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DOMESTICATING DUE DILIGENCE: MUNICIPAL TORT LITIGATION'S POTENTIAL TO ADDRESS FAILED ENFORCEMENT OF ORDERS OF PROTECTION

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"When the police fail in their duties, and when the courts refuse to provide remedies, victims of domestic violence are the ones who pay the price."
- Jessica Lenahan[1]

INTRODUCTION

Failed enforcement of an order of protection (OP) obtained by Jessica Lenahan from Castle Rock, Colorado, authorities led to the June 1999 kidnapping and murder of her three daughters by her estranged husband Simon, the subject of the OP.[2] In violation of the order, Simon purchased a gun and kidnapped the children from their mother's front lawn.[3] Despite

1. Jessica Lenahan, Testimony Before the Inter-American Commission on Human Rights (Oct. 22, 2008), *available at* http://www.chrgj.org/events/docs/Jessica%20Testimony%20FINAL%20for%20posting.pdf.

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

3. *Id.* at 753-54. I set aside the enforcement issues surrounding the purchase of a

Jessica's repeated pleas for help, the police never attempted to enforce the OP, which contained statutorily created language that mandated Simon's arrest in the event of a violation.[4] Instead, the emergency dispatcher criticized her for reporting the violation.[5] When Jessica went to the police station to file a complaint in person, the officer who took down the incident report "made no reasonable effort to enforce the [OP] or locate the three children and instead, he went to dinner."[6] After ten hours, Simon drove his truck, containing the bodies of the three girls, to the police station and engaged in a shoot-out with police during which he was killed by police.[7] Jessica's daughters were found dead in Simon's truck.[8]

Jessica sued the town of Castle Rock and in 2005, after years of litigation, the United States Supreme Court in *Town of Castle Rock v. Gonzales* denied Jessica's claims to a federal remedy.[9] The majority opinion, written by Justice Antonin Scalia, largely abrogated government's responsibility for harm suffered by victims of domestic violence due to the lack of enforcement of OPs against private actors under the United States Constitution.[10] The *Castle Rock* decision effectively precluded any right to recovery under federal law for harms resulting from failed OPs, rejecting Jessica's procedural and substantive due process arguments and re-articulating the Court's long-standing reluctance to treat the Fourteenth Amendment as "a font of tort law."[11]

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gun in violation of the order because my focus in this article will be on the response of municipal police, not the failures of federal and state firearms licensing procedures.

4. *Id.* at 751-53.

5. *See* Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 30 (2011) ("During the call, the dispatcher asked Jessica Lenahan to call back on a non-emergency line and scolded her stating that it was 'a little ridiculous making us freak out and thinking the kids are gone.'").

6. *Castle Rock IV*, 545 U.S. at 754.

7. *Id.*

8. *Id.* The police never determined which bullets killed the girls, but it is believed that Simon shot each of them in the head. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 85.

9. D. KELLY WEISBERG, DOMESTIC VIOLENCE LEGAL AND SOCIAL REALITY 267 (2012) ("In a sharp dissent in Castle Rock, Justice Stevens (joined by Justice Ginsburg) charged that the majority failed to take seriously (1) the purpose and nature of restraining orders, and (2) authority from other states recognizing that mandatory arrest statutes and restraining orders create an individual right to police action. . . . According to the dissent, mandatory arrest statutes 'undeniably create an entitlement to police enforcement of restraining orders' because, under the statute, the police were *required* to provide enforcement; they *lacked the discretion to do nothing* (emphasis in the original). Finally, the dissent noted that cases have found 'property' interests in other state benefits and services (welfare benefits, disability benefits, etc.) and, therefore, reasoned that police enforcement of a restraining order is a government service that is 'no less concrete.'" (citations omitted)).

10. *See Castle Rock IV*, 545 U.S. at 751-54.

11. *Id.* at 768 (citations omitted). For a full discussion of the *Castle Rock* case, see *infra* Part II.

Having exhausted all avenues for a domestic remedy, but persisting despite the Supreme Court's rejection, Jessica and her advocates filed a complaint against the government of the United States before the Inter-American Commission on Human Rights (Commission), alleging violations of the American Declaration of the Rights and Duties of Man.[12] During the pendency of the litigation, Jessica changed her surname from Gonzales to Lenahan.[13] In the summer of 2011 the Commission issued a groundbreaking report, *Jessica Lenahan (Gonzales) v. United States*, finding that the United States government violated the international nation-state[14] responsibility standard of "due diligence" by failing to effectively enforce orders of protection against perpetrators of domestic violence.[15]

In *Lenahan*, the Commission responded to Justice Scalia's due process analysis in *Castle Rock*, but also articulated additional grounds for relief, finding that the United States' failure to act with due diligence violated the "obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration."[16] The Commission made seven recommendations in total: (1) undertake an investigation into the death of Ms. Lenahan's children; (2) conduct an examination of the systemic failures that led to the failed enforcement of Ms. Lenahan's protective order; (3) offer full reparations; (4) adopt legislation making enforcement of protective orders mandatory; (5) adopt legislation including protections for children in the context of domestic violence; (6) continue to adopt policies to restructure victim stereotypes and eradicate discriminatory socio-cultural patterns including training and prevention programs for law enforcement; and (7) design protocols at the federal and state levels to more effectively investigate reports of missing children within the context of violations of OPs.[17] By setting aside the rejection of the due process arguments in *Castle Rock* and pivoting toward the United States' obligations under due diligence and equal protection standards, the *Lenahan* report reinvigorated domestic violence scholars and victim

12. *See Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 1-2.

13. *Id.* ¶ 1.

14. The term "nation-state" here refers to sovereign governments in the international order. The term "state" refers to one of the several states of the United States of America.

15. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 5 ("The [United States] failed to act with due diligence to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, which violated the [United States'] obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration."). The Commission also held that the United States violated the children's right to life under Article I of the American Declaration and that the United States violated Jessica's right to judicial protection. *Id.*

16. *Id.*

17. *Id.* ¶ 215.

advocates to pursue innovative legal theories under which to hold accountable the institutions responsible for failed OPs.

This article conceives of new applications of the established common law construct of municipal tort liability, infused with the international government liability standard of "due diligence," to bring about more effective enforcement of OPs. Municipal tort liability, which has developed in state courts over the last fifty years,[18] has yielded positive results for victims of failed OPs and, more importantly, has resulted in systemic change in OP enforcement policy and practice.[19] Although Jessica's attorneys asserted a constitutional tort liability argument in the early stages of the litigation under Section 1983 of the United States Code, no common law municipal tort theory was ever advanced on her behalf; as such, the argument that may have provided the best avenue for recovery was never heard.[20] This article addresses the potential of domestic municipal tort litigation as an effective strategy to incentivize police to create, adopt, and implement OP enforcement policies consistent with the overarching compliance mandate set forth in *Lenahan*.

Part I articulates two theoretical assumptions about international law compliance and the efficacy of grassroots norm-creation. Part II briefly describes the domestic litigation preceding *Lenahan* and the bases for the United States' rejection of the duty to properly enforce OPs. Part III of the Article explains the Commission's findings and discusses the reasons why the Commission's legislative reform mandate may not be the most effective route to achieving the goal of adequate enforcement of OPs. Part IV provides an analysis of the international nation-state liability standard of "due diligence" as applied by the Commission in *Lenahan*. Finally, Part V discusses the development of domestic municipal tort liability, its successes, and its limitations. This Article uses New York State jurisprudence to illustrate the common features of the international "due diligence" and domestic municipal tort liability frameworks. Examining the commonalities, this Article suggests a litigation strategy that may shift domestic courts away from a victim-focused liability assessment and toward a theory centered on the due diligence themes of foreseeability and prevention, thus "domesticating"[21] the principles articulated in *Lenahan* in

18. *See generally* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R. 5th 273, §§ 4-6, 8-10 (2001).

19. *See infra* Part V.

20. Gonzalez v. City of Castle Rock (*Castle Rock I*), No. Civ.A.00 D 1285, 2001 WL 35973820, at *5 (D. Colo. Jan. 23, 2001) ("The City of Castle Rock seeks dismissal of the claims against it on the ground that Plaintiff cannot establish municipal liability. Because I find that Plaintiff has failed to state a claim upon which relief can be granted, I will not address these arguments.").

21. "Domesticating" international law is a term of art that refers to the process of

the absence of formal compliance.

I. THEORETICAL ASSUMPTIONS REGARDING COMPLIANCE AND NORMATIVE INCENTIVES

A. The United States Government Will Not Voluntarily or Proactively Comply with the Commission's Recommendations

This Article assumes that the *Lenahan* decision is a legitimate articulation of the United States' violation of the international human rights due diligence obligation to protect women[22] from domestic violence committed by non-state actors, but that despite its legitimacy, the decision will not inspire the United States government to come into compliance with international law. This assumption necessarily implicates questions about whether the United States is obligated to comply with the expressions of applicable international law standards. Compliance incentives encouraging or discouraging nation-states to obey international law have generated a wealth of scholarship and prominent legal scholars throughout history have provided a range of compliance theories.[23] This Article only briefly summarizes the points relevant to the unique compliance problem faced by advocates seeking to domesticate the *Lenahan* ruling due to its basis in international human rights law.

Historically, international law scholars gathered around a unifying theory of compliance based on the idea that "international rules are rarely enforced, but usually obeyed."[24] This maxim centers on a nation-state's

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incorporating international law into domestic law. One of the earliest uses of the term to describe this process specifically with regard to international human rights law is in an article identifying the "potentially binding effect of international human rights norms as customary international law." Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 815-16 (1990).

22. The Commission focused on the United States' obligation to protect women from domestic violence, under international laws guaranteeing rights to life, equality, non-discrimination, and equal protection. *Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 107-21. In the Commission's view, domestic violence is an "extreme form of discrimination." *Id.* ¶ 114.

23. *See generally* Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*] (containing an historical analysis of myriad theories of international law compliance through the late 20th century); ABRAM H. CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) (articulating the "managerial model" of compliance, which relies primarily on "a cooperative, problem-solving approach"); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) (articulating the "fairness approach" involving legitimacy and distributive justice).

24. *See* Koh, *Why Do Nations Obey International Law?*, *supra* note 23, at 2603 (citing prominent international law scholar and critic, HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 249-52 (2d ed. 1954) ("[T]o deny that international law exists as a system of binding legal rules flies in the face of

legal or moral obligation to obey international law by consent to treaty obligations (*pacta sunt servanda*) or customary law (*opinio juris*).[25] In an era of increasing tension between human rights compliance and national security post-September 11,[26] contemporary international law scholars are engaged in a theoretical struggle that challenges the traditional maxim of compliance. Some have built on established theories to describe international law compliance as a "transnational process" of interpreting and internalizing global norms into domestic law, which "leads to reconstruction of national interests."[27] This viewpoint subsumes national interests within the more sophisticated process of global norm internalization.

Countervailing views that nation-states comply out of rational self-interest, placing national interests over any moral or norm-based obligation, are the subject of increased debate and scrutiny.[28] Recent efforts to reconcile this modern tension have focused on the "link between national

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all the evidence[.]")); *see also* LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.").

25. Customary international law is defined as a "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987).

26. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 746-54 (2004) (discussing the limitations of the law of armed conflict in constraining the war on terror and suggesting that international human rights frameworks may provide human rights advocates with tools to effect policy discourse and construct litigation strategy to hold the United States accountable for human rights abuses in the name of the war on terror); Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331 (2005) (discussing the United States' failure to ratify the Convention on the Elimination of All Forms Discrimination Against Women (CEDAW), an international human rights instrument respecting the rights of women).

27. Koh, *Why Do Nations Obey International Law?*, *supra* note 23, at 2659; *see also* Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004); Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337 (2004).

28. *See, e.g.*, Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1919 (2002-2003); *see also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (presenting a more sophisticated and detailed discussion of the rational choice theory applied to international law compliance); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71-118 (2008) (providing an in-depth discussion of how reputation affects state behavior). *But see* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 34-127 (1996) (presenting empirical evidence of the influence of international norms and institutions over state behavior); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1748, 1762-80 (2003) (presenting empirical evidence that international norms induce states to imitate one another); David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159 (2006) (reviewing and critiquing Goldsmith & Posner from a norms-based perspective).

self-interest and fidelity to norms as being essentially the same dynamic underlying normative rationality and normative morality."[29] This latter framework appears to hold the most promise for explaining and suggesting advocacy strategies to address the United States' lack of compliance with international human rights norms like those expressed in *Lenahan*.

Human rights law is a unique subset of international law concerned with the protection of the rights of individual persons rather than the interrelationship of nation-states and therefore presents unique compliance challenges. After World War II, international human rights law expanded the obligations of nation-states and their leaders to protect individuals from human rights abuses.[30] But the robust expansion of rights and duties did not provide a corresponding enforcement mechanism. Scholars have identified human rights as "an area of international law in which countries have little incentive to police noncompliance with treaties or norms" because "the major engines of compliance that exist in other areas of international law are for the most part absent."[31] For this reason, current compliance models cannot explain the reasons why nation-states either adhere to or ignore international human rights obligations.

The human rights obligation to prevent and punish domestic violence falls within this category of compliance anomalies. Within the existing compliance models, one might argue that there exists a rational self-interest for the United States to comply with such an obligation, for example, reducing the public health and economic costs imposed by domestic violence.[32] And as will be discussed herein, there are certainly moral and legal reasons why the United States *should* comply with applicable international human rights law. Recent attempts to describe compliance with decisions in the Inter-American system focus on nation-state actions in response to compliance orders issued from the Inter-American Court

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29. Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 899 (2011).

30. *See generally* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 333-82 (2d ed. 2012) (providing a brief history of the evolution of international human rights law, nation-state responsibility for injury to foreign nationals, and global human rights instruments).

31. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002).

32. *See, e.g.*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf ("The costs of intimate partner rape, physical assault, and stalking exceed $5.8 billion each year, nearly $4.1 billion of which is for direct medical and mental health care services."); *see also* Mary Ellsberg et al., *Intimate Partner Violence and Women's Physical and Mental Health in the WHO Multi-country Study on Women's Health and Domestic Violence: An Observational Study*, 371 LANCET 1165, 1165-72 (2008) (describing an empirical medical study finding that "intimate partner violence is associated with serious public-health consequences").

demanding specific types of victim reparations.[33] Because the Commission issued the *Lenahan* decision and because the Commission lacks the authority to issue compliance orders, this compliance framework is inapplicable.

Non-compliance is the norm for the United States when it comes to unfavorable opinions from the Inter-American system. The federal government has a history of ignoring Commission decisions, "arguing that it is not bound to comply with the decisions of such international human rights bodies," which indicates that none of the traditional compliance incentives are appealing to the United States government.[34] This pattern of non-compliance persisted after the Commission's decision in *Lenahan*; nearly a year has passed and the United States has yet to comply with any of the Commission's recommendations.

This Article acknowledges that the United States is not likely to comply and focuses instead on ways in which domestic violence victims and their advocates can change police OP enforcement policy and practice through the process of domesticating the decision, focusing on the "incorporation of thematic elements of the decision into legislation or case law" in order to influence government actors to act in a manner consistent, if not compliant, with the *Lenahan* recommendations.[35] As M. Cherif Bassiouni recently suggested, "[t]he future of [international human rights law regimes] is their absorption into national legal systems whose enforcement mechanisms are likely to have a far more effective impact on compliance than any assisting or prospective international set of mechanisms."[36] While the traditional debate over state compliance focuses on top-down strategies, the purpose of this Article is to offer pragmatic suggestions for influencing state OP enforcement policy and practice to conform to international human rights law from the ground up.

B. Grassroots Norm Entrepreneurship Can Incentivize Police to Create and Adhere to Police Policies That Comply with the Values Expressed by the Commission in the Absence of Formal Federal Compliance

This Article is also premised on an assumption that litigation and other

33. David Baluarte, *Strategizing for Compliance*, AM. U. INT'L L. REV. (forthcoming) (on file with author).

34. Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 49 (2008) (citing the United States' rejection of the IACHR's conclusions and recommendations in Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L./V/II.117, doc. 1 rev. 1, ¶ 150 (2002)).

35. *Id.* at 50.

36. M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 DENV. J. INT'L L. & POL'Y 22, 28-29 (2011) ("Thus, the center of gravity of human rights has, as it should, moved from internationalization to nationalization . . . .").

grassroots norm-shifting strategies can influence the policy and practice of institutions responsible for the enforcement of OPs. "Norms are the language a society speaks, the embodiment of its values and collective desires, the secure guide in the uncertain lands we all traverse, the common practices that hold human groups together."[37] "Norms do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behavior in their community."[38] They are the most powerful yet analytically elusive guideposts of human behavior. This Article is a contribution to the larger project of determining how customary international human rights law might influence domestic OP enforcement norms in the absence of traditional or formal government compliance.[39] In the case of OP enforcement, the most interesting norms to examine are those that encourage or discourage police compliance with official or unofficial policies guiding enforcement.

Using the *Lenahan* decision to "alert people to the existence of a shared complaint," human rights advocates could function as "norm entrepreneurs" by: "(a) signaling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms [of non-compliance] seem or be less costly, and (d) making compliance with new norms seem or be more beneficial."[40] Municipal tort litigation informed by principles of international human rights law may be able to set a precedent that more closely mirrors the *Lenahan* recommendations, resulting in the creation and implementation of more responsive police practices, which in turn may influence the norms guiding police behavior. As described by Sally Engle Merry, "This process of re-appropriation may introduce unfamiliar categories of self and personhood, including a redefinition of women's rights to safety, but it is the result of local agents mobilizing national and global law in the face of local resistance rather than a global imposition of a new moral order."[41] This concept of non-governmental norm

37. CHRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS, at ix (2006).

38. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 51 INT'L ORG. 887, 896 (1998).

39. The domestication of international human rights law in the United States is an increasingly popular subject of inquiry. *See generally* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM (Shareen Hertal & Kathryn Libel eds., 2011) (examining how international human rights norms influence domestic policy); BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo et al. eds., 2007) (one of the first major works on this subject); Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008) (examining the internalization of international human rights norms domestically).

40. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (defining norm entrepreneurs as "people interested in changing social norms").

41. Sally Engle Merry, *Women, Violence and Human Rights*, *in* WOMEN, GENDER AND HUMAN RIGHTS: A GLOBAL PERSPECTIVE 83, 89 (Marjorie Agosín ed., 2001).

entrepreneurship influencing government policy is not untested. Legal scholars have identified a number of areas where norm entrepreneurship has successfully influenced the United States to conform to international law including the campaign to ban land mines[42] and the treatment of detainees in Guantanamo Bay,[43] to name a few. Police practices and policies in the United States are similarly not immune.[44]

Although the role of norm entrepreneurship in demanding government accountability for domestic violence deserves its own detailed analysis, the scope of this Article does not afford a thorough examination.[45] Rather, this Article notes that norm entrepreneurship using the tools of education, litigation, and legislation has historically yielded successful, policy-changing movements with regard to OP enforcement.[46] These grassroots movements were based on models that reject "the classical administrative assumption that organizational change is most effectively imposed from the top down, with little or no participation by those most affected by the change."[47]

Because victim advocates have a limited pool of resources with which to affect government policy and practice, it is worthwhile to engage in a study of what types of grassroots activities are most likely to be effective in capitalizing off of the *Lenahan* decision to bring about better protections

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42. Lesley Wexler, *The International Deployment of Shame, Second Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561 (2003).

43. Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47 (2004).

44. In her memoir, civil rights attorney Connie Rice details her successful career suing the Los Angeles Police Department for its treatment of alleged criminals in its custody and on the streets. Through litigation and other norm-shifting strategies, she dramatically improved its policies and practices, creating a more humane police force. *See generally* CONNIE RICE, POWER CONCEDES NOTHING (2012).

45. *See generally* Elizabeth M. Schneider et al., *Implementing the Inter-American Commission on Human Rights' Domestic-Violence Ruling*, 46 CLEARINGHOUSE REV. 113 (2012) (providing an overview of some of the possible avenues for advocacy and norm entrepreneurship using the *Lenahan* decision, including municipal tort litigation).

46. In the late 1980s, the New York State police engaged in a statewide police policy and training project to encourage the adoption of pro-arrest policies in cases involving domestic violence. Lisa Frisch & Joseph M. Caruso, *The Criminalization of Woman Battering: Planned Change Experiences in New York State*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 102, 124-25 (Albert R. Roberts ed., 1996). These "planned change experiences" were structured using public policy theorists Robert T. Nakamura and Frank Smallwood's "political interaction model" of policymaking. *Id.* at 121. The model as applied to police practices involving domestic violence stresses the importance of focusing on the effect of policy on police practice in determining the most effective advocacy strategies to encourage policy implementation. *See id.* ("Traditional hierarchical views assume that the written policy is the ultimate goal for change and thus ignore the need to transform policy statements into predictable police practice.").

47. *Id.* (citing ROBERT T. NAKAMURA & FRANK SMALLWOOD, THE POLITICS OF POLICY IMPLEMENTATION 27 (1980)).

for victims of domestic violence through the effective enforcement of OPs. This Article examines the potential of one such avenue: municipal tort litigation.

II. CAPPING THE FONT OF FEDERAL TORT LAW: *CASTLE ROCK* IN BRIEF

The Supreme Court's analysis of federal tort law in *Castle Rock* provides the necessary context to engage in an informed exploration of the potential impact of the Commission's ruling in *Lenahan*. Justice Scalia's opinion in *Castle Rock* analogized OP enforcement cases with the United States Supreme Court's previous ruling in *DeShaney v. Winnebago*, in which the Court declined to identify a state duty to protect children from abuse inflicted by private individuals.[48] The case was brought by a mother whose son was fatally abused by his father; she sued social workers and local officials who were aware of the abuse and did not take actions to prevent it.[49] The Court took a definitive stand against extending due process protections to the actions of non-state actors, stating, "[i]ts purpose was to protect people from the State, not to ensure that the State protected them from each other."[50] The limiting effect of the unfavorable ruling in *DeShaney* reduced potential avenues for state accountability for domestic violence to four discrete categories: (1) victims in state custody or victims harmed due to state-created danger; (2) violations of procedural due process; (3) equal protection violations; or (4) state tort liability.[51] *Castle Rock* eliminated the due process pathway.[52]

In keeping with the *DeShaney* precedent, the decision in *Castle Rock* erred on the side of limiting state liability rather than engaging in a process of defining the contours of limited state liability in the specific context of domestic violence. Despite Colorado's existing mandatory arrest statute requiring the arrest of an individual who police had probable cause to believe was in violation of an OP, and despite that language being printed in the OP itself, Justice Scalia found that since the police were free to exercise their discretion in these cases, the law was not a mandatory

48. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (holding that, absent a special relationship, police inaction does not violate a victim's substantive due process rights).

49. *Id.* at 191.

50. *Id.* at 196.

51. WEISBERG, *supra* note 9, at 266; *see also* G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of* DeShaney, 29 COLUM. HUM. RTS. L. REV. 641, 645 (1997) [hereinafter Miccio, *Deliberate Care*] (analyzing state responsibility for domestic violence through the lens of *DeShaney*, international law, and the legislative history of the Violence Against Women Act).

52. *Castle Rock IV*, 545 U.S. 748, 768 (2005).

function of police power.[53] The main thrust of Scalia's argument in *Castle Rock* was that the scope of police duty under Colorado's mandatory arrest statute was unclear in cases where the offender was not present to be arrested and that other provisions giving victims the ability to seek redress in the courts for contempt of the order were a much clearer entitlement.[54] However, this is a limited view of the type of harm perpetrated in domestic violence that fails to consider the legislative intent underlying state mandatory arrest statutes.[55] It assumes that the harm is only present if the aggressor is in the victim's presence and that the state only has an interest in preventing *immediate* physical harm to the victim.

These assumptions are inapposite in cases involving psychological or emotional abuse, which the abuser may inflict remotely. And when the abuser kidnaps the children and holds them hostage in violation of the court's order, as was the case in *Castle Rock/Lenahan*, these assumptions ignore the terror and fear suffered by victims when their abusers secret their children to unknown parts in violation of the OP or custody agreement on record. Also, these assumptions inappropriately shift the burden of enforcement of the order off of law enforcement and onto the victim. They imply that the appropriate response to violations of OPs is not the state taking proactive measures to locate and arrest the abuser, securing the victim's safety; rather, it is the victim's responsibility to go to the court and file a contempt action, potentially aggravating the abuser and inflaming the situation that was already so dangerous that an OP had to be issued in the first instance.

Notably, Scalia distinguished federal claims from potential state court actions: "[this ruling] does not mean States are powerless to provide

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53. *Id.* at 782-84. A number of states have enacted mandatory arrest statutes, including New York. *See* NEAL MILLER, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 28 n.86 (2004), *available at* http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf (listing mandatory arrest statutes from Alaska, Arizona, Colorado, Connecticut, the District of Columbia, Iowa, Kansas, Louisiana, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, Wisconsin, and Missouri).

54. *Castle Rock IV*, 545 U.S. at 762-66.

55. In a controversial essay, Roger Pilon of the Cato Institute noted Justice Scalia's uncharacteristic disregard for the legislative history in the Colorado mandatory arrest statute. Roger Pilon, Town of Castle Rock v. Gonzales*: Executive Indifference, Judicial Complicity*, *in* 2004-2005 CATO SUPREME COURT REVIEW 101, 116 (2005) ("[The legislative history] makes it unmistakably clear that in this area involving domestic violence, Colorado, like a number of other states in recent years, meant precisely to remove virtually all law enforcement discretion, especially given the well-documented evidence that absent such mandatory requirements, police underenforcement tended to be the rule, often with tragic results, which is just what happened here. Yet Scalia dismisses the text, uncharacteristically, and the legislative history too, which he is ordinarily more inclined to do.").

victims with personally enforceable remedies."[56] In fact, as will be discussed herein, the font of tort law capped by the federal government may actually result in a wellspring of municipal tort actions among the several states. Municipal tort liability does exactly what the *Castle Rock* Court declined to do under federal law, that is, "create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented."[57] However, state court litigation was not the immediate reaction to the *Castle Rock* case.

Because orders of protection and their enforcement arise out of statutory law, advocates turned their attention to the state and federal legislatures in the years that followed the *Castle Rock* decision.[58] In the seven years since the opinion, legislative efforts have been disappointing. The lack of progress was noted by United Nations Special Rapporteur on Violence Against Women Rashida Manjoo in her findings following a 2011 mission to the United States.[59] The next section addresses some of the legislative efforts to strengthen OP enforcement at the federal and state levels and why they have fallen short of the goal of influencing actual police practice and policies regarding OP enforcement.

III. THE COMMISSION'S MANDATE AND WHY LEGISLATIVE EFFORTS ARE OFTEN INADEQUATE

The Commission's legislative recommendations reflect several mistaken assumptions: (1) that the federal and state legislatures are the primary or preferable source of expressive domestic law for treaty obligations and human rights values to which the Commission seeks to hold the United States accountable and (2) that federal and state legislative changes are the

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56. *Castle Rock IV*, 545 U.S. at 768.

57. *Id.* at 769-70. *But see* Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 13 GEO. J. GENDER & L. (forthcoming 2012) [hereinafter Goldscheid, *Rethinking Civil Rights*] (articulating an argument for the potential effectiveness of federal civil rights approaches to law enforcement accountability post-*Lenahan*).

58. Press Release, American Civil Liberties Union, ACLU Disappointed with Supreme Court Ruling on Domestic Violence Orders of Protection (June 27, 2005), *available at* http://www.aclu.org/womens-rights/aclu-disappointed-supreme-court-ruling-domestic-violence-orders-protection (calling for state legislatures to create statutes that hold law enforcement liable for failing to enforce protective orders); Statement of Fernando Laguarda, Counsel of Record, The National Network to End Domestic Violence, Regarding *Town of Castle Rock v. Jessica Gonzales* (June 27, 2005), *available at* http://www.ncdsv.org/images/StatementofFernandoLaguardareTownCastleRock.pdf (imploring state and federal lawmakers to pass legislation to prevent future similar tragedies from occurring).

59. "[E]ven where local and state police are grossly negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call, there is no federal level constitutional or statutory remedy." Special Rapporteur on Violence Against Women, *Mission to the United States of America*, ¶ 71, U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011).

best way to influence the actions of the individuals responsible for guaranteeing these rights and fulfilling these obligations—police and other state law enforcement actors. These assumptions are not uncommon, but they are mistaken if the goal of the Commission is to bring the OP enforcement practices of municipal police forces in compliance with international law.[60]

Attempts to legislate more effective enforcement of OPs may not succeed in achieving this result for several reasons, which are discussed in the next sections. "In the final analysis, the ability of the law to temper or even eradicate violence is compromised continuously by the contradictions between law's epistemological boundaries and cultural attitudes buffeted by social and economic arrangements."[61] These contradictions are evident in the formulation of local policies adopted under legislative imperative.

A. Implicit Obstacles to Legislating Compliance with International Law

The federalist structure of the United States legal system creates unique challenges for federal legislative implementation of any international human rights norm that implicates state executive functions. Unlike most other constitutional democracies within the Inter-American system, the United States is a federalist nation-state, comprised of the several states and their political subdivisions. Although the power to bind the United States to treaty obligations is reserved to the federal government, absent federal implementing legislation,[62] the states are not obligated to subordinate the values underlying any conflicting state laws to those of the federal government for most treaty obligations.[63] However, state and local

60. *See* Judith Resnick, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1624 (2006) ("But a Congress (internationalist or sovereigntist), appreciative of the prerogatives of state courts, ought not to advise state judges on how they should approach lawmaking."); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("[A] decision to create a private right of action is one better left to legislative judgment in the great majority of cases. . . . While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.").

61. Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 456 (1998).

62. Unless a treaty is deemed to be "self-executing," it requires federal legislative action to become binding law. *See* MURPHY, *supra* note 30, at 254 ("A self-executing treaty is capable of being directly applied as part of the internal law in the United States immediately upon entry into force of the agreement. . . . Non-self executing treaties, however, require legislation or some other source of U.S. law to implement them in the United States.").

63. The consular notice provisions of the 1963 Vienna Convention on Consular Relations (VCCR), to which the United States is a party, recently thrust the tensions between federal and state law in the United States into the international spotlight. In 2004, the International Court of Justice (ICJ) found the United States to be in violation

governments may choose to comply with human rights declarations and rulings, independent of whether or not the federal government has ratified the instruments or accepted the jurisdiction of the international tribunal.[64]

In addition to the procedural challenge of navigating the compartmentalization of nation-state responsibility among federal, state, and local governments, state laws respecting OPs implicate larger substantive law and policy concerns including the extension of the right of protection to LGBT victims[65] and property rights.[66] Because those are

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of the provision requiring nation-states to inform foreign nationals charged with crimes in the United States of their right to speak with a consular official from their home country. *See* Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*), 2004 I.C.J. 12, 13-14 (Mar. 31). Subsequently, the United States Supreme Court held that absent federal legislation implementing the ruling of the ICJ, the laws of the several states applied and therefore, if state law procedures for pleading violations of the VCCR were not followed, claims under it were barred. *See* Medellín v. Texas, 552 U.S. 491, 510 (2008) ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."). To preserve the rights of detained foreign nationals while the states determined their obligations in light of the Supreme Court ruling, the ICJ issued a stay of all executions of foreign nationals on death row in any state in the United States who had not been informed of their rights under the VCCR. Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*), Provisional Measures, 2003 I.C.J. 77 para. 59 (Feb. 5). Predictably, the State of Texas refused to cooperate despite a personal letter to the state's Governor, Rick Perry, from the Republican Presidential administration of Texan George W. Bush, drafted by Secretary of State Condoleezza Rice and Attorney General Michael Mukasey, urging Governor Perry to respect the ICJ ruling demanding the stay. The Governor's spokesman responded unequivocally: "The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court . . . . It is easy to get caught up in discussions of international law and justice and treaties." Allan Turner & Rosanna Ruiz, *Execution of Houston Girls' Killer Still on Track for Aug. 5*, HOUSTON CHRON. (July 16, 2008), http://www.chron.com/news/houston-texas/article/Execution-of-Houston-girls-killer-still-on-track-1788473.php (internal quotation marks omitted). State rejection of federal treaty obligations is a major concern that is outside the scope of this Article. It is noted here to illustrate the complexity of the compliance question and as a warning to any activists or advocates attempting to influence state policies. Absent a self-executing treaty obligation, state governments in the United States are not bound by international law. Oona Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 91-101 (2012) (distinguishing between self-executing treaties, private rights, and private rights of action under international law and providing a history of the distinction as it relates to claims in domestic courts for violations of international law); *see also* GUZMAN, *supra* note 28, at 3-6 (for additional discussion of the *Medellín* decision and the issues it raises for compliance).

64. *See generally* UNIV. OF VA., VIOLENCE AGAINST WOMEN IN THE UNITED STATES AND THE STATE'S OBLIGATION TO PROTECT 13-14 (2011), *available at* http://www.law.virginia.edu/pdf/hr/vaw.pdf.

65. Some state legislatures, like in New York, have broadened the definition of the category of persons against whom an order of protection may be sought, expanding the reach to the state's definition of "intimate partner." The definition includes same-sex partners, unmarried dating teens, ex-spouses, and other individuals not previously subject to the jurisdiction of orders of protection. N.Y. CRIM. PROC. LAW § 530.11 (McKinney 2012). Massachusetts, Pennsylvania, and Texas have similarly broad definitions of intimate partners. *See* MASS. GEN. LAWS. ch. 209A, § 1 (2007); 23 PA. CONS. STAT. § 6102 (2001); TEX. FAM. CODE ANN. § 71.0021(b) (West 2005); *see also* Jennifer Cranstoun et al., *What's an Intimate Relationship, Anyway? Expanding Access*

issues largely reserved to the states and because states vary widely on the range of protections afforded within the constraints of state law, it is unlikely that federal legislative action mandating policies for OP enforcement (other than monetary incentives[67] and federal firearms laws) will survive a judicial challenge.[68] As such, due to the complex interplay between the federal government and that of its several states, absent congressional action preempting this particular function of law enforcement, the federal government is constrained in its ability to adopt legislation directly impacting OP enforcement.[69]

B. Federal Legislation and Failed Statutory Causes of Action

The Violence Against Women Act (VAWA), passed by Congress in 1994, was a landmark piece of legislation that arguably demonstrated the government's acceptance of "an affirmative duty to prevent domestic violence."[70] The law originally provided for a federal civil rights cause of action for domestic violence. Six years later, in a case involving the rape of a Virginia Tech college student by two other male students, the Supreme Court extinguished VAWA's civil rights remedy declaring it unconstitutional because, in the Court's opinion, neither the Commerce Clause nor the Fourteenth Amendment state action and enforcement

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to the New York State Family Courts for Civil Orders of Protection, 29 PACE L. REV. 455, 463-68 (2009) (comparing New York's statutory scheme with several other states' laws).

66. Orders of protection may require that the abuser vacate the family residence, regardless of their ownership interest in the property. *See* Araya v. Keleta, 31 A.3d 78, 79 (D.C. 2011); V.C. v. H.C., 257 A.D.2d 27, 33 (N.Y. App. Div. 1999).

67. These types of incentives can be found in federal legislation such as the Violence Against Women Act and the Victims of Crimes Act. Violence Against Women Act, 42 U.S.C. § 14031 (2012) (creating a grant program for states dedicated to the enforcement of protective orders); Victims of Crimes Act, 42 U.S.C. § 10603a (2012) (establishing a grant program for states that set up a child abuse task force according to federal requirements).

68. "Contrary to our constitutional system, the international human rights system—including political and civil rights—imposes positive as well as negative state responsibilities. Under our federal constitutional system, claims that the state is responsible for failing to protect, prevent or punish have no force. . . . While it is undeniably progress that the international system has finally recognized gender violence as a human rights matter, the remedies are primarily state-centric. This raises, in turn, the limitations and dangers of transferring reliance for protection to, and, thereby, enhancing, the policing power of the state." NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 1343-45 (2009).

69. *Cf.* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001) ("[D]ialogue among various levels of government is critical to meaningful implementation of international human rights law in the United States.").

70. *See* Miccio, *Deliberate Care*, *supra* note 51, at 675, 669-77 (providing an analysis of the development and passage of the Violence Against Women Act, the language of the Act, and the legislative intent as an acceptance of the duty to prevent domestic violence against women).

doctrines permitted the assignment of liability to government actors for the conduct of private individuals.[71]

Unless and until the Supreme Court is willing to connect state action (or inaction) with the problem of domestic violence, other federal legislative efforts could be subjected to the same analysis. Both the Supreme Court's decision in *Castle Rock* and the defeat of the VAWA remedy in *Morrison* signal a structural rejection of domestic violence as a matter of nation-state responsibility in the United States. The countervailing international due diligence principle obligating the United States to prevent domestic violence has not and will not be enough on its own to unravel the precedent against nation-state responsibility established by the Supreme Court.

Furthermore, as this Article was being written, members of Congress were in an unexpected tug of war between the Senate and the House versions of the reauthorization of the surviving VAWA provisions.[72] Traditionally, reauthorization of the bill has been customary, enjoying bipartisan support and "little controversy."[73] However, the extension of protections to immigrants and same-sex individuals in VAWA has been politicized by the conservative majority in the House of Representatives.[74] So, in addition to the difficult precedent against federal legislative mandates for government liability for failed OP enforcement, even the larger protections that VAWA affords are subject to political pressures. Similar political constraints and compromises could befall any attempt to legislate federal liability for domestic violence. As such, federal legislation is perhaps the least likely avenue to *Lenahan* compliance.

C. The Shortcomings of State Legislation

In the absence of any federal mandates concerning the enforcement of OPs, the damaging and difficult precedent set by *DeShaney* and *Castle Rock* for domestic violence victims seeking relief under federal law has led many advocates to push for state legislative reform.[75] State legislative

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71. United States v. Morrison, 529 U.S. 598, 627 (2000); *see also* Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000) (discussing the history and origins of the remedy under VAWA and providing a critique of the Court's decision).

72. Jonathan Weisman, *Women Figure Anew in Senate's Latest Battle*, N.Y. TIMES (March 14, 2012), http://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html?_r=1&pagewanted=all.

73. *See id.*

74. *See id.*

75. G. Kristian Miccio, *The Death of the Fourteenth Amendment:* Castle Rock *and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 314-15 (2011) ("The answer rests in reforming state tort law, not in attempting to raise constitutional torts. . . . Thus, we need to look to negligence actions against the state. This will require reworking state tort law by limiting the affect of the [public duty doctrine] and, where applicable, state

efforts to curtail domestic violence are as old as the nation itself, but have achieved mixed results. "Although a law forbidding wife abuse was enacted in the Massachusetts Bay Colony as early as 1641, civil and criminal penalties for domestic violence remained rare throughout most of the nation's history."[76] Legislative efforts to strengthen the enforcement of OPs have been undertaken in a number of states.[77] But these efforts fall short for a number of reasons.

Early shortcomings of OP legislation included: the imposition of filing fees, mandates that clerks assist victims to seek orders without funding for adequate training or supervision, lack of provisions regarding the issuance of emergency OPs after-hours, mandated personal service on the batterer, lack of tracking or monitoring, and weak penalties for violations.[78] Modern OP statutes fail for other reasons, including, inter alia: underenforcement,[79] the creation of obstacles to filing suit, the lack of a mandate to investigate reported violations, and the unusual creation of short-term protection by imposing arbitrary time limits on the duty to arrest.[80]

Even when legislative efforts are comprehensive and complete, the practical application of the laws by law enforcement and the courts often produces a number of unintended consequences. Leigh Goodmark notes several that have resulted from attempts to legislate solutions to domestic violence, including: the penalization of women who stay in an abusive relationship, perpetuation of the assumption that women should turn to the legal system for assistance, the increased danger that can result from engaging the legal system, the devaluation of non-physical violence, the deprivation of victim agency and dignity, the inability of the legal system to realize the potential of the law, and the lack of particularized solutions

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immunity acts in cases of police refusal to enforce orders of protection."); *cf.* Burella v. City of Philadelphia, 501 F.3d 134, 153-54 (3d Cir. 2007) (Ambro, Circuit J., concurring) (suggesting that state tort reform may "prove to be a Potemkin village"); C. Keith Marshall, Jr., *Russia's Lack of American-Style Agency Principles: A Primary Cause of Corporate Governance Problems Today*, 8 S.C. J. INT'L L. & BUS. 131, 133 (2011) ("[T]he phrase 'Potemkin village' has come to signify a façade meant to impress and mislead (i.e., to hide some undesirable fact or condition).").

76. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1494 (2008).

77. *See* Kathryn E. Litchman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOY. U. CHI. L.J. 765, 801-20 (2007) (discussing the remedies provided by several states).

78. PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 15 (1990).

79. *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717, 1719 (2006) (identifying domestic violence as an "underenforcement zone" evidencing "distributive and democratic failure").

80. *See* Litchman, *supra* note 77, at 802-13 (discussing limitations of the OP enforcement legislation in Washington, New York, and California).

for women of color, immigrant women, and poor women.[81] Deborah Epstein identifies some legislative and administrative efforts that have resulted in a reduction in "the level of procedural justice accorded to batterers," noting the empirical connection between abusers' sense of fair treatment and victim safety suggested by social science data.[82] In sum, although it may be possible to pass state legislation, the unintended consequences that result when it is translated into action may actually completely undermine the goal of more effectively providing safety to victims through OP enforcement.

D. State Human Rights Statutes and Local Legislative Efforts

A seemingly natural target for advocates seeking to pass state legislation specific to the *Lenahan* recommendations might be a state's human rights statute. A number of states have passed these statutes, which generally prohibit discrimination on the basis of age, sex, race, creed, color, marital status, physical or mental handicap, or national origin, and some have further created state government bureaus for the enforcement of these statutes.[83] Few of the state human rights statutes on record make specific reference to domestic violence, though the related provisions regarding gender discrimination are pertinent because of the potential for equal protection claims under state constitutions.[84]

Federal courts have already struck down a number of equal protection arguments in OP enforcement cases.[85] The standard articulated in a

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81. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 19-45 (2004).

82. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1845, 1847 (2002).

83. At least fifteen states have passed domestic human rights statutes, including Alaska (ALASKA STAT. § 18.80.200 (2012)), Connecticut (CONN. GEN. STAT. ANN. § 46a-60 (2012)), District of Columbia (D.C. CODE § 2-1402.01 (2012)), Idaho (IDAHO CODE ANN. § 67-5901 (2012)), Illinois (775 ILL. COMP. STAT. 5/1-102 (2012)), Iowa (IOWA CODE § 216.5 (2012)), Maine (ME. REV. STAT. tit. 5, § 4552 (2012)), Minnesota (MINN. STAT. § 363A.02 (2012)), Missouri (MO. REV. STAT. § 213.010 (2012)), Montana (MONT. CODE ANN. § 49-2-101 (2012)), New Hampshire (N.H. REV. STAT. ANN. § 354-A (2012)), New Mexico (N.M. STAT. ANN. § 28-1-1 (2012)), New York (N.Y. EXEC. LAW § 290 (McKinney 2012)), Tennessee (TENN. CODE ANN. § 4-21-101 (2012)), and West Virginia (W. VA. CODE § 5-11-1 (2012)). Several of these states have also established a commission to handle complaints under these statutes, including Alaska, Illinois, Maine, Minnesota, Montana, New Hampshire, New York, and West Virginia.

84. For example, New York's Human Rights Statute protects domestic violence victims from employment discrimination, but does not address issues pertaining to OP enforcement. N.Y. EXEC. LAW § 296(1)(a) (McKinney 2012).

85. *See, e.g.*, Hynson v. City of Chester Legal Dep't, 864 F.2d 1026, 1027 (3d Cir. 1988) (denying equal protection claim, but setting forth three-part test to determine violation); *see also* Okin v. Village of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 439 (2d Cir. 2009) (failing to show police policy to discriminate against all

number of Circuits is nearly impossible to meet because it requires that plaintiffs engage in the overly burdensome and expensive task of compiling, requesting, and analyzing statistical data and other evidence of discrimination. Nearly half of the federal circuits have articulated a three-prong evidentiary burden that plaintiffs must satisfy to prevail on an equal protection claim: (1) evidence that the police had a policy or custom to provide less protection to domestic violence victims versus victims of other violent crimes; (2) the policy had a discriminatory purpose; and (3) plaintiff was injured as a result of the policy.[86] Some circuits have further narrowed the first prong of the analysis, requiring that plaintiffs show that the police discriminated against all women, not just women who are victims of domestic violence.[87] For similar reasons, state equal protection claims under the human rights statutes would likely prove to be nearly impossible to win absent overt and widespread discrimination by police against women.

To date, most of the cases arising under these statutes address discriminatory employment practices, discrimination in the provision of professional services, and other claims unrelated to domestic violence or OP enforcement. Further examination of the genesis and enforcement of these statutes and a determination of whether enforcement has led to corresponding policy change among state administrative agencies is necessary to determine whether targeting these statutes for amendment to include the protection of women from domestic violence would be worthwhile. Even if the statutes could be amended to specifically include discrimination against victims of domestic violence, the risk of unintended consequences and the problem of translating the anti-discrimination laws into police policy and practice for OP enforcement remain.

A number of norm entrepreneurs have petitioned city and county governments to pass ordinances declaring freedom from domestic violence as a fundamental human right.[88] To date, these ordinances have served a

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women, not just victims of domestic violence); Burella v. City of Philadelphia, 501 F.3d 134, 149 (3d Cir. 2007) (equal protection claim failed for lack of statistical evidence showing discrimination). *But cf.* Watson v. Kansas City, 857 F.2d 690, 696 (10th Cir. 1988) (finding police liable for violation of victim's right to equal protection applying rational basis scrutiny); Thurman v. Torrington, 595 F. Supp. 1521, 1529-30 (D. Conn. 1984) (equal protection case where city systematically failed to provide victims with adequate protection over a certain period of time, reflective of discriminatory purpose and policy).

86. *Hynson*, 864 F.2d at 1031.

87. *Okin*, 577 F.3d at 438.

88. Such ordinances have been passed in Cincinnati, Ohio; Baltimore, Maryland; and, most recently, in Miami-Dade County, Florida. Cincinnati, Ohio, Res. No. 47-2011 (Oct. 5, 2011), *available at* http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/33497.pdf;jsessionid=04A85735B29385693C8122F3BD3CA95B?m=32372; Balt., Md., Res. 12-0034 (Mar. 19, 2012), *available at* http://legistar.baltimorecitycouncil.com/attachments/8911.pdf; Miami-Dade Cnty., Fla.,

largely symbolic role, their substance not directly addressing the issue of municipal liability.[89] Although doubtless a creative and innovative norm-shifting strategy (one could imagine the potential utility of local legislation in persuading judges and state legislative decision makers to reframe domestic violence as a human rights issue), the effectiveness of local legislation in effecting police policy and practice regarding OP enforcement remains to be seen.

Until more effective legislative reforms gain momentum, a more fruitful path may be to allege and litigate violations of state and municipal duties under local tort laws. As will be discussed in-depth in the next two parts, there are a number of common elements of municipal tort liability shared among states, and infusing liability arguments with the human rights values expressed in the *Lenahan* decision remains one of the most promising avenues for achieving the outcomes sought by the Commission.

IV. DUE DILIGENCE DEFINED: FORESEEABILITY AND PREVENTION

One of the earliest legal expressions of a nation-state's duty to exercise due diligence to prevent breaches of international law, even those involving private conduct by non-states, is found in the famous 1872 international arbitration at the conclusion of the Civil War.[90] In an arbitration commonly referred to as "The Alabama Claims Arbitration," arbiters found that Great Britain had violated its treaty obligations as a "neutral" under the Treaty of Washington by providing assistance to the Confederate troops through the provision of warships.[91] The analysis of due diligence and its relationship

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Resolution Expressing the Board's Intent to Declare That the Freedom from Domestic Violence Is a Fundamental Human Right (July 17, 2012) [hereinafter Miami-Dade Cnty. Resolution], *available at* http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2012/121380.pdf.

89. None of the ordinances explicitly discuss municipal liability, which is unsurprising since such language could increase a municipality's exposure to lawsuits and might therefore render the ordinance politically unviable. *See* Res. No. 47-2011; Res. 12-0034; Miami-Dade Cnty. Resolution.

90. While earlier expressions of the underlying concepts of state responsibility that gave rise to the "due diligence" principle can be found as early as 1000 B.C., modern legal expressions of due diligence emerged in the late 18th and 19th centuries. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 440-41, 455, 526 (7th ed. 2008). *See generally* Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 267 (2004) (providing a detailed description of the historical development of state responsibility and the due diligence principle).

91. U.S. Dep't of State, The Case of the United States, to Be Laid Before the Tribunal of Arbitration, to Be Convened at Geneva Under the Provisions of the Treaty Between the United States of America and Her Majesty the Queen of Great Britain, Concluded at Washington, May 8, 1871 97, 130 (1872) [hereinafter *Alabama Case*], *available at* http://archive.org/details/cihm_34251 ("The United States understand that the diligence which is called for by the Rules of the Treaty of Washington is a *due* diligence; that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the Power which is to exercise it . . . . No diligence short of this

to negligence in the *Alabama* case is instructive:

> "Negligence," which is only the absence of the diligence which the nature and merits of any particular subject and the exigencies of any particular case demand as "due" from the nature of its inherent circumstances, implies blamable fault, called in the Roman law *culpa*, with responsibility for consequences. The idea of obligation, either legal or moral, and of responsibility for its non-performance, is found in all the forms and applications of the question, either of diligence or of negligence. . . . "A fault is blamable through want of taking proper care; and it obliges the person who does the injury, because by an application of due diligence it might have been foreseen and prevented."[92]

Importantly, the dual paradigms of foreseeability and prevention reflected in the historical roots of the due diligence principle are replete in both domestic municipal tort and international liability assessments, and therefore provide a consistent framework to link present-day analyses of each together.[93] Although the due diligence principle has continued to evolve since the *Alabama* case, its specific application in the context of nation-state liability for harms inflicted by individual non-state actors remain vague, unsettled, and rather specific to the type of harm alleged.[94] Not all of the international tribunals and instruments examining nation-state liability for the human rights abuses of individual non-state actors have framed the issue as one of due diligence.[95] An analysis of the due diligence principle and municipal tort liability within the specific context of failed enforcement of protective orders and domestic violence elucidates the contours of government responsibility within the foreseeability and

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would be 'due;' that is, *commensurate with the emergency, or with the magnitude of the results of negligence*. . . . That a neutral is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace."); *see also* Tom Bingham, *The Alabama Claims Arbitration*, 54 INT. & COMP. L. Q. 1, 1-25 (Jan. 2005) (including a detailed historical analysis of the facts of the case, the legal arguments presented, and the decisions of the arbiters).

92. *Alabama Case*, *supra* note 91, at 91-92 (citations omitted).

93. *See* discussion *infra*.

94. *See* Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law*, 8 INT'L CMTY. L. REV. 81, 121 (2006) ("The due diligence principle is especially important under international law because it can be applied to varied facts and circumstances. . . . How, whether, and with what breadth the due diligence principle is applied, however, remains one of political will."); *see generally* André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L. & COMP. L. Q. 615 (2003) (discussing the conflation of individual and state responsibility in recent prosecutions of international war crimes and the implications for the role of "intent" in finding fault and assigning liability).

95. *See* Johanna Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women Against Violence*, *in* DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 47, 51 (Carin Benninger-Budel ed., 2008) (citing cases from the European Court of Human Rights and the African Commission on Human and Peoples' Rights).

prevention paradigms.

A. The Due Diligence Principle as Applied to Cases of Domestic Violence

The use of the due diligence principle to determine nation-state responsibility in cases involving gender-based violence have clarified some of its vagaries within this specific context.[96] The main expressions of nation-state responsibility under this principle are found in the decisions of the Inter-American system and the Committee on the Elimination of Discrimination Against Women, the monitoring body of the main international declaration respecting women's rights, The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[97]

The first articulation of the due diligence principle as applied to a case involving international human rights was the Inter-American Court of Human Rights' 1988 decision in *Velásquez Rodriguez v. Honduras*.[98] This case established the responsibility of nation-states to protect individuals against harms committed by non-state actors, whether or not the actor could be identified, shifting the focus off of the harm itself and onto the inadequacy of the nation-state's measures to prevent and investigate a human rights violation committed within its territory.[99] This groundbreaking decision laid the foundation for individuals to seek redress for human rights abuses committed by non-state actors, specifically cases involving domestic violence.

Over a decade later, the Commission applied the due diligence principle in assigning fault to the nation of Brazil in *Maria da Penha Maia Fernandes v. Brazil*, a 2001 case in which a woman nearly died as a result

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96. *See id.* at 47, 61 (presenting a history of the development of the due diligence principal as it pertains to gender-based violence). Ms. Bourke-Martignoni is somewhat skeptical of the promise of due diligence for nation-state responsibility to prevent domestic violence, protect women from it, and provide remedies to victims. *Id.* at 61. It is important to note, however, that she wrote her analysis prior to the *Lenahan* decision, in which the Commission articulated specific parameters for assigning nation-state responsibility, focused on foreseeability and prevention.

97. *See* Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); Convention of Belém do Pará, arts. 2, 7, 8, 9, June 9, 1994, 33 I.L.M. 1534; 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. ¶¶ 45-58 (2001); *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to Be Free from Violence and Discrimination*, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II.117, doc. 44, March 7, 2003, ¶¶ 99-107; Comm. on the Elimination of Discrimination Against Women (CEDAW), Gen. Rec. 19, Violence Against Women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1, ¶ 9 (1993).

98. *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 172.

99. *Id.* ("An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.").

of domestic violence at the hands of her husband.[100] This case and those that followed articulated the duty of the state to prevent, investigate and punish domestic violence within its territory under its due diligence obligations, and to "protect the victim and provide a legal remedy for her as a woman at risk of or subjected to domestic violence; and to ensure that these obligations are given effect in the domestic legal system."[101]

The Inter-American Commission's decision in *Lenahan* is the first use of the due diligence principle to assign to the United States a duty to protect individual victims of domestic violence from harm inflicted by non-state actors, specifically through the effective enforcement of orders of protection. Expanding upon earlier rulings, the Commission took note of four principles emerging from the development of the standard over the previous decade, representing an "evolving law and practice related to the application of the due diligence standard in cases of violence against women":

(1) "a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances";[102]

(2) "the States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates the problem";[103]

(3) States are obligated to "guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence";[104] and

(4) "certain groups of women [are] *at particular risk* for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by [Nation-States] in the adoption of measures

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100. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶¶ 8-9, 55-58 (explaining that Maria's husband shot her while she was sleeping, the culmination of a series of abuses including electric shock applied to her while she was showering. The abuses she suffered caused her to suffer from tetraplegia and other injuries).

101. 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, at 73, Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011), *available at* http://www.aclu.org/files/pdfs/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf.

102. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 126 (internal citations omitted).

103. *Id.*

104. *Id.* ¶ 127.

to prevent all forms of violence."[105]

In assembling these principles, the Commission both rearticulated customary international law and also took the opportunity to develop it further. Principle (1) is a restatement of the due diligence standard as developed in customary international law. Principles (2) and (4) link the United States due diligence duties with a broader obligation to address the systemic discrimination contributing to domestic violence as a means of prevention—a new development. Most notably, principle (3) further expands the due diligence principle to a right to judicial remedies. The values expressed in these principles, establishing state liability and the right to equal protection and due process, unequivocally renounced the *DeShaney/Castle Rock* line of jurisprudence in the United States and established the due diligence principle as the international legal norm from which equal protection and due process claims emanate.

Applying the due diligence principle to the facts in the *Lenahan* case, the Commission looked at two main factors: (1) "the authorities' knowledge that victims were in a situation of risk"; and (2) "measures taken to protect the victims."[106] Both the Commission in *Lenahan* and the Supreme Court's dissent in *Castle Rock* situated their analysis within the same framework. Although the dissenting Supreme Court Justices were not addressing municipal tort liability questions specifically, they used state liability theories to justify their reasons why the State of Colorado should have been liable for the enforcement failures under federal constitutional law. The majority opinion also focused on state liability, but essentially found that the states had jurisdiction to decide liability under their own laws, refusing to subsume state liability standards into federal civil rights laws.[107] Examining the analysis in each reveals the Commission's tacit support of dissenting Justices in *Castle Rock*,[108] as well as the promise of municipal tort liability as an alternative strategy for achieving state responsibility.

1. Foreseeability: Authorities' Knowledge That Victims Were in a Situation of Risk

With respect to the government's ability to foresee the kidnapping and killing of Ms. Lenahan's three daughters in violation of the protective order, the Commission determined that the issuance of an OP, in and of itself, was sufficient to establish that the state recognized the risk because it represented a judicial determination that state protection was required.[109]

105. *Id.* (emphasis added).

106. *Id.* ¶¶ 138-59.

107. *Castle Rock IV*, 545 U.S. 748, 760 (2005).

108. *Id.* at 773 (Stevens, J., dissenting).

109. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 142.

They placed particular importance on the language contained in the order, specifically the mandatory arrest language.[110] Taking the opposite view of the Scalia majority in *Castle Rock*, the Commission noted that the mandatory arrest terms in the OP were sufficiently strong to create a reasonable expectation that law enforcement officials would "use every reasonable effort to protect the alleged victim and her children from violence."[111] The Commission focused on both the reasonableness of the expectation of police action (reliance) *and* the reasonableness of the actions of law enforcement themselves *in light of the order and its terms*.[112] This dual view of reasonableness within the context of state knowledge of risk is the most interesting for the purposes of finding common ground with domestic municipal liability jurisprudence.

As will be discussed *infra*, after the state's duty has been established, state municipal liability analyses often assign an additional burden to the victim to prove that she reasonably relied on the representations of law enforcement responding to the OP violation complaint. Both the states and the Commission take into account the reasonableness of the victim's reliance, but unlike the states, the Commission does not require the victim to prove that her actions were reasonable in response to the police action on the OP. Rather, it ascertains what reliance would have been reasonable in light of the actual language of the OP itself and keeps the burden on law enforcement to show that its actions were in keeping with what the victim could have reasonably expected.

The Commission's analysis reframes liability in terms of what the police did or did not do to protect the victim, not whether the victim was reasonable in relying on whatever protection was offered. In keeping with this framework, the Commission found that the state should have been aware of the potential risk of harm and that the "proper response would have required the existence of protocols or directives and training on how to implement restraining orders, and how to respond to calls such as those placed by Jessica Lenahan."[113] Having determined that the state could have foreseen the harm to Ms. Lenahan and her children, the Commission moved to the second prong of its analysis: actions taken to prevent the

110. *Id.* ¶¶ 143-44 ("Therefore, the Commission considers that the State's recognition of risk in this domestic violence situation through the issuance of a restraining order—and the terms of said order—is a relevant element in assessing the human rights implications of the State's action or inaction in responding to the facts presented in this case.").

111. *Id.* ¶ 144. In *Castle Rock*, Justice Scalia wrote: "We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Castle Rock IV*, 545 U.S at 760.

112. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 144.

113. *Id.* ¶ 145.

harm.

2. Prevention: Measures Undertaken to Protect the Victims

In examining the actions of the Castle Rock Police Department in response to Ms. Lenahan's calls on the evening in question, the Commission looked to a number of documents created by advocates nationally and within the state of Colorado to determine "the minimum measures that police authorities should have adopted to determine whether the order at issue had been violated."[114] These documents included model policies and law enforcement training manuals, which the state of Colorado cited in their defense to illustrate the positive actions taken at the state level to respond to domestic violence and train police.[115] Interestingly, the police practice norms created by advocates thus served as the basis for the Commission's determination as to whether the Castle Rock Police Department's practices were sufficient to prevent the human rights violation alleged. The Commission determined that the Colorado police department failed to implement the model enforcement policies available to them in any meaningful way.[116]

Even more interesting is what the Commission did not examine: Colorado state law, actual Castle Rock Police Department policies, or the policies of other police departments within the state of Colorado. Imagine if advocates had not taken the time to articulate model OP enforcement strategies. What would the Commission have used as a benchmark for adequate protection measures? This illustrates the potential influence of advocates aligning their interests and creating norm sources from which adjudicative bodies can sample to construct a standard of conduct where none formally exists. In comparing the actions of the Castle Rock Police Department with the model policies available to them, the Commission found the police response to be "fragmented, uncoordinated and unprepared" and therefore insufficient to prevent the foreseeable harms that occurred.[117] The Commission ends this part of the analysis with an expression of concern over the tendency for states to shift the burden onto the victim to monitor the prevention functions of the police.[118] This seemingly minor point in the Commission's analysis may in fact be the most powerful for advocates.

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114. *Id.* ¶ 148.
115. *Id.*
116. *Id.* ¶¶ 151-59.
117. *Id.* ¶ 150.
118. *Id.* ¶ 158.

3. Absence of Focus on the Reasonableness of the Victim's Reliance

Notably, the Commission does not focus on the reasonableness of Ms. Lenahan's reliance on the actions or inactions of the police in their due diligence analysis, apart from finding that the language of the OP itself induced reasonable reliance. In fact, the Commission expressly eschews the idea that victims should be responsible for ascertaining whether or not police have acted on a violation complaint and if so, whether the police have neutralized the threat.[119] Yet domestic case law consistently places the burden on the victim to do just that.[120]

This use of this so-called "reasonable battered mother test"[121] is irresponsible in the context of OP enforcement because it shifts the analysis away from the prevention measures taken by the state and reframes enforcement in terms of the reasonableness of the victim's reliance on those measures. Rather than viewing the enforcement failure in the context of the system that is solely responsible for it, it shifts the entire analysis onto one individual's actions within that system. Such an analysis incentivizes vague responses to victim inquiries regarding enforcement: the fewer the concrete assurances made to the victim, the less reasonable her reliance on them. Thus, enforcement becomes nothing more than a sham and the OP returns to its legally insignificant status. Stopping short of strict liability, the international due diligence standard does not assess blame to the state anytime a victim has been harmed due to failed enforcement. Rather, it assesses the foreseeability of the harm suffered and the adequacy of the means to prevent it as the sole prongs of the analysis. This type of analysis assesses the reasonableness of the state's action, not the victim's response.

Parsing the reasoning of state courts and examining closely their rationale in those cases illuminates the potential for litigants to prevent the shifting of the burden from the state to the victim by reframing "reasonableness" in terms of what *law enforcement* did or did not do rather than the *victim's* actions subsequent. Using the due diligence principle and the Commission's application of it with respect to foreseeability and prevention could create avenues for domesticating the principles of *Lenahan* through municipal tort litigation.

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119. *Id.*

120. *See* discussion *infra*.

121. G. Kristian Miccio articulated the "Reasonable Battered Mother Test" as a proposed solution to statutes that prosecuted victims for the abuse perpetrated against them if it was visited upon them in the presence of their children. In those cases, a mother's action or inaction is viewed in light of the abuse she suffered, not the representations made to her by the state. *See* G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 94 (1999).

V. THE PROMISE AND CRUX OF MUNICIPAL TORT LITIGATION: INTERNATIONAL DUE DILIGENCE CONTRASTED WITH STATES' SPECIAL RELATIONSHIP TEST

In addition to federal and state legislative efforts, the Commission further requires that the United States develop "programs to train public officials in all branches of the administration of justice and police" targeted at "restructuring the stereotypes of domestic violence victims" and promoting "the eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence acts,"[122] functions that fit squarely within the purview of state and municipal governments. Calling on local governments to create policies and protocols, the Commission invokes yet another layer of complexity within the federalist framework. Because municipal governments are political subdivisions of the state, they do not enjoy sovereign rights and duties and are thus subject to a common law regime that determines their duties to the individual.[123] However, like the international due diligence analysis, the dual assessment of foreseeability and prevention of the harm are hallmarks of liability assessment in domestic municipal tort law.[124]

Because Jessica Lenahan's attorneys did not advance a common law municipal liability theory the domestic courts never addressed it.[125] It is remarkable then, that the Commission essentially used the international due

122. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 215(6).

123. For a detailed discussion of the origins and development of municipal tort law immunities, see Gerald P. Krause, *Municipal Liability: The Failure to Provide Adequate Police Protection—The Special Duty Doctrine Should Be Discarded*, 1984 WIS. L. REV. 499 (1984). *See also* DAN B. DOBBS, THE LAW OF TORTS 720-32 (West Group 2000).

124. Foreseeability and prevention, typically attributed to the individual actor, are also applicable to governments to the extent that they indemnify their individual employees for actions within the scope of their duties, which is the case when police fail to enforce orders of protection. *See* Krause, *supra* note 123, at 524 ("The use of an ordinary negligence standard would not impose an absolute duty upon a municipality's police department to protect its citizens and enforce its laws; nor would it require that the police be at the scene of every crime. Rather, police departments would be held to a standard of due care, and their liability appropriately limited by the requirements of proximate cause and foreseeability."); *see also* Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 472-83 (1993) (identifying "awareness" and "participation" as two paradigms of responsibility for harm in the context of individual actors); Helen L. Monaco, *The Special Relationship Doctrine in Domestic Protective Order Cases*, 61 DEF. COUNS. J. 383, 392 (1994) ("Municipalities have a substantial interest in preventing inadequate police responses to domestic violence situations, either in the prevention of liability or the loss of life."). *See generally* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998) (exploring nature of governmental immunity and tort liability).

125. *See* Complaint and Jury Demand, Gonzalez v. City of Castle Rock, 2001 WL 35973820 (D. Colo. 2001), 2000 WL 35529077 (alleging constitutional tort theories under 42 U.S.C. § 1983, but not alleging common law municipal tort liability).

diligence standard to re-infuse the case with the tort theory that had been missing all along. The Commission's novel approach thus uncovered a potential avenue for recovery through common law municipal tort. As such, it offers new perspective for the litigation strategy of future cases brought before the United States court system.

A. Effectiveness of Litigation as a Tool to Affect Police Practice in Cases of Domestic Violence

Although scholars disagree about the effectiveness of tort litigation in spurring institutional and social change in other types of cases,[126] domestic violence tort litigation has a proven record of inspiring change in police response to domestic violence in a number of states.[127] Two groundbreaking cases from New York (*Bruno v. Codd*) and Connecticut (*Thurman v. City of Torrington*) prompted major shifts in police policy and practice with respect to responding to domestic violence complaints.[128] The *Bruno* case resulted in an out-of-court settlement in which the police agreed to "develop a pro-arrest policy on woman battering and to require training for all members of the NYPD (which at the time employed 28,000

126. *See, e.g.*, TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1838 (2008) (offering "a theoretical framework for evaluating the influence of tort litigation on regulatory policy making."); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1025 (2010) ("A host of distinguished scholars have offered multiple theories about why civil rights damages actions—and the millions of dollars paid out each year in these cases—will not effectively deter police department officials from engaging in future unconstitutional behavior. An equally accomplished group has defended the deterrent power of civil rights damages actions.").

127. "The pressure of lawsuits altered the response of police agencies to domestic violence. 'Between 1985 and 2000, many police departments mandated that training sessions on family violence should be part of their police academy curricula.' By 1998, state legislators had enacted laws in 30 states and the District of Columbia to encourage or require police training on the subject of domestic violence." KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 269 (2012) (citations omitted) (quoting Albert R. Roberts & Karel Kurst-Swagner, *Police Responses to Battered Women: Past, Present and Future*, *in* HANDBOOK OF DOMESTIC VIOLENCE STRATEGIES: POLICIES, PROGRAMS AND LEGAL REMEDIES 101, 105 (Albert R. Roberts ed., 2002)).

128. *See* Thurman v. City of Torrington, 595 F. Supp. 1521, 1525-26 (D. Conn. 1984) (Despite numerous complaints to the police department, victim's husband continued to harass and attack her, culminating in a violent episode during which her husband nearly stabbed her to death and kicked her repeatedly in the head in the presence of their child and police who were ineffective at the scene. The victim's husband was not arrested until he attempted to assault her while she was lying on a stretcher); Bruno v. Codd, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 407 N.Y.S.2d 165 (App. Div. 1978), *aff'd*, 393 N.E.2d 976 (N.Y. 1979) (stating multiple sworn statements allege police called to the scene of domestic violence would refuse to assist the wife, despite visible evidence of abuse).

officers) on the appropriate police response."[129] In *Thurman*, a Connecticut federal court awarded the plaintiff "$1.9 million in her lawsuit against the city of Torrington and twenty-four city police officers as the result of the department's policy and practice of nonintervention and nonarrest in domestic violence cases."[130] The court found that the City of Torrington had "'condoned a pattern or practice of affording inadequate protection, or no protection at all, to women who have complained of having been abused by their husbands or others with whom they have had close relations.'"[131]

The specific outcomes in these cases were groundbreaking, but simultaneous efforts in research circles inside and outside of police forces would complement the litigation and add further detail to the emerging police policies. While these cases were pending, researchers were compiling what would become a "pivotal" study in domestic violence pro-arrest response research: the Minneapolis domestic violence experiment.[132] The Minneapolis experiment found that "arrest was the most effective response, as there were nearly twice as many incidents of repeat violence by offenders who were not arrested, as compared with those who were arrested."[133] Formal policy recommendations from police groups also surfaced during this time period (1976-1984), including those from the International Association of Chiefs of Police, the Police Executive Research Forum, and the National Institute of Justice.[134] Unlike the policy and practice changes that resulted from the litigation in New York and Connecticut, these recommendations, while essential to changing public opinion and even police perceptions of domestic violence, did very little to effect changes in police policy.[135]

The *Bruno* and *Thurman* cases involved the same fundamental issue as the *Castle Rock/Lenahan* case: whether police, when responding to a call of domestic violence, engage in a course of action that favors arrest as the default. The pro-arrest policies that emerged as a response to *Bruno* and *Thurman* were wrought in the absence of the weight of precedent. In the years that followed, discussions regarding the proper state response to domestic violence evolved in depth and complexity among advocates and decision-makers alike. The question then becomes, how could an arguably stronger case in *Castle Rock/Lenahan*, in a state with a mandatory arrest

129. Frisch & Caruso, *supra* note 46, at 112 ("In *Bruno*, the New York City police, the probation department, and the family court were accused of denying battered women the legal protection to which they were entitled under state law.").

130. *Id.*

131. *Thurman*, 595 F. Supp. at 1529 (quoting the plaintiff's complaint).

132. Frisch & Caruso, *supra* note 46, at 113-16.

133. *Id.* at 114.

134. *Id.* at 116-19.

135. *Id.*

statute and mandatory arrest language standard in its orders of protection, result in a finding that police do not have a duty to apply the mechanisms that they established two decades prior? How could litigation be so much more effective during a time when we knew so much less about domestic violence?

An important part of the answer is that the pro-arrest movement began locally, state-by-state. The Supreme Court made it clear in *Castle Rock* that police liability for OP enforcement is also a state-by-state determination.[136] By taking a state-by-state approach through municipal liability statutes, rather than seeking a federal tort remedy, the future of OP enforcement litigation strategy could look more like the litigation giving rise to pro-arrest policies. This aim is distinguishable from other types of domestic violence tort litigation that have not resulted in a favorable outcome, which is discussed here as a word of caution should the municipal tort movement become reality.

B. Examples of Unsuccessful Domestic Violence Tort Litigation

Municipal tort liability can be distinguished from other, less successful, attempts to litigate domestic violence as a tort. For example, claims for the intentional torts of domestic violence are rarely brought by victims because of the exclusion of intentional torts from individual liability insurance policies, statutes of limitations, procedural barriers to filing suit, social stigma, and the lack of awareness that such claims can be brought, among other things.[137] These types of claims are easily distinguishable because they are aimed at punishing the individual abuser rather than the system that passively permitted the abuser to do harm. They have no potential to influence police practice respecting the enforcement of OPs.

Other types of claims distinguishable from municipal tort liability are those involving police brutality or misconduct. Empirical and anecdotal evidence shows that many police forces, including the New York Police Department, do not change their policies in response to unfavorable claims against individual officers in these cases and, in fact, regularly ignore information from lawsuits.[138] But these cases are also distinguishable from

136. *Castle Rock IV*, 545 U.S. 748, 764-65 (2005).

137. *See* Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 809-10 (2007) (advocating for liability for infliction of a sexually transmitted disease); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 129-52 (2001) (articulating the reasons why domestic violence victims are reluctant to bring intentional tort suits against their abusers); Jennifer Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 157-59 (2005) (proposing a mandatory system of tort liability insurance covering intentional torts involving domestic violence and urging a gender-based reframing of tort law in legal scholarship).

138. Schwartz, *supra* note 126, at 1041-59.

municipal tort litigation because they focus on the individual police actor and not the functions of the police force as a whole. Failed OPs are not a function of individual police action, but involve multiple failures beginning the moment that the dispatcher accepts the call alerting the police to a violation. As such, they are more likely to result in a change in the policy and practice of the response to OP violation complaints because the liability results from the actions of several individuals within the police force rather than a few errant members of the force.

Another distinction between police misconduct cases and municipal tort litigation is that police misconduct cases assign liability for an abuse of power, typically through use of force, but municipal tort cases assign liability for the failure to act—or the failure to act in a manner commensurate with the duty assumed. In OP enforcement, exposure to municipal liability is ongoing unless the appropriate policies and procedures are in place and followed. Police misconduct cases involve a much narrower exposure to risk in that the liability of the state arises from an individual act of police malfeasance, which ends upon its commission—not an ongoing breach of duty through inaction.[139]

Finally, it is important to note that the goal in both of these types of tort claims is to punish and deter certain conduct rather than to incentivize it. Intentional tort and police misconduct cases are aimed at deterring violent acts against victims. To the extent that police misconduct cases are also aimed toward changing police practice, the practice sought to be changed are policies to deter bad conduct by individual members of the force. Alternatively, municipal tort litigation, in the specific context of failed OPs, is aimed at incentivizing the creation of better police practices because liability arises from the absence of action, which can only be cured by incentivizing conduct, not deterring it.

As discussed in the next section, New York state courts have provided a wealth of opinions revealing the potential of claims arising out of the common law of municipal tort liability. An examination of the international standard of "due diligence" in tandem with these domestic articulations of municipal tort liability reveals that the elements of due diligence resemble those found in domestic tort law. The resemblance ends at a crucial point: New York State assigns victims an additional burden to prove that they reasonably relied on the assertions made by the police that the order would be enforced; the due diligence standard remains focused on the nation-state's ability to foresee, prevent, and protect the victim and to punish the perpetrator.

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139. *But see* Goldscheid, *Rethinking Civil Rights*, *supra* note 57 (urging the re-conceptualization of "law enforcement's under-responsiveness to domestic and sexual violence claims" as a part of the "continuum of police misconduct").

This burden shifting from the state to the victim is reflective of the larger, structural issue of inherent discrimination against victims of domestic violence in the American legal system, which international law seeks to address.[140] Using New York State's municipal liability standard and related court rulings as a case study, the evolution of this shift becomes apparent and it is possible to identify potential gaps in the jurisprudence that may be informed by international standards.

C. New York's Suitability as a Test State

New York is ripe for initial experimentation with domesticating due diligence because of its well-developed coordinated community response[141] to domestic violence and its rich history in examining and affecting change in police practice. Since the 1990s, police departments and advocates in New York State have engaged in "planned-change experiences," involving the formulation, implementation and evaluation of police policies to criminalize domestic violence with the ultimate goal of influencing police departments to adopt pro-arrest domestic violence response policies.[142] In addition, the state's Office for the Prevention of Domestic Violence (OPDV) has been a leader in creating model OP enforcement policies and corresponding training curriculum for police statewide.[143]

It is unsurprising, then, that the coordinated community response in New York State has been raising awareness about the *Lenahan* case for years. After the initial filing of Ms. Lenahan's petition before the Commission, advocates in New York hosted a number of conferences and trainings concerning the framing of freedom from domestic violence as a human right.[144] The International Women's Human Rights Law Clinic at the City

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140. *See* Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 154-56 (1994); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 261-64 (2005). *See generally* James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149 (1995).

141. A coordinated community response to domestic violence involves much more than the police. To be effective, it must be comprised of community leaders, domestic violence advocates, stakeholders and decision makers at the federal, state, and local levels, law enforcement, survivors, and their families.

142. Frisch & Caruso, *supra* note 46, at 102-31.

143. The OPDV has assembled a number of model policies and training materials regarding OP enforcement and police liability. *See* Johanna Sullivan & James A. Murphy, *Coordinated and Consistent Enforcement of Violations of Orders of Protection Can Be a Crucial Tool in Stopping Domestic Violence*, NEW YORK OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE (July 1, 2012), http://www.opdv.ny.gov/professionals/criminal_justice/nyptiarticle.html.

144. Between 2007 and 2008, several non-profit organizations hosted trainings, conferences and workshops with the theme of freedom from domestic violence as a human right. *See* Bettinger-Lopez, *supra* note 34, at 60-62.

University of New York and the Center for Constitutional Rights were the lead drafters of an amicus brief filed in the case.[145] Because a number of litigators and advocates in New York have been strategizing about how to reframe the issue for much longer than those in other states, it is likely that some of the first examples of experimental domestic OP enforcement litigation using the *Lenahan* decision will come from New York State.

New York is also one of the first states in which litigation began to make an impact on OP enforcement prior to the coordinated efforts of the community response. "As long ago as 1966, an appeals court in *Baker v. City of New York*, ruled that a person issued a protection order is owed a special duty of care by the police department."[146] Arguably, the State of New York thus assumed the duty to enforce orders of protection prior to the creation of the international duty for nation-states to do so. Because of the depth of New York jurisprudence on this topic, it provides an intricate anthology to study and from which to ascertain pattern and meaning in the rulings of the courts.

D. New York State Municipal Tort Liability Jurisprudence and Its Shortcomings

As a general rule, municipalities are not liable for injuries arising out of a failure to provide police protection.[147] The initial assessment of government immunity often hinges on whether or not the actions taken by the official in protection of the individual are discretionary, as opposed to mandatory.[148] This is an analysis subject to multiple interpretations of what actions implicate the officer's individual ability to choose a course of action.[149] But this governmental immunity analysis is created by statute, and separate from any common law special duty.

The common law duties that exist in the vast majority of states are a

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145. Brief for International Women's Human Rights Law Clinic, City University Of New York, as Amici Curiae Supporting Petitioner, Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011), *available at* http://www.aclu.org/files/pdfs/womensrights/gonzales_domestic_20081020.pdf; *see also Jessica Gonzalez v. U.S.A.*, AM. CIVIL LIBERTIES UNION (Oct. 24, 2011), http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa.

146. FINN & COLSON, *supra* note 78, at 59 (internal citations omitted).

147. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. g (2010). *See generally* Krause, *supra* note 123 (providing an overview of sovereign immunity, the special duty doctrine within the specific context of police protection, and municipal liability).

148. 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 73 (2012) ("In distinguishing between discretionary acts and ministerial functions, some courts hold that when state law confers a power on its governmental units for the public good, there arises a corresponding obligation to perform the duty, and tort liability may be imposed for failure to discharge it; discretionary immunity will not apply.").

149. *See id.* (discussing tort liability immunities of individual government actors).

unique, non-statutory exception to the general rule of governmental immunity and give rise to avenues for individuals to seek redress from the state for injuries that arise from the conduct of third parties when the police enter into a "special relationship" with the victim.[150] Such a relationship arises through either the existence of an OP and reasonable reliance on its terms or when the police create a dangerous situation or render a citizen more vulnerable to danger.[151] Proximate cause in these cases typically hinges on the reasonableness of the victim's reliance on the representations of the state—therein lies the opportunity for creative litigants to use the due diligence principles articulated in international law to shift the focus off the victim and onto the nature of the foreseeable risks to the victim arising from the adequacy of the state's response to domestic violence.[152]

New York has adopted a "special relationship" theory of municipal tort liability.[153] The test to determine whether a special relationship exists requires four elements:

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
(2) knowledge on the part of the municipality's agents that inaction could lead to harm;
(3) some form of direct contact between the municipality's agents and the injured party; and
(4) that party's justifiable reliance on the municipality's affirmative

150. Most states have adopted a "special relationship" test, but few have applied it in cases of municipal liability for failed OP enforcement. *See generally* Eaton, *supra* note 18, §§ 8-10. Examples of states that have include Alaska and Arizona, which have both adopted the "special relationship" doctrine found in the RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.") and applied it to OP enforcement cases. Dore v. City of Fairbanks, 31 P.3d 788, 793-94 (Alaska 2001) (determining no special relationship between police and children of abusive father who killed their mother and then killed himself in violation of an OP protecting mother); Wertheim v. Pima County, 122 P.3d 1, 3-4 (Ariz. Ct. App. 2005) (determining no special relationship between police and wife's lover, shot and killed by her husband, despite OP against husband, held by wife, prohibiting him from owning firearms; OP was never served on husband). Maryland also discussed § 315 of the Restatement (Second) in finding that a special relationship could exist under the Maryland Police standing domestic violence response order, depending on the representations made by police in responding to a call for domestic violence. Williams v. Mayor of Baltimore, 753 A.2d 41, 64 (2000).

151. *See* Esposito Eaton, *supra* note 18, § 2[a].

152. *See* Krause, *supra* note 123, at 509 ("The primary problem with the special duty requirement is that it is a poor risk spreader; the costs of municipal negligence are thrust upon the individual instead of being borne by the entire community.").

153. "Municipalities in New York state owe police protection to the community as a whole but not to any one individual, absent a special duty." Monaco, *supra* note 124, at 384 (providing a historical analysis of the development of this special duty in New York law).

undertaking.[154]

The first three prongs mirror the due diligence framework of foreseeability and prevention. Although not codified, the first three prongs of the standard are remarkably focused on state action or inaction, which is consistent with the due diligence principle and the *Lenahan* recommendations. However, as this four-prong test has developed in New York case law, the courts have increasingly relied on juries to determine the question of whether the victim reasonably relied on the representations of police.[155] This troubling shift from an analysis of state responsibility to that of the reasonable victim illustrates both the promise and the challenges of domesticating *Lenahan* through municipal tort.

1. Development of the "Reasonable Victim" Test in New York

New York courts have consistently reinforced the primacy of the OP in establishing liability for failed enforcement.[156] "[A] duly issued order of protection constitutes an 'assumption' of an 'affirmative duty' of protection coupled with an awareness that 'inaction could lead to harm.'"[157] As early as 1966, prior to the major opinions that would give rise to more effective police OP enforcement policies, the Appellate Division found that orders of protection were intended to prevent violence against the persons protected by the order.[158] A decade later, the *Bruno* decision and its corresponding settlement assigned additional OP enforcement responsibilities to the New York police, including, to: (a) respond swiftly and arrest the husband when there is reasonable cause to believe an OP has been violated; and (b) remain at the scene in order to terminate or prevent further offense.[159]

Municipal tort liability cases post-*Bruno* both expanded and narrowed the doctrine. While some cases stressed the centrality of the OP in the threshold analysis of whether a special relationship existed,[160] others narrowed the availability of recovery based on whether the victim had

154. Cuffy v. City of New York, 69 N.Y.2d 255, 260 (1987).

155. *See, e.g.*, Sorichetti v. City of New York, 65 N.Y.2d 461, 471 (1985).

156. *Id.* at 469-70 ("The order evinces a preincident legislative and judicial determination that its holder should be accorded a reasonable degree of protection from a particular individual. It is presumptive evidence that the individual whose conduct is proscribed has already been found by a court to be a dangerous or violent person and that violations of the order's terms should be treated seriously.").

157. Mastroianni v. Cnty. of Suffolk, 91 N.Y.2d 198, 204 (1997) (quoting *Cuffy*, 69 N.Y.2d at 260).

158. Baker v. City of New York, 25 A.D.2d 770, 771-72 (N.Y. App. Div. 1966) ("The order of protection, though a relatively new invention in the law . . . was intended both as a remedial and preventive arm of the former Domestic Relations Court . . . . Plaintiff was thus singled out by judicial process as a person in need of special protection and peace officers had a duty to supply protection to her.").

159. Bruno v. Codd, 393 N.E.2d 976, 980 (N.Y. 1979).

160. *Sorichetti*, 65 N.Y.2d at 469.

direct contact with the police and the relationship between the person protected by the OP and the injured party.[161] In the last twenty-five years, the reliance element became "critical in establishing the existence of a 'special relationship' . . . provid[ing] the essential causative link between the 'special duty' assumed by the municipality and the alleged injury."[162] Cases that followed regularly deemed any actions by the victim evidencing that they were "lulled . . . into a false sense of security"[163] by the police as de facto justifiable reliance or at most, a question to be determined by a jury.[164]

2. The "Reasonable Victim" Examined in New York's Highest Court

While historically the New York courts have left the question of the reasonableness of the victim's reliance to a jury, the most recent case from the state's highest court took the unusual step of making this determination itself. In the summer of 2011, the New York Court of Appeals excused the City of New York from liability for the failed enforcement of an OP that resulted in the shooting of a woman by her boyfriend in the presence of her two five-year-old twin sons in *Valdez v. City of New York*.[165] Despite over fifty years of New York jurisprudence that would have provided a foundation for assigning liability to the state and deference to the jury on the reasonable victim question,[166] the *Valdez* court instead found that the claimant had unjustifiably relied on an officer's promise that the abuser in violation of the order would be arrested "immediately" and barred her from relief.[167]

The Appellate Division examined the victim's reasonableness not only in

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161. *Cuffy*, 69 N.Y.2d at 262.

162. *Id.* at 261.

163. *Id.*

164. Raucci v. Town of Rotterdam, 902 F.2d 1050, 1058 (2d Cir. 1990) (holding that "failure of [the victim] to change her routine was a true indicator of her reliance on a perceived promise of police protection"); Mastroianni v. Cnty. of Suffolk, 91 N.Y. 2d 198, 205 (1997) (concluding that officers' representations that they "would do whatever they could" paired with additional affirmative undertakings including waiting in front of the residence and observing victim moving furniture back into her house rendered her reliance justifiable); Tarnaras v. Cnty. of Nassau, 264 A.D.2d 390, 391 (N.Y. App. Div. 1999) (finding that whether or not plaintiffs reasonably relied on representations that abuser would be arrested constitutes a triable question of fact); Zwart v. Town of Wallkill, 192 A.D.2d 831, 834 (N.Y. App. Div. 1993) (using evidence that victim did not alter her regular routine as support for the reasonable inference that she relied upon defendants' representations of protection and gave rise to a triable issue of fact); Berliner v. Thompson, 166 A.D.2d 78, 82 (N.Y. App. Div. 1991) (noting that whether defendant altered her daily routine in reliance on police promises gives rise to a triable issue of fact).

165. Valdez v. City of New York (*Valdez II*), 18 N.Y.3d 69, 85 (2011).

166. *See* discussion *infra.*

167. *Valdez II*, 18 N.Y.3d at 74.

light of police practice, but also their own, stating that "[i]n the few cases where courts have found justifiable reliance . . . a verbal assurance invariably has been followed by visible police protection of the plaintiff."[168] Effectively, the court justified its position that the victim acted unreasonably, not by examining the victim's actions, but by minimizing verbal assurances made by police absent further action taken by the police.

The oral arguments in the case took place shortly after the issuance of the Commission's opinion in *Lenahan*.[169] Despite this timely coincidence and despite the fact that the amicus brief asserted a compelling international human rights law argument, none of the lawyers in the case focused on due diligence, much less the Commission's ruling and recommendations.[170] This was a missed opportunity for the claimants to test the persuasiveness of the theory and language defining the international due diligence standard in a domestic forum. Admittedly, the court would not likely have been receptive to overt international law references. But had the petitioners engaged the court in a dialogue about a state-centered theory of liability, focusing on the first three prongs of the New York special relationship test, rather than allowing the court's focus to shift to the reasonableness of the victim, the outcome may have been different.

In crafting the majority opinion, Justice Graffeo seized upon key language in the dissent in a 1966 case on point, rearticulating that "the government is not an insurer against harm suffered by its citizenry at the hands of third parties."[171] This reasoning is reflective of the Supreme Court's analysis in *DeShaney* and *Castle Rock*, erring on the side of shielding law enforcement from lawsuits rather than assigning state responsibility for certain private harms. Although it could be viewed as an articulation of a generalizable "reasonable victim" standard, the opinion was so narrowly tailored to the facts of the case that it may compellingly be argued as an anomaly when viewed within the context of the larger body of

168. Valdez v. City of New York (*Valdez I*), 74 A.D.3d 76, 80 (N.Y. App. Div. 2010).

169. The oral arguments in *Valdez II* took place before the New York Court of Appeals on September 7, 2011. The *Lenahan* decision was issued less than two months prior, on July 21, 2011.

170. The oral arguments in this case are archived on the Court of Appeals website at No. 153, http://www.nycourts.gov/ctapps/arguments/2011/Sep11/Sep11_OA.htm (last visited July 1, 2012); *see also* Brief for N.Y.C. Bar Assoc. et al. as Amici Curiae Supporting Appellants, Valdez v. City of New York, 18 N.Y. 3d 69 (2011) (No. 2011-0153), 2011 WL 5920358.

171. *Valdez II*, 18 N.Y.3d at 75; Baker v. City of New York, 25 A.D.2d 770, 773 (N.Y. App. Div. 1966) ("[T]here is nothing in the statute which created such remedy that made any particular peace officer or the municipality which he served the insurer of the safety of the person for whose benefit such an order was issued.").

jurisprudence.[172]

E. Weaving Due Diligence into the Fabric of Municipal Liability as a Litigation Strategy to Eliminate the "Reasonable Victim" Analysis

As the preceding analysis illustrates, municipal tort liability may offer some advantages over federal legislative efforts to address government failure to enforce orders of protection. The strategy for victim advocates and litigators alike is to begin to use the due diligence framework of foreseeability and prevention to advance the argument in favor of state liability, focusing on the inadequacy of the state's enforcement rather than permitting the analysis to shift to the reasonableness of the victim's reliance. Using the reasoning set forth in *Lenahan* and referencing the international due diligence standard in the pleadings for domestic OP enforcement liability cases may help reframe the issue as one of human rights rather than human instinct.

It is clear that international human rights law aims to hold the nation-state accountable for failed OP enforcement. Domestically, states that create a special relationship duty but shift the burden to the victim to prove her actions were reasonable essentially hold the victim accountable for the failed enforcement. In doing so, the state mimics the dysfunction of an abusive relationship: the state holds much of the power and control in the issuance and enforcement of an OP, but rather than accepting responsibility when it fails its duty, it places the onus on the victim to prove that she was not at fault. This is akin to an abuser blaming the victim for the abuse he inflicts upon her.

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172. The essential facts of the case are helpful in distinguishing it from others of precedential value. The plaintiff obtained a second order of protection against her former boyfriend. *Valdez II*, 18 N.Y.3d at 72. A week later, her boyfriend threatened to kill her and she reported the threat to the Domestic Violence Unit of the police whereupon an officer told her that the boyfriend would be arrested "immediately." *Id.* The following evening, she stepped from her apartment into the hallway to take out the trash and her boyfriend shot her several times in front of her two children. *Id.* at 73. He then turned the gun on himself and committed suicide. *Id.* The Court distinguished these facts from those in *Mastroianni* on several bases: (1) plaintiff could not have reasonably relied on the police promise to arrest her boyfriend "immediately" in the literal sense, "since his location had to be discovered"; (2) based on her prior experience with the police, plaintiff should have expected that police would call once they arrested him and therefore she was not justified in relaxing her vigilance (by taking the trash outside her door into the hallway of her apartment building); (3) the police did not do anything more than promise to arrest him "immediately" and it is not "always justifiable for a citizen to rely on an assertion made by a police officer." *Id.* at 82-83. Advancing the logic of the Court, more reasonable behavior on the part of the plaintiff would have been to: (1) discount the representations of the police officer; and (2) consider any step from the threshold of her apartment door as a relaxation of vigilance. A reasonable OP holder in New York under this analysis remains in her dwelling indefinitely, calling the police for confirmation of arrest before so much as opening her front door, and viewing skeptically the representations made by police all the while.

In the alternative, shifting the focus from the reasonableness of the actions that the victim took in reliance on the police and redirecting the focus to *the foreseeable risks created by failed OP enforcement policies* may prove to be an effective litigation strategy post-*Lenahan*. Rather than perpetuating the theoretical connection between the actions taken by the victim and proximate cause, the framework more reflective of the due diligence standard and established municipal tort liability standards focuses on the foreseeable risks created by the municipality when the municipality affirmatively assumes a duty to protect the victim, but then fails to take reasonable measures to prevent the harm. This is the most powerful potential of reframing OP enforcement liability in terms of due diligence within the domestic framework of municipal tort: the reasonableness of the victim's reliance is viewed within the context of the foreseeable risks faced by the victim as a result of the (in)adequacy of state preventative measures, rather than the reasonableness of her reliance on those same flawed measures in the absence of an alternative. This slight shift in the analysis does not require courts to remove or strike down the reliance prong, but rather to shift the focus off the victim's behavior and on to the state's.

Litigants are not precluded from alleging violations of the American Convention and the due diligence principle in their domestic municipal liability pleadings. The Human Rights Institute at Columbia Law School is engaged in a number of projects to provide technical assistance to individuals seeking to incorporate human rights arguments in domestic pleadings.[173] Admittedly, there is a risk of immediately alienating the adjudicator by infusing routine civil proceedings with international law, but if it is done in a manner that does not insist on international law as precedent, but rather, informs the adjudicator's analysis of existing local law through the lens of international human rights norms, the potential positive outcome may outweigh the risk.

Additionally, attorneys representing victims in civil tort liability cases should use the language of due diligence in their oral and written legal arguments. At worst, it is ignored as irrelevant, non-binding rhetoric. At best, the courts make note of the arguments and afford them treatment in published opinions, providing litigants with a basis for further appeals and developing a body of jurisprudence that acknowledges the arguments as legitimate, if not persuasive. The goal is to shift the focus of courts and juries off of the victim's actions in reliance and back on to the state's failure to address foreseeable risks. Through this next frontier of tort litigation, victim advocates can develop norms that contradict the

173. *See The Bringing Human Rights Home Lawyers' Network*, COLUM. L. SCH., http://www.law.columbia.edu/human-rights-institute/initiatives/us (last visited July 1, 2012).

prevailing viewpoint limiting government liability for harm to individuals.[174]

In addition to conceptual advantages in shifting the legal analysis from the behavior of the victim to that of the state, the tort approach offers even more pragmatic advantages. First, tort claims carry with them the possibility of a monetary judgment as a tangible, rather than symbolic, remedy for the claimant and her family. Second, although the *Castle Rock/DeShaney* line of cases eliminated any federal Constitutional claims to protection, municipal tort liability suits informed by international law principles and filed in municipal courts provide a path for victims to seek meaningful enforcement of OPs.

CONCLUSION

Enforcement is said to be the "Achilles' heel" of the OP process because "an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested."[175] The laws giving rise to orders of protection, the decisions of the courts in issuing them, and police policies regarding enforcement will consistently fail to achieve their intended aim unless those entrusted with the execution of the law are both given the tools to do so and held accountable when they do not.

As Jessica Lenahan's primary appellate attorney, Caroline Bettinger-Lopez, so aptly noted, the Commission's decision in *Lenahan* provides an opportunity and a tool for government decision makers, domestic violence victim advocates, and other stakeholders to effectuate systemic change in the institutions responsible for OP enforcement.[176] The decision can be used for building coalitions and movements toward increased state responsibility, the normative development of civil rights law to better

174. "[T]ort law is essentially a normative enterprise that both reflects and influences broader moral conflicts in society." Lytton, *supra* note 124, at 472. "Each of the different powers of the State has a role to play in changing patriarchal values. For example, the judiciary and prosecutors working on cases of domestic violence have the potential and the obligation, to change the prevailing balance of power by taking a strong stance to disempower patriarchal notions. Interventions at this level may have both consequential and intrinsic effects in that prosecutors or judges can be considered to be the 'mouthpieces' of society, and strong statements condemning violence against women made on behalf of society through the judiciary or prosecutorial services will make that society less patriarchal." Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/61 ¶ 90 (Jan. 20, 2006) (by Yakin Ertürk).

175. FINN & COLSON, *supra* note 78, at 49.

176. Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS J. 183, 192-93 (2008).

incorporate international human rights standards, exerting political pressure and influencing public opinion.[177] The complex and varied standards of state responsibility in the American federalist governance structure and the United States' practice of noncompliance with the Commission's rulings requires a multifaceted approach to domesticating the due diligence principles articulated in *Lenahan*.

One promising approach may be through litigation based on a theory of municipal tort liability targeting the practices and policies of municipalities that consistently fail to properly enforce OPs. Creative litigants currently seeking redress from the United States can use the principles articulated in the *Lenahan* decision to compose novel municipal tort liability arguments focusing on foreseeability and prevention efforts by the state, viewing the reasonableness of the victim's reliance in the context of the foreseeable risks created by the inadequacy of the state's response, rather than focusing on the reasonableness of the actions that the victim took in reliance. Informing municipal tort liability arguments with international human rights theory may prove to be a promising, effective, grassroots, motivational tool in the creation of and adherence to effective OP enforcement policies and practices.[178]

177. *Id.* at 190.

178. "Theories thus become instruments, not answers to enigmas, in which we can rest. We don't lie back upon them, we move forward, and, on occasion, make nature over again by their aid." WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 53 (Longman's, Green & Co. 1907).