## NOTE

# LACK OF STATE ACCOUNTABILITY IN ACTS OF DOMESTIC VIOLENCE: UNDERSTANDING THE CONTRAST BETWEEN THE U.S. AND INTERNATIONAL APPROACHES

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## I. INTRODUCTION

Domestic violence is the most common form of violence women[1] experience around the world.[2] Worldwide at least one in three women is abused in some fashion or sexually coerced by an intimate partner during her lifetime.[3] More detailed research conducted in the United States indicates that in 2007, 554,000 females and 69,000 males were victims of violent crime by an intimate partner,[4] underlying the fact that domestic violence accounts for more than 450,000 visits to the emergency room each year.[5] The U.S. Department of Justice defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[6] This broad definition includes any physical, sexual, emotional, economic, or psychological acts that intimidate, humiliate, isolate, coerce, threaten, or hurt another person.[7]

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1. While the victims of domestic violence are usually women, this is not always the case. This Note will therefore use the gender-neutral terms "victim" and "batterer" for the two parties involved in a domestic violence incident. Gendered pronouns will be used in discussions of statistics on domestic violence, as these statistics distinguish between the sexes.

2. Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. U. J. INT'L HUM. RTS. 190, 190 (2010).

3. *Id.*

4. Erica Franklin, *When Domestic Violence and Sex-Based Discrimination Collide: Civil Rights Approaches to Combating Domestic Violence and its Aftermath*, 4 DEPAUL J. FOR SOC. JUST. 335, 338–39 (2011); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2007, at 6 (2008).

5. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy"*, 11 S. CAL. INTERDISC. L.J. 361, 361 (2002).

6. Hasselbacher, *supra* note 2, at 190.

7. *Id.*

Despite advocates waging a campaign against domestic violence in the United States since the 1960s, reported statistics still reveal appallingly high rates of intimate violence.[8] In one survey conducted by the Boston Health Commission, nearly half of the teens questioned about the pop star Rihanna's abusive relationship with fellow celebrity Chris Brown responded that Rihanna was at fault for the abuse she endured from Brown.[9]

This Note examines the responses of the criminal and civil justice systems to domestic violence in the United States and whether the policies implemented by law enforcement and legal officials are compatible with the best interests of domestic violence victims. It also analyzes the historical treatment of domestic violence in the United States as compared to emerging international discourse on the topic.

Part II traces the historical development of domestic violence laws in the United States to convey how the contemporary criminal and civil justice systems respond to intimate partner abuse. Part III looks specifically at the criminal justice system and the mandatory arrest and prosecution policies that are currently enforced in most jurisdictions in the United States. This section describes these policies, arguments for and against them, and some of the unintended negative consequences that flow from them. Part IV analyzes the civil justice system, using the recent Supreme Court case *Gonzales v. Castle Rock* as the foundation for the claim that civil protection orders lack efficacy because law enforcement officials do not have a constitutional duty to enforce the orders. This section also details the international reaction to the *Gonzales* decision, specifically the Inter-American Commission on Human Rights (IACHR) findings regarding the refusal of the United States to view domestic violence abuse as a human rights violation. Part V suggests possible changes that could take place at the federal, state, and local levels of the criminal and civil justice systems, which might help alleviate some of the tensions between U.S. and international sentiment and better serve the victims of domestic violence.

## II. HISTORICAL DEVELOPMENT OF DOMESTIC VIOLENCE LAWS IN THE UNITED STATES: FROM DISREGARD TO FULL-SCALE INVOLVEMENT

Until the 1960s, American society viewed domestic violence as a trivial matter that was best kept veiled within the confines of the private home.[10] Anglo-American common law provided the foundation for the view that husbands were the masters of the household and, as such, could subject their wives to corporal

8. *See* Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 159–60 (2003).

9. *See* Franklin, *supra* note 4, at 340–41.

10. *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case But Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 195–96 (2008).

punishment so long as they refrained from inflicting permanent injury.[11] Although the American legal system formally repudiated wife beating in the mid-nineteenth century, it would still be another century before the legal system ceased to implicitly condone domestic violence.[12] As such, the courts echoed public sentiment and routinely treated domestic violence as a "private matter" that was best resolved outside of the legal justice system.[13]

Social activists increased consciousness of the subordination of women in American society in the 1960s.[14] This movement led to the creation of shelters for the victims of domestic violence but did not spur the legal system into action on the civil and criminal fronts.[15] The 1970s saw the development of civil protection orders, changes to custody law stemming from domestic violence provisions, and increased criminal penalties for batterers coinciding with the emergence of mandatory arrest and prosecution policies.[16]

The activists' efforts culminated in robust legal system responses to domestic violence such as the Violence against Women Act (VAWA) in 1994.[17] VAWA—which was specifically enacted to fund enhanced law enforcement, prosecution, and victim services—has further increased the legal response to domestic violence.[18] Moreover, these efforts helped transform public sentiment from that of implied tolerance to express reprobation of domestic violence, such that it is regarded as a proper subject of the criminal justice system rather than a private menace committed with impunity.[19] For example, the Office on Violence Against Women, an agency of the Department of Justice, has awarded over $4 billion in grants and cooperative agreements to implement VAWA and develop resources to assist victims of domestic violence since its inception in 1995.[20] Today, the American civil and criminal justice systems harbor little tolerance for domestic violence.[21] State laws compel law enforcement officers to make arrests, prosecutors are required to charge and pursue criminal cases, and every state offers domestic abuse victims the right to petition for protection orders.[22]

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11. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

12. *See id.* at 2130.

13. Kohn, *supra* note 10, at 196.

14. *Id.*

15. *Id.* at 196–97.

16. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 10 (2004); Kohn, *supra* note 10, at 196–97.

17. Goodmark, *supra* note 16, at 9.

18. *Id.*

19. *See* Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 519 (2010).

20. U.S. Dep't of Justice, Office on Violence Against Women, *About the Office*, http://www.ovw.usdoj.gov/overview.htm (last updated Apr. 2012).

21. Kohn, *supra* note 19, at 519.

22. *Id.*

However, despite these advances in the legal system and public consciousness, domestic violence continues to permeate the United States and worldwide.[23]

This Note first explores the rationale for the mechanisms and policies employed in the civil and criminal spheres of the U.S. legal system to combat domestic violence. It then examines the more stringent norms that are accepted in the international realm. This analysis will hopefully illuminate the continued problem of intimate abuse, underscore its perceived trivialization, and lead to consideration of possible alternative remedies that build off the policies currently in place.

## III. THE CRIMINAL JUSTICE SYSTEM AND DOMESTIC VIOLENCE

The criminalization of domestic violence began in earnest following the social activism movement of the 1960s and 70s, which conveyed the necessity of legal consequences for batterers, and legal recourse for victims.[24] Two central developments that flowed from the criminal justice system's emergent response to domestic violence were mandatory arrest and mandatory prosecution policies.[25] A third policy appeared around the same time that the tougher criminal justice system interventions emerged for domestic violence.[26] This third policy, known as "diversion," suspends criminal prosecution of domestic violence charges.[27] Diversion is somewhat controversial because it may in some cases offer an alternative to the levying of criminal sanctions against batterers.[28]

### A. Mandatory Arrest Policies

After the criminalization of domestic violence, advocates soon discovered that police were reluctant to investigate and, when appropriate, make arrests on domestic violence calls.[29] To ensure that batterers would be held accountable and that police would heed their obligation to protect victims of domestic violence, law enforcement agencies began instituting mandatory arrest policies nearly thirty years ago.[30] Mandatory arrest policies compel law enforcement officers "to arrest a suspect whenever the officer has probable cause

23. *Id.* at 520; *see also* Hasselbacher, *supra* note 2, at 190–93 (discussing the pervasiveness of domestic violence globally).

24. *See* Goodmark, *supra* note 16, at 13–15.

25. *See* Kohn, *supra* note 10, at 212–14, 219–20.

26. JANE M. SADUSKY, PROSECUTION DIVERSION IN DOMESTIC VIOLENCE: ISSUES AND CONTEXT 1–2 (2003), *available at* http://www.bwjp.org/files/bwjp/articles/Prosecution_Diversion_DV_Cases.pdf.

27. *See id.* at 2.

28. *Id.* at 4.

29. Goodmark, *supra* note 16, at 14–15.

30. *See id.* at 15; Kohn, *supra* note 10, at 211–12.

to believe that an assault or battery has taken place, whether the officer has a warrant or has even witnessed any violence."[31] Essentially, this policy removes the reluctant officer's discretion whether to make an arrest when responding to a domestic abuse incident.[32]

Mandatory arrest policies were developed in the aftermath of a seminal 1984 study conducted by the Minneapolis Police Department and the Police Foundation.[33] The study conducted research on three different types of police responses to domestic violence calls—arrest of the suspect, counseling by the officer, and forced segregation between the victim and suspect for an eight-hour period.[34] The results revealed that suspects who were arrested had lower recidivism rates than suspects who received some type of mediation counseling or who were separated from the victim.[35] The influence of this study, along with the work of advocates, was far-reaching.[36] According to the National Institute of Justice, twenty-two states and the District of Columbia currently have mandatory arrest laws for domestic violence.[37] Another six states have preferred arrest provisions, while twenty-two states have discretionary arrest provisions.[38] Since the implementation of mandatory arrest policies, researchers have generally found an increase in domestic violence arrests.[39] However, whether mandatory arrest policies led to a decrease in recidivism rates among batterers is unclear.[40]

Several replication studies followed in the wake of the Minnesota study, and researchers found mixed results.[41] Specifically, these studies concluded that (1) the deterrent effect of arrests differed among races; (2) arrest reduced domestic

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31. Han, *supra* note 8, at 174.

32. *Id.*

33. Kohn, *supra* note 10, at 213; LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1 (1984), *available at* http://www.policefoundation.org/pdf/minneapolisdve.pdf.

34. SHERMAN & BERK, *supra* note 33, at 2.

35. *Id.* at 1.

36. *See* Kohn, *supra* note 10, at 214–15.

37. DAVID HIRSCHEL, NAT'L INST. OF JUSTICE, DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES tbl. 1 (2008), *available at* http://www.nij.gov/nij/publications/dv-dual-arrest-222679/dv-dual-arrest.pdf.

38. *Id.* tbl. 2, tbl. 3.

39. Kohn, *supra* note 10, at 217.

40. *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 280–81 (2005). "Police arrest avoidance was the rule rather than exception." *Id.* at 274. As a result, battered women were not receiving protection from the law enforcement community and mandatory arrest policies seemed to be the only viable option for protection. *Id.* at 279. However, the results of the Minnesota study could rarely be replicated, meaning the generalized conclusion that arrest decreases domestic violence could not be supported. *See id.* at 280.

41. *See* Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence? in* DO ARRESTS AND RESTRAINING ORDERS WORK 43, 46–49 (E.S. Buzawa & C.G. Buzawa, eds., 1996).

violence in some cities but increased it in others; (3) the recidivism rate for unemployed suspects increased following arrest in some studies; and (4) arrest potentially correlated with a greater number of re-offenders over a longer period.[42] Consequently, some critics of mandatory arrest policies have concluded that the Minnesota experiment produced merely localized results and these policies should be repealed while more research is conducted on the subject.[43] Other critics have targeted the potential detrimental effects of mandatory arrest policies on the victim.[44] These critics point to other studies that indicate mandatory arrest policies lead to "dual arrests"—that is, arrests of both the victim and abuser at the scene of the incident—victim reluctance to call the police following a domestic violence episode, and loss of victim input about to handle the situation.[45]

According to one author, reasons to honor victim input include the victim's genuine reluctance to have the abusive partner arrested by the time the police arrive, the victim's concerns over child care and finances without the support of the abusive partner, and the victim's desire to have the abusive partner removed from the home for an evening to calm down rather than be arrested.[46] Because mandatory arrest policies essentially eliminate the victim's choice and control when deciding whether to have the abusive partner arrested, it has been argued that these policies disempower victims.[47] This disempowerment mainly stems from certain unintended consequences of dual arrests, such as the victim's exposure to the criminal and civil legal systems, and the negative effects of the victim's arrest on her efforts to retain custody of her children.[48] Moreover, as the Pima County Attorney's Office Domestic Violence Unit Supervisor stated at a public lecture, victims frequently feel compelled to remain in an abusive relationship because of their concerns over custody, pressure from friends and

42. *Id.* at 597; *but see* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 984–85 (1994) (concluding that opposition to mandatory arrest policies should not be based on the replication experiments because although these studies lacked analysis on coordinated responses to domestic violence and input from battered women's movement personnel, they still demonstrated clear deterrent effects on certain abusers).

43. Schmidt & Sherman, *supra* note 41, at 51 (finding the lack of desirability of mandatory arrest policies was mostly due to their relatively short-term deterrent effect for only specific groups in several study cities).

44. *See* Kohn, *supra* note 10, at 216–18; Han, *supra* note 8, at 175–77.

45. *See* Kohn, *supra* note 10, at 216–18.

46. *Id.* at 216.

47. *See* Han, *supra* note 8, at 175–77.

48. *Id.* at 176. In some states a victim's arrest record may prevent her from gaining presumptive custody of her children, should she later seek to leave the abusive relationship. *Id.* Even if the victim is never charged, a social services agency may intervene, forcing the victim to choose between staying with the abusive partner and maintaining custody of the children. *Id.* This in turn ignores the fact that both the victim and the children may be placed in greater danger by leaving the abusive situation than by temporarily staying. *Id.* at 176–77.

family, financial worry, and the threat of future violent retaliation from the abusive partner.[49]

Because these policies produce mixed results in terms of victim safety and suspect recidivism, it is not surprising to find mixed reviews of mandatory arrests.[50] Studies on these types of domestic violence interventions reveal there is significant room for improvement before these policies can fully effectuate their stated purpose, to protect victims of domestic violence.[51] Now that domestic violence falls within the accepted categories of criminal conduct, the criminal justice system is obligated not only to hold the guilty accountable but to protect the victims. Police officers are on the front lines of this process. If they do respond to a call, and appear at the scene of a domestic violence incident, their behavior will significantly affect the ultimate outcome.[52] Their decisions concerning how to report the incident, whether an arrest is necessary, who to arrest, and the level of immediate support to provide to the victim can dramatically alter the batterer's recidivism rate, the efficacy of prosecution, and the victim's ability and willingness to hold the batterer accountable.[53] Police intervention is crucial, which underscores the need for officers to take seriously criminal violations by intimate partners.[54]

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49. Nicol R. Green, Supervisor, Domestic Violence Unit, Pima County Attorney's Office, James E. Rogers College of Law, Criminal Law and Policy Speaker, Prosecuting Domestic Violence Cases (Sept. 14, 2011).

50. *See* Kohn, *supra* note 10, at 235–37. The success of mandatory arrest interventions is unclear since at best the effect on victim safety is insignificant. *Id.* at 235. *See also* Schmidt & Sherman, *supra* note 41, at 49–53. *But see* ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 11 (2009) *available at* https://www.ncjrs.gov/pdffiles1/nij/225722.pdf (concluding that a series of studies conducted in several jurisdictions reveals that arrests do serve as a deterrent to abusers and that arrests in spite of the victim's wishes does not reduce the likelihood of victims reporting new abuse to police).

51. *See* Kohn, *supra* note 10, at 235–37. These studies include research compiled from large urban areas in Wisconsin, Nebraska, Colorado, Charlotte, and New York. In Milwaukee, a study found "no long-term reductions in prevalence of same-victim violence or any-victim violence in the group of perpetrators arrested versus those to whom only a warning was given." *Id.* at 235. In Omaha, researchers concluded that arrest by itself was not any more effective as a deterrent than other police responses after six months. *Id.* at 236. A Colorado study found that arrest deterred only employed batterers due to potential career risks and that arrest could exacerbate violence for unemployed batterers. *Id.* Research in Charlotte, North Carolina, revealed that arrest of misdemeanor abusers was not more effective as a deterrent to repeat abuse than citations or mediation and separation. *Id.*

52. CLAIRE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 573–74 (2001).

53. *See id*.

54. *Id.* at 573.

**B. Mandatory Prosecution Policies**

Mandatory prosecution policies, sometimes referred to as "no-drop" policies,[55] encourage prosecutors to pursue charges against domestic violence perpetrators regardless of the victim's wishes.[56] The goals of mandatory prosecution "are to protect victims from future violence by ensuring action from the state and to change the behavior of abusers by holding them accountable for their actions."[57] These policies were created as a mechanism to relieve victims, who are in many instances ambivalent about pursuing criminal sanctions against the abuser, of the burden of motivating the prosecution.[58] This rationale for the policies means that the availability of prosecutorial discretion often disappears after the initiation of a domestic violence prosecution.[59]

Prosecutors' offices can employ either "hard" or "soft" mandatory prosecution policies.[60] "Hard no-drop jurisdictions" implement strict policies that mandate the case go forward irrespective of the victim's desires and may even result in the arrest and imprisonment of victims who refuse to appear and testify at trial pursuant to a subpoena.[61] "Soft no-drop jurisdictions" are more deferential to victims in that they do not force victims to testify at the criminal proceedings.[62] Instead, victims are encouraged to cooperate and are provided with services to increase their comfort with the criminal justice system.[63] Moreover, if the victim refuses to testify, the prosecutor will likely drop the charges rather than subject the victim to arrest and possible imprisonment for refusing to testify.[64]

Mandatory prosecution policies emerged as another tool that the criminal justice system could wield to portray the increasing societal intolerance for domestic violence.[65] While different legal scholars and victims' advocates have articulated myriad justifications for mandatory prosecutions over the years, one essential argument that resurfaces often is that domestic violence cases contain unique challenges that frequently hinder successful prosecutions.[66] These

55. Throughout this section, the terms "mandatory prosecution" and "no-drop prosecution" will be used interchangeably as they are two different names for the same policies.

56. Han, *supra* note 8, at 181.

57. Keith Guzik, *The Forces of Conviction: The Power and Practice of Mandatory Prosecution Upon Misdemeanor Domestic Battery Suspects*, 32 LAW & SOC. INQUIRY 41, 42 (2007) (citations omitted).

58. Kohn, *supra* note 10, at 220.

59. *Id.*

60. Goodmark, *supra* note 16, at 17.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* Kohn, *supra* note 10, at 223.

66. *See, e.g.*, Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1126 (2003).

unique challenges stem from the victim's reluctance to testify.[67] The victim may recant previous statements to the police officers or simply refuse to testify for a number of reasons including intimidation and coercion by the abusive partner, susceptibility to the abusive partner's promises to cease abuse, familial and community pressure, or uncertainty whether the victim will be believed or the abusive partner will be held accountable.[68] With these issues in mind, advocates lobbied for mandatory prosecutions as a way to circumvent victim non-cooperation, uphold society's interest of ending domestic violence, and better serve the safety needs of victims.[69]

Like mandatory arrest, no-drop prosecution policies have generated debate and some criticism.[70] Much of the criticism centers on whether these policies make victims safer.[71] Several studies of mandatory prosecutions produced either ambiguous results or results contrary to their stated purpose of enhanced safety; specifically, two studies suggested that no-drop policies could actually increase the risk of re-abuse.[72] With hard no-drop policies, critics argue that victims end up being coerced by the government in much the same way as by the abusive partner, and such coercion, harmful in itself, may actually drive a victim back to her abuser.[73] Moreover, the contention that mandatory prosecution policies are justified because prosecution is the "best" or safest solution for the victim is overly optimistic.[74] The realities of the criminal justice system are such that domestic violence suspects will most likely receive only mild punishment, if any, and victims are rightfully hesitant to align themselves with the prosecutors over their abusers for safety reasons.[75]

Through extensive fieldwork in the court system in one Midwestern county, one researcher discovered another potential flaw with mandatory prosecution policies—these aggressive procedures may hinder batterers from

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67. Green, *supra* note 49; *see also* Kovach, *supra* note 66, at 1126.

68. Kovach, *supra* note 66, at 1126; *see also* Kohn, *supra* note 10, at 223 (explaining how mandatory prosecutions rectify what advocates and prosecutors observed as an obstacle to obtaining victim participation in the criminal proceedings against the abuser—the coercive control the abuser can exert over the victim when the decision whether to pursue charges is left in her hands).

69. *See* Han, *supra* note 8, at 182–84; Kohn, *supra* note 10, at 222–24.

70. Goodmark, *supra* note 16, at 18–19 (acknowledging that while legal mechanisms such as mandatory prosecutions have produced many desirable results since their implementation, for some battered women the legal system can create more problems than solutions due to many unintended consequences).

71. *See* Kohn, *supra* note 10, at 237–38.

72. *Id.*

73. *See* Han, *supra* note 8, at 182; Kohn, *supra* note 10, at 238. On the flip side, research has also shown that the more influence victims have in deciding to pursue charges against their abusive partner coinciding with greater prosecutorial discretion (i.e. soft no-drop policies), leads to improved victim safety and security. *Id.*

74. Han, *supra* note 8, at 183.

75. *Id.*

internalizing blame and taking responsibility for their violent behavior.[76] In efforts to achieve client control in these cases, defense attorneys may speak negatively about prosecutors' offices or the policies themselves.[77] Such statements can reinforce batterers' perceptions that they are being unjustly punished by the state.[78] In sum, mandatory prosecution policies can serve to relieve batterers of taking responsibility for their egregious acts because they never have to internalize blame for those acts: "[a]s the domestic battery suspect passes through the system, his violence is displaced to the state, which lays claim to it and repeatedly brings it to the courtroom as an accusation, carrying consequences, intended to increase the batterer's propensity to plea."[79] In the end, the state rather than the batterer claims accountability for the violence.[80]

However, proponents and many opponents of mandatory prosecution policies recognize that not all no-drop policies are created equal. Some jurisdictions adopt coercive, hard no-drop policies, while others pursue more discretionary, soft no-drop policies.[81] In this regard, the argument is not as simple as whether to adopt, or advocate for, a mandatory prosecution policy.[82]

> No-drop policies are in reality an amalgam of policies and practices which together dictate how prosecutors will pursue domestic violence cases. Within the mix there is plenty of room to maneuver in an attempt to reap the advantages of the no-drop strategy, without putting victims of domestic violence in greater danger of private abuse, or making them newly vulnerable to abuse at the hands of the state.[83]

Further, research suggests that these policies help reduce domestic violence rates and that prosecution and conviction leads to victim satisfaction with the criminal justice system.[84] The more time prosecutors and judges invest in victims by allowing them to voice their needs and concerns, the more cooperative

76. Guzik, *supra* note 57, at 70.
77. *Id.* at 59–60, 70.
78. *Id.* at 70.
79. *Id.*
80. Guzik, *supra* note 57, at 70.
81. *See* Goodmark, *supra* note 16, at 17; Han, *supra* note 8, at 187–89.
82. DALTON & SCHNEIDER, *supra* note 52, at 622.
83. *Id.*
84. *See* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor*, 20 W. ST. U. L. REV. 297, 304 (1993) (noting the San Diego City Attorney's Domestic Violence unit's growth and coordinated aggressive approach to domestic violence from 1986 to 1993 resulted in "major reductions" in domestic violence homicide rates and in re-arrest and re-prosecution rates for those abusers held accountable in their batterers' programs); KLEIN, *supra* note 50, at 38–39 (noting that a majority of victims in interviews with researchers in various locales supported domestic violence prosecutions and sentences and replied they were satisfied with the outcome and judge once the case was prosecuted).

the victim will be with the prosecution of her abusive partner.[85] Essentially, removing some of the prosecution-related burdens on victims that are identified with hard no-drop policies and establishing channels of communication helps to alleviate some of the victims' fears and better serve their interests.[86] In short, mandatory prosecutions are not strictly successes or failures but rather vary according to the ways in which prosecution offices implement these policies.[87]

One thing seems to be certain: action taken by criminal justice agencies is effective in preventing domestic violence if it is coordinated, responsive to the victims' interests, and unwavering in its goal of securing protection for victims.[88] Thus, "it is incumbent on the police, prosecutor, and courts to take such incidents seriously" to stem the tide of domestic violence.[89] Of course, aggressive tactics such as mandatory prosecutions seem, at least facially, to treat domestic violence incidents seriously. Indeed, hard no-drop policies build the seriousness of the offense into the policy itself, which serves as the state's justification for seizing control of the process in lieu of victim preference.[90] But does the public perceive prosecutorial offices to be taking domestic violence seriously and, more importantly, do the victims?

## C. Diversion

The growth in pretrial diversion programs coincided with increased pressure to push forward mandatory arrest programs in the 1980s.[91] One rationale behind diversion programs is to diminish victim reluctance to "seek the aid of the court" because of fears of incarceration and loss of economic support.[92] Diversion in the context of domestic violence cases can encompass a multitude of formal and informal arrangements.[93] These arrangements can range from strict sanctions and involuntary treatment to lenient court-ordered directives or complete suspension of court proceedings based on the batterer's promise to attend anger

85. Han, *supra* note 8, at 189.

86. *See* KLEIN, *supra* note 50, at 40–41.

87. *See* DALTON & SCHNEIDER, *supra* note 52, at 622.

88. *See* David A. Ford & Mary Jean Regoli, *The Preventative Impacts of Policies for Prosecuting Wife Batterers, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 181, 204-05 (E.S. Buzawa & C.G. Buzawa eds., 1992); *see also* Kohn, *supra* note 10, at 244–45 (stating that victim participation is crucial for an effective justice system response to domestic violence).

89. Ford & Regoli, *supra* note 88, at 204.

90. *See* DALTON & SCHNEIDER, *supra* note 52, at 621 (describing how the abuser "should know that he has committed a crime against the state, rather than 'merely' violated his partner, that the state insists his wrong be addressed, and that he lacks the power to avoid criminal sanctions by bullying his partner into dropping charges").

91. Sadusky, *supra* note 26, at 3.

92. *Id.* at 1.

93. *Id.* at 2.

management treatment.[94] The common element among all diversion programs is that they offer an alternative to criminal convictions for those batterers who are deemed first-time offenders.[95]

There are arguments for and against diversion as a suitable response to domestic violence.[96] Typical arguments for diversion focus on the supposed benefits to both the batterers and their victims.[97] Because batterers are forced to accept responsibility for their actions in many of these programs, they are less inclined to redirect blame on victims and the state.[98] Moreover, because many batterers return to relationships with victims, "sentencing options that involve ongoing monitoring of the [batterer] and seek to alter the [batterer]'s propensity for violence against the victim could be more likely to prevent recidivism than a typical misdemeanor assault sentence."[99] Domestic violence cases can be difficult to prove beyond a reasonable doubt, which may make diversion programs an attractive systematic alternative to trial.[100] In particular, diversion programs can enhance cooperation from victims who might otherwise be reluctant or refuse to testify.[101] While all victims want the violence to stop, many victims do not want their batterers incarcerated or stigmatized by criminal convictions due to "loyalty, guilt, financial dependence, love, or some combination [of these]."[102] In these cases, state supervision and counseling mandated by diversion programs presents the possibility of domestic violence cessation without a formal conviction.[103]

Although diversion programs are a common prosecutorial and judicial response to domestic violence offenders, many battered women's advocates are opposed to diversion.[104] The issues that arise from blanket support for diversion often noted by victim advocates include relaxed batterer accountability, problematic arrests and poor case screening, and decreased safety and protection

94. *Id.*

95. *Id.*

96. *Compare* Alafair S. Burke, *When Family Matters*, 119 YALE L.J. 1210, 1228 (2010) ("[M]eaningful diversion programs are arguably more effective than the pro forma convictions, fines, and brief periods of incarceration that are typical in misdemeanor [domestic] assault cases") *and* Rekha Mirchandani, *Beyond Therapy: Problem-solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853, 873–874 (2008) (proposing that diversion programs used in specific domestic violence courts are better suited to address the underlying issues associated with domestic violence on an individual and societal level, and lead to batterers' taking responsibility for the criminality of their behavior), *with* Sadusky, *supra* note 26, at 9 (contending that the coercive, control-driven dynamics of battering require limitations on the use of diversion programs especially in programs that do not emphasize batterer accountability or have lax case screening).

97. *See* Mirchandani, *supra* note 96, at 873–74; Burke, *supra* note 96, at 1227–29.

98. *See* Mirchandani, *supra* note 96, at 881–82.

99. Burke, *supra* note 96, at 1228.

100. *Id.* at 1229.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See* Sadusky, *supra* note 26, at 3.

for victims.[105] The heart of diversion critique is the issue of offender accountability.[106] Diversion is "often an informal and haphazard process, with no criteria or guidelines for eligibility, no admission of guilt, and little supervision or oversight by the court, prosecutor, probation, or other entity."[107] If the jurisdiction offers diversion as an alternative to formal trial, its use will normally result in no criminal record for the offender.[108] The prosecutor may, however, demand as a condition of diversion that the offender plea to a lesser offense and receive a sentence that is suspended as long as the offender remains in compliance with the terms of the diversion agreement.[109] Critics view this as simplifying "the task of holding the defendant accountable for any violation of his agreement."[110]

However, even policies created as hardline stances against domestic violence, such as mandatory arrest policies, sometimes create problems for domestic violence victims when they are used in jurisdictions that have diversion programs.[111] Because mandatory arrest policies have led to a proliferation of domestic violence arrests nationwide, an increasing number of these cases are dumped into diversion programs.[112] According to one author writing for the Battered Women's Justice Project:

> Arrests are problematic when disconnected from the context of the violence. Carrying on loud arguments, pounding the table, making occasional public insults, threatening to leave and take the children, or having extramarital affairs do not in themselves constitute domestic violence . . . . Domestic violence involves the use of intimidation, coercion, threats, and physical force. Loud arguments and pounding the table often lead to arrest, however, particularly under a mandatory arrest or "zero tolerance" response. Disorderly conduct has become a catch-all charge for such behavior and dual arrests a common response. The effect is not to necessarily intervene early in battering behavior, which may be the intent, but to trivialize battering by undermining its complexity and seriousness. The existence of a diversion program can make it more likely that arrest practices go unexamined.[113]

The fear is that prosecutors and courts faced with a high number of domestic violence related cases may apply a standard that fails to screen between cases that

105. *See id.* at 5–9.
106. *Id.* at 5.
107. *Id.* (citations omitted).
108. *See* DALTON & SCHNEIDER, *supra* note 52, at 575.
109. *Id.*; *see also* Sadusky, *supra* note 26, at 2.
110. DALTON & SCHNEIDER, *supra* note 52, at 575.
111. *See* Sadusky, *supra* note 26, at 6–7.
112. *See id.* at 6.
113. *Id.* (citations omitted) (internal quotation marks omitted).

are isolated, first-time incidents from those that have escalated to longstanding coercion, threats, or violence.[114] As a result, critics warn that all of these cases may be channeled into diversion programs where the truly serious domestic violence cases become "invisible."[115]

Diversion programs can also diminish the safety of domestic violence victims.[116] In many instances, offenders are not supervised properly, which increases the victims' vulnerability.[117] Similarly, "[w]here offenders are not required to plead guilty in order to participate in the diversion program, they can easily deny accountability for their conduct and further minimize coercive and violent behavior."[118] Thus, it is paradoxical that many victims favor diversion programs as the appropriate criminal justice system response to their cases.[119] Critics maintain, however, that despite some victims' approval of diversion as an alternative to incarceration, these programs should not automatically be viewed as a "solution" to deal with uncooperative victims.[120] Frustrated prosecutors dealing with uncooperative victims may find it easier to lump all offenders together in the same type of diversion program without taking into account the offenders' potential threat to the victims and whether the diversion will increase the victims' safety.[121] While the counseling involved in diversion programs can produce positive change in the behavior of some offenders, there is simply no guarantee.[122] According to some opponents of diversion programs, for those offenders who completely fail to follow through with the diversionary process, the unfortunate truth is that their cases are rarely prosecuted.[123] Diversion programs, like some of the unintended consequences witnessed with mandatory arrest and prosecution policies, can trivialize domestic violence and hinder the safety of the victims.

## D. Perceived Resistance to Taking Domestic Violence Seriously

A poor understanding of the dynamics of domestic violence has led to many of the unintended consequences resulting from mandatory arrest, mandatory prosecution, and diversion programs.[124] As one author put it, "context is

114. *Id.* at 7.
115. Sadusky, *supra* note 26, at 7.
116. *See id.*
117. *Id.*
118. *Id.*
119. *See* Burke, *supra* note 96, at 1228–29; *see also* Sadusky, *supra* note 26, at 7.
120. *See* Sadusky, *supra* note 26, at 7.
121. *See id.* at 7–8.
122. *See id.* at 7.
123. *See* Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 172 (E.S. Buzawa & C.G. Buzawa, eds., 1992).
124. *See* Sadusky, *supra* note 26, at 9.

everything."[125] This requires officers, prosecutors, and the courts to consider each case of domestic violence on its own terms, keeping in mind the elements of domestic violence—control, coercion, intimidation, and violence.[126] The best system response to domestic violence in one incident may not necessarily be the best response in another incident.[127] For example, an isolated incident of domestic violence that involved only shouting may be appropriately dealt with through diversionary tactics.[128] However, a longstanding pattern of domestic violence that includes repeated shouting or physical abuse should probably result in more stringent repercussions for the batterer, such as conviction and incarceration.[129]

The goal of the criminal justice system when dealing with domestic violence should be to deliver the most appropriate response available that not only ensures present and future safety for victims, but also demands batterer accountability, and seeks victim cooperation.[130] When officers, prosecutors, and the courts fail to use their time and resources to best aid domestic violence victims and hold batterers accountable, they risk trivializing the abuse. The inherent danger is that over time officers and prosecutors will send the message to their respective communities that domestic violence is not that serious.

In Fall 2011, domestic violence laws and the Topeka, Kansas community made headlines.[131] In October 2011, the Topeka, Kansas City Council voted to decriminalize domestic violence.[132] Before that, the county attorney, Chad Taylor, decided to stop prosecuting misdemeanor domestic violence claims.[133] Mr. Taylor argues that the County Commission dramatically cut his budget thus "forcing" him to do so.[134] Without county prosecutions of misdemeanor domestic violence complaints, the city would have to step up and pursue these cases.[135] The City Council slammed the door shut on this proposition because that would mean the city would have paid an additional $1 million to prosecute these cases, and the city had already completed its budget for the year.[136] The difficult question arose whether to revise the budget to accommodate these additional prosecutions or repeal the local law that makes domestic violence a crime.[137] In choosing the

125. LORETTA FREDERICK, EFFECTIVE INTERVENTIONS IN DOMESTIC VIOLENCE CASES: CONTEXT IS EVERYTHING (2001), *available at* http://www.bwjp.org/files/bwjp/articles/Effective_Interventions_Context_is_Everything.pdf.

126. *See* Sadusky, *supra* note 26, at 9.

127. *See id.* at 9–10.

128. *See id.*

129. *See* Sadusky, *supra* note 26, at 9–10.

130. *See* Kohn, *supra* 10, at 235–37; *see also* Han, *supra* note 8, at 189.

131. *See* A.G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES, Oct. 12, 2011, at A11.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Sulzberger, *supra* note 131.

137. *See id.*

latter, the City Council elected to wage a dangerous game of chicken, which raised concern that a lack of charges for those arrested for misdemeanor domestic violence could lead to increased violence and send a message of tolerance for domestic violence.[138]

While prosecution policies for domestic violence, especially mandatory policies, have been at the center of a robust debate concerning their effectiveness at preventing batterer abuse and recidivism, it is generally accepted that legal intervention can be valuable.[139] Specifically, there is research that demonstrates domestic violence prosecutions help to reduce domestic violence rates and that prosecution and conviction leads to victim satisfaction with the criminal justice system.[140] Gwinn and O'Dell report that the San Diego City Attorney's Domestic Violence Unit's coordinated aggressive approach to domestic violence from 1986 to 1993 resulted in "major reductions" in domestic violence homicide rates and in re-arrest and re-prosecution rates for those abusers held legally accountable.[141] Similarly, Klein found that a majority of victims in various locales supported domestic violence prosecutions and sentences and replied they were satisfied with the outcome once the case was prosecuted.[142] Thus, "it is incumbent on the police, prosecutor, and courts to take such incidents seriously."[143]

Decriminalizing misdemeanor domestic violence, as the Topeka City Council did, in order to avoid having to prosecute these cases, means not taking such incidents seriously.[144] Refusing to prosecute these crimes, as Mr. Taylor decided to do, because of budget constraints, is an inappropriate response to these incidents.[145] Will other district attorney offices decide to stop prosecuting crimes of domestic violence in efforts to balance their budgets? Time will tell. Even more uncertain is whether these actions will lead to extremely dangerous collateral consequences for the victims of domestic violence in Topeka.[146] As of October 11, 2011, at least eighteen suspected batterers have been released in Topeka without being charged, because no agency is willing to prosecute their cases.[147] What message does this send to these suspects? What incentive do they and other perpetrators have to curb these appalling acts of violence when they know they will face no repercussions?

When political leaders play budget politics with domestic violence prosecution they play games with public safety.[148] Victims and batterers will take heed and realize how *unserious* domestic violence is. It is understandable that

138. *See id.*
139. *See* Ford & Regoli, *supra* 88, at 204.
140. *See* Gwinn & O'Dell, *supra* note 84, at 304, 311; KLEIN, *supra* note 50, at 38–39.
141. Gwinn & O'Dell, *supra* note 84, at 304.
142. KLEIN, *supra* note 50, at 38–39.
143. Ford & Regoli, *supra* note 88, at 204.
144. *See* Sulzberger, *supra* note 131.
145. *See id.*
146. *See id.*
147. *Id.*
148. *See* Sulzberger, *supra* note 131.

reduced budgets call for less spending, but surely there is a better way to cut spending than the ill-conceived approaches of the Topeka City Council and District Attorney Taylor.[149] Simply put, depressed economic times do not excuse criminal behavior. One can hope rationality will prevail and those charged with the vital task of seeking justice, with or without an expansive budget, will again take this responsibility seriously. If not, neither will the batterers; domestic violence victims will be forced to suffer the consequences without hope of recourse. Only this time, victims will not only suffer at the hands of their abusers, they will also fall prey to the failings of the criminal justice system.

## IV. THE CIVIL JUSTICE SYSTEM AND DOMESTIC VIOLENCE

On June 22, 1999, Simon Gonzales, the husband of Jessica Lenahan (formerly Jessica Gonzales), abducted their three daughters from the girls' front yard in Castle Rock, Colorado.[150] After approximately ten hours and nine desperate pleas from Lenahan to the Castle Rock Police Department (CRPD), Gonzales arrived armed at the police station with his three children inside his truck.[151] After initiating a shootout with several police officers, Gonzales was shot and killed in the station parking lot.[152] It was later discovered that the children were dead inside the truck riddled with bullet holes that could have come from Gonzales, the police during the shootout, or both.[153] As the story of this tragedy unfolded, it was discovered that Gonzales had a history of abusive and erratic behavior, and that by 1999 he was increasingly threatening toward his family.[154] Lenahan had obtained two domestic violence restraining orders against Gonzales in May and June 1999.[155] The June order allowed Gonzales visitation with the children on alternate weekends and for one dinner a week.[156] The night Gonzales abducted his three daughters was not a visitation night.[157]

It is easy to be outraged by this tragedy. It is more difficult to comprehend the actions (or non-actions) taken by the police officers that fateful night. Equally disturbing was the U.S. Supreme Court decision that followed in the aftermath. That decision, *Castle Rock v. Gonzales*, rejected Lenahan's

149. *See id.*

150. Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 23 (2008).

151. *Id.* at 23–24.

152. *Id.* at 24.

153. *Id.* at 24–25 (observing that the Colorado authorities' investigation and report "summarily concluded, without supporting evidence, that the children had been murdered by their father with a gun he had purchased earlier that evening").

154. *Id.* at 22.

155. Bettinger-López, *supra* note 150, at 22.

156. *Id.* at 22–23.

157. *See id.* at 23.

argument that the police officers had a duty to protect against private violence.[158] Despite having a restraining order against her husband that included mandatory-sounding language about police duties to enforce it, the Court held that Lenahan failed to state a procedural due process claim under 42 U.S.C. § 1983; specifically, police retain discretion in carrying out such enforcement duties and any duty that was owed was owed to the public, and not just Lenahan.[159]

The *Gonzales* case is important for two reasons. First, it illustrates some problems in the civil justice system relating to domestic violence. These problems are potentially borne daily by people like Jessica Lenahan—problems associated with ineffective protection orders, inadequate police tactics, and the absence of officer reprimand when police fail to enforce protection orders. While not every case is as severe as Lenahan's, the circumstances of this incident represent the cumulative failings of the civil justice system's response to domestic violence.[160]

Second, this case has international implications. Lenahan did not stop at the U.S. Supreme Court. With the help of counsel, she petitioned the IACHR to review her case.[161] Lenahan sought redress for her personal tragedy by framing her case as a human rights violation, in hopes of spurring important legislative and policy reforms in the United States.[162] Relentless in her pursuit of justice, Lenahan received the answer to her petition on July 21, 2011.[163] Using the American Declaration of the Rights and Duties of Man as the benchmark, the IACHR held that Lenahan's human rights had indeed been violated because nations have a duty to protect women from private violence—the exact opposite to conclusion reached by the Supreme Court.[164] Although IACHR recommendations

158. Mark S. Kende, *Reviving Pragmatism in Constitutional Law: U.S. Opportunities and South African Examples*, 36 OHIO N.U. L. REV. 679, 688 (2010); *see* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 757 (2005) (finding that the "central state-law question is whether Colorado law gave respondent a right to police enforcement of the restraining order").

159. *See Gonzales*, 545 U.S. at 760, 765; Kende, *supra* note 158, at 689.

160. The grim circumstances surrounding the recent murder/suicide of Josh Powell and his two young sons in Washington illustrates this point. After his wife mysteriously disappeared in Utah in 2009 during a camping trip, Powell gained custody of his children only to lose it two years later. Matt Flegenheimer & Isolde Raftery, *Man Whose Wife Disappeared Dies with Sons in Explosion*, N.Y. TIMES, Feb. 6, 2012, at A13. Angered, Powell purposefully blew up his house during a visitation with his children. *See id.*; Sheena McFarland, *Over the Years, Powell's Behavior Increasingly Worried His In-Laws*, THENEWSTRIBUNE.COM, http://www.thenewstribune.com/2012/02/07/v-lite/2016841/over-the-years-powells-behavior.html (last visited Jan. 2, 2013). Powell was erratic, antisocial, controlling, and abusive to his wife. *See* McFarland. During the runup to his wife's disappearance, it became clear to Powell that she was going to leave him due to his abuse and constant threats. *See id*.

161. Bettinger-López, *supra* note 150, at 32, 34.

162. *Id.* at 34.

163. Gonzales v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

164. *Id.* para. 162; see also Bettinger-López, *supra* note 150, at 44.

are not binding on the United States, they can be internationally influential and serve as a direct challenge to the treatment of domestic violence in contemporary Supreme Court jurisprudence and police department protocol.[165]

Delving into the issues presented in the *Gonzales* case is necessary for any meaningful discussion of the civil justice system response to domestic violence. Specifically, critical analysis of civil protection orders, including their intended purpose and real-world effectiveness, can illustrate their fundamental shortcomings. Moreover, as the *Gonzales* case demonstrates, the nature of constitutional law and federalism in the United States' legal system can produce an inherent conflict between U.S. and international sentiment, immunize state actors from civil liability, and serve as an impediment to the formulation of better domestic violence laws in the United States.

## A. Civil Protection Orders

Civil protection orders are the primary form of protection for domestic violence victims.[166] In theory, civil protection orders "work to provide immediate relief to victims by enjoining batterers from further violence."[167] Those seeking civil protection orders often have to go through a two-step process in front of a judge in a civil proceeding.[168] First, the victim files an ex parte application for a temporary restraining order detailing the nature of abuse, and so long as "good cause" is shown, the presiding judge will issue the order.[169] In the second step, the victim can obtain a permanent restraining order after a hearing where both the victim and offender have an opportunity to testify.[170] During this hearing the victim must prove acts of abuse by the defendant.[171]

While civil protection orders do offer some advantages to domestic violence victims,[172] many have criticized them for failing to adequately deter batterer recidivism.[173] Further, interventions such as civil protection orders are only useful if the police departments charged with enforcing domestic violence prohibitions do so and hold batterers accountable.[174] Sadly, researchers have documented the deleterious effects of police nonintervention in the domestic violence realm.[175] One needs only to review the facts of the *Gonzales* case to witness the tragic results of law enforcement inaction.

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165. *See* Franklin, *supra* note 4, at 344.
166. Ko, *supra* note 5, at 362.
167. *Id.* at 363.
168. *Id.* at 365.
169. *Id.*
170. *Id.*
171. Ko, *supra* note 5, at 366.
172. *See id.* at 367–68.
173. *Id.* at 363.
174. *See* Franklin, *supra* note 4, at 341.
175. *See id.* at 342–60.

The seemingly simple act of going to the courthouse to file for a civil protection order can be fraught with peril for victims.[176] As one law professor noted, "[a]s batterers become more savvy about the legal system, the race to the courthouse to file for a civil protection order has become more common. Even when the victim does file first, [the victim's] abuser can answer with a petition of his own."[177] In these instances, the batterer merely files the same petition the victim filed but with one important difference—the allegations of abuse are reversed with the batterer claiming to be the victim.[178] The act of seeking legal assistance with a civil protection order also forces confrontation between the batterer and victim. Another harsh possibility that can result from a victim's choice to obtain a civil protection order concerns battered mothers. In some instances, the presiding judge may report the case to child protective services, which can result in a loss of custody of their children.[179] These women "are viewed as mothers who have failed their children by being abused and are suffering the consequences."[180] Thus, turning to the legal system for assistance is often an extremely difficult decision for domestic violence victims.[181]

Victims who seek legal intervention and obtain a civil protection order may not fare much better than if they decided to avoid help altogether. Two primary issues are often cited: (1) the few studies conducted to determine the efficacy of civil protection orders are inconclusive as to their deterrent effect;[182] and (2) protection orders are *always* ineffective when police do not enforce them.[183] While the question of civil protection order efficacy requires further research, the glaring problem facing many victims is the indisputable fact that police officers have the choice to disregard protection orders at the expense of victims' safety.[184]

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176. Goodmark, *supra* note 16, at 24–25.

177. *Id.* at 24.

178. *Id.* To compound matters for victims, courts sometimes struggle to make credibility determinations where there is little or no physical or other evidence. If the court sides with the batterer's version of events, the victim is then at risk of facing criminal charges should the victim violate the order. *Id.*

179. *Id.* at 27–28.

180. Goodmark, *supra* note 16, at 27.

181. *See id* at 27–28.

182. *See* DALTON & SCHNEIDER, *supra* note 52, at 499; *see also* Ko, *supra* note 5, at 372–76. Ko offers an in-depth look into several studies performed to test whether civil protection orders prevent abuser recidivism. She concludes that while victims often reveal satisfactory viewpoints on protection orders, the objective empirical studies are less conclusive on the actual effectiveness of protection orders. *Id.* at 389.

183. *See* Franklin, *supra* note 4, at 342–45 (discussing the police officers' decision to not enforce the civil protection order in the *Gonzales* case); *see also* Ko, *supra* note 5, at 379–81.

184. *See* Kende, *supra* note 158, at 689 (reviewing the Supreme Court's holding in the *Gonzales* case).

The civil protection process in the United States does not operate without enforcement. Law enforcers give civil protection orders teeth. As two commentators posited:

> Enforcement is the Achilles' heel of the civil protection process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested. For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported.[185]

In Jessica Lenahan's case, police officers simply failed to act despite the fact that her order of protection specifically mandated police enforcement in bold language on the back of the order.[186] The text on the back of the order under the heading "Notice to Law Enforcement Officials" read in part:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.[187]

However, the Supreme Court, showing great concern over law enforcement logistical difficulties, managed to turn this seemingly mandatory directive into a mere suggestion.[188] While the directive clearly states that officers "shall" make arrests for protection order violations, the Court held that such arrests were discretionary.[189]

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185. PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 49 (1990).

186. Kende, *supra* note 158, at 689.

187. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 752 (2005).

188. *See id.* at 760; *see also* Kende, *supra* note 158, at 688.

189. Franklin, *supra* note 4, at 343.

The language on the back of Lenahan's civil protection order was the result of the mandatory policies that came into being precisely because the police so often downplayed or ignored the real dangers in domestic disputes.[190] However, the *Gonzales* decision effectively shut the door to due process claims against police officers who fail to act in response to domestic violence calls that result in injury or death.[191] One way of understanding police nonintervention and domestic violence is to view it as a form of discrimination against women.[192] This "gender-based approach" is compelling considering that females constitute the vast majority of domestic violence victims.[193] According to one writer, "it is no coincidence, nor even a vestige of historical discrimination," that this is the case because by nature domestic violence is sex-based.[194] As such, the historical subordination of private acts of violence by law enforcement officials has had a disproportionate effect on women.[195]

Before the implementation of mandatory arrest policies, police declined to intervene in intimate partner abuse, which was consistent with the general conception of domestic violence as a private matter.[196] As active engagement became the norm across the country, gender-neutral law enforcement protocols emerged to address domestic violence.[197] However, while the protocols in theory are gender-neutral, it is well-documented that police are often more likely, in practice, to respond to violence between non-intimates than to violence between intimates.[198] Accordingly, the disparate treatment domestic violence compared to other types of violence can be probative of discriminatory intent.[199] Another way to highlight discriminatory motives is to analyze the aforementioned historical background of law enforcement officials' response to domestic violence in the United States.[200] History exhibits a conceptual framework of discrimination, and so exposes the possible intent behind contemporary practices.[201] While laws have changed over time, victims have struggled to be safe from repeat threats and violence from their batterers.[202] Despite the foreseeable impact domestic violence has on women, law enforcement officials subordinate domestic violence to

190. *See* Kende, *supra* note 158, at 689.

191. Franklin, *supra* note 4, at 344.

192. *Id.* at 345.

193. *Id.* at 349 (stating that women make up ninety to ninety-five percent of domestic violence victims); *see also* Bettinger-López, *supra* note 150, at 51.

194. Franklin, *supra* note 4, at 353.

195. *See id.*

196. Kohn, *supra* note 10, at 212.

197. *See* Franklin, *supra* note 4, at 345.

198. *Id.*

199. *Id.* at 349.

200. *See* Kohn, *supra* note 10, at 212; Franklin, *supra* note 4, at 349.

201. Franklin, *supra* note 4, at 349.

202. *See* Kohn, *supra* note 19, at 527.

stranger violence "because of a deeply rooted . . . social understanding of gender relations that militates against state intervention in 'private' matters."[203]

Perhaps the outcome in Jessica Lenahan's case would have turned out differently if her three daughters had been abducted by a stranger rather than their father. If that were the case, the police officers would certainly have no argument that it was a private matter needing to be resolved independently of law enforcement. What is clear, and wholly indefensible, is that officers of the Castle Rock Police Department treated Lenahan's civil protection order as a worthless piece of paper.

## B. Lack of State Accountability and the International Implications

> *The obligation to protect human rights is not confined to those who have signed the Inter-American Convention but equally applies to each and every member of the Organization of American States based on fundamental human rights.*[204]

Simon Gonzales was no stranger to the CRPD. In the months leading up to his violent rampage, Gonzales had several run-ins with CRPD officers.[205] Due to his abusive behavior, Lenahan filed for divorce and separated from him in 1999.[206] Despite the separation, Gonzales continued to display unpredictable, reckless behavior, including two break-ins to Lenahan's house and trespassing on private property.[207] The CRPD knew or should have known that Gonzales was associated with domestic abuse and reckless behavior.[208]

According to Lenahan, Gonzales continued to harass and terrorize her and the children even after she obtained the civil order of protection.[209] Lenahan informed CRPD about Gonzales's violations but to no avail.[210] Either the police would completely ignore her calls or dismiss and scold her for calling them for help.[211] On June 22, 1999, the day of the abduction, Lenahan received the same response from the CRPD.[212]

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203. Franklin, *supra* note 4, at 353.

204. Petition in Accordance with International Commission on Human Rights Rules of Procedure 23 and 49 (Arges Sequeira Mangas v. Nicaragua, Case 11.218, Inter-Am. Comm'n H.R., Report No. 52/97, ¶ 144 (1998)) Inter-Am. Comm'n H.R., para. 398, (May 11, 2007).

205. Gonzales v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, para. 4 (2011).

206. *Id.* para. 18; *see* Bettinger-López, *supra* note 150, at 22.

207. *Gonzales*, para. 19.

208. *Id.*

209. *Id.* para. 21.

210. *See id.*

211. *Id.*

212. *Id.* para. 24; *see* Bettinger-López, *supra* note 150, at 23–24.

Lenahan first called the police department on June 22 at 5:50 p.m. concerned for the welfare of her children.[213] She again called at 7:40 p.m. and informed the police department that she had a civil protection order against her husband and she again expressed concern over the safety of her children.[214] At 7:50 p.m., two hours after her first call, two officers arrived at Lenahan's house.[215] After viewing her protection order and listening to Lenahan's concerns, the officers informed her that there was nothing they could do because the children were with their father.[216] At 8:30 p.m., Lenahan made cell phone contact with Gonzales and learned that he was with the children at an amusement park approximately forty miles from Castle Rock.[217] When she communicated this information to the police department, the officers declined to do anything because the amusement park was out of their jurisdiction.[218] Lenahan called before 10:00 p.m. and again around 10:00 p.m. with increasing worry only to be scolded for using the emergency line on the latter call.[219] After calling a seventh time at midnight, the dispatch officer said she would send an officer over to Lenahan's house—that officer never arrived.[220] Lenahan went to the police department and pleaded for help but was again told to wait a little longer and that Gonzales had a right to spend time with his children.[221] The police officers' inaction and indifference continued until Gonzales arrived armed at the station around 3:15 a.m.[222]

In the lawsuit she filed against the town in federal court, Lenahan alleged violations of the procedural and substantive components of the Fourteenth Amendment's Due Process Clause.[223] In her procedural due process claim, Lenahan alleged the civil protection order, coupled with Colorado's mandatory arrest law, created a property type entitlement for police response that was ignored, resulting in the deaths of her children.[224] She also argued "that the police violated her children's substantive due process rights when they failed to take reasonable steps to protect her children from the real and immediate risk posed by their father."[225] The district court dismissed both claims and Lenahan appealed to the U.S. Tenth Circuit Court of Appeals.[226] Sitting en banc, the Court of Appeals affirmed the dismissal of the substantive due process claim, but reversed the

213. *Gonzales*, para. 25.
214. *Id.*
215. *Id.* para. 26.
216. *Id.*
217. *Id.* para. 27; *see* Bettinger-López, *supra* note 150, at 23.
218. Bettinger-López, *supra* note 150, at 23–24.
219. *Gonzales*, Inter-Am. Comm'n H.R. Report, para. 30.
220. *Id.*
221. *Id.* para. 31.
222. *See id.* para. 32.
223. Bettinger-López, *supra* note 150, at 25.
224. Kende, *supra* note 158, at 689.
225. Bettinger-López, *supra* note 150, at 25.
226. *Id.*

dismissal of the procedural due process claim.[227] The United States Supreme Court granted certiorari on the procedural claim.[228]

Writing for a 7-2 majority, Justice Scalia held that the Due Process Clause did not grant Lenahan a personal entitlement to police enforcement of her civil order of protection.[229] Despite the repeated use of the word "shall" in Colorado's mandatory arrest law, the Court posited, "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."[230] According to the Court, it was unclear whether the preprinted notice on the back of Lenahan's civil protection order required police to seek a warrant to arrest Gonzales, to actually arrest him, or enforce the order in another fashion.[231] In the Court's view, this uncertainty evidenced police discretion over enforcement.[232] The Court also refused to assume the state statute granted victims a personal entitlement to "something as vague and novel as enforcement of restraining orders," rather than simply protecting the public interest in punishing criminal behavior.[233] The Court concluded by stating that the "benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."[234]

The Supreme Court's decision in *Gonzales*, while upsetting, was predictable if examined from the perspective of the Court's jurisprudence on the issue of state liability for private acts of violence.[235] The Court noted their earlier decision of *DeShaney v. Winnebago County Department of Social Services* in *Gonzales*.[236] In *DeShaney*, the Court held that the failure of child protection officials to prevent serious child abuse did not violate the child's substantive or procedural due process rights.[237] *DeShaney*, like *Gonzales*, involved an innocent child subjected to horrific acts of violence by the child's father.[238] Expressing concern over potential abuse by the child's father, the child's mother made several

227. *Id.*

228. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 755 (2005).

229. *See Gonzales*, 545 U.S. at 768; *see also* Bettinger-López, *supra* note 150, at 26.

230. *Gonzales*, 545 U.S. at 760.

231. Bettinger-López, *supra* note 150, at 26.

232. *Id.*

233. *Gonzales*, 545 U.S. at 766; *see* Bettinger-López, *supra* note 150, at 26.

234. *Gonzales*, 545 U.S. at 768; *see* Bettinger-López, *supra* note 150, at 27.

235. *See Gonzales*, 545 U.S. at 768–69 (stating that the "result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law'" and it is the states' option to craft legislation if victims are going to obtain personally enforceable remedies against state actors); *see also* Franklin, *supra* note 4, at 343.

236. *Gonzales*, 545 U.S. at 755, 768, 769 (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989)).

237. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 203 (1989); *see* Franklin, *supra* note 4, at 343.

238. *See DeShaney*, *supra* note 237, at 191–92.

calls to child protection services but they did not respond to her pleas for assistance.[239] Ultimately, the father beat the child so severely that the child suffered permanent brain damage and "[was] expected to spend the rest of his life confined to an institution for the profoundly retarded."[240]

The *Gonzales* decision prompted swift and intense reaction from domestic violence advocates and civil rights lawyers.[241] Lamenting the potential adverse effects for victims seeking necessary legal protection, the critics decried the decision as sending the wrong message to batterers and law enforcement, while risking the creation of "a culture of impunity for lazy, rogue, or misguided officers."[242] There was, however, another legal avenue available to Lenahan.[243] Despite exhausting her domestic remedies, Lenahan petitioned the IACHR for relief, asserting that the United States was responsible for human rights violations stemming from the CRPD's inaction and the Court's decision.[244]

The IACHR is an autonomous body of the Organization of American States (OAS), which is composed of all countries in North, South, and Central America, and the Caribbean.[245] IACHR was created in 1959 specifically to promote human rights issues.[246] The IACHR, composed of seven independent human rights experts, considers human rights claims and promulgates written decisions on state responsibility.[247] While lawyers in other parts of the Western Hemisphere routinely use the IACHR to challenge governmental abuse, violence, and corruption committed by state actors and private individuals, U.S. lawyers and advocates are largely unfamiliar with or unaware of the Commission.[248] The reasons for the United States' lack of engagement with the international human rights system stem from several differences in cultural values, including the value Americans place on the sovereignty of the Constitution, which can foster resistance to the imposition of another layer of even higher authority.[249]

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239. *See* Bettinger-López, *supra* note 150, at 25–26.

240. *DeShaney*, 489 U.S. at 193.

241. Bettinger-López, *supra* note 150, at 28.

242. *Id.*

243. *See* Franklin, *supra* note 4, at 343–44.

244. *See* Bettinger-López, *supra* note 150, at 36.

245. *About the OAS: Who We Are*, ORG. OF AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited Jan. 11, 2013); *What Is the IACHR?*, ORG. OF AM. STATES, http://www.oas.org/en/iachr/mandate/what.asp (last visited Jan. 10, 2013); *see* Bettinger-López, *supra* note 150, at 29.

246. *What Is the IACHR?*, *supra* note 245; *see* Bettinger-López, *supra* note 150, at 29.

247. *What Is the IACHR?*, *supra* note 245; *see* Bettinger-López, *supra* note 150, at 29.

248. Bettinger-López, *supra* note 150, at 29.

249. *See* Andrew Moravcsik, Professor of Government and Director, European Union Center, Harvard University, Address at Conference on Unilateralism and U.S. Power, Woodrow Wilson School, Princeton University: Explaining the Paradox of American Human Rights Policy: Rights Culture or Pluralist Pressures? (Dec. 5, 2003), *available at* http://asrudiancenter.wordpress.com/2009/02/20/explaining-the-paradox-of-american-human-rights-policy-rights-culture-or-pluralist-pressures/.

The United States has declined to ratify most international human rights treaties and has not ratified any inter-American human rights treaties.[250] The few treaties the United States has ratified are replete with broad reservations, understandings, and declarations (RUDs) attached by the Senate.[251] While the President elects the country's treaty partners and decides the subject matter of negotiations, the Senate has the ultimate power to approve the treaty.[252] With this power, the Senate may elect to consent to the treaty as conceived, consent only if certain RUDs are attached, or reject the treaty altogether.[253] Thus, the Senate can significantly hamper the treaty process should members perceive the treaty as an unconstitutional encroachment on the U.S. system of federalism.[254] The core of the opposition to human rights treaties has been summarized as:

> exceptional ambivalence and unilateralism of the U.S. human rights policy to the instrumental calculation of American politicians about the domestic consequences of adherence to international norms, which in turn reflect the distinctive structure of political interests and institutions in the US . . . . ***The US is skeptical of domestic implementation of international norms because it is powerful geopolitically, enjoys extraordinary democratic stability, contains a concentrated, active conservative minority, and possesses politically decentralized and fragmented political institutions.*** Any one of these four general characteristics—external power, democratic stability, conservative minorities, and political decentralization—would be likely to render governments less likely to accept binding multilateral norms. ***The United States is the only advanced industrial democracy that possesses all four characteristics.*** Thus it is predictably the advanced democracy least willing to fully acknowledge the domestic legal validity of global human rights norms.[255]

Believing treaty ratification to be a potential pretext for the federal government to circumvent constitutional limitations of power and implicate matters reserved to the states, congressional opponents have declined to ratify many human rights treaties, including inter-American treaties.[256]

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250. Bettinger-López, *supra* note 150, at 30, 52.

251. Koren L. Bell, *From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties*, 5 YALE HUM. RTS. & DEV. L.J. 255, 263 (2002).

252. *Id.*

253. *See id.*

254. *See id.* at 263–64.

255. Moravcsik, *supra* note 249.

256. *See* Bell, *supra* note 251, at 264, 272.

In the absence of a treaty, human rights complaints against the United States brought before the IACHR are examined under the American Declaration[257] and the OAS Charter. However, the human rights framework set in place by the IACHR is rarely used for domestic advocacy, as human rights violations in the United States are typically deemed civil rights infringements.[258] Unfortunately, domestic violence is not treated as a human rights violation or civil rights impingement in the United States; domestic violence advocacy is relegated to local legal service providers and organizations that strive to pass and strengthen "mandatory arrest legislation, [obtain] civil and criminal orders of protection for victims and their children, [represent] victims in family law matters, and [ensure] short-term solutions for victims fleeing their abusers."[259] Internationally, the treatment of domestic violence as a human rights issue has not fared much better, although this is changing.[260] Because of (or perhaps, in spite of) the U.S. legal system's treatment of domestic violence, and the emerging international focus on domestic violence as a human rights issue, Lenahan approached the IACHR. In doing so, Lenahan filed a novel international legal claim against the U.S. government: the U.S. government has a duty to address private violence and it violated its obligation to Lenahan when the CRPD failed to act the night of June 22.[261]

The IACHR concluded that the U.S. government does indeed have a duty to protect victims of domestic violence, and it failed to meet this duty with due diligence.[262] The Commission highlighted the fact that the apparatus in place to protect victims—civil protection orders—gives little protection when law enforcement officials do not have an organized system in place enabling prompt and effective implementation of the orders.[263] The Commission also noted "the strong link between discrimination, violence and due diligence, emphasizing that a State's failure to act with due diligence to protect women from violence

257. The American Declaration was drafted in 1948 as part of the OAS Charter. Bettinger-López, *supra* note 150, at 30. Signatories to the Charter, such as the United States, are legally bound by the Declaration's provisions, which, as repeatedly interpreted by the Commission, require "states to respect, ensure, and promote guaranteed rights and freedoms through the adoption of appropriate or necessary measures." *Id.* at 30–31.

258. *Id.* at 52–53.

259. *Id.* (citing the Supreme Court's decision in Morrison v. United States, 529 U.S. 598 (2000), which barred VAWA's civil remedy for victims of domestic violence per the Court's pronouncement that gender-motivated violence is a local rather than national issue).

260. Domestic violence has typically been absent from international human rights discourse. Bettinger-López, *supra* note 150, at 53–54. As in the United States, the international human rights paradigm has traditionally avoided holding governments accountable for safeguarding individual rights in the private sphere, instead focusing on public civil and political rights. Hasselbacher, *supra* note 2, at 191–96.

261. *See* Bettinger-López, *supra* note 150, at 54.

262. Gonzales v. United States, Case 12.626, Inter-Am. Comm'n H.R. Report No. 80/11, para. 160 (2011).

263. *See id.* para. 160.

constitutes a form of discrimination," and that these "principles have also been applied to hold States responsible for failures to protect women from domestic violence acts perpetrated by private actors."[264] Accordingly, domestic violence, recognized by the international community as a serious human rights violation, is a problem that "all OAS Member States" have a "legal obligation to protect women from."[265]

While Jessica Lenahan received a favorable decision from the IACHR, her pursuit of justice may seem somewhat futile considering there is no formal enforcement mechanism in the United States. Put another way, the value of an internationally recognized right, upheld by an international human rights tribunal, but without a domestic judicially-enforceable remedy may at first seem worthless.[266] But the Commission's report has already had international influence and, hopefully, it will trigger coalition building and domestic violence advocacy in the United States.[267] Treating domestic violence as a human rights violation has "the potential to spur important normative developments, generate international and domestic political pressure, and change public opinion."[268] Moreover, it can lead to a new, transnational discourse on domestic violence as a human rights violation—a discourse that disavows the traditional relegation of domestic violence to the private sphere and instead pushes for robust U.S. and international advocacy for domestic violence victims.[269]

## V. SUGGESTIONS FOR CHANGE

The U.S. criminal and civil justice systems can, at least in some situations, do more harm than good for domestic violence victims. On the criminal side, mandatory arrest and prosecution policies may result in several unintended negative consequences for the victim or the victim's children.[270] Further, diversion programs, while delivering a desired and sometimes useful alternative to batterers and victims, risk failing to hold batterers accountable for their actions.[271] The civil justice system, on the other hand, lacks a federally mandated civil remedy because domestic violence is not treated nationally as a

264. *Id.* para. 111.

265. *Id.* para. 162.

266. *See* Bettinger-López, *supra* note 150, at 55.

267. *See id.* The Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005) is an example of how international sentiment can influence U.S. law. In that case, the Court invoked international opinion to support its holding that the death penalty for juvenile offenders was unconstitutional because it constituted disproportionate punishment. *Id.* at 64.

268. *Id.* at 55.

269. *See id.*

270. *See* Kohn, *supra* note 10, at 217–18; Han, *supra* note 8, at 175–77.

271. *See* Sadusky, *supra* note 26, at 5–6.

civil rights violation.[272] Victims of domestic violence must rely on civil protection orders to procure any form of legally recognized security from their batterers, which may prove worthless if law enforcement officers do not enforce them.[273] Should the batterer violate the protection order with law enforcement's knowledge, the victim cannot claim the government officials violated her rights since U.S. law dictates courts cannot hold government actors liable for failing to protect against private acts of violence.[274]

United States policymakers and advocates could take various approaches to promote the rights of domestic violence victims while simultaneously reducing the consequences inherent in the U.S. legal system that victims routinely endure. The first thing that must change is the persistent view that domestic violence is a private problem that needs to be addressed only through local services and agencies. As statistics, reports, and articles on domestic violence indicate, it is a vast problem that affects every society, class, ethnicity, and race.[275] Examining the financial costs of domestic violence highlights the unfortunate fact that it is rampant. In the U.S. alone, the costs of intimate partner violence exceeds $5.8 billion each year, $4.1 billion of which is spent on direct medical and mental health care services.[276] Taking into account property loss, police response, ambulance services, and the criminal justice process, the total annual cost of domestic violence jumps to $67 billion.[277]

Domestic violence, unlike non-intimate violence, does not attract the same measure of public and political outcry, but it is just as insidious and destructive.[278] Viewing domestic violence as a public issue that threatens the health and safety of millions of Americans each year could lead to legislative changes aimed at providing the necessary support and outreach victims need. A proactive, good-faith effort by federal, state, and local policymakers to combat domestic violence would need to start from the fact that freedom from domestic violence is a matter of human rights.[279] From there, the federal government could increase funding for domestic violence and require judges, prosecutors, and police to undergo annual domestic violence training sessions.[280] Congress could also

272. *See* United States v. Morrison, 529 U.S. 598, 627 (2000); *see also* Bettinger-López, *supra* note 150, at 52.

273. *See* Franklin, *supra* note 4, at 342–45.

274. *See* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 766 (2005).

275. *See, e.g.*, Hasselbacher, *supra* note 2, at 190–91.

276. ELAINE ALPERT ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003) *available at* http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf; *see* Bettinger-López, *supra* note 150, at 68.

277. Bettinger-López, *supra* note 150, at 68.

278. Han, *supra* note 8, at 159–60.

279. *See generally* Bettinger-López, *supra* note 150, at 54–67.

280. *Id.* at 68.

pass legislation that "set[s] quantifiable benchmarks and timetables for states' compliance with international obligations" concerning domestic violence.[281]

Inaction towards cases of domestic violence will not be tolerated as it fosters an environment of impunity and promotes the repetition of violence.[282] The IACHR recommended in their final report that the United States should:

> [a]dopt multifaceted legislation at the federal and state levels, or . . . reform existing legislation, making mandatory the enforcement of protection orders and other precautionary measures to protect women from imminent acts of violence, and . . . create effective implementation mechanisms. These measures should be accompanied by adequate resources destined to foster their implementation; regulations to ensure their enforcement; training programs for the law enforcement and justice system officials who will participate in their execution; and the design of model protocols and directives that can be followed by police departments throughout the country.[283]

This recommendation is quite sensible and also entails "adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims," while promoting the "eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs."[284]

The federal government could also promote better domestic violence victim protection in the civil and criminal justice systems by ratifying, without RUDs, the Inter-American Convention and other international human rights treaties it has historically declined to accept.[285] To overcome the concerns that international treaties will encroach on states' rights and erode the separation of powers, the federal government could work with state and local governments through negotiation and cooperation to implement the human rights goals of the treaties.[286] According to one author, Canada adopted such a system and it has produced beneficial results:

> [B]y recognizing the fluid multiplicity of political forces channeled through the federal system . . . . [T]he component forces became flexible, partner-participants . . . exerting their

281. *Id.*

282. *See* Gonzales v. United States, Case 12.626, Inter-Am. Comm'n H.R. Report No. 80/11, para. 168 (2011).

283. *Id.* para. 215(5).

284. *Id.* para. 215(6).

285. Bettinger-López, *supra* note 150, at 68.

286. *See* Bell, *supra* note 251, at 264, 278.

> political power . . . . [And] recognizing the independent agency of the system's sub-units and granting them authorship in the creative process . . . ."[287]

If this happens, the antagonism between federalism concerns and international human rights treaties may dissolve.[288]

## VI. CONCLUSION

Since the 1960s, advocacy for victims of domestic violence has evolved in attempts to meet the unique challenges of these cases. At the behest of women's rights advocates and feminist activists, the legal justice system has started to take domestic violence more seriously in the past forty years. Mandatory arrest and prosecution policies have emerged in the criminal realm, while protection orders have become a mainstay for domestic violence victims in the civil justice system. Once considered a purely private problem, domestic violence prevention is now firmly entrenched in the U.S. law enforcement and legal system. However, these advances are not enough and, in some cases, they end up hampering victims more than protecting them from their batterers. Batterers risk arrest and prosecution every time they decide to abuse their intimate partner. If criminal sanctions are not optimal or would be too cumbersome to pursue, domestic violence victims also have the option to get civil protection orders mandating, at least facially, that batterers stay away from their victim.

These developments in criminal and civil law have proven to be truly beneficial for many domestic violence victims. However, many victims still feel unsafe after pursuing legal sanctions against their batterers. Unfortunately, victims have good reason to feel vulnerable because the law as it currently stands can only do so much to protect victims. Victims may suffer several unintended consequences of pursuing criminal sanctions against their batterers and risk potential terrifying repercussions from the batterer in the future. As the *Gonzales* case demonstrates, if the victim elects to obtain a civil protection order they will then have to rely on local law enforcement officials to enforce the order, which is far from guaranteed and can result in dangerous and even deadly consequences for the victim if police fail to enforce. Moreover, the rate of domestic violence in the United States has not significantly decreased in the years since more aggressive advocacy started. Thus, while law enforcement and legal interventions can help, some change is needed to effectively protect more victims of domestic violence and adequately deter batterer recidivism.

Change must start at the top with the U.S. federal government recognizing domestic violence as a human rights violation. Viewing domestic violence this way can open the door to increased funding for advocacy agencies

287. *Id.* at 278.
288. *See id.*

and government funded organizations that expressly focus on helping victims of abuse. This shift can also have immense international implications such as bringing the United States into line with most other Western developed countries' perception of domestic violence. If the United States were to ratify several international human rights treaties, the U.S. government could interface with these other countries to coordinate domestic violence policy and legislation, develop a more cohesive and less stigmatized global understanding and awareness of domestic violence, and incorporate proven domestic violence initiatives from around the developed world that deter batterer abuse and better address the needs of victims. This change is achievable despite the great challenge of influencing entrenched attitudes. Whatever the difficulty, the U.S. government needs to take the next step in domestic violence advocacy—recognize the domestic violence epidemic is a public, international problem of immense proportions, approach the problem from this perspective, labeling these atrocities human rights violations, and work at the federal, state, local, and international level to achieve a significant reduction in violence.