

2012

Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality

Rehan Abeyratne

Dipika Jain

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Recommended Citation

Abeyratne, Rehan, and Dipika Jain. "Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality." *American University Journal of Gender Social Policy and Law* 21, no. 2 (2012): 333-378.

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DOMESTIC VIOLENCE LEGISLATION IN INDIA: THE PITFALLS OF A HUMAN RIGHTS APPROACH TO GENDER EQUALITY

REHAN ABEYRATNE AND DIPIKA JAIN*

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* Rehan Abeyratne is Assistant Professor and Assistant Director of the Centre for Human Rights Studies, Jindal Global Law School, National Capital Region of Delhi, India; J.D. 2010, Harvard Law School; A.B. 2007, Brown University. Dipika Jain is Assistant Professor and Executive Director of the Centre for Health Law, Ethics and Technology, Jindal Global Law School, National Capital Region of Delhi, India; LL.M. 2009, Harvard Law School; LL.M. 2007, Dalhousie University; LL.B. 2004, University of Delhi. We would like to thank the *Journal of Gender, Social Policy & the Law* and the Women and the Law Program at the Washington College of Law for inviting us to present this paper at the *Lenahan v. United States of America: Domesticating International Law* Symposium. We also thank the symposium participants for their comments and feedback. Ashleigh Barnes, Shilpi Bhattacharya, Jonathan Burton-MacLeod, and Jayantha Perera offered helpful comments early in the drafting process and we are grateful to them. For excellent research assistance, we thank Nidhi Khanna. Finally, we are indebted to the Journal's editorial staff for their thoughtful, timely, and incisive edits.

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INTRODUCTION

A. Background

In *Jessica Lenahan (Gonzales) v. United States*, the Inter-American Commission on Human Rights found, inter alia, that the United States violated a woman's right to equality and non-discrimination under Article II of the American Declaration of the Rights and Duties of Man.¹ The Commission found that the existing legal framework in the United States does not meet international human rights standards,² particularly with regard to women from minority and low-income groups.³ It stressed that international law requires states to act with "due diligence" to protect women from domestic violence.⁴ Moreover, the Commission recognized that because domestic violence is one of the most pervasive and pernicious forms of gender-based violence, states should adopt special measures to protect at-risk groups, including young women.⁵ It urged the United States to enact laws to make the enforcement of protective orders mandatory and "to create effective implementation mechanisms . . . accompanied by adequate resources destined to foster their implementation" and "training programs" for law enforcement and judicial officials.⁶

1. See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 5 (2011).

2. See *id.* ¶ 160 (acknowledging that the United States recognized its duty to protect its citizens from domestic violence and failed to do so).

3. See *id.* ¶ 94 ("Studies and investigations presented by the parties reveal that women constitute the majority of domestic violence victims in the United States. Some sectors of the United States female population are at a particular risk [of] domestic violence acts, such as Native American women and those pertaining to low-income groups.").

4. See *id.* ¶ 123 ("[T]here is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence. This consensus is a reflection of the international community's growing recognition of violence against women as a human rights problem requiring State action.").

5. See *id.* ¶ 201(4)-(5) (insisting that the United States execute measures at federal and state levels including training programs for law enforcement designed to respond to domestic violent situations that threaten harm to women and children).

6. See *id.* ¶ 201(4) (claiming that such training programs will protect women from

The Indian Government, unlike its American counterpart, has enacted legislation to provide women with a range of remedies and protections from domestic violence. In 1983, India's Parliament added Section 498A to the Indian Penal Code (IPC), which allows women to file criminal complaints against their husbands and husbands' relatives for any "cruelty" suffered at their hands.⁷ In 2005, the Parliament passed the Protection of Women from Domestic Violence Act (PWDVA), a wide-ranging law that protects women from various types of violence (physical, sexual, verbal, and economic) and imposes positive obligations on the state to protect women from violence.⁸ For instance, the state is required to provide police officers with "periodic sensitization and awareness training" on domestic violence issues.⁹ The Act also empowers the state to pass protective orders (that the police must enforce) and to appoint special "protection officers" assigned to assist domestic violence victims in obtaining medical care and in the filing of domestic violence reports.¹⁰

Thus, India already has laws in place that, at least in theory, meet the Inter-American Commission's recommendations in *Lenahan*. India therefore presents an interesting case study to analyze whether human rights recommendations aimed at a particular country—here, the United States—can be generalized and implemented effectively in a different environment. This Article will analyze the deficiencies in the Indian domestic violence regime in light of the *Lenahan* recommendations.

While the Indian government should be applauded for taking seriously its obligations to protect women from domestic violence, this paper shows that its positive approach has been stymied by: (1) the victimization of male partners and their female relatives as a result of special protections accorded to women; and (2) police harassment and rent-seeking under the guise of enforcement. These negative consequences have overshadowed the benefits that these laws were intended to provide to domestic violence victims. This demonstrates that even a legislative framework against domestic violence that meets international human rights standards can be limited or counterproductive due to powerful cultural and institutional barriers.

imminent violence).

7. See The Criminal Law (Second Amendment) Act, No. 46 of 1983, INDIA PEN. CODE § 498A (1860) (protecting women from both physical and mental actions that may drive them to suicide or likely injury to life, limb, or health).

8. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005), vol. 12 (providing more effective protection of the rights of women who are victims of violence).

9. See *id.* § 11(b) (noting that training also applies to central and state government officials).

10. See *id.* §§ 8-9 (describing that the duties of protection officers include locating a safe shelter home and maintaining a list of legal service providers).

The Article proceeds in six parts. Section I traces the history of domestic violence in India from independence up to the passage of the PWDVA. Sections II and III lay out the major criticisms of the PWDVA and Section 498A, respectively, paying particular attention to the victimization of male partners and female in-laws, as well as police corruption. Section IV outlines the facts of the *Lenahan* case and discusses the U.S. court decisions and the Inter-American Commission Report. It then analyzes the differences between the U.S. Supreme Court and the Commission's Report, focusing on sources of law and the breadth of inquiry undertaken by each body. Section V discusses the Indian domestic violence legislation within the framework of the *Lenahan* Report, which advanced a broad conception of equality.

The Article concludes with some recommendations as to how India can reform its domestic violence regime such that it continues to positively protect women, but mitigates the negative consequences stemming from its current laws. In short, India must adopt multifaceted legislation that better targets deeply rooted institutional and cultural problems such as corruption and patriarchal social norms, in addition to combating domestic violence per se.

B. Domestic Violence in India

In Indian society, strong patriarchal norms dictate that women have little social status in society right from birth.¹¹ Sex selective abortion of female fetuses and female infanticide are widely practiced to ensure only male children are born.¹² Indian women also have lower life expectancies and less access to education (and therefore lower literacy rates), healthcare, and employment opportunities than Indian men.¹³ There is also a widespread belief that a woman is her father's, and later her husband's, property.¹⁴ This is illustrated by the traditional dowry system in which a bride's family must provide cash, property or gifts to her bridegroom's family as part of

11. See Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491, 502 (1996) (positing that the view of women as property in India has conditioned women to expect abuse and to endure it); Pami Vyas, Note, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 185 (2006) (noting that pervasive gender discrimination occurs from birth, through marriage, until a woman's death).

12. See Vyas, *supra* note 11, at 184 (explaining that religious and social customs, like dowry, contribute to such practices).

13. See *id.* at 184-85 (stating that a woman's responsibilities as a wife, mother, and daughter-in-law take precedence over other opportunities).

14. See Pardee, *supra* note 11, at 502 (showing that the dowry system rests on the notion that men own their wives).

the wedding.¹⁵

Against this backdrop, it is no surprise that Indian women suffer from a high incidence of domestic violence. Indian government statistics indicate that, on average, a crime is committed against women every three minutes and that thirty-seven percent of married women experience domestic violence at some point in their marriage.¹⁶ More disturbingly, eighty-seven percent of the men surveyed in a 2001 study admitted to committing some domestic violence act in that year.¹⁷

Both Section 498A and the PWDVA have been criticized for encouraging false complaints that have led to the victimization of the most frequent perpetrators of domestic violence—the male partner and his female relatives. The PWDVA defines domestic violence broadly, and includes “insults” and “ridicule” under the definition of “verbal and emotional abuse,” without defining those terms.¹⁸ Opponents of the law claim that such capacious definitions invite women to report mere domestic squabbles as domestic violence under the PWDVA.¹⁹ These opponents have also gained traction by arguing that these laws violate a man’s right to equality, citing the fact that only women (not men) can file claims under the PWDVA and Section 498A.²⁰ The upshot of this conservative advocacy is that accused men and their female relatives have been recast as a vulnerable group victimized by domestic violence laws. However, there is no evidence to substantiate these claims of victimization, which have

15. See Amy Hornbeck et al., *The Protection of Women from Domestic Violence Act: Solution or Mere Paper Tiger?*, 4 LOY. U. CHI. INT’L L. REV. 273, 275 (2007) (detailing the importance of dowry as a tool for social mobility, especially because a woman becomes part of her husband’s family rather than her natal family upon marriage).

16. See National Crime Records Bureau, *Crime in India—2005* (Aug. 4, 2006), available at <http://ncrb.nic.in/ciiprevious/Data/CD-CII2005/cii-2005/Crime%20Clock-05.pdf> (delineating the incidence of different domestic violence crimes against women in India); INT’L INST. FOR POPULATION SCIS. & MACRO INT’L, NATIONAL FAMILY HEALTH SURVEY (NFHS-3), 2005-2006: INDIA: VOLUME I 509 (2007), available at <http://hetv.org/india/nfhs/nfhs3/NFHS-3-Chapter-15-Domestic-Violence.pdf> (classifying the statistics on domestic abuse under female empowerment).

17. See INT’L CTR. FOR RESEARCH ON WOMEN, DOMESTIC VIOLENCE IN INDIA: EXPLORING STRATEGIES, PROMOTING DIALOGUE 12 (2002), available at <http://www.icrw.org/files/publications/Domestic-Violence-in-India-4-Men-Masculinity-and-Domestic-Violence-in-India.pdf> (noting also the types of violence used against women).

18. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3, Explanation I(iii), INDIA CODE (2005), vol. 12 (adding that the insults especially apply to those that deal with not having a child or a male child).

19. See Biswajit Ghosh & Tanima Choudhuri, *Legal Protection Against Domestic Violence in India: Scope and Limitations*, 26 J. FAM. VIOLENCE 319, 323 (2011).

20. See, e.g., FIGHT AGAINST MISUSE OF DOWRY LAW (IPC-498A), <http://www.498a.org> (last visited Sept. 19, 2012) (contending that 498A is rampantly misused by “unscrupulous” women to extort and harass men).

mostly arisen from hearsay and rumor and are probably exaggerated.²¹ It is nonetheless ironic that the PWDVA—which aims to protect women from domestic violence—has become notorious in Indian society as a tool to victimize other women, particularly the mothers-in-law and sisters-in-law of female complainants.

At an institutional level, rampant police corruption has led to weak enforcement of domestic violence laws, as cases against wealthy or influential suspects are not properly investigated and recorded, and other suspects escape prosecution or civil penalties through bribes.²² The Indian police also exploit domestic violence laws to extort money from innocent men. For example, because Section 498A sets forth a presumption of guilt, the police have reportedly threatened to arrest many men and their relatives unless they pay substantial bribes.²³ The Indian Supreme Court has noted that this provision gives “a licen[s]e to unscrupulous persons to wreck personal vendetta or unleash harassment” that could create a new legal terrorism.²⁴

Thus, the PWDVA and Section 498A have been rendered ineffective, even counterproductive, due to deeply rooted cultural norms and institutional deficiencies. These adverse effects have prevented Indian domestic violence law from providing the sort of protection to women that the Indian government anticipated.

I. HISTORY OF DOMESTIC VIOLENCE LEGISLATION IN INDIA

A. Anti-dowry and Criminal Provisions

India became independent in 1947 and adopted a Constitution in 1950, which remains in force today.²⁵ Part III of the Constitution protects fundamental rights, including the right to life, which has been interpreted to mean the right to live a life with dignity and free from violence.²⁶ The

21. See *infra* Section III(B) (discussing Indian domestic violence legislation in the context of the *Lenahan* decision).

22. See Ghosh & Choudhuri, *supra* note 19, at 327 (positing that rather than the police acting as saviors of domestic abuse victims pursuant to its new role under the PWDVA, it has instead embraced the power to punish clashes).

23. See Madhu Purnima Kishwar, *Laws Against Domestic Violence: Underused or Abused?*, MANUSHI, Sept.-Oct. 2000 [hereinafter Kishwar, *Laws Against Domestic Violence*], available at <http://www.indiatogether.org/manushi/issue120/domestic.htm> (adding that cruelty in a marriage under 498A constitutes a non-bailable offense).

24. See Sushil Kumar Sharma v. Union of India, (2005) 1 S.C.R. 730, ¶ 18 (India) (emphasis omitted) (decrying the misuse of 498A as “an assassin’s weapon” rather than as a shield designed to strike at the roots of the “dowry menace”).

25. See INDIA CONST. art. 394, available at <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm> (noting January 26, 1950, as the commencement of India’s Constitution).

26. See *id.* art. 21. Article 21 of the Indian Constitution, which protects the right to

Constitution also empowers the State to take affirmative measures to protect women under Article 15.²⁷ The Indian Parliament has often invoked Article 15 to pass special legislative or executive measures to protect women, which have generally been upheld by the Courts.²⁸

It took India fourteen years after independence to pass its first law directly relating to violence against women. In 1961, the Dowry Prohibition Act (DPA) came into effect and criminalized the acts of giving and taking dowry. However, the Act did not effectively curb the practice of dowry.²⁹ The Indian Parliament later passed the Dowry Prohibition (Amendment) Acts in 1984 and 1986, but their impact was as negligible as that of the 1961 Act.³⁰

The campaign to end dowry-related domestic violence eventually led to the passage of the Criminal Law (Second Amendment) Act in 1983, which introduced Section 498A to the Indian Penal Code (1860).³¹ Under this provision, any husband (or his relatives) who inflicts “cruelty” on his wife could face a criminal fine and imprisonment for up to three years. This is a cognizable and non-bailable offense.³² Cruelty is defined as any willful conduct that “is likely to drive the woman to commit suicide or to cause

life, has been given this expansive meaning through a series of landmark Supreme Court judgments. *See, e.g.,* Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516, 530 (India) (holding that preventative detention must be minimally restrictive because Article 21 protects human dignity); Unni Krishnan v. Andhra Pradesh, (1993) 1 S.C.R. 594, 703 (India) (extending the right to life to the right to have a livelihood); People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001, ¶¶ 1, 3 (May 2, 2003) (interim order) (India), available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401033 (demanding that the right to food be included within the right to life).

27. *See* INDIA CONST. art. 15(3) (“Nothing in this article shall prevent the State from making any special provision for women and children.”).

28. *See* LAWYER’S COLLECTIVE—WOMEN’S RIGHTS INITIATIVE, STAYING ALIVE—5TH MONITORING & EVALUATION 2012 ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, xii (2012) [hereinafter LAWYER’S COLLECTIVE REPORT] (noting that Article 15 is largely resorted to for the protection of women and children).

29. *See* Ghosh & Choudhuri, *supra* note 19, at 320 (noting that many acts of violence related to dowry were not reported); *see also* LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xii (explaining that the Act could not actually prevent the demand for and taking of dowry).

30. *See* Ghosh & Choudhuri, *supra* note 19, at 320 (showing that dowry deaths actually increased over time); *see also* LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xii (failing also because of the inaction of state officials).

31. *See* The Criminal Law (Second Amendment) Act, No. 46 of 1983, INDIA PEN. CODE § 498A (1997) (“Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.”).

32. As defined by the first schedule of Code of Criminal Procedure in the criminal justice system of India, a cognizable offense is a criminal offense in which the police are empowered to register a First Information Report, investigate, and arrest an accused without a court issued warrant. A non-bailable offense is one in which the accused must appear in court to get bail.

grave injury or danger to life, limb or health (whether mental or physical),” or harassment that involves “coercing [the woman] or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”³³ However, as we will discuss in Part II, many actions brought under this law have been defeated due to the inaction or corruption of law enforcement officials.³⁴

In 1986, Section 304B was added to the IPC and created the new offense of “dowry death.”³⁵ This section holds a woman’s husband and in-laws criminally responsible for death resulting from any burns or other injury she incurs under suspicious circumstances within seven years of marriage. There must be a demonstration, however, that the husband or his relatives subjected the woman to “cruelty” in relation to the demand for dowry.³⁶

While Section 498A includes everyday domestic violence against women within its ambit, Section 304B can only be invoked when domestic violence or the death of a woman are linked with dowry issues. Moreover, only married women facing violence at the hands of the husband or their families can claim relief under both these provisions. Thus, violence in live-in relationships and other non-matrimonial relationships are not included.³⁷ These provisions also fail to provide Indian women with civil remedies such as injunctions, protective orders, interim relief, and other support services such as shelter and monetary relief.³⁸

Additionally, neither of these provisions holds perpetrators criminally liable for physical and mental abuse unrelated to dowry demands. For

33. INDIA PEN. CODE § 498A.

34. See LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xii (explaining that the nation’s policy to council, conciliate, and mediate was preferred); see also LAWYER’S COLLECTIVE, HANDBOOK ON LAW OF DOMESTIC VIOLENCE xvi (Indira Jaising ed.) (2009) [hereinafter HANDBOOK OF DOMESTIC VIOLENCE] (noting that the positive actions of investigation needed to enforce the new laws was often ignored).

35. See The Dowry Prohibition (Amendment) Act, No. 43 of 1986, INDIA PEN. CODE § 304B (1860) (“(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called ‘dowry death,’ and such husband or relative shall be deemed to have caused her death. . . . (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”).

36. See *id.* (demonstrating that the cruelty must specifically relate to dowry, unlike the general cruelty provided for in section 498A).

37. See *id.* (demanding a showing of cruelty from a husband or member of his family); INDIA PEN. CODE § 498A (specifying a cause of action against a husband or his relative).

38. See INDIA PEN. CODE § 304B (providing only for a criminal punishment); INDIA PEN. CODE § 498A (including only a criminal punishment and monetary fine to the state).

example, in *Waghmare v. State of Maharashtra*, a woman suffered severe emotional and physical abuse at the hands of her husband and his family, and she eventually committed suicide.³⁹ They regularly beat her and harassed her for a motorcycle, and, most shockingly, after two months of marriage, her brother-in-law poured kerosene on her and set her on fire. She filed a petition alleging cruelty under Section 498A. The Bombay High Court, however, held that these incidents of domestic violence were not sufficient to lead her to commit suicide and that the demand for a motorcycle was not a dowry demand. Even in such a horrific case, Section 498A did not provide relief to a domestic violence victim because the Court was unwilling to characterize the acts of violence as dowry-related.

Thus, existing laws could not effectively curb domestic violence, particularly in those cases that did not relate—or were read not to relate—to dowries or rise to the level of forcing women to commit suicide.⁴⁰ The lacunae in the existing laws, coupled with powerful cultural norms against women's rights, left many domestic violence victims without an effective remedy.⁴¹ It was against this backdrop that the Lawyers' Collective started drafting a bill in 1993.⁴² After more than a decade of negotiation and effective lobbying, the Domestic Violence Act was passed in 2005.⁴³

International treaties, agreements, and reports have played an important role in this lobbying effort. These include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, the Mexican Plan of Action in 1975, the Nairobi Forward Looking Strategies in 1985, the Beijing Declaration and Platform for Action in 1995, the Vienna Accord of 1994,⁴⁴ and reports by the Special Rapporteur on Violence Against Women. In 1992, the Committee on the Elimination of All Forms of Discrimination Against Women found that gender-based violence constitutes discrimination against women and impairs or nullifies a range of fundamental rights under international human rights law.⁴⁵ The

39. See *Waghmare v. Maharashtra*, (1990) Crim.L.J. 407, ¶ 3 (Bombay H.C.) (Apr. 10, 1989) (India) (holding that the men's harassment of the woman was not done with the specific intention of driving her to commit suicide).

40. See LAWYER'S COLLECTIVE REPORT, *supra* note 28, at 4-5 (pointing out that the provisions did not expand to situations of sexual or economic violence).

41. See *id.* (explaining the general lack of support systems that were in place for women prior to the PWDVA).

42. See Hornbeck et al., *supra* note 15, at 278-79 (drafting the bill in hopes that it would provide more options for women looking to review their relationships, stop violence, and negotiate their domestic issues with dignity).

43. See LAWYER'S COLLECTIVE REPORT, *supra* note 28, at 3 (taking its framework from the existing legal situation in India and international standards).

44. The Protection of Women from Domestic Violence Act, No. 43 of 2005, pmbl., INDIA CODE (2005), vol. 12.

45. *General Recommendation 19*, U.N. Committee on Elimination of Discrimination Against Women, ¶¶ 6-7, 1992, available at <http://www.un.org/>

Committee stated that discrimination under the Convention is not restricted to actions by or on behalf of Governments: states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish actors of violence, and for providing compensation.⁴⁶ The Committee further noted that states should take comprehensive measures, including the development of a proper legislative framework to deal with domestic violence.⁴⁷ In January 2000, the CEDAW Committee recommended that India pass comprehensive legislative reforms to promote the human rights of women.⁴⁸

The women's rights movement in India has drawn from these sources to advocate for gender laws that meet international standards. For example, in the landmark *Vishaka v. Rajasthan* litigation, advocates urged the Supreme Court to draw on international law to fill gaps in the existing legal framework on sexual harassment.⁴⁹ The Court's opinion relied on CEDAW and other international instruments to adopt guidelines on sexual harassment in the workplace.⁵⁰

In 2001, due to pressure from both international and domestic women's rights organizations, and influenced by the CEDAW recommendations, the Ministry of Human Resources proposed a Protection from Domestic Violence Bill on behalf of the Government of India. The bill was later referred to a Parliamentary Standing Committee on Human Resource Development. The Committee suggested amendments to the bill, which it submitted in its 124th Report on the Protection from Domestic Violence Bill, 2002.⁵¹ The bill, including the Standing Committee recommendation,

womenwatch/daw/cedaw/recommendations/recomm.htm (finding that gender-based violence seriously inhibits a women's ability to enjoy rights on an equal standard with men).

46. See *id.* ¶ 9 (specifying that human rights covenants dictate responsibility for the protection of women against violent private actors).

47. See *id.* ¶ 24(a) (explaining that legislation must be broad enough to cover private and public actors).

48. See *Observations on State Report*, Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/IND/2-3, ¶ 13, available at <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/89e6367c3ac1ba6fc12567b70027d9fb/d6acfe9057b04958c125728100315ff3?OpenDocument> (last modified Aug. 26, 2011) (commanding the need for sensitivity training and the destruction of structural barriers to women's equality).

49. See *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011, ¶ 15 (India) (arguing that international conventions and norms play a role in evaluating fundamental rights in the Constitution of India as related to gender violence and discrimination).

50. See *id.* ¶ 27 ("The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ('CEDAW') and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear.").

51. See *Parliament of India, Department-Related Parliamentary Standing Committee on Resource Development, Hundred Twenty-Fourth Report on the*

was introduced before the Indian Parliament on December 22, 2002.⁵²

B. The Protection of Women from Domestic Violence Act

The Protection of Women from Domestic Violence Act (PWDVA) finally became law in 2005. It was only passed after a great deal of parliamentary deliberation to bridge the gap between existing legal provisions and progressive aims enshrined in the Constitution and international human rights conventions. The PWDVA provides female victims of domestic violence legal recourse, both civil and criminal. Specifically, it allows women to seek injunctions and protective orders, along with criminal provisions for imprisonment and fines, which come into play when a perpetrator breaches a civil order.⁵³ This broader response to domestic violence more effectively addresses the social realities that Indian women face, including threats of violence and mental abuse for which they often require immediate civil remedies.⁵⁴

Significantly, the PWDVA did not limit protection against domestic violence to marital relationships. Unlike prior domestic violence legislation, the PWDVA covers “domestic relationships,” which include “all relationships based on consanguinity, marriage, adoption and even relationships which were ‘in the nature of marriage.’”⁵⁵ It therefore covers all women in abusive relationships, regardless of whether the perpetrator is a spouse, domestic partner, or someone in a live-in relationship. It also protects unmarried women, siblings, and other women living with the alleged perpetrator.

The PWDVA also introduced the concept of “right to residence,” which prevents women from being forced out of their marital homes. It also emphasized the concept of “shared household” that covered women in non-matrimonial relationships.⁵⁶ The term “shared household,” as defined by

Protection of Women from Domestic Violence Bill ¶ 4 (2002), available at <http://164.100.47.5/book2/reports/HRD/Report124th.htm> (noting that wide publicity was given to the proposal and introduction of the bill).

52. See INTERNATIONAL COMMISSION OF JURISTS, NATIONAL IMPLEMENTATION PROGRAMME—GENDER INJUSTICE IN SOUTH ASIA: REPORT ON THE LEGISLATIVE REVIEW PROJECT IN INDIA 4 (April 2003), available at http://old.icj.org/IMG/pdf/India_workshop_final_report.pdf (stating that the pressure and rush to pass such a bill resulted in serious criticism of the bill).

53. See LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xiii (recognizing domestic violence as both a criminal and civil issue); see also HANDBOOK OF DOMESTIC VIOLENCE, *supra* note 34, at xviii (elaborating on the protections of the PWDVA).

54. LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xiii (broadening protections and understanding that domestic violence did not only occur to married women, but encompassed a much larger issue).

55. See *id.* (explaining the unprecedented nature of such an extension).

56. See *id.* (arguing that the new terms introduced to the PWDVA were far more appropriate because it covered all women in the household rather than just married

Section 2(s), may include a property of the joint family of which the male respondent is merely one of several members. By putting a restraint against alienation, disposal, or renunciation of rights in such a shared household, the law seeks to virtually shackle the rights of even those who may not have any role in the dispute from which the controversy has arisen.

Section 20(1) of the PWDVA empowers magistrates to grant monetary relief in favor of the aggrieved woman.⁵⁷ This was a very important and groundbreaking provision. It largely ensures that women who file complaints under this Act are not pushed out of their houses and, in disputed cases, women will have a share in the household or the right to residence and due process protection. Prior to the passage of the PWDVA, women were thrown out of their marital homes after disputes with their husbands. Some of them were rendered homeless.⁵⁸ Under the PWDVA, if a woman is forced out of the marital home, a magistrate can pass an order giving her access to the home.⁵⁹ However, the possibility of abuse of Section 20(1)(d) is writ large when we consider that a female partner in a live-in relationship that may have only lasted for a month can claim maintenance allowance under this provision, with no restrictions attached.⁶⁰

The PWDVA created two new institutions to implement its provisions, the posts of Protection Officer (PO) and Service Provider (SP).⁶¹ The PO, who is often a woman, is assigned to help abused women seek medical assistance and follow a magistrate's instructions.⁶² The SP, on the other hand, assists with legal work, which ends with the filing of a Domestic Incident Report (DIR) before a local magistrate.

women).

57. The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 20(1), INDIA CODE (2005), vol. 12.

58. GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM AND GENDER EQUALITY IN INDIA 165 (2011) (describing the harsh conditions encountered by women prior to the PWDVA).

59. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 19(1), INDIA CODE (2005), vol. 12 (granting the magistrate with the power, among others, to restrain the male's relatives from also entering the home).

60. See *id.* § 2(a) (defining "aggrieved person" as "any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent"); *id.* § 2(f) (defining "domestic relationship" to include a female partner in a live-in relationship and extending the protection of an "aggrieved woman" under the Protection of Women from Domestic Violence Act).

61. See Sri T. Mathivanan, *A Perception on the Protection of Women from Domestic Violence Act, 2005*, (2008) 4 L.W. (JS) 62 (explaining that both are bound in duty the moment they learn of a domestic incident).

62. Hornbeck et al., *supra* note 15, at 289-90 (stating that a Protection Officer must also inform a woman of her right to apply for a protection order, an order for monetary relief, a custody order, a compensation order, or a residence order); Mathivanan, *supra* note 61 (noting that the functions of the Service Provider are less broad than the Protection Officer).

To be clear, the PWDVA does not create any new criminal offenses; however, if the domestic violence case reveals any offenses punishable under the Indian Penal Code or Dowry Prohibition Act, magistrates may frame appropriate charges against the respondent and try cases themselves or commit them to the Sessions Court as required.⁶³

Unfortunately, the PWDVA did not provide a useful definition of “respondent.” Section 2(q) merely states that “respondent” means “adult male person,” suggesting that women do not fall within its ambit.⁶⁴ Several High Court decisions have interpreted this provision to include women as respondents, recognizing that, in India, domestic violence is often perpetrated by female in-laws.⁶⁵

The Indian Parliament eventually clarified the definition of “respondent” by adding a proviso to this section. The proviso includes an accused man’s female relatives in the definition, where the victim is a wife or woman living in a relationship in the nature of marriage.⁶⁶ This means that victims of domestic violence can file cases against not only male but also female perpetrators.

According to the National Crime Bureau in 2006, there was an 8.2% rise in the number of reported domestic violence cases since 2005 under Section 498A of the IPC.⁶⁷ More strikingly, the Bureau reported a 12.2% increase in the number of cases filed since 2005 under Section 304B of the IPC (dowry deaths).⁶⁸ In total, then, reported crimes against women increased by 5.9% during 2006.⁶⁹

Given the private nature of domestic violence crimes—where women are either too ashamed or too afraid to report many incidences of violence—this is a statistic that should be welcomed. Far from showing an increase in

63. Mathivanan, *supra* note 61 (explaining that the Act was designed to protect women from incidences of domestic violence both explicit and dormant).

64. Amita Punj & Arvendra Singh, *The Protection of Women from Domestic Violence Act, 2005: Can Women Be “Respondents”?*—An Appraisal of Section 2 (q), 2010 (1) S.C.C. (Jour.) 23 (defining the respondent as an adult male person).

65. *See id.* (noting that courts have expressed differing views as to whether the proviso includes females); *see also* Sarita v. Umrao, (2008) 1 R.Cr.D. 97 (Rajasthan H.C.) (India) (arguing that had females meant to be excluded, the legislature would have provided for a specific exclusion); Nand Kishore v. Rajasthan, (2008) 4 R.L.W. 3432 (Rajasthan H.C.) (India) (dismissing an action to quash a complaint against a female relative because Section 2(q) of the PWDVA did not exclude female relatives as respondents).

66. *See* Mathivanan, *supra* note 61 (adding also that a male child may complain along with his mother).

67. *See* National Crime Records Bureau, *Report: Crime in 2006*, in HANDBOOK OF DOMESTIC VIOLENCE, *supra* note 34, at xiv (demonstrating the incidence of torture, defined as “cruelty by husband and relatives,” in India in 2006).

68. *Id.*

69. *See id.* (including crimes committed under Special and Local Laws).

domestic violence, it shows that this historically underreported crime is finally being addressed with the passage of the PWDVA in 2005.

II. NEGATIVE CONSEQUENCES OF THE PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE ACT

A. Victimization of Male Partners and Their Female Relatives

The need for the PWDVA arose because of the ineffectiveness and misuse of existing laws to curb violence against women.⁷⁰ However, the introduction of the PWDVA raises concerns of false complaints.⁷¹ It has also been criticized for neglecting men who experience domestic abuse.⁷² For example, “[o]rganizations like *Save Indian Family* claim that they are approached for help by a large number of males complaining of harassment by women, even violence.”⁷³ In addition, a study on police and prisons acknowledged that Indian domestic violence laws have been misused by victims and by the police and put forth recommendations to streamline the laws.⁷⁴ Still, there is no data to establish with any accuracy the extent of this misuse.

The Act has also been criticized for its lack of clarity and ambiguities. For instance, the Act includes “insults” and “jibes” under the definition of “verbal and emotional abuse” in Explanation I (iii) of Section 3 of the Act, without defining these terms.⁷⁵ The phrase “mental and verbal abuse” therefore has the potential to be misinterpreted. It might, in some cases, be extended to mere domestic quarrels that were not intended to fall under the definition of mental and verbal abuse.⁷⁶ A comprehensive study on

70. See *M.A. Mony v. M.P. Leelamma*, (2007) Crim.L.J. 2604, ¶ 8 (explaining that Parliament introduced the law because it felt that the civil law did not provide relief to a woman subjected to domestic violence); XIV Lok Sabha Debates, 23 August 2005, available at <http://164.100.47.132/LssNew/psearch/DebateAdvSearch14.aspx> (describing the problem of domestic violence as “seeing yet unseeing” and the general inaction by courts to positively affect domestic violence problems).

71. See SUMAN RAI, LAW RELATING TO PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE 568 (2008) (advocating for restraint and privacy when dealing with domestic issues and decrying the use of the law as a “facilitator for breaking up families”).

72. See *id.* (contending that the government was insensitive to men in passing such a law, which offers no protection to the man from a “shrewish” woman).

73. See Ghosh & Choudhuri, *supra* note 19, at 323 (admitting that the PWDVA may be misused).

74. See N.K. Singhal, *Crimes Against Women—Role of Section 498-A, IPC in States of Delhi and Haryana* (2002), in RESEARCH STUDIES ON POLICE AND PRISON ISSUES (1970-2009) 257-58, available at <http://bprd.nic.in/index2.asp?slid=378&sublinkid=160&lang=1> (elaborating that the definition of cruelty be more precise, and among other recommendations, that the applicability of 306 be limited to suicide by the wife and not other unnatural deaths).

75. Ghosh & Choudhuri, *supra* note 19, at 323.

76. See *id.* (noting that ambiguities in the law increase apprehension of its misuse).

domestic violence showed that a significant portion of domestic quarrels arise out of a husband's refusal to move to a separate house, late-night shifts at work for either partner, and disputes over household responsibilities between relatives, including parents, siblings, and in-laws.⁷⁷ In many cases, therefore, these quarrels do not rise to the level of domestic violence and should not be prosecuted as such.

The PWDVA has been challenged for excluding men from bringing domestic violence claims. The constitutional validity of the PWDVA was challenged before the Delhi High Court in *Aruna Parmod Shah v. Union of India* on the ground that it is unconstitutionally gender-specific. However, the Court upheld the Act, stating:

The argument that the Act is ultra vires the Constitution of India because it accords protection only to women and not to men is, therefore, wholly devoid of any merit. We do not rule out the possibility of a man becoming the victim of domestic violence, but such cases would be few and far between, thus not requiring or justifying the protection of Parliament.⁷⁸

The PWDVA defines "respondent" as any male adult person who has been, or is, in a domestic relationship with the aggrieved person.⁷⁹ The Court held that the gender-specific nature of the PWDVA was a reasonable classification in view of the Act's object and purpose, and that the Act was therefore constitutional. The Court further held that "[l]ike treatment to both does not, in any manner, derogate from the sanctity of marriage since an assumption can fairly be drawn that a 'live-in relationship' is invariably initiated and perpetuated by the male."⁸⁰

Similarly, the Madhya Pradesh High Court in *Ajay Kant v. Smt. Alka Sharma* stated:

[I]t is clear by the definition of respondent that for obtaining any relief under this Act an application can be filed or a proceeding can be initiated against only adult male person and on such application or under such proceeding, aforementioned protection order can be passed. Obviously those orders will also be passed only against the adult male person. As provided under Section 31 of the Act, non-compliance of a protection

77. *See id.* (elaborating on the superficial nature of many domestic quarrels, including disputes over gifts to relatives).

78. *See Aruna Parmod Shah v. Union of India*, (2008) 102 D.R.J. 543 (Delhi H.C.) (Apr. 7, 2008) (India) (contending that the perceptions that brought forth the protections for women in India were justified and founded).

79. *See The Protection of Women from Domestic Violence Act, No. 43 of 2005*, § 2(q), INDIA CODE (2005), vol. 12 (providing that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or male partner).

80. *See Shah*, 102 D.R.J. ¶ 5 (noting that the court should not be "impervious" to social stigmas against women when making such decisions).

order or an interim protection order has been made punishable and as such it can be said that the complaint for this offence can only be filed against such adult male person/respondent who has not complied with the protection order. Hence, it is clear that the application under Section 12 of the Act which has been filed by the respondent against petitioner Nos. 3 and 4, who are not adult male persons, is not maintainable.⁸¹

However, this interpretation has been held to contradict the Indian Parliament's intent, as the Parliament clarified the definition of "respondent" by adding a proviso that includes an accused man's female relatives in the definition, where the victim is a wife or woman living in a relationship in the nature of marriage.⁸² In *Sandhya Manoj Wankhde v. Manoj Bhimrao Wankhde*, the Supreme Court granted an appeal to set aside the impugned order of the Bombay High Court, which stated that the term "respondent" under the PWDVA meant adult male person, who is or has been in a domestic relationship with the aggrieved person.⁸³ The Court held that the proviso widened the scope of the definition including a relative of the husband or the male partner and noted that no authority had ever given a restrictive meaning to the term "relative."⁸⁴ It added, "[I]t is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005."⁸⁵ Therefore, women can bring claims under the PWDVA against female relatives of their male partners. However, the Supreme Court did not hold that men could bring domestic violence suits against their female partners.⁸⁶

Section 18 of the PWDVA empowers magistrates to issue prohibitory orders upon prima facie satisfaction that "domestic violence has taken place or is likely to take place."⁸⁷ It is important to note that a magistrate

81. *Ajay Kant v. Smt. Alka Sharma*, (2008) Crim. L.J. 264 (Madhya Pradesh H.C.) (June 19, 2007) (India).

82. See LAWYER'S COLLECTIVE REPORT, *supra* note 28, at 144 (resting its argument on the fact that the legislature did not specifically exclude females); Mathivanan, *supra* note 61 (extending the definition of respondent to female relatives living in the same household as the complainant).

83. See *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade*, (2011) 3 S.C.C. 650 (India) (arguing that the legislature never intended to exclude female relatives).

84. *Id.*

85. *Id.*

86. See *id.* (restricting the discussion of statutory interpretation to the term "respondent" and not to terms regarding the complainant).

87. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 18, INDIA CODE (2005), vol. 12 ("The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favor of the aggrieved person and prohibit the respondent from—(a) committing any act of domestic violence; (b) aiding or abetting in the commission of acts of domestic violence; (c) entering the place of employment of the aggrieved person

may issue an injunction against the male perpetrator prohibiting him from entering any place that may be “frequented by the aggrieved person” or from operating a bank account “enjoyed by both the parties,” even if that account was held solely by the respondent. Needless to say, places “frequented by the aggrieved person” include the house in which both partners resided before the alleged domestic violence took place.⁸⁸ The house in question might be owned or rented by the male respondent where the aggrieved woman has no right, title, or interest. Thus, the magistrate may deprive the male respondent of access to his own house and bank account under this section.⁸⁹

Furthermore, Section 23 empowers magistrates to pass interim orders in the course of any proceedings before them that would include a Section 18 order.⁹⁰ Under Section 23, upon prima facie satisfaction “on the basis of the affidavit,” inter alia, that the application discloses that “there is a likelihood” of domestic violence being committed, he may grant an ex parte protection order under Section 18.⁹¹ Section 25 further states that a protection order under Section 18 shall be in force “till the aggrieved person applies for discharge.”⁹²

Thus, if a woman alleges some misconduct by the male respondent with whom she has lived in a shared household, and approaches a magistrate with an application under Section 18 (read in conjunction with Section 23 asserting, on affidavit, that the latter is likely to subject her to emotional abuse), the magistrate can issue an ex parte interim protection order prohibiting the respondent from entering his own house or operating his own bank account.⁹³

or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person; (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact; (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate; (f) causing violence to the dependents, other relatives or any person who give the aggrieved person assistance from domestic violence; (g) committing any other act as specified in the protection order.”).

88. See R.K. Gauba, *Domestic Violence Law—A Recipe for Disaster?*, (2007) 8 S.C.C. (J) 25 (arguing that such protections seem to have “gone overboard”).

89. See *id.* (contending that actions allowed by the PWDVA may essentially render a man homeless and without monetary resources).

90. See The Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005, § 23, INDIA CODE (2005), vol. 12 (providing that a Magistrate may pass interim orders for proceedings including protection orders, residence orders, orders for monetary relief, custody orders, and compensation orders).

91. *Id.*

92. See *id.* § 25 (granting the Magistrate the power to alter, revoke, or modify an order if he is satisfied there has been a change in circumstances).

93. See *id.* §§ 18, 19, 23 (establishing the right to protection and residence orders

In this situation, the respondent does not have an opportunity to contest the allegations against him, as Section 23 allows magistrates to grant *ex parte* orders. Moreover, Section 31 of the PWDVA makes the breach of an interim order a cognizable criminal offense.⁹⁴ Together, these laws allow female petitioners to obtain protection orders without having their allegations contested and, if an order is breached, they can bring criminal charges against respondents.

Section 17 of the PWDVA sets forth the right of the aggrieved woman to reside in a shared household.⁹⁵ “The right is absolute and subject to denial only in the event of eviction or being excluded in accordance with the procedure established by law.”⁹⁶ The procedure for securing this right is found in Section 19, which also sets out the elements that can be introduced in residence orders. However, the PWDVA does not establish procedures through which an affected respondent can secure an order of eviction or exclusion against the female petitioner. Thus, the respondent cannot avail a legal remedy against his female partner with whom this right to reside was never intended.⁹⁷

Some of the restraining orders available under Section 19 are susceptible to misuse. These include orders: “([1]) directing the respondent to remove himself from the shared household; . . . ([2]) restraining the respondent from alienating or disposing [of] the shared household . . . ; [and (3)] restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate.”⁹⁸ That the respondent might be ordered to leave the shared household may not only be unjust, but also harms the possibility of reconciliation between the parties.⁹⁹

The next sub-section looks at police corruption, harassment, and non-action in domestic violence cases.

and the implementation of such orders by a magistrate); Gauba, *supra* note 88 (noting that an aggrieved woman may not even have a right, title, or interest to such property without the order).

94. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 31, INDIA CODE (2005), vol. 12 (punishing the breach of an interim protection order with up to one year in prison, or a fine of up to twenty thousand rupees, or both).

95. See *id.* § 17 (granting shared household rights regardless of whether the woman has any right, title, or beneficial interest in the household).

96. Gauba, *supra* note 88.

97. See *id.* (stating that because the PWDVA is a special law favoring a special class of women, it cannot be controlled by the existing legal framework).

98. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 19, INDIA CODE (2005), vol. 12 (providing also that the Magistrate may require the respondent to obtain alternate accommodation for the aggrieved woman either at the same level as she was living or require the respondent to pay her rent).

99. See Gauba, *supra* note 88 (arguing that the harsh provisions of the PWDVA do not provide for encouragement to save the marriage, even when innocent children are involved).

B. Police Harassment

Police failures to properly investigate domestic violence and implement judicial orders have long prevented domestic violence victims in India from receiving justice. Corruption in local police forces is rampant. The police are often reluctant to press charges against or investigate influential persons.¹⁰⁰ Those with strong political ties or economic standing are often able to persuade the police to act in their favor.¹⁰¹

Women's rights advocates argue that the lack of training of police officers and magistrates regarding the Act's requirements and its purpose, combined with a lack of sensitivity training towards the issue of domestic violence, has weakened the Act's enforcement.¹⁰² This lack of training leads to the re-victimization of women, as the police either fail to respond to calls for help or send women "back home to their abusers by branding their victimization as mere domestic disputes."¹⁰³ "One female [victim] in West Bengal spoke of the insensitivity she faced at the hands of officers who believed her abuser's stories that she was a prostitute, and dismissed her pleas for aid and told her she should be ashamed" for seeking police assistance.¹⁰⁴

Widespread police and judicial corruption also limit the PWDVA's effectiveness.¹⁰⁵ Though corruption is difficult to measure, it is widely believed that some Indian police officers and judges purposely choose not to enforce domestic violence laws.¹⁰⁶ It has been reported that the police often fail to properly report and investigate domestic violence and dowry-related deaths. This unwillingness to investigate and report incidents of domestic violence can be attributed to the widespread view "that domestic violence is a family problem and should be dealt with privately."¹⁰⁷

100. See Ghosh & Choudhuri, *supra* note 19, at 327 (explaining that the apathy of police leads to further suffering of domestic violence victims).

101. See *id.* (discussing a case in which a domestic case was brought to the notice of a protection officer but no formal complaints were lodged).

102. See RAKHI LAHIRI, HUMAN RIGHTS LAW NETWORK, THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: THE CURRENT SITUATION 5 (2009), available at http://www.hrln.org/hrln/pdf/intern_work/PWDVA%20Article%20-Rakhi%20Lahiri_formatted%20by%20Karuna_.pdf (discussing the failure in the implementation of the PWDVA's protection and training provisions).

103. See *id.* (stating that women also face the problem of magistrates continuing cases, which forces women to return home to their abusers and the site of their trauma).

104. See *id.* (noting that many police stations in West Bengal treat domestic violence cases as 498A complaints that have a much higher threshold of cruelty to warrant a criminal complaint).

105. See Hornbeck et al., *supra* note 15, at 288 (examining the sources that threaten the efficacy of the PWDVA, including judicial inefficiency).

106. See *id.* (purporting that police officers may refuse assistance because of the PWDVA's lack of a criminal remedy).

107. See *id.* (accepting that police officers' inaction is a conscious choice).

As a result, many victims fear that their complaints will not be taken seriously if reported to the police. This fear almost certainly leads to the underreporting of domestic violence claims.¹⁰⁸ Not surprisingly, then, the adequacy of police investigations into dowry-related crimes and domestic violence has historically been low.¹⁰⁹

The PWDVA contains several provisions aimed at addressing these concerns, particularly with regard to the conduct of the police in handling domestic violence cases. Most importantly, the Act mandates that police participate in sensitization and awareness training.¹¹⁰ Moreover, some police districts have added female police officers to their police force to encourage a greater number of victims to report domestic violence incidents.¹¹¹ Despite these reforms, police corruption remains a significant impediment to the effective enforcement of the PWDVA.¹¹²

III. MISUSE OF OTHER LEGISLATIVE PROVISIONS: INDIAN PENAL CODE SECTION 498A AND THE DOWRY PROHIBITION AMENDMENT SECTION 304B

A. The Constitutionality of Section 498A

Section 498A of the Indian Penal Code is the provision most commonly relied upon by women who have experienced domestic violence. A female petitioner has the right to file a complaint under Section 498A along with an application under the PWDVA.¹¹³ Both the PWDVA and Section 498A use similar tests of injury and harassment. Section 498A also expressly recognizes grave injury to the mental health of a woman to constitute the offense of “cruelty.”¹¹⁴

However, because of its propensity for misuse, the constitutional validity of Section 498A has been challenged in a number of cases.¹¹⁵ In *Sushil*

108. *See id.* at 292 (detailing how women also underreport for fear of being subjected to additional violence).

109. *See id.* at 292-93 (stating that when investigations do occur, evidence gathering and documentation are insufficient and “lackadaisical” at best).

110. *See* The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 11, INDIA CODE (2005), vol. 12 (providing that such provisions of the act be given wide publicity through the public media).

111. *See* Hornbeck et al., *supra* note 15, at 293 (discussing All-Women Police Units created to reunify families through counseling).

112. *See id.* at 286 (arguing that the PWDVA cannot succeed without cooperation among police and successful dissemination of information regarding the PWDVA).

113. *See* HANDBOOK OF DOMESTIC VIOLENCE, *supra* note 34, at 146 (creating a cause of action for a woman subjected to cruelty by her husband).

114. *See id.* (defining cruelty expressly as “willful conduct”).

115. *See id.* at 147 (noting that the constitutionality of 498A has been challenged on various grounds).

Kumar Sharma v. Union of India, the husband of a woman who had filed a complaint against him under Section 498A challenged its constitutional validity on the grounds that it is frequently misused.¹¹⁶ The Supreme Court dismissed this claim, holding that the mere possibility of misuse did not render a provision invalid.¹¹⁷ However, the Court's final words summarized the potential issues with this provision:

The object of the provision is the prevention of the dowry meance [sic]. But as has been rightly contented by the petitioner many instances have come to light where the complaints are not bona fide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignomy [sic] suffered during and prior to trial Merely because the provision is constitutional and intra vires, does not give a license to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing framework. As noted above the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used a shield and not an assassin's weapon. If cry of "wolf" is made too often as a prank assistance and protection may not be available when the actual "wolf" appears.¹¹⁸

The Court, in other words, recognized the prospective danger that this provision could be misused, but nonetheless held that it was constitutional because the petitioner had not demonstrated that such misuse had actually occurred.

In *Inder Raj v. Sunita*, the Delhi High Court dealt with a challenge to the constitutional validity of Section 498A on the grounds that it violated the right to equality under Article 14 of the Indian Constitution. The petition argued that Section 498A provides arbitrary powers to the police and that the definition of "cruelty" is unconstitutionally vague.¹¹⁹ The Court upheld the provision, stating that the word "cruelty" is well defined in the law, and its interpretation would therefore not be arbitrary.¹²⁰ The Court went on to state that if conferring wide discretion to courts in interpreting laws is itself

116. See *Sushil Kumar Sharma v. Union of India*, (2005) 6 S.C.C. 281 (India), available at <http://indiankanoon.org/doc/1172674/> (arguing that 498A leads to persecution because of the sympathies associated with dowry torture).

117. See *id.* (expressing disapproval over the misuse of 498A but explaining that simple misuse does not constitute unconstitutionality).

118. *Id.*

119. See *Inder Raj v. Sunita*, (1986) Crim.L.J. 1510 (Delhi H.C.), available at <http://indiankanoon.org/doc/322263/> (arguing that the term is so vague that cruelty and harassment could mean the same thing).

120. See *id.* (stating that there is no arbitrary exercise of power in defining either harassment or cruelty because both words are well known).

the conferring of arbitrary powers, then most of the provisions of law would also have to be struck down as *ultra vires*.¹²¹ The Court noted that it had the discretion to punish an offender for the same offense for up to ten years, which can lead to some arbitrariness. Still, it concluded that Indian law clearly establishes that such discretion is not arbitrary and thus does not violate Article 14 of the Constitution.¹²²

In *Krishan Lal v. Union of India*, the High Court of Punjab and Haryana held that Article 14 of the Constitution requires that all persons similarly situated be treated equally.¹²³ However, the government may differentiate among people based on reasonable classifications.¹²⁴ In this light, the Court held that the classification of a husband and his relatives—for the purpose of imposing criminal punishment—is reasonable, especially when the alleged violence takes place within the marital home where it is difficult to gather evidence. Thus, it held that Section 498A did not violate Article 14 of the Indian Constitution.

B. The Misuse of Section 498A

While its constitutionality has been upheld, Section 498A appears to be frequently misused by the police. There is a widespread belief among the Indian public that this provision is used primarily to file false charges to harass or blackmail an innocent spouse and his relatives.¹²⁵ The court in *Verrulu v. The State* demanded a stop to the unhealthy trend of false complaints that had been resulting in unnecessary misery to the husband and his relatives.¹²⁶ In *Sapneswar Dehuri v. State of Orissa*, another court observed that the killing of daughters-in-law for the non-fulfillment of demands has “undoubtedly” become rampant, but it noted that even in a case where a young bride dies a natural death, eyebrows are raised and suspicion is immediately cast on the in-laws.¹²⁷

121. *See id.* (expressing that the court has the duty and latitude to interpret terms but had not done so in the present case).

122. *See id.* (affirming that discretion in sentencing is wholly within the power of the court).

123. *See Krishnan Lal v. Union of India*, (1994) Crim.L.J. 3472 (Punjab & Haryana H.C.), available at <http://indiankanoon.org/doc/1632112/> (“[A]ny invidious discrimination is obnoxious to equality.”).

124. *See id.* (explaining that Article 14 forbids class legislation generally but permits reasonable classification, provided that it is founded on an “intelligible differentia,” which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question).

125. *See V.K. DEWAN, LAW RELATING TO DOWRY PROHIBITION 184* (2010) (explaining that the trend of false claims is a glaring reality).

126. *See id.* (positing that a “psychopath wife” may have chosen to commit suicide for reasons other than cruelty).

127. *See id.* (demonstrating that statutory provisions may be misused in such

According to its critics, Section 498A of the IPC is a poorly and vaguely formulated law that allows women to file frivolous lawsuits that lead to innocent men and their relatives being arrested without investigation. Pro-male activists claim that the social consequence of such prosecution has led to suicides by accused married men.¹²⁸ They also claim that married women often use this provision to blackmail their husbands and in-laws to accede to their demands at the brink of a divorce.¹²⁹ Thus, marital discord is disguised as domestic violence or “cruelty.” If these reports of false claims are accurate, it would constitute an abuse of due process, for this provision was intended to be a shield against violence, not “a sword or bargaining tool.”¹³⁰

Publications such as *Manushi*, a magazine devoted to gender studies, have also highlighted the misuse of such laws while lauding their efficacy in certain cases.¹³¹ According to *Manushi*, female complainants often allege threats of dowry demands in complaints of domestic violence or cruelty, even when dowry is not at issue.¹³² Lawyers and police officers are reported to have encouraged complainants to make these false allegations to implicate the male partner’s family members in these lawsuits.¹³³ Madhu Kishwar, a noted advocate of women’s rights, has also cited examples of phony dowry allegation cases that were heavily publicized in the media.¹³⁴

Unscrupulous families might also exaggerate claims or invent false claims under Sections 498A and 406 of the IPC to use as bargaining tools to demand the return of more than was given as *stridhan*.¹³⁵ Similarly,

situations).

128. See Siddesh Inamdar, *Husbands Allege Misuse of Domestic Violence Act*, THE HINDU (Oct. 26, 2009), <http://www.thehindu.com/news/states/other-states/article38941.ece> (detailing that for every 100 male suicides, 45 are married).

129. See Madhu Purnima Kishwar, *Destined to Fail: Inherent Flaws in the Anti-dowry Legislation*, MANUSHI, <http://www.manushi.in/articles.php?articleId=1061> (last visited Sept. 28, 2012) [hereinafter Kishwar, *Destined to Fail*] (calling for the scrapping of the anti-dowry law because of its role as a root of illegal extortion).

130. See MAJUMDAR AND KATARIA, *LAW OF DOWRY PROHIBITION, CRUELTY AND HARASSMENT* 94 (2010).

131. See Kishwar, *Destined to Fail*, *supra* note 129 (noting that misuse claims are not only brought by in-laws and husbands, but by women’s organizations as well).

132. See *id.* (noting that Section 498A provides a strong weapon for revenge for women, whether or not the source of discord is the dowry).

133. See Kishwar, *Laws Against Domestic Violence*, *supra* note 23 (purporting that implicating the whole family will result in a larger financial settlement for the woman).

134. See Kishwar, *Destined to Fail*, *supra* note 129 (describing the case of Nisha Harma who accused and called for the arrest of her groom and his parents the night before their wedding over fake dowry demands).

135. See *id.* *Stridhan* is defined as that portion of a woman’s wealth over which she alone has the power to sell, gift, mortgage, lease or exchange—in whole or in part. Usually, *stridhan* is passed from mother to daughter, unless the woman decides otherwise. Any dues from her can also be recovered from her *stridhan*. Besides the

women are encouraged to overstate their claims of domestic violence to demand an enhanced settlement as a pre-condition for divorce by mutual consent. Thus, a large number of cases filed under Section 498A are subsequently withdrawn.¹³⁶

Manushi also unearthed several cases where lawyers advised their male clients to preempt their wives' filing a Section 498A complaint against them by filing a divorce petition before the Section 498A claim is brought to the police.¹³⁷ These men are then able to reasonably argue that charges of "cruelty" were simply false charges filed in retaliation against the husband's petition for divorce.

Manushi's investigations revealed that police would often use the threat of arrest under Section 498A to extort large sums of money from a husband's family.¹³⁸ Likewise, many have alleged that the police threatened to oppose or delay the granting of bail to accused men and their families, unless they produced large bribes.¹³⁹ Others allege that lawyers encourage complainants to exaggerate the amount owed to them as *stridhan*. This ensures that the lawyers themselves receive large settlements from their male clients, provided they were entitled to a percentage of the settlement as a commission for coercing the husband's family.¹⁴⁰

The Malimath Committee Report¹⁴¹ on the criminal justice system concluded that Section 498A helps neither the wife nor the husband in a domestic violence situation.¹⁴² Since it makes "cruelty" both a non-bailable and non-compoundable offense, innocent individuals are regularly arrested and imprisoned, leading to stigmatization and both mental and physical

ornaments and trousseau given at marriage, *stridhan* also includes all the gifts of money, property, jewelry, and so on received by the woman before, during, and after the marriage.

136. See Kishwar, *Laws Against Domestic Violence*, *supra* note 23 (noting that even when the goal of returning all of her rightful belongings is reasonable, the use of Section 498A still constitutes an abuse of the provision).

137. See *id.* (creating a situation in which the woman must now fight a defensive divorce case).

138. *Id.*

139. *Id.*

140. *Id.*

141. See MINISTRY OF HOME AFFAIRS, GOV'T OF INDIA, COMM. ON REFORMS OF CRIMINAL JUSTICE SYS., REPORT 3 (2003), available at http://mha.nic.in/pdfs/criminal_justice_system.pdf. In 2003, the Government of India's Ministry of Home Affairs constituted the Committee on Reforms of Criminal Justice System to undertake a comprehensive examination of all aspects of the criminal justice system, fundamental principles, and relevant laws. This report highlighted lacunae in the Indian criminal justice system and suggested important recommendations.

142. See *id.* at 191 (demonstrating that after an investigation occurs, a woman may not be able to return home even if she wants to and is at the mercy of her natal family, while her husband may also not be able to return home if he is in prison).

hardships. According to the Report, reconciliation or return to the marital home becomes practically impossible as a result.¹⁴³ For instance, even if the petitioner wishes to make amends by withdrawing the complaint, she cannot do so because the offense cannot be withdrawn (non-compoundable). Thus, men accused of inflicting “cruelty” against their wives are unlikely to return to a normal family life.¹⁴⁴

However, the Malimath Committee’s insistence on reconciliation and compromise raises serious concerns.¹⁴⁵ Almost certainly, a large percentage of women who approach the state or non-governmental organizations for help in a domestic violence case must return to violent domestic situations.¹⁴⁶ Both the state and NGOs recommend a process of “mediation” between husband and wife to resolve their differences, in which the woman negotiates from a disadvantageous position because of strong patriarchal cultural norms. Thus, in many cases, the woman might feel compelled to withdraw her criminal complaint against a violent husband as a precondition for a settlement or for an easy divorce.¹⁴⁷

In light of the Malimath Committee Report, a petition alleging the misuse of Section 498A was admitted by the Rajya Sabha (Upper House of Parliament) Committee on Petitions in 2011.¹⁴⁸ This angered many women’s rights organizations, which claimed that any misuse resulted from sloppy investigation by the police and argued that any amendment to this law would constitute a regressive step in women’s rights laws in India.¹⁴⁹ They also argued that the possibility of a large number of women falsifying incidents of violence and harassment was not only remote but also

143. *See id.* (noting that legal obstacles can make reconciliation unrealistic).

144. *See id.* (stating that men are often suspended from or lose their jobs as a result of such charges).

145. *See* AMNESTY INT’L, REPORT OF THE MALIMATH COMMITTEE ON REFORMS OF THE CRIMINAL JUSTICE SYSTEM: SOME OBSERVATIONS 25-26 (Sept. 19, 2003) [hereinafter AMNESTY INT’L REPORT], available at <http://www.amnesty.org/fr/library/info/ASA20/025/2003/en> (explaining that the insistence on mediation is often due to a lack of choices for women to escape a violent situation).

146. *See id.* at 25 (noting that the woman is placed at a severe disadvantage in the patriarchal process, especially with the lack of police follow-up after mediation has returned the parties home).

147. *See id.* at 26 (explaining that Section 498A does not protect a woman’s right to the matrimonial home).

148. *See* RAJYA SABHA, COMM. ON PETITIONS, PETITION PRAYING FOR AMENDMENTS IN SECTION 498A OF IPC (n.d.), available at http://164.100.47.5/newcommittee/press_release/Press/Committee%20on%20Petitions/498%20IPC%20English.pdf (alleging that the abuse constitutes “tremendous harassment and torture”).

149. *See* T.K. Rajalakshmi, *Oppressor’s Case, Women’s Organisations Rise Up Against a Petition That Seeks an Amendment to Section 498A of the Indian Penal Code*, FRONTLINE (Mar. 26-Apr. 8, 2011), <http://www.frontlineonnet.com/fl2807/stories/20110408280709600.htm> (arguing that the petition portrayed aggrieved women who brought complaints as dishonorable women, or “Delilahs and Jezebels”).

improbable.¹⁵⁰

National Crime Bureau data from 2008 revealed that the number of dowry deaths had increased from 6,975 cases in 1998 to 8,093 in 2007.¹⁵¹ Cases registered under Section 498A had also increased from 41,375 to 75,930 (almost doubled), while the reported number of sexual harassment cases had grown from 8,053 to 10,950 in the same ten-year period.¹⁵² This, of course, reveals only that the number of reported cases increased, but does not tell us about the incidence of domestic violence cases or about the misuse of the provision.

This underscores an important limitation in the debate over false complaints: the absence of good data. For instance, Amnesty International observed that the Malimath Committee provides no data to show how frequently Section 498A is being misused.¹⁵³ This suggests that the Committee's recommendations were based on rumor rather than empirical research. The only available empirical study on the alleged "misuse" of 498A was published by the Centre for Social Research, which found that 6.5 percent of the dowry harassment cases they studied were found to be false at the time of investigation.¹⁵⁴ While this study suggests that the number of false complaints filed is low, most organizations fighting to repeal or amend Section 498A have relied on the findings of the Malimath Committee Report, which assumes a much higher percentage of false complaints.¹⁵⁵

Amnesty International also reported that a large number of cases of violence against women were subsequently logged as "false" after the filing of an initial complaint.¹⁵⁶ This usually meant that the victim had

150. See *id.* (contending that because silence and marriage are extolled values in India, it is highly improbable that women would fake incidences of domestic violence).

151. See *id.*

152. See *id.*

153. See AMNESTY INT'L REPORT, *supra* note 145, at 25 (arguing that most "false" claims were actually situations in which the victim and perpetrator of violence had reached a compromise and a complaint had been withdrawn).

154. See *The Storm Around 498A*, THE HINDU, Mar. 8, 2011, <http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/article1518769.ece> (finding that only .1% of domestic violence incidents even reach the criminal justice system).

155. See Anupam Bhagria, *Amend Domestic Violence Act to Plug Its Misuse Against Men*, *Demands NGO*, INDIAN EXPRESS (Oct. 12, 2009), <http://www.indianexpress.com/news/amend-domestic-violence-act-to-plug-its-misu/527991/> (advocating for an amendment to Section 498A by contending that it harms minor girls, children, fathers, pregnant women, and aged grandmothers more than it helps protect women); see also Nitesh Kumar Sharma, *Jaipur Men Victim of False Dowry Cases*, TIMES OF INDIA (Mar. 20, 2009), http://articles.timesofindia.indiatimes.com/2009-03-20/jaipur/28055005_1_dowry-harassment-domestic-violence-cases (calling for reform by pointing out a case in which a physically-challenged man was falsely charged with domestic violence and almost lost his job).

156. See AMNESTY INT'L REPORT, *supra* note 145, at 25 (reporting that thirty percent

reached a compromise with the perpetrator, witnesses had turned hostile, or the petitioner chose to withdraw her complaint for other reasons.¹⁵⁷ The labeling of these complaints as “false,” though, is problematic, for it implies that women have falsely or maliciously lodged complaints, which benefits those who argue that women misuse legislation against domestic violence.¹⁵⁸ In other words, the incidence of misuse of Section 498A is exaggerated because of this labeling. Still, in light of the lack of concrete data regarding misuse, a detailed study of “false” and retaliatory cases is necessary to determine exactly to what extent Section 498A has been misused and whether that misuse outweighs its benefits as a tool to provide relief to victims of domestic violence.

India is not alone in struggling to protect women from domestic violence. The Inter-American Commission on Human Rights found that the United States does not have a legal framework that consistently protects and provides relief for victims of domestic violence.

IV. *JESSICA LENAHAN (GONZALES) V. UNITED STATES* AND THE INTER-AMERICAN COMMISSION’S APPROACH TO EQUALITY

In *Jessica Lenahan (Gonzales) v. United States*, the Inter-American Commission published a detailed report, which concluded, inter alia, that the United States violated one of its citizen’s right to equality and non-discrimination under Article II of the American Declaration.¹⁵⁹ The Commission stressed that international law requires states to act with “due diligence” to protect women from domestic violence.¹⁶⁰ The Commission recommended that the United States adopt special protection measures and take positive action to protect at-risk groups, including young women.¹⁶¹ These measures include legislation to make the enforcement of protective orders mandatory and the creation of “effective implementation mechanisms” accompanied by “adequate resources to foster their implementation.”¹⁶² The Commission further suggested training programs

of cases were filed as false in the Rajasthan government).

157. *See id.* (detailing that cases of withdrawal made up forty percent of the Section 498A filings).

158. *See id.* (noting that the rumor of misuse is furthered by the police and judiciary).

159. *See Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 5 (2011) (concluding that the United States failed to act with due diligence).

160. *See id.* ¶ 160 (expressing that the state was not coordinated, or ready to adequately implement the restraining order).

161. *See id.* ¶ 201 (detailing recommendations including an exhaustive investigation of the case at issue).

162. *See id.* ¶ 201(4) (recommending that such goals be implemented through law enforcement and justice training programs as well as model protocols and directives by

for law enforcement and judicial officials to reverse stereotypes about domestic violence victims and to help end “discriminatory socio-cultural patterns” that prevent women from receiving the full protection of the law.¹⁶³

This section will examine the Inter-American Commission Report’s findings and recommendations with regard to the right to equality and the due diligence principle. It will also compare the Report to the Supreme Court’s decision in *Town of Castle Rock v. Gonzales*, which held that Ms. Lenahan failed to state a cognizable claim for relief under the U.S. Constitution. To provide the proper context for this comparison, we will set first set forth the facts of this case on which both the Commission and the Supreme Court relied.

A. Facts of the Case

The facts underlying Jessica Lenahan’s lawsuit are truly horrific. Ms. Lenahan, who is of Native American and Latin American descent, married Simon Gonzales in 1990.¹⁶⁴ They lived in Castle Rock, Colorado and had three daughters: Leslie, Katheryn, and Rebecca.¹⁶⁵ In 1999, Ms. Lenahan obtained a valid restraining order against her husband, Simon Gonzales.¹⁶⁶ The order granted Ms. Lenahan temporary sole custody of her three daughters and limited Mr. Gonzales’ interactions with the girls to “a mid-week dinner visit” that had to be arranged “upon reasonable notice” and alternate weekends.¹⁶⁷ The order included a warning for Mr. Gonzales, stating that “a knowing violation of a restraining order is a crime” and that he “may be arrested” if police officers had probable cause to believe that he knowingly violated the order.¹⁶⁸ It also included a “Notice to Law Enforcement Officials,” which read, in relevant part, that they “shall use every reasonable means to enforce this restraining order.”¹⁶⁹

The order was issued to protect Ms. Lenahan and her daughters from Mr. Gonzales’ “erratic and emotionally” abusive behavior towards them, which

police departments throughout the country).

163. *See id.* ¶ 201(6) (recommending the adoption of public policies and institutional programs for all public officials).

164. *Id.* ¶ 18.

165. *Id.*

166. *See id.* ¶ 62 (showing that the temporary restraining order was valid May 21, 1999, and then rendered permanent on June 4, 1999).

167. *See id.* ¶ 63 (noting that Jessica Lenahan and Simon Gonzales arranged for him to have the children on Wednesday nights following the permanent order).

168. *See Town of Castle Rock v. Gonzales (Castle Rock IV)*, 545 U.S. 748, 751-52 (2005) (noting that because this case came to the Supreme Court from the dismissal of a complaint, the Court assumed the truth of Ms. Lenahan’s allegations).

169. *See id.* at 752 (calling for the arrest of Mr. Gonzales, or, if not possible, retention of a warrant for his arrest in case of a breach of the violation).

included verbal, physical, and sexual abuse, and threats to kidnap the children.¹⁷⁰ Prior to the issuance of the order, Ms. Lenahan had reported at least four incidents of domestic violence to the Castle Rock Police.¹⁷¹

On June 22, 1999, around 5:00 or 5:30 p.m., Mr. Gonzales picked up his three daughters while they were playing outside Ms. Lenahan's home and drove away with them in his pickup truck.¹⁷² No prior arrangements had been made for Mr. Gonzales to see his children that evening.¹⁷³ Ms. Lenahan did not know that he had taken her children, though she suspected as much. She called the Castle Rock Police Station at 7:42 p.m., and reported that she filed a restraining order against her husband, but that she did not know "whether he picked them up today or not."¹⁷⁴ The station dispatched two officers to Ms. Lenahan's home, where she showed them a copy of the restraining order.¹⁷⁵ However, the officers told her that there was nothing they could do and suggested that she call the police station again at 10:00 p.m. if the children had not returned home by then.¹⁷⁶

Ms. Lenahan made four further phone calls to the Castle Rock Police Station that night. At 8:43 p.m., she informed them that she had located her daughters: Mr. Gonzales had taken them to Denver—outside the jurisdiction of the Castle Rock police—without her permission.¹⁷⁷ She called again at 9:57 p.m. to report that the children were still missing, but she was told to wait until midnight.¹⁷⁸ At midnight, she called the police station a final time and told the dispatcher that her children remained missing.¹⁷⁹

Ms. Lenahan, now desperate to find her children, drove to her husband's apartment, and when she found it empty, called the police station for a final

170. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 65 (detailing Mr. Gonzales' abusive behavior to include stalking, exhibitions of suicidal behavior, and breaking and entering into Ms. Lenahan's home while high on drugs).

171. *See id.* ¶ 67 (reporting that Mr. Gonzales had stalked her, stolen her wedding rings, and had unlawfully changed the locks on her doors).

172. *Castle Rock IV*, 545 U.S. at 753.

173. *Id.*

174. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 72 (noting that they had agreed to a dinner hour on whatever night was best but no agreement had been made on this night).

175. *See Castle Rock IV*, 545 U.S. at 753 (detailing that Ms. Lenahan requested that the restraining order be enforced immediately).

176. *Id.*

177. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 74 (stating that the behavior was highly unusual and "wrong," especially since two of the girls had school the next day).

178. *See Castle Rock IV*, 545 U.S. at 753; *Lenahan*, Case 12.626, Report No. 80/11, ¶ 75 (relating that she had spoken with Mr. Gonzales who was aware that he was not supposed to have the children overnight).

179. *Castle Rock IV*, 545 U.S. at 753.

time at 12:10 a.m.¹⁸⁰ She was told to wait for an officer to arrive, but when no one arrived, she went to the police station at 12:50 a.m. and filed a missing person's report on the children.¹⁸¹

At 3:25 a.m., Simon Gonzales drove his truck to the Castle Rock Police Department and fired shots through the station's window with a semiautomatic handgun he had purchased that evening.¹⁸² Mr. Gonzales exchanged fire with police officers at the station, which resulted in his death.¹⁸³ The police found the bodies of three young girls—his daughters Leslie, Katheryn, and Rebecca Gonzales—inside the cab of his pick-up truck.¹⁸⁴ According to the police investigation, Mr. Gonzales had murdered all three girls before the shootout with the police.¹⁸⁵

B. Procedural History in U.S. Courts

On January 23, 2001, Jessica Lenahan filed suit in the United States District Court for the District of Colorado under 42 U.S.C. § 1983. She alleged that the town of Castle Rock, Colorado, violated her rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution by failing to respond to reports that her estranged husband had violated the terms of a restraining order.¹⁸⁶ Her complaint further alleged that the Castle Rock Police Department had an official policy of failing to respond to violations of restraining orders and that the town tolerated this lack of enforcement.¹⁸⁷

Despite the Police Department's failure to respond to a mandatory protective order, the District Court held that Ms. Lenahan failed to state either a substantive or procedural due process claim under the Fourteenth Amendment.¹⁸⁸ It therefore granted defendant Castle Rock's motion to

180. *Id.*

181. *See id.* at 753-54 (noting that Ms. Lenahan filed "an incident report"); *Lenahan*, Case 12.626, Report No. 80/11, ¶ 79 (detailing that Ms. Lenahan filed a missing persons report and that she feared that Mr. Gonzales was suicidal).

182. *See Castle Rock IV*, 545 U.S. at 754; *Lenahan*, Case 12.626, Report No. 80/11, ¶ 81.

183. *See Castle Rock IV*, 545 U.S. at 754; *Lenahan*, Case 12.626, Report No. 80/11, ¶ 81.

184. *See Castle Rock IV*, 545 U.S. at 754.

185. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 82-85 (finding that the girls were shot at close range and not by any rounds of the police officers, although the exact location of the homicides of the children was unknown).

186. *See id.* ¶ 86 (presenting both claims of substantive and procedural violations); *Castle Rock IV*, 545 U.S. at 751 (alleging that the officers had failed to act pursuant to official policy or custom).

187. *See Castle Rock IV*, 545 U.S. at 754 (alleging that the town's actions constituted a willful, reckless, and wanton disregard to civil rights).

188. *See Gonzales v. City of Castle Rock (Castle Rock I)*, No. Civ.A.00 D 1285, 2001 WL 35973820, at *4-5 (D. Colo. Jan. 23, 2001) (concluding that the lack of a

dismiss under F.R.C.P. 12(b)(6).¹⁸⁹

On appeal, the Tenth Circuit Court of Appeals affirmed the District Court's rejection of Ms. Lenahan's substantive due process claim, but found that she had a cognizable procedural due process claim.¹⁹⁰ An en banc panel reached the same conclusion on rehearing, finding that Ms. Lenahan had a "protected interest in the enforcement of the restraining order" for which she had a "right to be heard."¹⁹¹ The panel found that the Castle Rock Police violated this right as they "never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order."¹⁹² The police, according to the panel, also unconstitutionally denied Ms. Lenahan a different sort of process: they denied her "bona fide consideration . . . of a request to enforce a restraining order."¹⁹³

The U.S. Supreme Court granted certiorari and held that Ms. Lenahan had no constitutionally protected interest in having a restraining order against her husband enforced by the local police.¹⁹⁴ The City of Castle Rock had not violated the Fourteenth Amendment, as it had not deprived Ms. Lenahan of property to which she was entitled any procedural protection under the Due Process Clause. The Court therefore reversed the judgment of the Court of Appeals.¹⁹⁵

Justice Scalia, on behalf of seven justices, authored a majority opinion that hewed narrowly to Fourteenth Amendment precedent. The opinion stressed that the Due Process Clause does not protect "everything that might be described as a benefit," but only those benefits to which an individual has a "legitimate claim of entitlement."¹⁹⁶ The majority then explained why Ms. Lenahan did not have such an entitlement under Due

cause of action for such a tragic set of facts was extremely troubling).

189. *See id.* (holding that Ms. Lenahan did not have a protectable property interest because the obligation imposed by the protective order was not mandatory).

190. *See Gonzales v. City of Castle Rock (Castle Rock II)*, 307 F.3d 1258, 1263, 1266 (10th Cir. 2002) (holding that Ms. Lenahan could survive the motion to dismiss because the state statute defined the duties of peace officers and that Ms. Lenahan had sufficiently pleaded allegations to the degree of a violation of that duty).

191. *Gonzales v. City of Castle Rock (Castle Rock III)*, 366 F.3d 1093, 1110, 1117 (10th Cir. 2004) (en banc) (finding that Ms. Lenahan justifiably relied on the protective order).

192. *See id.* at 1117 (expressing that the police never entertained the idea of finding probable cause to enforce the restraining order).

193. *See id.* (referring to the police's response to Ms. Lenahan's situation as a "sham" and "cruel deception").

194. *See Castle Rock IV*, 545 U.S. 748, 768 (2005) (concluding that it therefore had no need to address the town's custom or policy since no property interest existed).

195. *See id.* at 768 (explaining that the benefit a third party may receive from another being arrested does not trigger Due Process Clause substantive or procedural protections).

196. *See id.* at 756 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)) (noting that there must be more than an "abstract need or desire").

Process Clause. It relied on two principal justifications.

First, the Court said that benefits that government officials have discretion to grant or deny do not constitute legitimate entitlements that are protected by the Due Process Clause.¹⁹⁷ In this case, Colorado passed a domestic violence statute that instructed police officers on how to respond to restraining order violations. These instructions were restated on the back of the restraining order and required, *inter alia*, that the police use “every reasonable means to enforce a restraining order.”¹⁹⁸ The Tenth Circuit, after examining the text and legislative history in detail, concluded that the intent of the Colorado legislature was to make enforcement of the orders mandatory and “alter the fact that the police were not enforcing domestic abuse restraining orders.”¹⁹⁹

The Supreme Court did not adhere to the Tenth Circuit’s reading of the statute, despite the presumption of deference that it usually grants to a federal court’s conclusions as to the law of a state within its jurisdiction.²⁰⁰ To the contrary, the Court noted that “law enforcement discretion” is deeply rooted in the United States, and can only be overridden by a clear statement from the legislature.²⁰¹ Here, the Colorado statute required the police to “use every reasonable means to enforce a restraining order.”²⁰² According to the Court, this language was not sufficiently strong to eliminate all police discretion.²⁰³ This discretion, in the Court’s view, leads to indeterminacy in the enforcement of restraining orders, which “is not the hallmark of a duty that is mandatory.”²⁰⁴ Since only a mandatory duty to

197. *See id.* (citing *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989)) (stating that a unilateral expectation of a service does not authorize constitutional protections).

198. *See* COLO. REV. STAT. § 18-6-803.5(3) (2012) (authorizing a police officer to arrest a violator of a protective order or, in the alternative, seek a warrant to arrest the person).

199. *See Castle Rock III*, 366 F.3d 1093, 1101, 1108 (10th Cir. 2004) (characterizing police officer response to the enforcement of protective orders as “arbitrary denial of [the] entitlement”).

200. *See Castle Rock IV*, 545 U.S. at 757 (acknowledging this presumption of deference, but refusing to defer to the Tenth Circuit’s views because they were not based “upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state-legislative-hearing transcript.”).

201. *See id.* at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999), where the Court declined to read a law enforcement ordinance as denying police discretion to enforce the ordinance).

202. *See* § 18-6-803.5(3) (including assuming all information received from the registry is true in pursuing probable cause).

203. *See Castle Rock IV*, 545 U.S. at 761-63 (explaining that the Colorado domestic violence statute, other Colorado statutes, and domestic violence statutes in other jurisdictions still retain at least a modicum of police discretion).

204. *See id.* at 763 (arguing that a practical necessity for discretion exists, especially in a case where the violator’s whereabouts are unknown).

enforce would be constitutionally protected, and the police here retained some discretion in enforcing Ms. Lenahan's restraining order; she did not have a legitimate "entitlement" to its enforcement under the Due Process Clause.

A second (and related) reason the Court put forth to explain why Ms. Lenahan did not have a legitimate entitlement is that the enforcement of her restraining order—which would include seeking an arrest warrant against Mr. Gonzales—is itself merely a procedure, not a property interest.²⁰⁵ As Justice Souter explained in his concurring opinion, the sorts of property interests protected by the Due Process Clause are independent of the procedures used to enforce those interests.²⁰⁶ Justice Souter gave many examples of protected property interests, including welfare benefits, utility services, and professional licenses, which were "distinguishable from the procedural obligations imposed on the state officials to protect [the property interests]."²⁰⁷ In this case, however, Ms. Lenahan's claim would take the Court beyond any previously recognized property interest "by collapsing the distinction between property protected and the process that protects it."²⁰⁸ The majority agreed with this view, but went even further to conclude that Ms. Lenahan's claim to an entitlement of a procedure not only failed to specify a property interest, but was inadequate even to support standing.²⁰⁹

For these reasons, the Court held that Colorado had not created a legitimate entitlement that was protected by the Due Process Clause.²¹⁰ The Court went on to state that even if Colorado had created such an entitlement, it would still not necessarily constitute a property interest for the purposes of the Due Process Clause.²¹¹

Justice Stevens, joined by Justice Ginsburg, wrote a dissenting opinion that disagreed with the majority's interpretation of the Colorado statute.

205. *See id.* (holding that the procedure is inadequate even as to standing, let alone a property interest).

206. *See id.* at 771-72 (Souter, J., concurring) (explaining that state rules of executive procedure cannot confer property rights to be protected by the Due Process Clause).

207. *See id.* at 772 (holding that the property interest protected by the Due Process Clause always exists apart from state procedural protection).

208. *See id.* (contending that an extension of protected property interests to Ms. Lenahan would result in the federalization of mandatory state law directives).

209. *See id.* at 764 (majority opinion) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) (noting that Ms. Lenahan would have been assured nothing more than the seeking of a warrant).

210. *See id.* at 766 (commenting that the enforcement of restraining orders are vague and novel and cannot just "go without saying").

211. *See id.* at 766-68 (purporting that a right to the entitlement of a restraining order does not resemble any traditional conception of property and has no ascertainable monetary value).

Justice Stevens found that “Colorado law has quite clearly eliminated the police’s discretion to deny enforcement” and Ms. Lenahan therefore had a legitimate claim of entitlement to enforcement.²¹² With this established, Justice Stevens went on to conclude that state officials could not deprive Ms. Lenahan of this protected interest without following fair procedures.²¹³ On this view, the Castle Rock police were obligated, at a minimum, to “listen to the claimant and then *apply the relevant criteria*” in reaching their decision.²¹⁴ The Police Department’s failure to follow even these basic safeguards resulted in “an unacceptable risk of arbitrary and ‘erroneous deprivation[s]’ [of citizens’ private interests].”²¹⁵

C. The Inter-American Commission Report

In July 2011, six years after the Supreme Court’s ruling, the Inter-American Commission on Human Rights published a landmark report in *Jessica Lenahan (Gonzales) v. United States*, in which it concluded that the United States violated several rights protected by the American Declaration of the Rights and Duties of Man (American Declaration).²¹⁶ These rights include: Jessica Lenahan’s right to equality and non-discrimination under Article II; her daughters’ right to life under Article I, in conjunction with their right to special protection as female children under Article VII; and Ms. Lenahan and her next-of-kin’s right to judicial protection under Article XVIII.²¹⁷

For the purposes of this Article, we will focus on the Commission’s findings with respect to Ms. Lenahan’s right to equality and non-discrimination. Article II of the American Declaration states that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”²¹⁸ According to the Commission, the right to equality

212. See *id.* at 789 (Stevens, J., dissenting) (arguing that Ms. Lenahan was entitled to far more than a “unilateral expectation” of enforcement).

213. See *id.* at 792 (contending that the police’s conduct clearly amounted to a due process violation).

214. See *id.* (noting that the State must listen to what that person has to say to prevent mistaken deprivations of property).

215. See *id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (holding that the failure to adhere to these minimal safeguards violated Ms. Lenahan’s constitutional rights).

216. See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 5 (2011) (concluding that the state failed to act with due diligence).

217. See *id.* (finding that the United States violated Articles XXIV and IV of the American Declaration, but concluding that the claims related to these articles were adequately addressed under Article XVIII).

218. Organization of American States Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003).

requires states not only to provide for equal protection of the law, but also to “adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law.”²¹⁹ Since gender-based violence is “one of the most extreme and pervasive forms of discrimination” that severely impairs and nullifies the enforcement of women’s rights, states must take “positive action” to protect women from this sort of violence, which includes domestic violence.²²⁰

The Commission noted that states have been held liable under international law for failing to take measures to protect women from gender-based violence.²²¹ In the domestic violence context, the Commission observed that Article II requires states to prevent and eradicate both direct and indirect violence against women, including “domestic violence perpetrated by private actors in certain circumstances.”²²²

According to the Commission, a state’s human rights obligations in this regard can be understood through the international legal principle of due diligence.²²³ This principle sets forth the circumstances under which a state must prevent and respond to the acts or omissions of private actors. It encompasses “the organization of the entire state structure—including the State’s legislative framework, public policies, law enforcement machinery and judicial system.”²²⁴

In this case, the Commission concluded that the state apparatus “was not duly organized, coordinated and ready to protect these victims from domestic violence by adequately and effectively implanting the restraining order,” which resulted in a violation of Article II of the American Declaration.²²⁵ The Commission noted that this violation was exacerbated by a “historical problem with the enforcement of protection orders” that disproportionately affects women, particularly women from minority and low-income groups.²²⁶

219. *See Lenahan*, Case 12.626, Report No. 80/11, ¶ 108-09 (establishing that states must adopt measures necessary to recognize and guarantee effective equality and abstain from discriminatory framework).

220. *See id.* ¶¶ 110-12, 117 (considering state failures in the realm of domestic violence to be affronts to the right to life of women).

221. *See id.* ¶ 112 (noting that every key international human rights instrument incorporates the right to life).

222. *See id.* ¶ 120 (stating that the eradication of domestic violence is a crucial component of the State’s duty to eliminate all forms of discrimination).

223. *See id.* ¶ 125 (using due diligence as a tool to understand the obligations in practice to victims of domestic violence).

224. *See id.* (stating that both the Commission and the Supreme Court of the United States accept the due diligence principle).

225. *Id.* ¶ 160.

226. *See id.* ¶ 161 (noting that within this context, a high correlation between wife battering and child abuse exists).

The Commission's Report highlighted problems with the Castle Rock Police Department's handling of the case. It found that the Police Department did not respond appropriately to Ms. Lenahan's requests. Despite her numerous phone calls and trip to the police station, the police made no serious effort to locate her daughters or to enforce the restraining orders. For example, when Ms. Lenahan called the police station at approximately 10:00 p.m. to report that she knew the children were with their father, the dispatcher responded dismissively that she was being "a little ridiculous making us freak out and thinking the kids are gone."²²⁷ As the Report concluded, though Ms. Lenahan consistently conveyed her concerns regarding the whereabouts of her children, "the dispatchers and officers apparently applied only their personal perceptions in determining that the girls were safe because they were with their father."²²⁸

The Report notes further that the police officers failed to conduct a "thorough check of Simon Gonzales' previous criminal background," which would have alerted them to his erratic and abusive behavior that Ms. Lenahan had reported earlier.²²⁹ The Police Department also did not appear to have any "protocols or directives in place guiding police officers on how to respond" to reported restraining order violations, which led to delays in their response.²³⁰ Most glaringly, Castle Rock Police officers did not seem to understand that it was their responsibility—and not Ms. Lenahan's—to determine whether the restraining order had been violated.²³¹ As this was a domestic violence situation, Ms. Lenahan (and her children) might have been in danger if she confronted Mr. Gonzales and demanded the children's return. Thus, instead of asking Ms. Lenahan to locate her children and then call them back (which they requested on at least two occasions), the police should have tried to locate Mr. Gonzales and the children themselves.²³²

The Report also criticized the investigation into the deaths of Ms. Lenahan's daughters. While the investigation concluded that all three girls

227. *See id.* ¶ 76 (showing that the dispatcher also expressed frustration over the lack of arrangements made between Ms. Lenahan and Mr. Gonzales).

228. *See id.* ¶ 152 (concluding that the police were clearly acting on their own biases and did not follow through once they discovered the restraining order allowed for parenting time).

229. *See id.* ¶ 154 (contending that understanding his behavior would have in turn led to a better understanding of the risks of a violation of the order).

230. *See id.* ¶ 155 (detailing that it took the dispatcher over an hour to enter an attempt to locate Mr. Gonzales and his vehicle).

231. *See id.* ¶ 158 (exemplifying the lack of understanding by having Ms. Lenahan repeatedly contact Mr. Gonzales in spite of the police's knowledge that it was a domestic violence situation).

232. *See id.* ¶ 158 (demonstrating that the State itself used the defense that Ms. Lenahan never reported that the restraining order had been violated).

died due to injuries caused by “large caliber gunshot,” the autopsy reports did not identify which bullets, those of the police or Mr. Gonzales, actually struck Leslie, Katheryn, and Rebecca Gonzales.²³³ As a result, the Commission recommended that a “serious, impartial and exhaustive investigation” be conducted to ascertain the exact cause, time, and place of the three deaths.²³⁴

In its recommendations, the Report also urged the U.S. government to conduct a thorough investigation into the “systematic failures that took place related to the enforcement of Jessica Lenahan’s protection order” and to conduct an inquiry “to determine the responsibilities of public officials for violating state and/or federal laws, and holding those responsible accountable.”²³⁵ It further recommended that the United States pass “multifaceted legislation” to improve the enforcement of mandatory protective orders and pay Ms. Lenahan and her family “full reparations.”²³⁶

D. Differences Between the U.S. Supreme Court and Inter-American Commission Decisions

While both the Inter-American Commission and the U.S. Supreme Court relied on comparable facts to rule on Jessica Lenahan’s case, they reached completely different conclusions. At least two factors account for this divergence: (1) sources of law and (2) the breadth of inquiry undertaken by each body.

The Commission relied on a wider array of legal sources than the Supreme Court, and it conducted a much broader inquiry into the issue of domestic violence both in the United States and abroad. Justice Scalia, who wrote the majority opinion for the Court, is strongly against referring to international or foreign law sources when interpreting individual rights under the Constitution.²³⁷ As a result, his opinion cited only U.S. sources, and confined itself to a narrow question—whether Ms. Lenahan had stated a cognizable claim under the Due Process Clause of the Fourteenth Amendment.²³⁸ Interestingly, though the Fourteenth Amendment also

233. See *id.* ¶ 85 (noting solely the entry areas of the bullet wounds).

234. See *id.* ¶ 201(1) (requiring that the next-of-kin be notified of the course of the investigation).

235. See *id.* ¶ 201(2) (necessitating the need for an investigation to prevent and guarantee that such situations would not reoccur).

236. See *id.* ¶¶ 201(3)-(4) (recommending that the legislation be accompanied by adequate resources so that it could be effectively implemented).

237. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (“I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.”).

238. See *Castle Rock IV*, 545 U.S. 748, 751, 755 (2005) (restricting the analysis to a violation stemming from the failure of the police officers to respond pursuant to official

guarantees “equal protection of the laws,” the Equal Protection Clause was conspicuously absent in the U.S. Supreme Court’s analysis. This is because the Supreme Court has consistently interpreted the “equality” guaranteed under the U.S. Constitution to not require the government to protect marginalized or vulnerable groups (including women) from private acts of violence and discrimination.²³⁹

By contrast, the Inter-American Commission based its report on the American Declaration, which imposes a broad definition of “equality” on member states, including positive obligations to adopt legislation and other measures to protect vulnerable groups from both public and private acts of violence.²⁴⁰ To interpret the content of state obligations under the Declaration, the Commission relied on principles of public international law and drew support from a wide range of sources, including international conventions, U.N. resolutions, U.N. reports, and the decisions of other international and regional bodies.²⁴¹

The Commission also conducted its own investigation into the *Lenahan* case and the issue of domestic violence generally. This brought to light facts that the U.S. Supreme Court did not even consider. First, the Commission examined the incidence of domestic violence in the United States²⁴² It found that there were at least 3.5 million incidents over a four-year period, and that certain women—particularly Native American women and women from low-income groups—were especially at risk.²⁴³ Second, the Commission looked into the problem of domestic violence in Colorado

policy or custom).

239. See *United States v. Morrison*, 529 U.S. 598, 620-21 (2000) (“[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”); see also *United States v. Harris*, 106 U.S. 629, 638 (1883) (holding that the Constitution places restraint upon state action); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating that the Fourteenth Amendment does not authorize Congress to create a code to regulate private rights); *United States v. Cruikshank*, 92 U.S. 542, 542-43 (1876) (positing that the Fourteenth Amendment does not add to the rights of one citizen against another).

240. See *Lenahan*, Case 12.626, Report No. 80/11, ¶ 123 (basing its findings on the growing and broad international consensus to use due diligence to interpret State legal obligations).

241. See, e.g., *id.* ¶ 124 (citing United Nations General Assembly Resolutions and a Report of the Special Rapporteur on Violence Against Women to establish the broad international consensus on the use of the due diligence principle to interpret state obligations towards violence against women); *id.* ¶ 132 (referring to decisions of the European Court of Human Rights and the CEDAW Committee where states were held responsible for failing to protect domestic violence victims).

242. See *id.* ¶¶ 93-94 (characterizing the problem of domestic violence as acute and significant).

243. See *id.* (demonstrating that only half of the domestic violence in the United States is reported to the police).

specifically. It found that the state experienced “alarming rates of domestic violence,” given that over a three-year period “45 percent of female homicide victims statewide were killed by an intimate partner.”²⁴⁴ Finally, the Commission looked at both federal and state laws in the United States that targeted domestic violence to determine if they provided adequate protection. The Commission’s Report traced the development of the restraining order as a state law remedy for domestic violence, and the enactment of the federal Violence Against Women Act of 1994 (VAWA).²⁴⁵

By gathering this data on the incidence of domestic violence, and by analyzing the legal framework created to combat it, the Commission was able to place this case in its broader sociopolitical context. It looked beyond the facts of Ms. Lenahan’s legal claim to conclude that domestic violence remained a serious problem, especially for minority women, in both the State of Colorado and the United States generally. On this basis, the Commission recommended not only reparations for Ms. Lenahan, but legislation at both the federal and state levels to protect women and children from domestic violence, accompanied by “adequate resources to foster their implementation” and “training programs for law enforcement and justice system officials.”²⁴⁶

However, the extent to which U.S. federal or state governments will actually follow these recommendations is unclear. Since the Commission’s conclusions are not legally binding—and the U.S. Supreme Court did not find any constitutional violations in this case—the United States is not compelled to adopt measures that would meet its obligations under the American Declaration.

Moreover, the United States is not a party to CEDAW, which has a number of provisions that relate to domestic violence.²⁴⁷ These include Article 2 (comprehensive state obligation to prohibit and eliminate discrimination against women), Article 5 (elimination of prejudices and practices based upon the stereotyped roles of women and men), and Article 16 (elimination of discrimination against women in marriage and family relations).²⁴⁸ President Jimmy Carter signed the treaty in 1980, but the

244. *See id.* ¶ 99 (noting that most of the homicides in Colorado are disproportionately and alarmingly female).

245. *See id.* ¶¶ 97-98 (describing VAWA as a comprehensive legislative packet that requires states to enforce protective orders, although many of the responsible parties are state and local laws and ordinances).

246. *See id.* ¶¶ 201(4)-(5) (calling for designs of model protocols to be followed across the country).

247. *See* Convention on the Elimination of All Forms of Discrimination Against Women arts. 2, 5, 16, Dec. 18, 1979, 1249 U.N.T.S. 13 (providing, inter alia, to pursue policies to eliminate discrimination and promote the principles of equality for women).

248. *See id.* (establishing several protections, including adopting appropriate

Senate has never ratified it.²⁴⁹ As with many multilateral human rights treaties, the Senate is likely concerned that CEDAW would conflict with U.S. laws or dictate to federal and state governments how to tackle domestic violence.

India, by contrast, signed the Convention in 1980 and ratified it in 1993.²⁵⁰ This might account for the Indian government's greater willingness to pass positive legislation to combat domestic violence.

V. CONCLUSION: THE LIMITS OF THE *LENAHAN* APPROACH IN INDIA

In the spirit of *Lenahan*, the Indian Government has taken positive measures to combat domestic violence through legislation enacted in 2005. Domestic violence has been criminalized in India since 1983, when Section 498A to the Indian Penal Code was adopted. Section 498A allows women to file criminal complaints against their husbands and husbands' relatives for the crime of "cruelty."²⁵¹ As discussed earlier, complaints filed under Section 498A are compoundable and non-bailable, which means that once filed they cannot be withdrawn and the accused must appear before a judge to receive bail.²⁵²

Section 498A has proved a limited remedy for domestic violence. It only addresses domestic violence faced by married women. Since it is located within the Indian Penal Code, it offers no civil remedies. Thus, prior to 2005, married Indian women could not obtain restraining orders against their husbands unless they filed suit for matrimonial remedies like divorce or judicial separation.²⁵³ Such limitations, allied with a powerful social movement, led the Indian Parliament to enact the PWDVA.

In 2005, the Parliament passed the PWDVA, a wide-ranging law that protects women from various types of violence (physical, sexual, verbal, and economic). Unlike Section 498A, which institutes only criminal sanctions against perpetrators of domestic violence, the PWDVA includes

legislative measures and sanctions to destroy discrimination against women).

249. See *Convention on the Elimination of All Forms of Discrimination Against Women, States Parties*, UNITED NATIONS TREATY COLLECTION (Aug. 31, 2012, 1:09 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (demonstrating that President Carter signed on July 17, 1980).

250. See *id.* (showing that India signed the Convention on July 30, 1980, only days after the United States).

251. See INDIA PEN. CODE § 498A (1860) ("Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."); HANDBOOK OF DOMESTIC VIOLENCE, *supra* note 34, at 146.

252. See CODE CRIM. PROC. (India): Offenses Relating to Marriage (noting also that the Magistrate of the first class tries such claims).

253. See Jayna Kothari, *Criminal Law on Domestic Violence, Promises and Limits*, ECON. & POL. WKLY. 4843, 4848 (Nov. 12, 2005) (noting that even where injunction orders were available, violations of the orders came with no penalties).

both civil and criminal penalties. Victims can seek injunctions and protective orders whose breach can result in criminal punishments such as imprisonment and fines.²⁵⁴

The PWDVA also expands the ambit of domestic violence protection to unmarried women. It covers all relationships based on consanguinity, marriage, adoption, and even relationships that are “in the nature of marriage.”²⁵⁵ Moreover, echoing the Inter-American Commissions’ recommendations, the PWDVA imposes positive obligations on the state to protect women from violence, including mandatory police sensitization and awareness training on issues of domestic violence.²⁵⁶ It also requires state governments to appoint protection officers and service providers to assist victims in obtaining shelter and medical assistance, and in filing domestic incident reports to the local magistrate.²⁵⁷

Thus, at first glance, both Section 498A and particularly the PWDVA are very progressive pieces of legislation that comport with India’s obligations under international human rights law to prevent and prosecute acts of domestic violence. However, as we discussed in Sections II and III, these laws have not been successful. This failure can be attributed to two major negative consequences: (1) the victimization of male partners and their female relatives; and (2) police harassment and rent-seeking. While the first is mostly a consequence of poor drafting, the second reveals a deeply rooted institutional problem that is more difficult to resolve.

A. Victimization

The creation of a new class of victims is an unintentional and unfortunate consequence of domestic violence laws in India. Troublingly, when these laws are misused it is not just male partners, but also their female relatives who bear the consequences. Neither the PWDVA nor Section 498A has any safeguards to protect these (often female) victims of false complaints. This can be easily remedied. Under existing Indian law, Section 340 of Criminal Procedure Code, read in conjunction with Section 191-193 of the Indian Penal Code, provides for the filing of complaints against individuals who present false evidence in Court. It is imperative to have a similar mechanism built into the PWDVA and Section 498A to

254. See LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xiii (seeing domestic violence as a civil and criminal issue); see also HANDBOOK OF DOMESTIC VIOLENCE, *supra* note 34, at xix (highlighting availability of civil remedies).

255. See LAWYER’S COLLECTIVE REPORT, *supra* note 28, at xiii (expanding the class of protected women).

256. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 11, INDIA CODE (2005), vol. 12 (imposing obligations on all state actors).

257. See *id.* §§ 8-10 (separating the duties of protection and service officers into assistance and legal).

provide some sort of deterrence for false complaints, while still ensuring that genuine complaints of domestic violence are filed without any adverse impacts.

Section 498A has become a lightning-rod of controversy and has spurred conservative activism because it does not allow men to bring domestic violence cases. For instance, conservative opponents of this provision have created 498a.org, a website that describes itself as “an attempt to create awareness among Indian nationals about the rampant misuse of 498a (Dowry Law misuse) by unscrupulous women to extort money and harass their husband’s entire extended family . . . [it] is dedicated to the victims of gender-biased laws of India”²⁵⁸

The PWDVA also appears to only allow women to bring complaints of domestic violence.²⁵⁹ It also includes “insults” and “ridicule” under the definition of “verbal and emotional abuse,” without defining those terms.²⁶⁰ Further, Sections 18 and 23 of the Act empower magistrates, on a prima facie showing that “domestic violence has taken place or is likely to take place,” to issue *ex parte* orders that prohibit accused *perpetrators* from entering their homes.²⁶¹ Other problematic provisions include Sections 19 and 20(1).²⁶²

Gender-specific and vague provisions like these exacerbate the potential for false complaints. However, there has been no serious effort to measure the extent of this problem. The Malimath Committee Report, which is the best-known study in this area, concluded that Section 498A is grossly misused without offering any statistics to support this finding.²⁶³ The Report instead likely relied on rumor and general public impressions, which have been shaped by websites like 498a.org that almost certainly exaggerate the incidence of false complaints. Moreover, local authorities label many domestic violence cases “false” in situations where the victim

258. See 498A.ORG, <http://www.498a.org/index.htm> (last visited Oct. 12, 2012) (referring to men as the victims of gender-biased laws in India).

259. See *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade*, (2011) 3 S.C.C. 650, 8-9 (India) (ruling that the term “respondent” includes the female relatives of accused men, but not explicitly extending it to women in domestic relationships); *Aruna Pramod Shah v. Union of India*, (2008) 102 D.R.J. 543, 543 (Delhi H.C.) (Apr. 7, 2008) (India) (rejecting a challenge to the Act’s constitutionality made on the grounds that it defines the term “respondent” as only applying to men).

260. See *The Protection of Women from Domestic Violence Act, No. 43 of 2005*, § 3, Explanation I(iii), INDIA CODE (2005), vol. 12 (specifying insults only to the point that insults regarding the lack of a child or male child as especially insulting).

261. See *id.* §§ 18-19, 23 (granting large discretionary power to the Magistrate in implementing protective orders).

262. See *supra* Part II (discussing the problems of false claims and their effects on men and their relatives).

263. See AMNESTY INT’L REPORT, *supra* note 145, § IV(1) (noting the difficulties in substantiating claims based on rumors or independent studies with political leanings).

reached a compromise with the perpetrator, witnesses turned hostile, or the petitioner chose to withdraw her complaint for other reasons.²⁶⁴

Due to the uncertainty behind reports of false complaints, we have no good data on false complaints and their incidence is likely exaggerated. What is clear, however, is that conservative groups have capitalized on the poor drafting of domestic violence laws to exaggerate the extent of false complaints and harassment. Public sentiment towards Section 498A and the PWDVA might well be improved by improving the drafting of these laws to make them gender-neutral, to define offenses more clearly, and to perhaps make it more difficult for women to obtain prospective ex parte relief.

B. Police Harassment and Rent-Seeking

The failure of police officers to effectively investigate and report domestic violence (and possible dowry-related deaths) is widely acknowledged.²⁶⁵ This is due to both a cultural unwillingness to investigate or report domestic violence incidents and rampant corruption within the Indian police forces.

The police's unwillingness to investigate and report this crime is rooted in strong cultural beliefs that regard domestic violence as a family matter outside the purview of the state.²⁶⁶ More fundamentally, many Indians—and therefore many Indian police officers—do not consider domestic violence to be an unacceptable form of control over women.²⁶⁷ The notion that a woman is a man's property—and therefore not entitled to assert any rights against a man—is also prevalent.²⁶⁸

Cultural reasons also account for the underreporting of domestic violence cases. Some women may feel embarrassed, deny that there is a

264. See *id.* (describing that such cases amount to forty percent of final reports stemming from section 498A complaints).

265. See, e.g., Kirti Singh, *Violence Against Women and the Indian Law*, in *VIOLENCE, LAW & WOMEN'S RIGHTS* 77, 96 (Savitri Gooneskere ed., 2004) (reporting that the police often refuse to give a copy of the First Information Report to the complainant even when bound by law); Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 *AM. U. J. GENDER SOC. POL'Y & L.* 801, 813 (2003) (describing the hostility and sexual violence toward women by the police).

266. See *AMNESTY INT'L REPORT*, *supra* note 145, § IV(1) (urging that domestic violence be thought of as a criminal rather than a familial matter).

267. See Purna Manchandia, *Practical Steps Toward Eliminating Dowry and Bride-Burning in India*, 13 *TUL. J. INT'L & COMP. L.* 305, 319 (2005) (reinforcing that Indian society has a strong predilection towards regarding women as their husband's property).

268. See Pardee, *supra* note 11, at 502 (reasoning that because a man feels his wife is his property, he may dictate her fate and therefore reasonably engage in violent activities such as dowry death).

problem, or fail to recognize that the perpetrator's behavior is abusive.²⁶⁹ Alarmingly, seventy percent of female domestic violence victims in India believe their physical abuse was justified, which makes them unlikely to report incidents.²⁷⁰

In addition to cultural obstacles, widespread corruption limits effective police enforcement of domestic violence complaints. The police are often reluctant to press charges against, or investigate individuals belonging to, the political or economic elite.²⁷¹ There have been several news articles since 2005 that point toward police inaction in many Indian states. For instance, Zeenath, a widow, filed a complaint against her in-laws for domestic violence in the local court of Chandigarh, Punjab, as the police refused to register her complaint.²⁷² In a recent rape incident in Orissa, the police similarly refused to register a complaint against the accused.²⁷³ An even more shocking news article revealed that a female police officer experienced domestic violence for eight years at the hands of her husband while her police colleagues and the local government in Indore, Madhya Pradesh refused to intervene.²⁷⁴

The *Lenahan* case highlights a similar problem in the United States. Jessica Lenahan called the police on several occasions, but they refused to intervene and failed to prevent the deaths of her daughters.²⁷⁵ Like India, the United States has historically viewed domestic violence as a private matter unsuited for law enforcement or judicial intervention.²⁷⁶ The Inter-

269. See INT'L CTR. FOR RESEARCH ON WOMEN, VIOLENCE AGAINST WOMEN MUST STOP: TOWARD ACHIEVING THE THIRD MILLENNIUM DEVELOPMENT GOAL TO PROMOTE GENDER EQUALITY & EMPOWER WOMEN 1 (2005), available at http://www.icrw.org/docs/2005_brief_mdg-violence.pdf (reporting that violence from both intimate partners and strangers goes widely unreported).

270. See Vyas, *supra* note 11, at 187 (signaling that the patriarchal notions in Indian society are pervasive).

271. See Ghosh & Choudhuri, *supra* note 19, at 327 (highlighting that political clout may save a man accused of domestic violence from punishment).

272. See Raghav Ohri, *Manimajra Resident Accuses Chandigarh Police of Inaction*, INDIAN EXPRESS (Nov. 25, 2010), <http://www.indianexpress.com/news/manimajra-resident-accuses-chandigarh-police/715666/> (reporting that police officials stated that they were not aware of the woman's complaint and needed to check on it).

273. See Debabrata Mohanty, *Orissa Rape: NCW Report Points at Police Inaction*, INDIAN EXPRESS (Feb. 19, 2012), <http://www.indianexpress.com/news/orissa-rape-ncw-report-points-at-police-ina/913941/> (detailing a situation in which police failed to investigate the gang rape of a girl that resulted in a coma).

274. See *Domestic Violence: Cop Faces Police Inaction*, DAILYBHASKAR.COM (Feb. 6, 2011), <http://daily.bhaskar.com/article/MP-IND-domestic-violence-cop-faces-police-inaction-1821836.html> (noting that even a police inspector could not receive help from the police regarding her domestic abuse).

275. See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 160 (2011) (concluding that the United States failed in its duty to protect victims in the *Lenahan* case from domestic violence).

276. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2,11 (2006) (positing that wife beating was historically seen as an appropriate way to chastise and

American Commission therefore recommended that the United States “continue adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns.”²⁷⁷

In India, too, domestic violence can only be effectively tackled if it is conceived of as part of a broader series of reforms to the political and legal culture. To echo *Lenahan*, “multifaceted legislation” must be adopted.²⁷⁸ While the existing laws can be amended to be gender-neutral and less ambiguous, deeply engrained cultural beliefs and corruption cannot be altered so easily. Laws targeted at domestic violence, like Section 498A and the PWDVA, will only be effective if the Indian Government takes affirmative steps to remedy the underlying social issues.

To that end, we offer a few preliminary suggestions. First, it is essential that the Government collect accurate data pertaining to the misuse of current domestic violence laws. This data collection should encompass a range of issues, including: false complaints, police failures to investigate, and extortion by both the police and complainants. Given that domestic violence victims often do not report incidents, trained professionals, including female survivors of domestic violence, should be tasked with collecting this information. If such data is collected, it will not only permit the government to design more effective legislation to combat domestic violence, but might well deflate the momentum that conservative groups have gathered in rallying against existing legislation. For if the improved data collection shows that actual incidence of false complaints is low, groups that continue to cast male respondents and female in-laws as the real “victims” in this context would find their credibility strained.

Second, the Government should institute disciplinary sanctions against state officials—including police officers and judges—who fail to properly investigate or adjudicate domestic violence claims, accept bribes to alter the outcome of a case or investigation, or use the threat of a domestic violence claim to extort money from men. While the high degree of corruption in the system will likely make these sanctions difficult to enforce, the mere threat of public censure should induce officials in the criminal justice system to more effectively enforce domestic violence laws.

Finally, channeling *Lenahan*, we propose that the Indian state adopt “public policies and institutional programs aimed at restructuring the

discipline wives); U.S. DEPARTMENT OF JUSTICE, FINAL REPORT: ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE 3 (1984) (acknowledging that spousal or child abuse is still widely, if decreasingly, viewed as a private family matter).

277. See *Lenahan*, Case 12.626, Report No. 80/11, ¶ 201(6) (reaching such measures through comprehensive prevention programs).

278. See *id.* ¶ 201(4) (including precautionary measures to protect women from imminent violence).

stereotypes of domestic violence victims” and “promote the eradication of discriminatory socio-cultural patterns that impede women” from equal protection under the law.²⁷⁹ This requires educational programs targeted not only at law enforcement officials, but also at the general public, and particularly children. It is only when the Indian public recognizes domestic violence (and the under-enforcement of laws meant to stop it) as a serious threat to women’s rights (and human rights) that domestic violence can be eradicated.

279. *See id.* ¶ 201(6) (advocating also for the full protection of children).