The *Lenahan* decision can serve as persuasive authority in cases seeking law enforcement accountability, including claims under state-created danger or

80. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

81. City of Cincinnati City Council, Res. 47-2011 (Ohio 2011), available at <http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/33497.pdf>.

82. City of Baltimore City Council, A Council Resolution Concerning: The Freedom from Domestic Violence Is a Fundamental Human Right, Res. 12-0034R (Md. 2011), available at <http://legistar.baltimorecitycouncil.com/attachments/8843.pdf>.

83. Memorandum from the Miami Dade County Attorney to the Chairman and Members of the Board of County Commissioners (July 17, 2012), available at <http://www.miamidade.gov/govaction/matter.asp?matter=121380&file=true&yearFolder=Y2012>.

84. *Id.*

85. Elizabeth M. Schneider et al., *Implementing the Inter-American Commission on Human Rights’ Domestic-Violence Ruling*, 46 CLEARINGHOUSE REV. 113, 115-16 (2012).

86. *Id.* at 116.

equal protection theories.⁸⁷ The decision also supports approaches that reframe the problem of law enforcement under-responsiveness as police misconduct, such as the DOJ guidance initiative mentioned above. Additionally, the decision could strengthen arguments about the seriousness of the risks of domestic violence, and the importance of enforcing protective orders, in a range of federal and state domestic violence or sexual assault cases that address matters such as torts, family law, protective orders, custody disputes, or Hague convention claims. The principles may also inform state constitutional substantive due process and equal protection (or ERA) claims.

The *Clearinghouse* article suggests that a human rights perspective can similarly be brought to a family court's attention in simple ways.⁸⁸ The rights to liberty, to be free from abuse, to family integrity, and to respect for family life, and the best interests of the child standard, may be particularly relevant in domestic violence cases.⁸⁹ Closing arguments, trial memos, and other court presentations can reference the basic human right to be free from abuse, writes Professor Margaret Drew. "A single sentence in closing, drawing the court's attention to the systematic worldwide abuse of women, can shift a judge's perspective to appreciate that gender-based violence constitutes a human rights violation."⁹⁰ Lawyers can also incorporate testimony about the effect of intimate partner abuse on the broader family structure.

Additionally, Ejim Dike urges us to identify community groups engaged in organizing on domestic violence and related issues, who will be prepared to put the message of *Lenahan* to immediate use.⁹¹ Advocates can also call on the Government to address the issues raised by the *Lenahan* decision, for example, in its periodic reports to the United Nations Human Rights Committee, the U.N. Committee Against Torture, and the U.N. Committee on the Elimination of Racial Discrimination.⁹² Annual events, such as 16 Days of Activism Against Gender Violence, International Human Rights Day, and International Women's Day, offer opportunities to raise awareness of the IACHR decision and the need for greater law enforcement

87. *Id.* at 115-17.

88. *Id.* at 119.

89. *Id.* (citing CHRISTINA BRANDT-YOUNG, N.Y. LEGAL ASSISTANCE GRP., FIVE INTERNATIONAL HUMAN RIGHTS CITATIONS TO USE IN YOUR NEXT NEW YORK STATE DOMESTIC VIOLENCE BRIEF (2009); COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & COLUMBIA LAW SCH. SEXUALITY AND GEND. LAW CLINIC, HUMAN RIGHTS AND DOMESTIC VIOLENCE: AN ADVOCACY MANUAL (2010)).

90. *Id.* at 119-20.

91. *Id.* at 117-18.

92. *Id.* at 118.

accountability in the violence against women arena in the United States.⁹³ “The Inter-American Commission’s *Lenahan* decision,” writes Dike, “could be a galvanizing tool particularly for communities of color and indigenous communities, where the criminal justice system has disproportionately failed to protect residents from gender-based violence.”⁹⁴

Advocates can also engage in these themes through media advocacy in all forms: print, video, and social media. One powerful example of the use of multimedia in this area is a documentary film being made about Jessica Lenahan’s life and her case.⁹⁵

Finally, the *Lenahan* decision, and other international jurisprudence that it is connected to—for example, *González v. Mexico (In re Cotton Field)*,⁹⁶ *Maria da Penha Maia Fernandes v. Brazil*,⁹⁷ and *Opuz v. Turkey*⁹⁸—can contribute to building international norms and networks focused on due diligence in the context of violence against women. New frontiers include cases that might advance theories of “intersectional” or “multidimensional” discrimination, and cases that make critical connections between economic and social rights (i.e., the rights to housing, health, education, work) and gender-based violence—ideas that are incubating in Articles 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (a.k.a. the Convention of Belém do Pará)⁹⁹ and waiting to be fully realized!

CONCLUSION

By framing domestic violence as a human rights violation, the *Lenahan* decision challenges advocates and policymakers to re-think the United States’ approach to domestic violence, and to ask whether fundamental rights are being respected, protected, and fulfilled. It also reminds us of the law’s value in helping survivors move to safety and to enjoy equal rights

93. *Id.*

94. *Id.* at 117.

95. JESSICA GONZALES VS. THE UNITED STATES OF AMERICA, http://www.jessicagonzalesvsunitedstates.com/Jessicas_Story.html (last visited Sept. 30, 2012).

96. *González v. Mexico (In re Cotton Field)*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, Operative ¶¶ 4-7 (Nov. 16, 2009).

97. *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev. ¶¶ 54-58 (2011).

98. *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. (2009).

99. Organization of American States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, available at <http://www.cidh.org/Basicos/English/basic13.Conv%20of%20Belem%20Do%20Para.htm>.

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under the law. The decision holds the potential to influence domestic violence advocacy in the United States and, more broadly, to help realize human rights here at home.

