

Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Jessica Gonzales,
in her individual capacity and on behalf of her deceased daughters,
Katheryn, Rebecca, and Leslie Gonzales

vs.

The United States of America

Case No. 12.626

**BRIEF OF WOMEN EMPOWERED AGAINST VIOLENCE (WEAVE)
AS AMICUS CURIAE IN SUPPORT OF
JESSICA GONZALES**

October 17, 2008

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

Women Empowered Against Violence (WEAVE) is a non-profit organization that works closely with adult and teen survivors of domestic violence. WEAVE was founded in 1996 and is incorporated in the District of Columbia, United States. It provides an innovative range of direct legal, counseling, economic and educational services that leads survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. Among the services provided to clients are legal representation in cases for civil protection orders and safety planning to address the specific safety needs of each client. Additionally, WEAVE provides training to law enforcement officials and other service providers.

The issues presented in this case are of vital importance to victims of domestic violence. Victims turn to the judicial system and law enforcement officials with an expectation that the state will act to protect them from violence. Civil protection orders are a significant tool in empowering victims and ensuring their safety. Through experience, WEAVE knows that, for protection orders to protect victims, protection orders must be enforced by law enforcement officials and the judiciary. The Commission's decision in this case will have implications far beyond the interests of Jessica Gonzales and could lead to greater protection for the millions of domestic violence victims in the United States and the thousands of WEAVE clients. WEAVE provides the perspective of front-line advocacy with victims as well as a practical understanding of the importance of protection orders, their enforcement, and, more generally, the justice and law enforcement systems' response to domestic violence.

¹ No counsel for a party authored this brief in whole or in part. No person or entity other than Women Empowered Against Violence made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Ms. Gonzales's brief explains that the Castle Rock Police Department's (CRPD) actions (or, rather, inaction) on the night of June 22, 1999, violated her human rights and those of her daughters. The subsequent Supreme Court decision in *Town of Castle Rock v. Gonzales*, Ms. Gonzales argues, leaves Ms. Gonzales and domestic violence victims in the United States with no effective legal remedy by which they can hold police and other state actors accountable for their failures to protect domestic violence victims. We concur in her legal arguments.

Our brief shows that Ms. Gonzales's experiences with the CRPD and the judiciary are not exceptional in that judicial and police response to domestic violence in the United States is, at best, not uniform and, at worst, detrimental to survivors. The CRPD's actions are representative of systematic failures of the United States to exercise due diligence to protect domestic violence victims, who are disproportionately women of color and immigrant women. The Supreme Court decision in *Gonzales* highlights federal and state courts' foreclosure of legal remedies available to victims. The experiences of Ms. Gonzales, a woman of Mexican and Native American descent, demonstrate the severe limitation of civil legal remedies available to all domestic violence survivors. This brief reviews and discusses this limitation in remedies and the peculiar challenges faced by women of color and immigrant women in obtaining appropriate governmental services to protect themselves from domestic violence. Although police response and judicial protections are imperfect for all, this brief argues that women of color and immigrant women are particularly poorly served by the State. The failure of judicial and law enforcement measures to address the epidemic of domestic violence in the United States or

Petitioner has consented to the filing of this brief.

to provide adequate legal remedies for victims results in a denial of the basic protections mandated by international human rights standards and in a violation of women's rights to safety.

I. DOMESTIC VIOLENCE IS AN EPIDEMIC IN THE UNITED STATES AND CONSTITUTES A VIOLATION OF HUMAN RIGHTS.

Domestic violence is an epidemic in the United States that severely impacts women's lives, health, opportunities, and their ability to exercise their human rights. This violence, often called intimate partner violence or relationship abuse, is a pattern of intimidation and abuse that a batterer uses to control his partner, and constitutes an act of discrimination. The batterer exercises and maintains control through physical abuse, as well as economic, sexual, and psychological abuse. The context within which the violence is perpetrated and experienced – an intimate relationship – makes this abuse especially pernicious and its effects severe and wide-ranging.

Domestic violence is ubiquitous in the United States. Approximately one in three American women experiences physical abuse by a partner.² Such abuse is the leading cause of injury to American women.³ Nearly 300,000 American men also experience relationship abuse each year.⁴

As high as these numbers are, they likely do not reveal the full scale of this epidemic. Domestic violence is notoriously underreported, as has been the experience of many of our clients who come to our organization only after years of abuse, and many of whom never report the abuse to any government agency. Overall acts of domestic violence

² C.J. Newton, *Domestic Violence: An Overview*, FINDCOUNSELING.COM MENTAL HEALTH JOURNAL, Feb. 2001, <http://www.findcounseling.com/journal/domestic-violence/> (last visited Oct. 15, 2008) [hereinafter *Domestic Violence: An Overview*]; United States Senate, Subcommittee on Crime, Corrections, and Victims' Rights, *Ten Years of Extraordinary Progress: The Violence Against Women Act, A Report by Senator Joseph R. Biden Jr.*, (Sept. 2004), available at http://biden.senate.gov/documents/VAWA_Report.pdf; *About Domestic Violence Against Men* (May 20, 2007), <http://www.oregoncounseling.org/handouts/domesticviolencemen.htm>. See also Callie Marie Rennison, U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Intimate Partner Violence and Age of Victim, 1993-99* 1 NCJ-187635 (Oct. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipva99.pdf>.

³ Montana State University-Northern, *Statistics*, <http://www.msun.edu/stuaffairs/response/stats/stats.html> (last visited Oct. 15, 2008).

are reported less than other violent crimes.⁵ There are a myriad of reasons that victims do not report the abuse at all, and specifically to state agencies. Many victims feel shame and fear stigmatization. Victims are often dependent on their abusers either financially or for their legal immigration status. Our clients often share children or other family ties with their abusers that make complete separation nearly impossible. Moreover, as a following section addresses, those victims who experience the highest rates of abuse often have the fewest resources and greatest barriers when reporting and seeking help. For these and many other reasons, victims often choose not to or are unable to disclose the reality of their abusive situations.

Victims' experiences with law enforcement officers are a primary factor underlying the under-reporting of domestic violence. Our clients often find that, when they do call the police, they are disbelieved and not offered appropriate assistance. Police officers, the overwhelming majority of whom are men, tend to support traditional patriarchal gender roles, making it difficult for them to identify with and help female victims.⁶ This bias towards patriarchal roles can also lead to erroneous interpretation of events and encounters, which in turn leads to mistaken conclusions, including assuming that the victim is not in danger or that no serious violent act has occurred.⁷ Police biases, assumptions and judgments constitute further discrimination toward domestic violence victims, who do not receive the same level of objectivity as victims of other crimes. They contribute to a sense that seeking police assistance is unproductive and discourage our clients and their communities from reporting abuse.

⁴ See *Domestic Violence: An Overview*, *supra* note 2.

⁵ *Id.*

Another important factor for domestic violence victims is that the alleged abuser is rarely prosecuted. In a 2000 survey, only 7.5% of women who were raped by an intimate partner, 7.3% of the women who physically assaulted by an intimate partner, and 14.6% of women who were stalked by an intimate partner reported that their attacker was criminally prosecuted.⁸ Many of WEAVE's clients have expressed a belief that there is no recourse for them and no punishment for their abusers. This belief is especially strong among some of our clients of color and immigrant clients who feel that police and the judiciary devalue their victimization because they are people of color or immigrants. These experiences help to explain victims' reluctance to report occurrences of domestic violence and seek outside assistance.

A. Domestic Violence is a Crime Against Women and Constitutes Impermissible Discrimination Against Women.

Notwithstanding its prevalence, domestic violence in the United States is predominantly a crime against women. The overwhelming majority of victims are women. According to the federal government, between 1998 and 2002, women accounted for 73% of the victims of physical violence within the family, 84% of spouse abuse victims, and 86% of victims of violence against a relationship partner (boyfriend or girlfriend) in the

⁶ Martha Smitley, Susanne Green, & Andrew Giacomazzi, National Criminal Justice Reference Service, *Collaborative Effort and the Effectiveness of Law Enforcement Training Toward Resolving Domestic Violence* 19 (Jan. 14, 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/191840.pdf>.

⁷ *Id.*

⁸ Patricia Tjaden & Nancy Thoennes, U.S. Department of Justice, *Bureau of Justice Statistics Special Report, Full Report of the Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*, NCJ-183781 (Nov. 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>

U.S.⁹ Women are five to eight times more likely than men to be victims of domestic violence.¹⁰

Moreover, domestic violence against women victims is significantly more severe and causes more serious injuries than that against men.¹¹ Women are far more likely than men to be the victims of battering at the hands of an intimate partner resulting in death.¹² Between 1976 and 2005, the U.S. Department of Justice reports one-third of all female murder victims were killed by an intimate partner, compared to only three percent of male murder victims.¹³ Such extraordinary disparities underline the fact that domestic violence victims are experiencing terrible discrimination on account of gender.

Domestic violence is demonstrably a highly gendered experience. Therefore, the State response to this violence – whether good or poor – has a significantly disproportionate effect on women and their exercise of their human rights. When the State fails to respond adequately and appropriately to crimes of domestic violence, it is perpetuating unlawful discrimination.

⁹ Matthew R. Durose et al., U.S. Department of Justice, *Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances* 10 NCJ 207846 (June 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

¹⁰ Lawrence A. Greenfeld et al., U.S. Department of Justice, *Bureau of Justice Statistics Factbook: Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 38 NCJ-167237 (Mar. 1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>.

¹¹ Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with request for an investigation and hearing of the merits (Dec. 23, 2005) at 21-22 [hereinafter Gonzales Petition].

¹² Leonard J. Paulozzi, Linda E. Saltzman, Martie P. Thompson, & Patricia Holmgren, Center for Disease Control, *Surveillance for Homicide Among Intimate Partners, - United States, 1981 – 1998*, 50 (SS03); 1-16 ¶ 4 (Oct. 12, 2001), <http://www.cdc.gov/MMWR/preview/mmwrhtml/ss5003a1.htm>. See also, South Carolina Coalition Against Domestic Violence and Sexual Assault, *Prevalence of Domestic Violence*, available at <http://www.sccadvasa.org/articles/59.pdf> (last visited Oct. 15, 2008).

¹³ U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics, Homicide Trends in the U.S.: Intimate Homicide*, available at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last visited Oct. 15, 2008).

B. A Victim's Experience of Domestic Violence is Impacted by her Race, Gender, Class and Immigration Status.

Gender, class, race, and immigration status are significant determinants of the likelihood that a person will experience domestic violence and how the state will respond to her experiences. Domestic violence affects every racial, ethnic, religious, and immigrant community, crosses every income level and age group, and is found in rural, suburban, and urban communities. While some data suggest that there is not a significant difference between women of different races in reporting domestic violence to the police,¹⁴ some communities report higher levels of victimization by partners. According to reporting, the women who suffer the most from occurrences of non-lethal domestic violence are Native American women, African American women, women residing in urban areas, women who live in low income households, and women between the ages of 16 and 24.¹⁵ Out of the 3 million women who are abused annually, Native American women are the most likely to report experiencing domestic violence, followed by African American women, Caucasian women, and finally Latina women.¹⁶ On average, 23 out of every 1,000 Native American women, 12 out of every 1,000 African American women and 8 out of every 1,000 Caucasian women will experience particularly physically violent victimization.¹⁷ Along with having the highest rate of violent occurrences, Native American women also report more violent attacks. They report more rapes and more instances of being stalked than their

¹⁴ Rennison, *supra* note 2 at 3.

¹⁵ Greenfeld et al., *supra* note 10.

¹⁶ Matthew DuRose et al., *supra* note 9.

¹⁷ Callie Marie Rennison, U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Violent Victimization and Race, 1993-8*, 9 NCJ-176354 (Mar. 2001), <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf>.

African American and Caucasian counterparts.¹⁸ WEAVE's experience is consistent with this reporting data, as disproportionately high numbers of women of color (and immigrant women) seek WEAVE services.

Women living in poverty experience domestic abuse at much higher rates than women in households with high incomes.¹⁹ In the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.²⁰ During times when abusers experience financial or job instability, violence increases within the home.²¹ These rates of violence, extremely high in every community, show that women living in poverty and women of color are more likely to experience domestic violence. Unfortunately, those who need services the most have the least access to services.²²

Immigrant women are particularly likely to be underserved by the systems that are in place to protect victims and ensure accountability for the perpetrators of domestic violence. The nature of this phenomenon springs from two sources. First, immigrant women are less likely to avail of police and court protections than others because they do

¹⁸ Tjaden & Thoennes, *supra* note 8 at iv. See also Brief for Amici Curiae Sacred Circle, National Resource Center to End Violence Against Native Women, et al supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12.626, Inter-Am. C.H.R. (October 22, 2008) [hereinafter Brief for Amici Curiae Sacred Circle] for a fuller discussion of the experiences of Native American victims of domestic violence.

¹⁹ Rennison, *supra* note 17.

²⁰ Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Intimate Partner Violence*, 4 NCJ-178247 (May 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf>.

²¹ Michael L. Benson & Greer Litton Fox, U.S. Department of Justice, National Institute of Justice, *When Violence Hits Homes: How Economics and Neighborhood Play a Role 2* (September 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/205004.pdf>.

²² See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6 ¶ 26 (March 7, 2008) (“not[ing] with concern that the alleged insufficient will of federal and state authorities to take action with regard to [gender-based] violence and abuse often deprives victims belonging to racial, ethnic and national minorities . . . of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered.”).

not trust those systems. They have justifiable fears related to the possibility of being deported. Many have limited English proficiency. Many experience stigma from their communities when they engage these systems. The effect of these combined factors on willingness to engage with the criminal justice system is already well-documented.²³

The second source is less well understood: when immigrant women *do* report crimes and seek enforcement of protection orders, the response that they experience from the system very often puts them in a worse position than they were before reporting. A series of incidents from 2007 and 2008 drawn from WEAVE's own client base in the Washington, D.C. metropolitan area, amply illustrates some of these forces at work:

“Ana,²⁴” a Latina woman with lawful permanent residence, received death threats from her husband, a retired military man and a U.S. citizen. She returned home one day to find every picture of the two of them in the house ripped to pieces, and she sought a protective order. Her husband admitted everything to the Judge, but said that he had just acted out of anger. He and the Judge discussed his military background, suggesting to Ana that the Judge connected with her husband and imputed credibility to him because of his military status. The Judge paid little heed to the bags of ripped photos our client had with her. The Judge denied her a protective order. The client told WEAVE, “I felt unheard because I was an immigrant.”

“Maria,” another Latina woman, also married to a U.S. citizen, endured five minutes of her husband crushing her leg in a doorway before police arrived. When

²³ See, e.g., Leslye Orloff & Janice Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 157 (2001).

²⁴ Names have been changed to protect client confidentiality.

the police arrived, no one spoke Spanish, and the woman did not speak English. She kept begging the police to pay attention to her leg, which was swollen and bruised. Instead, the police interviewed the husband to find out what had happened. By the time a Spanish-speaking officer arrived, 20 minutes later, their view of the incident was already skewed. Moreover, in court, a judge deemed that by the time that officer arrived who understood what she was saying, too much time had passed for her exclamations about her injuries to be considered “excited utterances” for purposes of introducing the statements into evidence at court. The Judge denied her petition for a protective order.

“Fatima,” the daughter of an African client called 911 when her father was savagely beating her mother. The police were able to help the mother and children to safety, and the local prosecutor brought the man to trial on criminal assault charges. At trial, the defendant convinced most members of the jury that the woman had inflicted these injuries on herself to obtain an immigration benefit; the case ended in a mistrial.

“Maribel,” a Latina woman who is in the United States without documentation, called the police when her boyfriend was beating her. The police came, noted the marks on her body, and, rather than assisting Maribel to find health care or arresting her boyfriend, the officers reported both Maribel and her boyfriend to the United States Immigration and Customs Enforcement. Now both are in deportation proceedings.

Another WEAVE client, “Alicia,” was able to get a protection order against her husband, but the husband violated the order. He got into her apartment, began kicking her, yelling at her and threatening to kill her if she called the police. Despite his threat, the

client was able to call the police. Instead of enforcing the protection order, the responding officer, who spoke her language (Spanish), told her she would be better off talking to the abuser and trying to maintain a more peaceful relationship. This experience left the woman enormously fearful that her protection order was worthless, and that she was at her abuser's mercy.

WEAVE's immigrant clients have made an enormous leap of faith simply to engage the criminal justice system, but in too many cases, they were then met with disbelief and disrespect from police, prosecutors, judges, and juries. They endured accusations of manipulating the system for immigration purposes. Most horrifyingly, in cases where they were unable to prevail because of accusations and assumptions like these, they rightly fear that they have made their abusers more angry and more likely to strike back at them, whether here in the United States or in their home country if either party is deported.

These experiences demonstrate the necessity for each part of the judicial and law enforcement system to respond appropriately. In Fatima's story, above, the police responded well, and the prosecutor believed her, swiftly bringing her abuser to trial. He did not, however, anticipate the power of the defendant's arguments that the victim was somehow playing the system to get immigration status. Fatima was let down by the jury. The answer in that case might have been to bring in an expert on immigration law to explain to the jury how the criminal trial could not determine her immigration status. Overloaded with cases and unfamiliar with immigrant victims' experiences, the prosecutor did not do that and the jury remained convinced that someone would beat herself badly to get immigration benefits. Fatima's husband walked free and pressured her to reconcile.

Without all parts of the system responding effectively – from the initial police contact through to a criminal trial or enforcement of a protective order – our clients remain vulnerable to, and afraid of, further abuses. The following sections of this brief discuss the primary parts of the state’s response to domestic violence: the police and the judiciary.

II. OVERALL POLICE RESPONSES TO DOMESTIC VIOLENCE ARE INADEQUATE AND DISCRIMINATORY.

Although many police officers are empathetic and diligent and many police departments are committed to serving victims, police responses to domestic violence vary widely in the United States from jurisdiction to jurisdiction. This section reviews how police respond to victims of domestic violence and discuss the flaws and weaknesses in those responses, particularly as applied to women of color and immigrant women. These victims are experiencing discrimination on multiple levels—first, the response to domestic violence victims, with its inherent gender biases, discriminates among domestic violence victims as a whole, compared to other crime victims. Second, within the response to domestic violence victims, police response discriminates against immigrant women, women of color, and poor women.

A. The Historical Context of Domestic Violence in the United States Informs Current Police Practices.

Throughout U.S. history, the state (including both the judiciary and law enforcement officials) has routinely treated domestic violence as a private matter in which state intervention was not appropriate. For decades, law enforcement policies characterized domestic violence incidents as a private matter, not suited for law enforcement

intervention.²⁵ In recent decades, the women's movement in the United States has raised the public consciousness of domestic violence and advocated state responses that condemn rather than condone such violence. Although the public discourse has shifted slowly, there has been a significant change in the American public's awareness of domestic violence and a liberalization of public attitude toward state intervention in the home. These factors contributed to the development of local legislation that opened some legal remedies to domestic violence victims and put in place much stronger policies and structures in police agencies.²⁶

Although the public discourse has shifted, law enforcement has continued to respond in ways that reflect earlier understandings about domestic violence as a private issue. Police officers responding to a victim's call often fail to treat the abuse as criminal. Many officers encourage informal resolution between the parties, urging the victim to work it out with the abuser.²⁷ As recently as 1984, only ten percent of large city police departments in the U.S. encouraged officers to make arrests for crimes of domestic violence.²⁸ Forty percent explicitly encouraged mediation; one half had no formal policy on domestic violence.²⁹ Arrests of abusers were rare in multiple studies.³⁰ Studies estimate that arrests occurred in only three to fourteen percent of all intimate partner cases to which

²⁵ See Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae Supporting Respondent at 16, [hereinafter Brief of NCADV] (citing Machaela M. Hctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 649 (1997)).

²⁶ "According to the 1990 Law Enforcement Management and Administrative Statistics Survey (LEMAS), 93% of the large local police agencies (agencies with more than 100 officers) and 77% of the sheriffs' departments have written policies concerning domestic disturbances. In addition, 45% of the large local police agencies and 40% of the sheriffs' departments have special units to deal with domestic violence." Zawitz, *infra* note 74.

²⁷ Machaela M. Hctor, Comment, *Domestic Violence As a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 650 (1997).

²⁸ *Id.*

²⁹ *Id.*

officers actually responded.³¹ This failure of law enforcement to treat domestic violence as a crime was a primary impediment to effectively addressing domestic violence,³² and reflects a history of wrongly disparate treatment of this particular crime as compared to other violent crimes.

To remedy this failure, many states and the District of Columbia have enacted legislation that requires police officers to make an arrest when there is probable cause to believe that one person has committed domestic violence or has violated a restraining order, also called a civil protection order.³³ These “mandatory arrest laws” eliminate police discretion. Some of these mandatory and pro-arrest policies were adopted in response to the federal Violence Against Women Act (VAWA), which specifically required these policies as a condition for various grants to states and local governments.³⁴ They illustrate public frustration with the inadequacy of police response and encourage police to treat domestic violence as a crime.

³⁰ Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1852 (2002).

³¹ *Id.* (citing Eve S. Buzawa & Carl G. Buzawa, Introduction, in *Domestic Violence: The Changing Criminal Justice Response* vii, xvi (Eve S. Buzawa & Carl G. Buzawa eds., 1992)).

³² Hocror, *supra* note 27.

³³ Andrew R. Klein, *The Criminal Justice Response to Domestic Violence* 95 (Cengage Learning 2003). *See also* NEAL MILLER, WHAT DOES RESEARCH AND EVALUATION SAY ABOUT DOMESTIC VIOLENCE LAWS? A COMPENDIUM OF JUSTICE SYSTEM LAWS AND RELATED RESEARCH ASSESSMENTS 91, n.270 (Dec. 2005) (draft), *available at* <http://www.ilj.org/publications/dv/DomesticViolenceLegislationEvaluation.pdf> (citing ALASKA STAT. § 18.65.530; ARIZ. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b(a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. §§ 236.12(2); KAN. STAT. ANN. § 22-2307(b)(1); LA.REV. STAT. ANN. § 46-2140; MISS. CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. §2C:25-21; N.Y. CRIM. PROC. LAW § 140.10(4)(c); OHIO REV. CODE ANN. §§ 2935.032(A)(1)(a), 2935.03 (B)(1) (discretionary); OR. REV. STAT. § 133.055(2)(a); R.I. GEN. LAWS §12-29-3; S.C. CODE ANN. § 16-25-70(B); S.D. CODIFIED LAWS ANN. § 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2(2); VA. CODE ANN. §19.2-81.3; WASH. REV. CODE ANN. § 10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2); MO. REV. STAT. § 455.085.1).

³⁴ Violence Against Women Act of 2005, § 102, 42 U.S.C. § 3796hh (2006). *See* Brief for New York Legal Assistance Group, et al. as Amici Curiae Supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12.626, Inter-Am. C.H.R. (October 22, 2008) [hereinafter Brief for New York Legal Assistance Group] for a fuller discussion of VAWA’s impact on the experiences of domestic violence victims and its limits.

B. Civil Protection Orders Are an Essential Means of Protecting Battered Women.

In an effort to require police to effectively respond to domestic violence in the face of resistance by law enforcement to treating domestic violence as a crime, beginning as early as 1970, states across the country began to adopt legislation authorizing judges to issue civil restraining orders (also known as orders of protection) to victims of domestic violence who demonstrate that they fear future physical harm from their abuser.³⁵ Today, all 50 states have passed such legislation.³⁶ Civil protection orders, which vary from state to state, often order the respondent to stay away from the petitioner, to not contact her, to move out of the petitioner's residence, and to follow custody and visitation orders, and to pay child support if children are involved. Every state has criminal penalties for violations of protection orders.³⁷ Thirty-one states have laws that require that police make an arrest when there is probable cause to believe that a person has violated an order of protection.³⁸

These protection orders can be effective in keeping the respondent away from the survivors, prohibiting contact, and awarding custody of the parties' children, but their effectiveness is dependent in many cases on police activity, primarily in serving the protection orders on respondents and in responding when a protection order is violated.

³⁵ Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy"*, 11 S. CAL. INTERDIS. L.J. 361, 362 (2002) (clarifying that even though there are other reform policies such as implementing mandatory arrests or pro-arrest police procedures, creating domestic violence units in prosecutors' offices, and setting up treatment programs for abusive spouses, most states have adopted civil restraining orders as the remedy).

³⁶ Epstein, *supra* note 30, at 1858; ABA Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State*, June 2007, <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>.

³⁷ ABA Commission on Domestic Violence, *supra* note 36.

³⁸ ACLU, *Domestic Violence: Protective Orders and the Role of Police Enforcement* (Mar. 1, 2007), citing National Network to End Domestic Violence, *Criminal Violations* (2005), <http://www.aclu.org/womensrights/violence/28743pub20070301.html#6>.

C. Inadequate Law Enforcement Responses Fail Survivors and Negate the Effectiveness of Civil Protective Orders.

Victims of domestic violence who obtain restraining orders depend on and rightly expect police assistance in the enforcement of these orders.³⁹ As the Gonzales Petition explains in further detail, police enforcement of restraining orders through arrest and other means is crucial to protecting women's safety, as an order alone does not guarantee that the abuse will end.⁴⁰ Protection orders are often violated.⁴¹ Nearly one third of women with protection orders reported violations involving severe violence and injury to themselves.⁴² Notwithstanding official legislative policy statements and mandatory arrest laws in at least thirty-one states, there is a widespread and consistent pattern of police failing to enforce restraining orders in the context of domestic violence and in compliance with those laws.

As discussed *supra*, the majority of domestic violence victims do not report the abuse and do not seek police assistance. According to a 2000 Department of Justice study, about one-quarter of women who were physically assaulted by an intimate partner reported the incident to the police.⁴³ Fifty-two percent of women who were stalked by an intimate partner reported the stalking to the police.⁴⁴ And less than one-fifth of women raped by an intimate partner report their rape to the police.⁴⁵ Women who do not report intimate partner violence to the police commonly list three main reasons for keeping silent: the

³⁹ The jurisdictional rules that apply to American Indian and Alaska Native tribes further limit the juridical remedies available to American Indian and Alaska Native women. For a full discussion of these rules and their impact on American Indian and Alaska Native women, see Brief for Amici Curiae Sacred Circle, *supra* note 18.

⁴⁰ Gonzales Petition, *supra* note 11, at 28-29.

⁴¹ Tjaden and Thoennes, *supra* note 8.

⁴² U.S. Department of Justice, National Institute of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50, NCJ 171666 (July 1998), available at www.ncjrs.gov/pdffiles/171666.pdf.

⁴³ Tjaden and Thoennes, *supra* note 8; Greenfeld et al., *supra* note 10.

⁴⁴ Tjaden and Thoennes, *supra* note 8.

private nature of the relationship, their fear of retaliation from their abuser, and their feeling that the police would not respond adequately to the abuse.⁴⁶ This fear of inadequate response is based on the reality of survivors' experiences.

1. Frequent Failure to Respond or to Respond in a Timely Way to 911 Calls

When notified of an incidence of domestic violence, police fail to respond to about 10% of calls from intimate violence victims.⁴⁷ A national study shows that, “[a]ll too often, police responded to domestic violence calls either by taking no action at all, by purposefully delaying response in the hope of avoiding confrontation....”⁴⁸ In a 2004 survey of 74 clients at the Domestic Violence Intake Center at the Superior Court of the District of Columbia, four clients reported that the police did not show up after they called to report an incident of domestic violence.⁴⁹ One person reported having to call the police four times within an hour to get them to respond.⁵⁰ For those callers to whom the police responded, the average response time was 33.24 minutes – ranging from two minutes to three hours.⁵¹

2. Failure to Arrest

When police do respond to calls from domestic violence victims, they often respond inappropriately by failing to make an arrest or by incorrectly arresting the victim. As addressed *supra*, some jurisdictions have adopted mandatory arrest laws as a policy that

⁴⁵ *Id.*

⁴⁶ Greenfeld et al., *supra* note 10.

⁴⁷ *Id.*

⁴⁸ See Brief of NCADV, *supra* note 25, citing Hoctor, *supra* note 27, at 649.

⁴⁹ Survey conducted by Survivors and Advocates for Empowerment (SAFE), Washington, DC (2004) [hereinafter SAFE Survey].

⁵⁰ *Id.*

⁵¹ *Id.*

promotes victims' safety.⁵² These laws have had measurable success in increasing the rates of arrests. For example, before the District of Columbia adopted a mandatory arrest policy, police arrested abusers in only 5% of domestic violence cases.⁵³ After adoption of a mandatory arrest policy, police arrested abusers in 41% of cases.⁵⁴ After the adoption of a mandatory arrest policy in New York City, felony domestic violence arrests increased by 33% and arrests for violation of protection orders increased by 76%.⁵⁵

Nonetheless, not every jurisdiction has a mandatory arrest policy, and even those with such a law on the books do not always yield effective, consistent practices. Despite a mandatory arrest policy in the District of Columbia, of the victims in the above-mentioned 2004 survey, 62% of those surveyed reported that responding police officers took reports; 7% were arrested with the batterer; 4% of victims were arrested while their abusers were not; and 29% reported the police were reluctant to arrest the batterer.⁵⁶ In one California jurisdiction, where the police department has a policy requiring arrest, officers failed to make arrests in at least 30% of cases where visible injuries were present.⁵⁷ Police officers in Washington state responding to reports of protection order violations often attempted to "calm the parties down" and tell abusive spouses to "take a walk around the block" to cool down.⁵⁸

⁵² See *supra* Part II.A.

⁵³ U.S. Attorney General's Task Force on Family Violence, *U.S. Dept. of Justice Final Report* 10-26 (1984).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ SAFE Survey, *supra* note 49.

⁵⁷ Women's Justice Center, *Online Handbook: Advocating for Women in the Criminal Justice System in Cases of Rape, Domestic Violence and Child Abuse*, available at http://www.justicewomen.com/handbook/part1_problem.html (last visited Oct. 15, 2008).

⁵⁸ See Donaldson, 831 P.2d at 1105 (Wash. Ct. App. 1992) ("[A] common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could 'cool off.'").

These snapshots of typical police response to a domestic violence complaint reflect a national trend of low arrest rates for domestic violence—as low as three to fourteen percent.⁵⁹ A national survey showed that police attempts at mediation or separation of the parties so they could “cool off,” like those in Washington, is also common.⁶⁰ A report from the United States Department of Justice surveying female victims of domestic violence between 1992 and 1996 found that only one in five incidents reported to the police resulted in an arrest at the scene.⁶¹ Further, in only 29% of the cases did the police question the suspect or a witness, and in 30% of the cases they failed to take an official report.⁶² A subsequent Department of Justice report surveying domestic violence victims from 1998 to 2002 found that only 36% of family violence incidents reported to the police resulted in an arrest.⁶³ The National Violence Against Women Survey examined arrest rates by offense and found consistently that domestic violence assailants were arrested or detained less than half the time: in 47% of rape cases, 36% of physical assault cases, and 28% of stalking cases.⁶⁴ Even when domestic violence victims actually call the police, in the majority of cases abusers are not arrested.

In fact, WEAVE’s clients have encountered these same challenges in their experience with the police following a domestic violence call. Recently, an immigrant survivor, Maria⁶⁵, sought enforcement of a protection order she had secured against her abuser. When the abuser showed up at her apartment and refused to leave, she went to the police. The police berated her for coming to station instead of calling 911, and only agreed

⁵⁹ Brief of NCADV, *supra* note 48, *citing* Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN’S L. J. 213, 217 (1988) (citing various studies on low arrest rates by police).

⁶⁰ See Brief of NCADV, *supra* note 48, *citing* Hctor, *supra* note 27, at 649.

⁶¹ Greenfeld et al., *supra* note 10.

⁶² *Id.* at 20.

⁶³ DuRose et al., *supra* note 9.

⁶⁴ Tjaden and Thoennes, *supra* note 8.

to accompany her back to the apartment after hours of intensive argument with her advocate. The police officer also instructed Maria not to call the police against her abuser because he was being a good father and helping her with her rent. The officer then refused to arrest the abuser, although he was in clear violation of the civil protection order.⁶⁶

There are several factors that may contribute to the likelihood of arrest following a domestic violence call. For instance, if an abuser behaves aggressively toward the police officers involved, arrest is more likely.⁶⁷ By contrast, certain factors may discourage the police from arresting an abuser. One Washington court noted that the more closely related the two parties are the less likely police officers are to arrest the perpetrator.⁶⁸

Ability of the parties to communicate with the police may also weigh heavily on whether or not an abuser is arrested. An abuser who is able to communicate with the police and represent him or herself as the more reasonable party, perhaps because of language ability, may thereby diminish the likelihood of an arrest. If a party experiences communication difficulties, however, she may become frustrated. If it is a victim who shows his or her frustration, the police may perceive them as unreasonable, and thus an arrest may be less likely to occur.

Apart from the low arrest rate of abusers following a police report for domestic violence, another troubling trend is the practice of “dual arrest,” whereby the victim is arrested alone or alongside his or her abuser. In jurisdictions with mandatory arrest policies, police often will “either throw up their hands, arrest both parties, and leave it to the courts to sort out, or choose to arrest the woman because she may appear to be the

⁶⁵ Name has been changed to protect client’s identity.

⁶⁶ Case details are withheld to protect WEAVE client’s confidential information.

⁶⁷ Brief of NCADV, *supra* note 25, at 15.

aggressor to the untrained eye.”⁶⁹ Research shows that most of the women who were arrested following reports of domestic abuse were acting in self-defense.⁷⁰ One study suggests the dual arrest rate for intimate partner violence is only about 2%,⁷¹ but other sources indicate that in some areas women make up almost a quarter of domestic violence arrestees.⁷² These practices are particularly harmful to battered women:

Problems for the battered woman do not end with the arrest; she also faces the prospect of having her children removed by child protective services, being charged inappropriately, being pressured to plea bargain, being wrongfully convicted, having her arrest and conviction history used against her in subsequent custody proceedings, losing her job, and having the batterer use the threat of criminal prosecution to continue to control her.⁷³

The prospect of such a result can be daunting to all women, but particularly to women of color and immigrant women, who are already disproportionately affected by domestic abuse. Police, therefore, must respond appropriately to domestic violence calls and follow mandatory arrest policies by arresting the abuser, both to ensure public safety and to avoid exposing the victim to additional harm.

⁶⁸ Donaldson v. City of Seattle, 831 P.2d. 1098, 1104 (Wash. Ct. App. 1992) (stating that the more closely related the two parties are the less likely officers are to arrest).

⁶⁹ Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680 (2004); accord Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN’S L.J. 339, 344 (1995); see also 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, 23 (2004).

⁷⁰ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 831 (2001); Joan Zorza, *Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 980 (1994).

⁷¹ David Hirschel et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, Report Submitted to U.S. Dep’t of Justice, Doc. No. 218355 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

⁷² Holly Maguigan, *Wading Into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 426, 442 (2003).

⁷³ Goodmark, *supra* note 69, at 23.

3. Failures of Evidence Gathering and Record Keeping, Preventing Effective Judicial Investigations and Prosecution of Domestic Violence

Another problem exists where police officers do respond but fail utterly to conduct adequate investigations or keep appropriate records, thereby harming the victim's chances of obtaining meaningful protection. Although the police do take official reports in the majority of reported incidents, nationally, they are more likely to take reports when an incident involves strangers and not intimate partners.⁷⁴ In a 2002 survey of survivors in Santa Rosa, California, "a significant number of responding officers failed to carry out even the most fundamental requirements of victim protection and the most basic level of evidence gathering essential for prosecuting the cases."⁷⁵ In one-third of cases, the officers did not ask victims about the presence of firearms.⁷⁶ In almost half of cases, officers did not take photographs, even though victims had visible injuries.⁷⁷ In 27% of cases, officers did not ask victims about the perpetrator's history of abuse.⁷⁸ In no case in which the victim needed an interpreter did the officer provide one.⁷⁹ When a victim cannot communicate to the police officers, evidence gathering and the creation of records is clearly impeded. The differential in taking reports for intimate partner violence appears to be the legacy of that fundamental misunderstanding that for decades formed the core of law enforcement attitudes toward domestic violence. The failure to create and maintain records and gather evidence has obvious implications for holding abusers accountable and permitting survivors to access legal remedies.

⁷⁴ Marianne W. Zawitz, U.S. Department of Justice, *Bureau of Justice Selected Findings: Domestic Violence: Violence between Intimates* 5, NCJ-149259 (Nov. 1994), <http://www.ojp.usdoj.gov/bjs/pub/pdf/vbi.pdf>.

⁷⁵ Women's Justice Center, *supra* note 57.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

III. JUDICIAL RESPONSES TO DOMESTIC VIOLENCE ARE INADEQUATE AND DISCRIMINATORY.

The United States Supreme Court decision in Ms. Gonzales's case highlights limitations in judicial remedies available to survivors. The restricting of domestic violence to state and local courts, a detrimental judicial attitude toward domestic violence survivors, and the failure of the state to treat domestic violence as a serious and systematic human rights violation contribute to the inadequacy of the judicial response in the United States to domestic violence.

A. Localized remedies provide uneven and inadequate remedies for survivors of domestic violence.

Recent Supreme Court rulings have dramatically limited the federal causes of action available to survivors of domestic violence.⁸⁰ In addition to the *Gonzales* decision, in *United States v. Morrison*,⁸¹ the Supreme Court struck down a narrow portion of the Violence Against Women Act that would have allowed for a federal civil rights cause of action to remedy domestic violence.⁸² Without federal causes of action available to survivors of domestic violence, these cases are being confined to over-burdened and under-funded state dockets, further discriminating against domestic violence victims and limiting the access of women of color and immigrant women to appropriate judicial remedies.

Relegating domestic violence disputes to state dockets has logistical implications: state dockets have tighter schedules and less funding than do federal courts.⁸³ Litigating

⁸⁰ For a full discussion of the impact of recent Supreme Court rulings on American Indian and Alaska Native women, see Brief for Amicus Curiae Sacred Circle, *supra* note 18.

⁸¹ *United States v. Morrison*, 529 U.S. 598, 627 (2000).

⁸² See the Brief for New York Legal Assistance Group, *supra* note 34, for a full discussion of VAWA's implications.

⁸³ Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between the Truly National and the Truly Local*, 42 B.C. L. REV. 1081, 1091–93 (1999).

domestic violence disputes on the state level also has an important impact on judicial understanding of domestic violence; each jurisdiction adopts its own method of judicial education, as well as its own remedy.⁸⁴ This approach means that for a battered woman in Connecticut, the only “long-term” protection order available to her lasts for just six months,⁸⁵ while in neighboring New York, a protection order may be issued for up to five years.⁸⁶ In Maryland, the survivor may have her hearing before a judge who has not been trained in the unique dynamics of domestic violence.⁸⁷ A few miles away, in the District of Columbia, a battered woman’s case will be heard by a judge sitting on a special domestic violence bench and may result in a year-long protection order.⁸⁸ These few miles may mean the arbitrary difference between meaningful protection and none at all.

Judicial interpretation of mandatory arrest statutes provides another telling example of the limitations of being almost entirely reliant on state-issued civil protection orders. The trend in states toward adoption of mandatory arrest statutes is marked.⁸⁹ Despite a clear call from many state legislatures that police must arrest the abuser when responding to a report of domestic violence, judicial interpretation of these statutes has tended to tolerate police discretion.⁹⁰ For example, in *Donaldson v. City of Seattle*, the court held that

⁸⁴ *Id.*

⁸⁵ WomensLaw.org, *Connecticut: Restraining Orders*, http://www.womenslaw.org/laws_state_type.php?id=491&state_code=CT (last visited Oct. 15, 2008).

⁸⁶ ABA Commission on Domestic Violence, *supra* note 36.

⁸⁷ See e.g., Raymond McCaffrey, Dan Morse & Daniel de Vise, *Slaying Suspect's Wife Warned of Risk to Children: Md. Courts Found Insufficient Threat*, WASH. POST, April 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/31/AR2008033100887.html>.

⁸⁸ WomensLaw.org, *District of Columbia: Restraining Orders*, http://www.womenslaw.org/laws_state_type.php?id=63&state_code=DC (last visited Oct. 15, 2008).

⁸⁹ See *supra* Part II.A.

⁹⁰ See Carole Kennedy Chaney & Grace Hall Saltzstein, *Democratic Control and Bureaucratic Responsiveness: The Police and Domestic Violence*, 42 AM. J. POL. SCI. 745, 749 (1998) (citing research findings that, despite mandatory arrest policies, police departments and officers enjoy considerable discretion in responding to domestic violence complaints).

police do not need to seek out and arrest an abuser if he has already fled the scene of the abuse by the time the police arrive.⁹¹

This judicial accommodation of police discretion runs counter to research showing that mandatory arrest policies benefit women fleeing domestic violence. In addition to contravening public support for policies that protect survivors, such accommodation dramatically weakens the protective capacity of civil protection orders and renders them a weak tool for remedying domestic violence. As discussed *supra*, without mandatory arrest policies (and sometimes, even with them), police fail to make arrests consistently.

A purely local—as opposed to federal—judicial response to domestic violence contributes to the misperception of domestic violence as happening only in isolated instances.⁹² Such responses “divest violence against women of its systemic character, and belie a common view that claims of gender-based violence are more anecdotal than structural, more idiosyncratic than institutional.”⁹³ Federal causes of action would remedy this misunderstanding of domestic violence, mitigate the discrimination that currently exists, and allow women—regardless of where they live, or what their race is—to seek judicial protection from intimate partner violence.⁹⁴

Immunity protections can also limit the judicial remedies available to survivors of domestic violence. Although widely criticized, the doctrine of interspousal tort immunity still exists in some jurisdictions. For example, in Georgia and Louisiana, an abused spouse

⁹¹ Donaldson v. City of Seattle, 831 P.2d. 1098, 1104 (Wash. Ct. App. 1992) (highlighting the problems arising from imposing upon police officers a mandatory duty to investigate when the offender is no longer on the scene).

⁹² Weissman, *supra* note 83, at 1091-93.

⁹³ *Id.*

⁹⁴ *Id.*

is barred from bringing a tort claim against her abusive spouse.⁹⁵ Qualified immunity of state actors also poses a barrier: the governing statute, 42 U.S.C. § 1983, is applicable in all jurisdictions and prevents a survivor of domestic violence from bringing suit against a governmental actor who made a mistake in enforcing or refused to enforce her restraining order.⁹⁶ In order to bring a successful § 1983 claim, an abused woman would have to show that a state actor denied her a constitutional right.⁹⁷ The holding in *Gonzales* demonstrated how difficult it is to bring a cause of action successfully against a defendant acting under the color of state law.⁹⁸

Finally, the absence of federal judicial remedies may have a disparate impact upon the development of standards affecting immigrant survivors seeking protection. In recent years, anti-immigrant rhetoric has increased so sharply throughout the United States that many people, including some in law enforcement, believe immigrants' access to the courts should be sharply limited.⁹⁹ As one scholar notes,

Judges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and 'illegality' regarding undocumented immigrants...Deeply ingrained and consistently reinforced conceptions of undocumented immigrants as 'illegal' shape the way they are perceived and treated.¹⁰⁰

⁹⁵ See *Boblitz v. Boblitz*, 462 A.2d 506, 510 (noting that it was not until 1965 that courts began to depart from the rule stated in *Thompson*). Those still adhering to the rule include Georgia (*see Larkin v. Larkin*, 601 S.E.2d 487 (Ga. Ct. App. 2004)) and Louisiana (*see Hamilton v. Hamilton*, 522 So.2d 1356, 1359 (La. Ct. App. 1988)). Today, the doctrine is widely criticized. *See Bozman v. Bozman*, 830 A.2d 450, 466 (Md. 2003) (stating "[t]he majority of the States, we discovered, were of the view that the doctrine was outdated and served no useful purpose, that 'there presently exists no cogent or logical reason why the doctrine of interspousal tort immunity should be continued.'").

⁹⁶ *See Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991).

⁹⁷ *Id.*

⁹⁸ Nicole M. Quester, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391 (2007).

⁹⁹ *See generally* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX HISP J L & POL. 45 (2005).

¹⁰⁰ *Id.* at 57.

Although discrimination can happen at all levels, federal courts routinely handle matters involving immigration law and are more likely to be familiar with the correct interpretation of the extent of immigrants' access to the courts. Unlike many states, federal judges are not elected, and are therefore slightly removed from the political pressures against immigrants prevalent today; this relative insulation shows in the string of decisions supporting immigrants and the barring of consideration of immigration status in many kinds of proceedings.¹⁰¹

B. Under the Guise of Efficiency, Courts Often Rush Through Domestic Violence Cases.

Courts' cursory treatment of domestic violence cases begins in the pleading stage. Battered women who come to courthouses seeking a judicial remedy are often asked to fill out standardized forms, sometimes with the help of a clerk or lay advocate. While these forms may increase efficiency and make the court experience less frightening, they also limit the ability of women to tell their full story. As one scholar notes, as petitioners fill out these forms, "complicated patterns of abuse are reduced to a box-checking format that eviscerates meaning from the content of the domestic violence experience."¹⁰² The forms often include standardized allegations, dissuading petitioners from stating their claims with specificity.

Many immigrant survivors face the additional disadvantage in the pleading stage because they must rely on translators and interpreters to tell their stories, and even the best interpreters can make mistakes which affect the survivors' credibility down the line.

¹⁰¹ *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007) (striking down anti-immigrant ordinance); *Montoya, et al. v. S.C.C.P. Painting Contractors, Inc., et al.*, 530 F.Supp.2d 746 (D. Md. 2008) (holding immigration status as irrelevant in a wage case); *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005) (also holding that immigration status is irrelevant in a wage case).

WEAVE clients have worked with interpreters who interpolate what they think would be helpful, whether or not the survivor has said something, so petitions end up bearing little resemblance to the petitioner's experience.

Hearings on petitions for protection order are too often cursory and curtailed by courts. For example, the average time in New Jersey for hearings was five minutes and forty-five seconds.¹⁰³ In Massachusetts, courts allotted as little as an average of two minutes for a hearing.¹⁰⁴ These quick summary proceedings have mixed consequences for survivors. On the one hand, they allow petitioners access to judicial remedies without the time and expense of a full trial.¹⁰⁵ On the other, such quick hearings do not permit petitioners to fully describe the incidents that brought them to court.¹⁰⁶ Because judges only allot a few minutes to each domestic violence hearing, discovery and an opportunity for persuasive argument are also limited. The petitioner and respondent may also present vague and contradictory factual accounts, and some judges "resent" having to weed through these differing stories, particularly with unrepresented parties.¹⁰⁷ During these

¹⁰² Weissman, *supra* note 83, at 1127.

¹⁰³ Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39, 47 (1993) (noting that the average time for each domestic violence case to be heard in New Jersey was approximately 5 minutes and 45 seconds).

¹⁰⁴ JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 129 (1999) (reporting that in some courts studied in Massachusetts, a judge disposed of 8 consecutive civil protection order hearings in less than 18 minutes. He makes a "favorable" comparison with another judge who took 1 hour and 45 minutes to dispose of the same number. The second judge spent an average of 13 minutes per hearing as opposed to approximately 2 minutes per hearing spent by the first judge).

¹⁰⁵ Weissman, *supra* note 83.

¹⁰⁶ See Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567, 590 (2000) (comments from Leah Hill describing the "quieting of violence" where judges refused to allow domestic violence victims to describe the incidents fully).

¹⁰⁷ Cf. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 963 (1990) (describing comparable negative reactions of federal judges when adjudicating "routine" claims which require them to decipher conflicting accounts about what happened, particularly where there is no attorney). Because most state statutes set forth a mechanism for pro se representation, there are more plaintiffs in domestic violence injunction proceedings representing themselves than in other cases, including custody and divorce cases which are less likely to be litigated pro se. See Barbara J. Hart, *State Codes on Domestic Violence*, 43 JUV. & FAM. CT. J. 4, 7 (1992) (noting that two-thirds of state statutes have provisions which enable abused persons to file pro se).

truncated proceedings, judges sometimes refuse to hear crucial evidence.¹⁰⁸ Courts may categorically refuse to hear some issues central to a given petitioner's case, like child support, or may issue a boilerplate order without considering what would actually constitute comprehensive relief based on the unique facts of a given case.¹⁰⁹ Truncated hearings are especially difficult for victims who need interpreters, as the process of interpreting itself takes up time, eating away the precious few minutes that a victim may have to tell her story.

Survivors also face judicial pressures to resolve their issues outside of the protection order process. Judges have also asked that battered women file separate protection order, divorce, and custody actions, further confusing and frustrating petitioners, many of whom appear *pro se*.¹¹⁰ These separate proceedings are unnecessary hurdles for any petitioner. *Pro se* litigants have particular difficulty negotiating these separate proceedings, compounded by the fact that many of them fear facing their batterer face-to-face in court.¹¹¹ Moreover, judges often encourage survivors to negotiate with their batterers, even though many studies have documented the ways in which it is

¹⁰⁸ See Memoli & Plotino, *supra* note 103 (noting that the average time for each domestic violence case to be heard in New Jersey was approximately 5 minutes and 45 seconds); Ptacek, *supra* note 104, at 161 (reporting that in some courts studied in Massachusetts, a judge disposed of 8 consecutive civil protection order hearings in less than 18 minutes. He makes a "favorable" comparison with another judge who took 1 hour and 45 minutes to dispose of the same number. The second judge spent an average of 13 minutes per hearing as opposed to approximately 2 minutes per hearing spent by the first judge).

¹⁰⁹ See, e.g., *V.C. v. H.C., Sr.*, 257 A.D.2d 27, 31 (N.Y. App. Div. 1999) (trial court refusing to consider exclusive use of the residence in a protection order hearing); see also Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: an Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 195, 206 (1993) (noting that judges believe that women should be satisfied with relief limited to prohibiting further acts of violence and that other issues, including custody, can be taken care of in a divorce proceeding); Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 1011 (1989) (noting that judges often believe that domestic violence is an isolated event best handled by another court or social service agency).

¹¹⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

¹¹¹ *Id.*

undesirable—and perhaps even damaging—for the parties to mediate in domestic violence cases.¹¹²

Although summary proceedings and a judicial emphasis on out-of-court resolutions have allowed crowded state dockets to meet the increasing demand for protection orders, this judicial treatment of domestic violence cases may add to the damaging perception that these claims are not worthy of the courts' attention.¹¹³ Especially for women of color and immigrant women, this perception leaves survivors feeling increasingly helpless, unable to access remedies against their batterers. Courts' current treatment of domestic violence cases also misses an opportunity for judicial education about the complications surrounding domestic violence, as well as an opportunity for appropriate and uniquely tailored relief.

C. Negative judicial attitudes toward domestic violence cases limit remedies and traumatize survivors.

Lack of judicial training and documented gender bias in courts hinder victims' access to effective judicial remedies. There remains a view that domestic violence claims are bothersome, difficult, and unwelcome in court, leading some judges to dispense “perfunctory justice,” including rushing cases through the system and refusing to hear testimony about the violence itself.¹¹⁴ This bias can become obvious discrimination against women who bring domestic violence claims to court, manifesting itself in disrespectful and insensitive treatment.¹¹⁵ For example, a recent study in Massachusetts

¹¹² See generally Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985).

¹¹³ Weissman, *supra* note 83, at 1091-93.

¹¹⁴ See Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31 (Spring 2008).

¹¹⁵ *Id.*

has found the Family Court system there violates the human rights of battered women by holding them to a higher standard than fathers, treating them with disrespect, pressuring them to use face-to-face mediation with their abusers, and allowing the men to continue the emotional and financial abuse through the legal system.¹¹⁶

Judicial attitudes about an assignment to domestic violence cases is similarly concerning. In the perceived pecking order of judicial assignments, family court is seen as having a lesser status; some judges see domestic violence work as less prestigious, even trivial in nature.¹¹⁷ New judges often get their start on the family court bench.¹¹⁸ Assigning new judges to domestic violence cases can mean, sadly, that these complicated cases are treated by some judges as “on-the-job training.”¹¹⁹ Family court is held in such low esteem among the judicial community that judges rarely choose to be assigned there. Instead, many sit on the family court bench only after being promised that they will be promoted to general civil or criminal divisions after one term.¹²⁰

This lesser status of domestic violence cases means that judges may be less likely to invest their time into learning about domestic violence and that formal judicial education programs will be less likely to include domestic violence training.¹²¹ Without judicial

¹¹⁶ Wellesley Centers for Women, Battered Mothers Fight to Survive the Family Court System, Research & Action Report Fall/Winter 2003, *available at* <http://www.wcwonline.org/o-rr25-1b.html> (last visited Oct. 17, 2008).

¹¹⁷ See Symposium, *Advocating for Victims of Domestic Violence*, 20 WOMEN'S RTS. L. REP. 73, 77 (1999) (panel discussion featuring a newly appointed judge assigned to domestic violence cases who stated that matters she considers trivial, i.e., “if someone just gives the other person a shove,” nonetheless may be brought to court under the domestic violence statute); Judith Resnik, *Visible on “Women's Issues,”* 77 IOWA L. REV. 41, 48 (1991).

¹¹⁸ Andrea Weigil, *Special Court Caught in Crossfire*, NEWS & OBSERVER, (Raleigh, N.C.), Oct. 12, 2000, at B1 (noting complaints about the fact that untrained and inexperienced judges and prosecutors are assigned to North Carolina's Wake County special domestic violence court).

¹¹⁹ *Id.*

¹²⁰ See Memoli & Plotino, *supra* note 103, at Footnote 143 (referring to the Pathfinders Committee Report to Chief Justice Robert Wilentz 7) (1989).

¹²¹ Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1072-74 (1995) (noting that judicial education is critical but is lacking in many states); Rosemary C. Hunter, *Gender in Evidence:*

education, judges struggle to understand the complicated dynamics of abuse, as well as the realities of the effect that such violence has on women of color and immigrants. For example, there is evidence that some judges misconstrue domestic violence generally as an isolated, private matter—one relating to “personality flaws, relationships gone bad, anger and jealousy”¹²²—as opposed to a cyclical, dangerous relationships worthy of a thoughtful, concrete, long-term judicial remedy. Without judicial education, some judges also fail to see the complex financial, social, cultural and political issues outside of a given relationship that may encourage a battered woman to stay with an abusive partner, or that may make it incredibly difficult for her to leave.¹²³

The need for judicial education about domestic violence is heightened by the fact that most judges presiding over domestic violence cases are men.¹²⁴ Without judicial education, some male judges may have trouble understanding the testimony they hear in domestic violence cases, when compared to their own experiences. For example, many fewer men than women are victims of intimate partner violence, and the “choice between domestic violence and homelessness is not one men often confront.”¹²⁵

Judges can therefore struggle to fit the testimony of violence presented by petitioners into a cognizable legal framework. For example, some judges who hear petitioners’ descriptions of assaults by a boyfriend or husband because the house was not clean enough or because the petitioner’s phone rang too loudly, find the petitioners

Masculine Norms vs. Feminist Reforms, 19 HARV. WOMEN'S L.J. 127, 166 (1996) (describing feminist education campaigns that are designed to remove gender bias from the courts, and judicial education programs as a feminist strategy for improving outcomes for battered women in the courts).

¹²² Kinports & Fischer, *supra* note 109, at 201 (courts considering domestic violence as just “a fight between two people”).

¹²³ Kinports & Fischer, *supra* note 109, at 167.

¹²⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

¹²⁵ *Id.*

implausible, because they cannot imagine such factors inciting violence against an intimate partner.¹²⁶ The converse can be true as well. Judges can impose a provocation and response (cause and effect) framework onto the stories petitioners tell about domestic violence,¹²⁷ thereby blaming the victim for the abuse she suffered and contributing to a pattern of systemic revictimization.

When judges impose this provocation and response framework onto incidents of domestic violence, they can dangerously misconstrue abuse as an isolated assault, instead of seeing the violence as part of a larger systematic power and control dynamic.¹²⁸ This misunderstanding may downplay, in the judge's mind, the need for ongoing, comprehensive relief, and convince the judge instead that isolated punishment for the seemingly isolated instance of violence will be enough.

Judicial attitudes toward domestic violence cases also manifest themselves in the form of inappropriate and disrespectful comments made in open court. In North Dakota, a judge lectured a petitioner, telling her, "If you go back [to Respondent] one more time, I'll hit you myself."¹²⁹ Upon hearing evidence of spousal abusive, a judge in Georgia ordered the abusive defendant to take his battered wife out to dinner every week and "try to work it out."¹³⁰ A judge in New York began a domestic violence hearing by saying, "Well, well, well, we had a little domestic squabble, did we? Naughty, naughty. Let's kiss and make up

¹²⁶ Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 *FAM. L.Q.* 247, 258-60 (1993).

¹²⁷ See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 *TEX. L. REV.* 1929, 1930 (1991) (arguing that judges may make serious errors because of their inability to identify with the person whose case is before them; instead, they base their decisions on their own experiences and understandings which they assume to be neutral or truthful).

¹²⁸ *Id.*

¹²⁹ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases; Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 20 (1999) (describing demeaning comments made by judges who mistreat victims of domestic violence such as "oh, it's you again," and "how long are you going to stay this time?").

¹³⁰ See Margaret Graham Tebo, *Equal Justice*, 86 *A.B.A. J.* 44, 44 (Sept. 2000).

and get out of my court.”¹³¹ A petitioner in Florida was sentenced to a day in county jail for running from the court room crying after she was denied a protection order against her estranged husband, who was accused of raping her.¹³² This uneducated, disrespectful judicial behavior inhibits victims’ access to judicial remedies and makes the court experience an unnecessarily traumatic one for survivors of domestic violence, one they are unlikely to want to repeat.

D. Language barriers and issues surrounding immigration status may make it more difficult for survivors of domestic violence to secure a judicial remedy.

Some abusive partners have attempted to control their victims through threats to report them to immigration authorities, saying things like, “If you leave me, I will have you deported.”¹³³ These types of threats play into very real and pervasive fears of deportation held by immigrants – both documented and undocumented – fears that are fueled by massive immigration raids by the United States government¹³⁴ and well-publicized anti-immigrant sentiment.¹³⁵

These threats may be particularly frightening for undocumented women, or for women whose immigration status is dependent upon the status of their abusive spouse, as was the dynamic in this case:

¹³¹ See Epstein, *supra* note 129, at 42-43 (describing cases including one in which a Florida judge who, after hearing testimony that a man had doused his wife with lighter fluid and set her on fire, burst into song in open court, crooning, “You light up my wife,” to the tune of “You Light Up My Life.”).

¹³² See Weissman, *supra* note 83, quoting Bill Duryea, *Women's Reaction to Ruling Leads to Jail*, ST. PETERSBURG TIMES (Fla.), Dec. 1995, at 1A.

¹³³ See generally Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections* (Feb. 2002) available at http://new.vawnet.org/category/Main_Doc.php?docid=384.

¹³⁴ Justin Fenton & Kelly Brewington, *46 Held in Immigration Sweep*, BALTIMORE SUN, 1B (Jul. 1., 2008).

¹³⁵ See e.g., Melissa Nalani Ross, *Anti-Immigrant Fervor Translates to Terror for Women*, ON THE ISSUES (Fall 2008), available at http://www.ontheissuesmagazine.com/2008fall/2008fall_11.php; Mark Potok, *The Bait and Switch: SPLC v. Lou Dobbs*, Southern Poverty L. Center, available at

Ankita's ordeal began in early 1998 when she arrived in the United States with her new husband, an Indian software engineer working for a prestigious Silicon Valley firm. For nearly two years he beat her almost daily; slapping, punching, and kicking her even when she was pregnant. She finally called the cops the day both her eardrums burst from his blows. But when he threatened to divorce her for 'ruining his life,' Ankita begged him to let her stay. 'I told him, "I'm sorry. I won't do this again," and fell at his feet crying,' she says. For Ankita, a noncitizen, divorce spells deportation. If her husband had been a citizen or permanent resident of the United States, she would have had the right to leave him and apply for her own green card to stay in the country. But her husband was in the country on an H-1B work visa . . . Because Ankita's visa, a spousal H-4, was inextricably tied to her husband's, the end of her marriage would also be the end of her right to stay in the United States. If she returned to India, Ankita would have to leave her eight-month-old baby behind, since taking her son out of the country without her husband's consent could be considered kidnapping by both the United States and India.¹³⁶

Immigrant survivors of domestic violence also report several additional factors that may keep them from seeking judicial relief. Some women have said that having to confront their abusers in open, public court can make hearings intimidating and even undesirable.¹³⁷ Others have said that they need victims' advocates from their own culture in order to feel comfortable discussing the violence done to them, as well as the unique relief they may be seeking.¹³⁸ The need for translation can also make attempts to navigate the judicial system frustrating for immigrant survivors of domestic violence.¹³⁹ Other survivors have said well-paid lawyers represent their abusers, and that they have had trouble finding

<http://www.splcenter.org/news/item.jsp?aid=260>; Editorial, *Immigration Reform in Pieces*, INT'L HERALD TRIBUNE (Sep. 27, 2006).

¹³⁶ Karyl Alice Davis, comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557 (Winter 2004).

¹³⁷ Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REVIEW 4 (2) (2003), <http://wcr.sonoma.edu/v4n2/erezhartley.html>.

¹³⁸ *Id.*

¹³⁹ *Id.*

comparable representation, and in some cases representation at all.¹⁴⁰ Language barriers can inhibit victims' securing of representation, putting them at a disadvantage in court against represented opposing parties. Some immigrant survivors of domestic violence also worry about how much their abuser's defense of spousal abuse being appropriate in their home country will resonate with the judge hearing their case.¹⁴¹

Although the Violence Against Women Act (VAWA) created several immigration status options for survivors of domestic violence,¹⁴² these options still require months of work by a lawyer to piece together applications, and months of waiting while immigration authorities review applications.¹⁴³ These waiting periods can be fraught with anxiety, and fear over approaching authorities or the inability to find a volunteer lawyer may still dissuade some immigrant victims of domestic violence from seeking this relief.

IV. CONCLUSION.

What Ms. Gonzales suffered is not, unfortunately, unique to her. Like so many domestic violence survivors of color and immigrant survivors in the United States, Ms. Gonzales, a woman of Mexican and Native American descent, was ignored and her case mishandled by police. Her legal remedies were curtailed by the United States Supreme Court. As her case demonstrates and as this brief has argued, the protections in place for domestic violence victims in the United States are flawed at best, and women of color and immigrant women remain at especially high risk for having their rights violated.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Violence Against Women Act of 2005, H.R. 3402, 109th Cong. §§ 801-834 (2005), *codified at* 42 U.S.C. § 3796hh.

¹⁴³ See Brief for New York Legal Assistance Group, *supra* note 34.

Women in the United States need effective judicial recourse and vigilant enforcement of their human rights. Amici respectfully request that the Inter-American Commission on Human Rights find that the Castle Rock Police Department's actions in Ms. Gonzales' case, and the subsequent United States Supreme Court decision, violated her human rights. We further request that the Commission confirm States' affirmative duties to exercise due diligence to protect domestic violence survivors' rights and affirm that, under international law, violence against women is a form of discrimination and States are responsible for protecting women against the human rights violations of non-state actors. We ask the Commission to recommend that the United States provide full, effective remedies for Ms. Gonzales including individual relief and legal and programmatic reform that will provide full, effective judicial remedies for domestic violence survivors in the U.S., as set forth in Ms. Gonzales's petition to the Commission.

Dated: October 17, 2008

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