

**DOMESTIC VIOLENCE AND EQUAL PROTECTION OF THE LAWS: A
LOOK AT *TOWN OF CASTLE ROCK V. GONZALES* AND *LENAHAN V.
UNITED STATES***

ARTICLE

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INTRODUCTION

THE AFTERNOON OF JUNE 22, 1999, LESLIE, KATHERYN AND REBECCA Gonzales were kidnapped by their father, Simon Gonzales, and later found dead in the trunk of his car. Their mother, Jessica Lenahan, upon noticing that her daughters were missing from the front yard of their home, contacted the police. Lenahan obtained a restraining order¹ against her estranged husband years earlier due to Gonzales’ erratic behavior, which included attempted suicide in front of their children.² The police did nothing despite the fact that the preprinted text of the restraining order called for law enforcement to “use every reasonable means to enforce this restraining order,” and that they “shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when . . . [they] have information amounting to probable cause that the restrained person has violated or attempt-

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¹ The terms *restraining order* and *protection order* are used interchangeably in this article.

² Jessica Lenahan, *Jessica Gonzales’ Statement before the IACHR*, ACLU (Mar. 2, 2007), <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-statement-iachr> (last visited Oct. 26, 2014).

ed to violate any provision of this order”³ The police department of Castle Rock, Colorado, repeatedly told Lenahan that she should wait, that they could do nothing to help her, and that Gonzales had a right to be with his daughters even though the conditions of the restraining order did not allow for unannounced visits to the home.⁴

Lenahan pleaded for help from the police throughout the night, both in person and through the phone, but her ordeal was far from over. At 3:20 a.m., Gonzales arrived at the Castle Rock police station and opened fire. By the end of the night, Gonzales was dead and the bodies of Lenahan’s three daughters were found in the car. After the tragic events of the early morning of June 23, 1999, Lenahan filed suit against the town of Castle Rock, and took her case all the way to the Supreme Court of the United States. However, it took a decision from the Inter-American Commission on Human Rights to recognize Lenahan and her daughters’ right to the enforcement of the restraining order at the particular moment in which their lives depended on it.

Although domestic violence legislation and activism has increased attention to the dangers and risks in many people’s lives, there can be no doubt that domestic violence continues to be a pervasive societal problem. The existence of legislation that criminalizes such violence and provides civil and criminal remedies for its victims has proven to be insufficient due to several factors, such as the unequal enforcement of such remedies by government actors, an inability to inform victims on how to request remedies, and a continuing vision of domestic violence as a private affair.

This paper will focus on the United States Supreme Court’s decision in *Castle Rock v. Gonzales*,⁵ and the subsequent decision of the Inter-American Commission on Human Rights in *Lenahan v. United States*, which declared that the United States had violated Lenahan’s and her daughters’ human rights.⁶ Particularly, the paper will address the different conceptions of equal protection of the laws and the role of the State in the protection of victims of violence.

I. DOMESTIC VIOLENCE

The phenomenon of domestic violence is closely tied to the status and roles that women have been accorded in society and the idea of family in America prior to the twentieth century, that is, the idea that the family is private, that marriage is intended to endure for life and that women are subservient to men in

³ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 752 (2005) (quoting *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1144 (10th Cir. 2004) (en banc) (appendix to O’Brien, J., dissenting)).

⁴ *Id.* See also *Lenahan*, *supra* note 2.

⁵ *Town of Castle Rock*, 545 U.S. 748.

⁶ *Lenahan v. United States*, Case 12.626, Inter-Am Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11 (2011).

such a relationship.⁷ Long before the events of June 1999 that changed Jessica Lenahan's life, activists had recognized the necessity of bringing the violence suffered by women in the privacy of home to the public eye. Although wife disciplining had been condemned by a number of states, it was not until the early 1970s that the feminist movement began to coin the term *domestic violence* to describe instances of men beating their wives within the confines of the household. The first pieces of legislation that offered criminal and civil remedies were passed during this time, but the remedies offered remained insufficient to adequately address the particularities of intimate partner violence.

It was with the "passage of the Pennsylvania Protection from Abuse Act in 1976," that many states refined their legislation in order to expand the relief offered to victims of domestic violence.⁸ Also, by 1994, Congress passed the first federal law pertaining to domestic violence, the *Violence Against Women Act* (hereinafter, "VAWA") which recognized "the severity of crimes associated with domestic violence, sexual assault, and stalking."⁹ VAWA also responded to the uneven nature of state legislation that was passed throughout the United States and sought a national solution.¹⁰ Even with such legislation in place across the country, enforcement of remedies for victims was doubtful, with a systematic refusal from police to arrest men who perpetrated violence against their partners.¹¹

Similarly, in Puerto Rico the feminist movement that led the public battle for approval of legislation that condemned acts of domestic violence faced its share of obstacles. Before legislation was passed, multiple organizations emerged, all of which recognized domestic violence as a social problem; they aided victims and helped in shaping the future law.¹² With the help and experience of these groups, legislation that addressed domestic violence in the home as an issue of public concern was presented in legislature in 1989. This particular piece of legislation was quite advanced for its time and reflected a "public policy of commitment with the protection of the health, life, security and dignity" of victims of violence in its physical, verbal, sexual and economic manifestations.¹³

⁷ ELIZABETH M. SCHNEIDER *ET AL.*, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 14-15 (3d ed. 2013).

⁸ *Id.* at 221.

⁹ *About the Office*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/ovw/about-office> (last visited Oct. 30, 2014).

¹⁰ *Id.*

¹¹ G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 282 (2010-2011).

¹² Elisa M. Hernández Negrón, *Ley Núm. 54: Evolución y obstáculos*, 46 REV. JUR. UIPR 23, 24-25 (2011-2012) (some of these organizations and groups were the Center for the Aid of Victims of Sexual Assault (*Centro de ayuda para víctimas de violación*), Commission for Women's Issues (*Comisión para los asuntos de la mujer*), and the Julia de Burgos Protected House (*Casa protegida Julia de Burgos*)).

¹³ Esther Vicente, *Una ley mal tratada: El Tribunal Supremo del siglo 21 ante la violencia, las mujeres y el género*, 46 REV. JUR. UIPR 95, 101 (2011-2012) (translation by author).

The statute, commonly known to the public as *Ley 54*,¹⁴ although approved, received no funding to kick-start the massive education campaigns necessary to enforce its provisions.¹⁵

Despite the relatively quick evolution of domestic violence legislation in both the United States and Puerto Rico, the pervasiveness of intimate partner violence continues to be alarming. From the year 2003 to 2012, domestic violence accounted for twenty one percent of violent crimes in the United States,¹⁶ with women still accounting as the majority of victims of such crimes.¹⁷ Even with state and federal legislations regarding prevention and punishment of acts of domestic violence, unequal enforcement of remedies such as protection orders remains a problem. Victims of domestic violence receive ineffective assistance while applying for such remedies, and unequal enforcement of protection orders continues to exist, emboldening aggressors and leaving victims vulnerable.¹⁸

In Puerto Rico, the problem of domestic violence is compounded by social, economic and cultural factors that increase the likelihood of violence and discrimination against women. The Puerto Rico Office of the Women's Advocate showed that "[i]n 2003, a woman was killed on average every 15.2 days. The data from 2001 to 2008 indicate[d] that 178 women were killed by their partners or ex-partners on the island."¹⁹ "Puerto Rico reports an intimate partner homicide rate of 1.4 per 100,000 women per year, as compared to 0.78 in the United States" ²⁰ Even when faced with such numbers, the government of Puerto Rico considered, during the months of April and May of 2014, eliminating the Office of the Women's Advocate, the government agency charged with the overseeing of policy on gender issues.²¹ This move was widely criticized by feminist groups.

As for the expedition of orders of protection, which play a critical role in the protection of survivors of domestic violence, the records kept by several gov-

¹⁴ Domestic Abuse Prevention and Intervention Act, Act No. 54 of Aug. 15, 1989, 8 LPRA §§ 601-664 (2006 & Supp. 2012).

¹⁵ Hernández Negrón, *supra* note 12, at 26.

¹⁶ JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., NCJ 244697, NONFATAL DOMESTIC VIOLENCE, 2003-2012 1 (2014), <http://www.bjs.gov/content/pub/pdf/ndv0312.pdf>. "Domestic violence includes rape, sexual assault, robbery, and aggravated and simple assault committed by intimate partners, immediate family members, or other relatives." *Id.*

¹⁷ *Id.* "The majority of domestic violence was committed against females (76%) compared to males (24%)." *Id.*

¹⁸ See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 4 (2010), http://www.ncjfcj.org/sites/default/files/cpo_guide.pdf.

¹⁹ Jodie G. Roure, *Gender Justice in Puerto Rico: Domestic Violence, Legal Reform, and the Use of International Human Rights Principles*, 33 HUM. RTS. Q. 790, 797 (2011) (footnote omitted).

²⁰ Amici Brief of the Am. Civil Liberties Union et al. at 1, *United States v. Puerto Rico*, No. 12 - 2039 (D. P.R. Apr. 1, 2013), ECF No. 28, https://www.aclu.org/files/assets/aclu_pr_amicus_brief_-_dv_and_sv.pdf.

²¹ See *García Padilla se reunirá con la Procuradora de las Mujeres*, EL NUEVO DÍA, Apr. 30, 2014, <http://www.elnuevodia.com/garciapadillasereuniraconlaprocuradoradelasmujeres-1763476.html>.

ernmental agencies demonstrate a severe lack of accuracy. The records kept by the Puerto Rico Police Department are particularly alarming. For example, in 2001 their records displayed only 502 orders of protection issued in contrast to the 18,171 orders that were actually granted that year.²² This is also true of the records kept of intimate partner homicides, as women's advocacy groups have pointed out in their independent research and data collection.²³ Enforcement of such orders has also proven to be inadequate. "In 2007 . . . 25% of the women killed by their [intimate] partners had previously reported incidents of domestic violence to the [police] . . ." ²⁴ In the instances in which there had been a violation of an issued order of protection, the police often failed to arrest the offender. The drastic inaccuracy of police protection order records, whom the holders of the orders rely on for enforcement, demonstrate that they are not acknowledging the problem of domestic violence in the Island and, consequently, cannot properly provide adequate protection to the holders of such orders.

II. THE CASES

A. *Town of Castle Rock v. Gonzales*

Because of the failure of Castle Rock's police department to enforce her restraining order, Jessica Lenahan filed suit in the United States District Court for the District of Colorado. She alleged that the city of Castle Rock and its police officers had violated her due process rights under the Fourteenth Amendment of the United States Constitution, which provides that a state will not "deprive any person of life, liberty, or property, without due process of law."²⁵ In particular, she claimed that Castle Rock's "police officers, acting pursuant to official policy or custom, failed to respond properly to her repeated reports that . . . [Simon Gonzales] was violating the terms of . . . [her] restraining order."²⁶ The complaint also alleged that the actions of the police officers were taken either willfully or with such negligence as to show a complete disregard of Lenahan's civil rights.²⁷ It is interesting to note that presenting the case as an issue of equal protection of the laws for victims of domestic violence was considered, but ultimately dis-

²² OFICINA DE LA PROCURADORA DE LAS MUJERES, LA RESPUESTA INSTITUCIONAL DEL SISTEMA DE JUSTICIA CRIMINAL EN EL MANEJO DE LOS CASOS DE VIOLENCIA DOMÉSTICA: EVALUACIÓN E IDENTIFICACIÓN DE NECESIDADES PARA PROMOVER LA SEGURIDAD DE LA VÍCTIMA Y LA INTERVENCIÓN CON LA PERSONA AGRESORA 185 (2005), <http://www2.pr.gov/agencias/mujer/InvestigacionesEstudios/Documents/Respuesta%20Institucional%20del%20sistema%20de%20justicia%20criminal%20en%20el%20manejo%20de%20los%20casos%20de%20violencia%20doméstica/Ver%20Informe.pdf>.

²³ See Amici Brief of the Am. Civil Liberties Union *et al.*, *supra* note 20, at 1.

²⁴ *Id.* at 3.

²⁵ U.S. CONST. amend. XIV, § 1.

²⁶ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 751 (2005).

²⁷ *Id.* at 754.

missed “due to uncertainty about the substance of the standard of review for sex-based equal protection claims in the U.S. Supreme Court’s jurisprudence.”²⁸

Before reaching the Supreme Court, the city of Castle Rock filed a motion to dismiss the case, which the District Court granted, arguing that, either construed as a substantive or procedural due process claim, Lenahan had “failed to state a claim upon which relief could be granted.”²⁹ The United States Court of Appeals for the Tenth Circuit, however, found that the complaint alleged a procedural due process claim and concluded that Jessica Lenahan “had a ‘protected property interest in the enforcement of the terms of her restraining order’ and that the town had deprived her of due process because ‘the police never *heard* nor seriously entertained her request to enforce and protect her interests in the restraining order.’”³⁰

In an opinion by Justice Antonin Scalia, the Supreme Court of the United States framed the controversy in this case as “whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.”³¹ The Court, in a 7-2 vote opinion, found that Lenahan did not have a property interest in police enforcement of her restraining order. The criticism that this opinion elicited from domestic violence advocates warrants a close evaluation of the decision taken by the Supreme Court.

First, the Court relied on its past decision in *DeShaney v. Winnebago County Department of Social Services*,³² and elucidated that, “the so-called *substantive* component of the Due Process Clause does not ‘requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.’”³³ However, it would now consider what *DeShaney* left unanswered: whether a state law could create an entitlement capable of requiring due process protection.³⁴ Like in *DeShaney*, the Court denied that the government had any duty to take affirmative action in the protection of the lives of Jessica Lenahan and her daughters.

The Court stated that an entitlement was not created if courts or government officials had the discretion to grant or deny such an entitlement,³⁵ and continued its analysis by examining the language of the restraining order issued to Lenahan. The opinion evaluated the language of the order, particularly the

²⁸ Amy J. Sennett, *Lenahan (Gonzales) v. United States of America: Defining Due Diligence?*, 53 HARV. INT’L L.J. 537, 546 (2012).

²⁹ *Town of Castle Rock*, 545 U.S. at 754.

³⁰ *Id.* at 755 (quoting *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101, 1117 (10th Cir. 2004)).

³¹ *Id.* at 750-51.

³² *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

³³ *Town of Castle Rock*, 545 U.S. at 755 (quoting *DeShaney*, 489 U.S. at 195).

³⁴ *See id.*

³⁵ *Id.* at 756.

portion which read: “A peace officer shall use every reasonable means to enforce a restraining order. . . . [He] shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause”³⁶ Regardless the language of the order, the Court went on to state that it did not find the provisions to be truly mandatory, considering the tradition of police discretion in so-called mandatory arrest statutes.³⁷ Specifically, the opinion said:

It is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.³⁸

It later added:

Even if the statute could be said to have made enforcement of restraining orders *mandatory* because of the domestic-violence context of the underlying statute, that would not necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. The serving of public rather than private ends is the normal course of the criminal law because criminal acts, “besides the injury [they do] to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.”³⁹

Ultimately, the majority’s opinion found the concept of property for the purposes of the Due Process Clause, as espoused in earlier decisions by the Court, incompatible with what Lenahan was asking for, because it had no ascertainable monetary value.⁴⁰

The dissenting opinion in the case, written by Justice Stevens, who was joined by Justice Ginsburg, points to three adverse conclusions that can be drawn from the Court’s decision. First, the dissent argues that the majority takes the context of domestic violence statutes, and their mandatory arrest policies, lightly.⁴¹ That is, the majority does not understand that the unmistakable goal of these statutes was to eliminate police discretion, which often resulted in officers

³⁶ *Id.* at 759 (emphasis omitted) (quoting COLO. REV. STAT. § 18-6-803.5(3) (1999)).

³⁷ *Id.* at 760.

³⁸ *Id.* at 761-62 (footnote omitted).

³⁹ *Id.* at 764-65 (alteration in original) (citation omitted) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

⁴⁰ *Id.* at 766.

⁴¹ *Id.* at 779 (Stevens, J., dissenting).

ignoring a victim's calls for enforcement of a violated restraining order.⁴² Second, the Court failed to note that the Colorado statute, and the orders of protection it created, were passed for the benefit of a particular group of people and that the orders at issue were specifically created to provide protection to their beneficiaries.⁴³ Also, the dissent believed that the conceptualization of an entitlement as solely that which has ascertainable monetary value fails to grasp how a victim's interest in enforcement could be just as worthy of protection as an interest in any other government or private service that could be considered a valid entitlement.⁴⁴

The majority's opinion in *Town of Castle Rock v. Gonzales* led to criticism from domestic violence advocates for essentially leaving other survivors of domestic violence vulnerable to their aggressors, as there would be no obligation for the police to act on the mandates of the orders of protection. At the same time, the Court's opinion established, as it had in earlier decisions, that the Constitution could restrain government action, but it would not impose responsibilities on the government for the protection of its citizens.⁴⁵

B. *Lenahan v. United States*

The Inter-American Commission on Human Rights is an "autonomous organ of the Organization of American States."⁴⁶ The Commission's principal goal is to promote, monitor and protect human rights within the Americas.⁴⁷ The human rights framework that the Commission relies on stems from the *Charter of the Organization of American States*, the *American Declaration on the Rights and Duties of Man*, and the *American Convention on Human Rights*.⁴⁸ In order to monitor compliance with international human rights standards, the Commission will monitor individual Member State's human rights situations, pay particular attention to certain thematic areas and hear individual petitions.⁴⁹ It was through the individual petition system that Lenahan, after exhausting her domestic remedies, managed to have her human rights claims heard.

Jessica Lenahan's petition to the Inter-American Commission on Human Rights, in *Lenahan v. United States*, marked "the first time the United States . . . [was] found guilty of human rights violations in the domestic violence context

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Max D. Siegel, *Surviving Castle Rock: The Human Rights of Domestic Violence*, 18 *CARDOZO J.L. & GENDER* 727, 735 (2011-2012).

⁴⁶ *What is the IACHR?*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Nov. 3, 2014).

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ *Id.*

by an international tribunal”⁵⁰ In her petition, Lenahan argued that, by failing to protect her daughters:

[T]he United States had committed a series of violations under the American Declaration on the Rights and Duties of Man. [sic] including (1) violations of the right to equality before the law and the obligation not to discriminate (Article II), . . . and the right to special protection as women and children (Article VII); and (2) and violations of right to judicial protection (Article XVIII).⁵¹

Specifically, she “claimed that the failure of the United States to effectively respond to her requests for enforcement of the restraining order and the subsequent lack of judicial remedy” constituted an act of discrimination and a violation “of the right to equality before the law,” and that the duty to protect the rights encompassed in the American Declaration sometimes required a public response to private acts of violence.⁵²

The United States, on the other hand, argued that its authorities, in this case the Castle Rock Police Department, had responded as required of them by law.⁵³ The United States added that the *American Declaration on the Rights and Duties of Man* imposed no affirmative duties to protect victims of private violence.⁵⁴ It also alleged that the due diligence standard that is commonly applied in the international sphere was unclear in that it set no particular guidelines “other than the need [for the State] to be *effective*.”⁵⁵

The Commission’s ruling in August 2011, based on international standards of due diligence in cases of domestic violence, held that the United States had violated Lenahan’s and her daughters’ human rights, as well as the rights of other abuse survivors throughout the country.⁵⁶ In its report the Commission stated that:

108. As with all fundamental rights and freedoms, the Commission has observed that States are not only obligated to provide for equal protection of the law. They must also adopt the legislative, policy and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the American Declaration.

109. The Commission has clarified that the right to equality before the law does not mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without dis-

⁵⁰ Sennett, *supra* note 28, at 546-47.

⁵¹ *Id.* at 539-40 (footnotes omitted).

⁵² *Id.* at 540.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (quoting *Lenahan v. United States*, Case 12.626, Inter-Am Comm’n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 ¶ 58 (2011)).

⁵⁶ Siegel, *supra* note 45, at 731-32.

crimination. In practice this means that States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their face or in practice; and to combat discriminatory practices.⁵⁷

When applied to Lenahan's case, the Commission further concluded that:

[E]ven though the State recognized the necessity to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, it failed to meet this duty with due diligence. The state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order at issue; failures to protect which constituted a form of discrimination in violation of Article II of the American Declaration.

161. These systemic failures are particularly serious since they took place in a context where there has been a historical problem with the enforcement of protection orders; a problem that has disproportionately affected women - especially those pertaining to ethnic and racial minorities and to low-income groups - since they constitute the majority of the restraining order holders.⁵⁸

The Commission also noted that, in light of the Supreme Court's past opinions, it may have narrowed the judicial "remedies available to domestic violence survivors in legal proceedings against [negligent] government officials" who failed in their duty to protect a particular individual's physical security.⁵⁹

The Commission established the obligations and responsibilities that the United States had with survivors of domestic violence as espoused through the due diligence standard. This standard has an extensive history in the field of International Law and in the human rights system; it was developed by the Inter-American Court of Human Rights as a way to impose state responsibility for private acts.⁶⁰ This standard not only imposes responsibility, but also mandates the prevention, punishment and remedies for such acts.⁶¹ In regards to violence against women, "the issuance of the Declaration on the Elimination of Violence Against Women" by the United Nations "and the appointment of a Special Rapporteur on Violence Against Women" helped incorporate the due diligence standard into the evaluation of state obligations to victims of domestic violence.⁶² The application of due diligence in regards to Jessica Lenahan's grievances before the Commission served to hold the United States responsible for

⁵⁷ *Lenahan*, Report No. 80/11, doc. 11 ¶¶ 108-109 (2011) (footnotes omitted).

⁵⁸ *Id.* ¶¶ 160-161 (footnote omitted).

⁵⁹ Siegel, *supra* note 45, at 734.

⁶⁰ Sennett, *supra* note 28, at 542.

⁶¹ Siegel, *supra* note 45, at 733.

⁶² Sennett, *supra* note 28, at 543.

the negligence of the Castle Rock police officers and the subsequent lack of legal remedies before the courts of the land.

The Commission highlighted four principles of the due diligence standard as developed in the international legal system:

First, international bodies have consistently established that a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances. Second, they underscore the link between discrimination, violence against women and due diligence, highlighting that the States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem. States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women.

127. Third, they emphasize the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence. Fourth, the international and regional systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence.⁶³

In order to properly follow the principles that encompass the due diligence standard in the realm of international human rights, the Commission elaborated a context-specific analysis of the substance of due diligence in Lenahan's experience with government agents and representatives of the United States. The analysis in the report is two-fold.⁶⁴ First, the Commission asks whether the United States, through its representatives in the Castle Rock Police Department, had sufficient knowledge that the victims, Lenahan and her daughters, were in a situation of immediate risk.⁶⁵ Then, it went on to examine whether the authorities took reasonable measures to protect them from such a risk.⁶⁶ Undisputedly, the order of protection and the negligent actions of the police officers provided sufficient ground to conclude that the United States failed to act with due diligence.⁶⁷ The Commission focused on the language of the restraining order, and affirmed that the terms of the order were sufficiently strong to create a reasona-

⁶³ *Lenahan*, Report No. 80/11, doc. 11 ¶¶ 126-127 (footnotes omitted).

⁶⁴ *See id.* ¶ 137.

⁶⁵ *See id.* ¶¶ 138-145.

⁶⁶ *See id.* ¶¶ 146-159.

⁶⁷ *Id.* ¶ 160.

ble expectation of police reliability in enforcing compliance with the order.⁶⁸ The United States not only failed to prevent violation of the protection order and act in a manner which demonstrated understanding of the sensitive situations in which domestic violence victims often find themselves, but justified further government indifference through its judicial system.

III. IMPLICATIONS

The Inter-American Commission on Human Rights' ruling in 2011 caused a wave of commentary on its possible effects on domestic rights advocacy and policy in the United States. However, not much has changed in legislation and enforcement since the tragic events described in *Castle Rock v. Gonzales* unfolded. In spite of such stagnation in domestic violence remedies, the decision in *Lenahan v. United States* offers valuable insights into what should change at the domestic level to increase protection of victims and what are the most feasible avenues to effect such a change. Some of the implications that stem from the decision, discussed below, are: the use of international venues to make human rights claims, the different conceptualizations of equal protection in the context of domestic violence, and the application of due diligence to prevent and punish acts of domestic violence.

A. International Law and standards in domestic law

The landmark decision in *Lenahan v. United States* may have marked the first time that the United States government was found responsible for violating the human rights of domestic violence survivors in an international tribunal,⁶⁹ but it is worth asking what effect this could have on the domestic judicial system. The Commission's findings and suggestions are ultimately not binding for the United States government. At best, the decision can influence Supreme Court jurisprudence in the same way that other declarations, opinions from foreign courts, and standards of International Law influence its consideration of cases. The Court has undoubtedly been selective as to the occasions in which it decides to adopt standards of foreign law, with some judges opposing its use in domestic decision-making and others considering it useful in cases that involve controversies regarding basic human rights.⁷⁰ This means that the Supreme Court could go one of two ways: either ignore the decision entirely, or adopt its

⁶⁸ Sarah Rogerson, *Domesticating Due Diligence: Municipal Tort Litigation's Potential to Address Failed Enforcement of Orders of Protection*, 21 AM. U. J. GENDER SOC. POL'Y & L. 289, 315 (2012-2013).

⁶⁹ Sennett, *supra* note 28, at 546-47.

⁷⁰ See Ethan Kate, *A "Supreme" Court?: How an Unfavorable Ruling in the Inter-American Commission on Human Rights Should Impact United States Domestic Violence Jurisprudence*, 28 WIS. INT'L L.J. 430, 445-46 (2010-2011).

suggestions as consistent with evolving standards of decency in the international arena.

Although the adoption of the Commission's suggestions and subsequent alteration of Supreme Court jurisprudence is doubtful, given the views of some judges on the use of International Law as a relevant source for decision-making,⁷¹ the importance of international and regional mechanisms in advocacy for survivors of domestic violence cannot be easily dismissed. While it is true that the reports and decisions that stem from these mechanisms may not, by their mere existence, shift policies and legal thought in the United States judicial system, they are an effective tool for advocates against domestic violence to cast their advocacy in human rights terms. This includes efforts to highlight the continuous failure of state officials to protect survivors of domestic violence and educate on the availability of outside mechanisms to bring such abuses to light. Advocates should use the Commission's determinations as a persuasive authority in legal proceedings, both at the domestic and international level. Furthermore, such observations and recommendations should be utilized to promote policy changes.⁷² Said advocacy can have real effects, at least at the state level. In the aftermath of the Commission's ruling, several cities in the United States "passed resolutions claiming domestic violence to be a human rights violation."⁷³ The results of *Lenahan v. United States* also led the U.S. Department of Justice to conduct comprehensive investigations of the police departments of New Orleans and Puerto Rico.⁷⁴ The investigation in Puerto Rico shed light into the "longstanding failure to effectively address domestic violence and rape" in a manner that violates the Fourteenth Amendment.⁷⁵

B. Equal protection of the laws in the context of domestic violence

It must be noted that, although the *Town of Castle Rock* case was argued as a due process claim under the Fourteenth Amendment at the domestic level, once Lenahan's claims reached the international human rights arena, the controversy was conceived as an equal protection issue. Framing the lack of enforcement of restraining orders as an equal protection issue gave way to the most important aspect of the Inter-American Commission's report: its recognition that domestic violence is a form of discrimination that requires state accountability.⁷⁶ The

⁷¹ See *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).

⁷² Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 *FORDHAM L. REV.* 529, 554 (2008-2009).

⁷³ SCHNEIDER, *supra* note 7, at 1016.

⁷⁴ Caroline Bettinger-López, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 *AM. U. J. GENDER SOC. POL'Y & L.* 207, 224 (2012-2013).

⁷⁵ *Id.* at 225 (quoting CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT 58 (2011)), http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf.

⁷⁶ *Lenahan v. United States*, Case 12.626, Inter-Am Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11 ¶ 170 (2011).

Commission acknowledged the longstanding notion in the sphere of human rights that violence against women constitutes a severe form of discrimination,⁷⁷ and that such discrimination is exacerbated by traditional conceptions of acts of domestic violence as entirely private affairs. This is a pronounced difference from the opinion in *Town of Castle Rock v. Gonzales*, yet it reflects a growing trend in the international sphere to condemn acts of domestic violence and encourage the undertaking of positive obligations by states.

The Supreme Court's opinion in *Town of Castle Rock* reestablished the dangerous distinction between public and private sphere when it stated that the State was not responsible for private acts of violence. Yet, it is evident that the Court failed to consider the very public consequences of acts of violence in interpersonal relationships and home settings. Domestic violence still disproportionately affects women, especially women of color and low-income classes, effectively eliminating a portion of citizens from fully and freely participating in political and civil society. It is as Clare Dalton wrote:

To the extent that practices of violence against women, including domestic violence, still function to subordinate women to men, public failure to curb that violence has particular consequences. First, as long as *the state* in its official capacity, and society more generally, continue to tolerate private violence, women are not, in reality, the full and equal citizens the constitution and laws promise they will be; the full and equal citizens we tend to imagine, for the most part, they are.⁷⁸

While important strides have been made in the years since domestic violence was criminalized and states began passing legislation to protect survivors, the impact of such violence and the lack of accountability of government officials in the effective implementation of legislation remain staggering. It is also indisputable that, from the Commission's conception of equal protection of the law, not only are states prohibited from creating discriminatory laws, but they have an affirmative obligation to prevent discrimination. In the particular context of domestic violence, this imposes obligations to prevent, punish, and protect from private acts, contrary to the Supreme Court's opinion in *Town of Castle Rock v. Gonzales*. Again, the Supreme Court's declaration that the State is not responsible for providing protection from private acts of violence assures that the United States conceives the extent of its responsibility differently from that which is imposed on a State in the international human rights sphere. The understanding is that the Constitution is conceived in purely negative terms, it simply prohibits legislation that will have discriminatory effects. It is silent on how ineffective legislation and, in particular, lack of proper enforcement of available remedies can also result in discrimination. It allows for selective enforcement, as there is no real obligation to act on violations of restraining orders that survivors sought from the judicial system, and also allows for outright discrimination of particular

⁷⁷ *Id.* ¶ 162.

⁷⁸ CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 943 (2001).

groups of women. Caroline Bettinger López, lead counsel in *Lenahan v. United States*, noted:

[A]dvocates used the *Gonzales* case to demonstrate how police in the United States systematically fail to protect victims of domestic violence, or assist them with escaping abuse. They noted the disproportionate effect this practice has on women of color and immigrant women. In many cases, police will *under-respond* by ignoring women of color who call them for assistance. In other instances, police will *over-respond*, re-victimizing women of color by arresting them instead of the perpetrators. Federal and state courts have increasingly foreclosed many legal avenues available to domestic violence victims seeking to enforce their right to protection and hold police accountable.⁷⁹

The lack of positive obligations assumed by the State in protecting victims of private violence creates an environment of impunity for aggressors who violate orders of protection. *Lenahan v. United States* made clear to governments that the State also becomes complicit in discrimination when it takes on a vital duty, such as the enforcement of restraining orders, and consequently ignores it by diluting the meaning of domestic violence statutes and systematically failing to provide access to and enforce remedies for victims.

C. Due diligence standard

The United States alleged that the due diligence standard set forth in the Commission's decision was vague in its substantive components and only mandated that the State be effective in its actions.⁸⁰ The due diligence standard in cases of domestic violence requires an analysis of the foreseeability of risks for the victim and the undertaking of affirmative obligations by the State, at all levels, to ensure protection.⁸¹ Due diligence, then, requires more than a long list of remedies in a statute: it requires a duty to ensure that such remedies are real and not just symbolic.

Due diligence needs to be applied to all aspects in which domestic violence policy is relevant, whether at the judicial, public policy or societal level. This means that accurate records must be kept of: issued orders of protection; effective and timely police responses to calls from domestic violence victims, whether they hold orders of protection or not; police protocols for domestic violence cases, and personnel education on the dynamics of such a particularized form of violence. At the judicial level, acting with due diligence should not stop at the creation of specialized domestic violence courtrooms, but should expand to increasing sensibility to gender issues and knowledge of the multiple manifestations of domestic violence. Lastly, executive branches should encourage policies

⁷⁹ Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 59 (2008-2009) (footnotes omitted).

⁸⁰ Sennett, *supra* note 28, at 540.

⁸¹ *Id.* at 541.

that address issues of domestic violence as a form of discrimination such as education on gender violence, the dynamics of such violence and how to pursue remedies. It should also actively pursue the proper overseeing of the other branches of government so that due diligence can become a generalized standard for action and does not depend on a case-by-case analysis of whether proper action was taken to ensure a victim's safety.

CONCLUSION

Domestic violence remains one of the most common forms of violence in the United States and Puerto Rico, with women still comprising the majority of victims. The different manifestations of private acts of violence, such as physical, emotional or psychological, can have a considerable effect on the full participation and equal rights of victims in society. Yet, as the decision in *Castle Rock* made clear, the equal protection of the law only serves to withhold government action, not encourage it to act on behalf of those who suffer violence, even in instances in which the government itself has provided remedies to such violence. Restraining orders and other provisions commonly found in domestic violence statutes are relegated to words on paper when victims cannot rely on their enforcement by the same government who created them. This, however, requires a rethinking of the obligations of the State as positive rather than negative, that is, a duty to act as opposed to a duty to abstain in cases of domestic violence. Undertaking positive obligations in the areas of enforcement, education and overseeing may ensure that the State acts with due diligence, as defined in *Lenahan v. United States*, to protect and end discrimination against victims of domestic violence. The consequences of domestic violence should not be as nefarious as the death of victims in order to compel the State to take action.