Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES

JESSICA RUTH 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

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

Presented by

New York Legal Assistance Group,
University of Texas School of Law Domestic Violence Clinic,
California Partnership to End Domestic Violence,
Domestic Violence Report,
National Association of Women Lawyers,
Sanctuary for Families,
Professor Elizabeth Schneider,
University of Baltimore Family Law Clinic,
University of California at Berkeley Law School (Boalt Hall) Domestic Violence Practicum,
University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic,
University of Toledo College of Law Domestic Violence Clinic,
Victim Rights Law Center

Christina Brandt-Young
Amanda Beltz
New York Legal Assistance Group
Domestic Violence Clinical Center
450 W. 33rd St., 11th Floor
New York, New York 10001 USA
+1.212.613.5086

Sarah M. Buel
Clinical Professor of Law
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
+1.512.232.9326

Attorneys for Amici Curiae

TABLE OF CONTENTS

INTERESTS OF AMICI

Founded in 1990, amicus the New York Legal Assistance Group ("NYLAG") is a not-for-profit organization dedicated to providing free civil legal services to New York's low income families. In 1994, NYLAG established its Domestic Violence Initiative, which provides assistance to victims of domestic violence on a priority basis. In addition to obtaining orders of protection, the Initiative provides victims with legal representation in child protection, custody, visitation, child and spousal support and matrimonial matters. NYLAG has further demonstrated its commitment to promoting legal services for victims of domestic violence through its Domestic Violence Clinical Center ("DVCC"). The DVCC is an innovative program administered and supervised by NYLAG attorneys, which offers law students the opportunity to learn the substantive and litigation skills necessary to provide exceptional representation to battered women. As such, NYLAG has a special degree of knowledge and expertise in the field of domestic violence.

Amicus University of Texas School of Law Domestic Violence Clinic ("DVC") was formed in 1997 as part of the University of Texas School of Law's clinical programs. Its mission is to provide comprehensive legal services to indigent domestic violence victims and collaborate with community agencies to improve victim safety and offender accountability.

Amicus the California Partnership to End Domestic Violence (CPEDV) is the federally recognized state domestic violence coalition for California. Its members include over 200 California agencies, organizations and individuals working to address domestic violence at local, state and national levels. CPEDV is a member-driven organization that serves as a leader and catalyst for social change by implementing innovative solutions to ensuring safety and justice for victims of domestic violence and their children. This includes promoting legislative and public

policy reforms that improve institutional responses to domestic violence, providing training and technical assistance to domestic violence service providers, fostering collaboration and coalition building at the local, state and national levels, and providing information and referrals for domestic violence victims who are in need of assistance. As the statewide coalition, CPEDV is acutely aware of both the successes and limitations of the Violence Against Women Act in addressing the needs and safety of domestic violence victims and their children. Accordingly, CPEDV has a compelling interest in this case and joins the amicus curiae brief filed by the New York Legal Assistance Group and the University of Texas School of Law.

Amicus Domestic Violence Report (DVR) is a multi-disciplinary newsletter that is widely distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers and others interested in ending domestic violence. Since October of 1995, it has published every two months and covers all of the many aspects of domestic violence, and is primarily concerned with promoting the safety of domestic violence victims and the children in homes where domestic violence occurs. The newsletter editors, contributors, and advisory board, who include lawyers, psychologists, nurses and other healthcare providers, criminologists, police, academics, researchers and battered women's advocates, work with and train policymakers throughout the nation and assist them in drafting protocols and appropriate responses for domestic violence.

Amicus the National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. It was founded in 1899, long before most bar associations admitted women. Today, NAWL is a national voluntary organization with members in all 50 states, devoted to the interests of all women including women lawyers. Through its members, committees, and the Women Lawyers Journal, it provides a collective voice in the bar, courts,

Congress, and workplace. NAWL stands committed to ensuring access to the courts for women and families in need of protection.

Amicus Sanctuary for Families' Center for Battered Women's Legal Services specializes in providing legal assistance and direct representation to indigent victims of domestic violence, primarily in family law and immigration matters. Over the last two decades, the Center has also assisted a growing number of victims of human trafficking, many of whom have also been subjected to domestic violence. These legal services are carried out by Center staff through advocacy and training in collaboration with volunteers from the private bar, law schools, and New York City's public interest community. The Center plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children. The Center's goal of helping its clients achieve safety and independence is strengthened by its location within a large, multifaceted agency that addresses battered women's needs for safe, confidential residences, permanent housing, counseling, support with parenting, and assistance with job readiness, education, and training. This goal is also furthered by its collaboration with a diverse range of local, national, international, private, and community organizations. For that reason, the Center joins this brief as amicus curiae.

Amicus Elizabeth Schneider has been involved in law reform in the domestic violence arena for more than 30 years. She is currently a Visiting Professor of Law at Columbia Law School, is the Rose L. Hoffer Professor of Law and Director of the Edward V. Sparer Public Interest Law Fellowship Program at Brooklyn Law School, and has taught Domestic Violence and the Law at Brooklyn, Harvard and Columbia Law Schools. She is the author of the prizewinning book *Battered Women and Feminist Lawmaking* (Yale University Press, 2000) and co-author of the law school casebook, *Domestic Violence and the Law: Theory and Practice*

(Foundation Press, 2d. ed. 2008) (with Cheryl Hanna, Judith G. Greenberg and Clare Dalton). Professor Schneider was a consultant to the UN Secretary-General's Report on All Forms of Violence Against Women, which was submitted to the General Assembly in Fall 2006. She is a national expert in the fields of federal civil litigation, procedure, gender, law and domestic violence and is a frequent commentator for print and broadcast media.

Amicus the University of Baltimore Family Law Clinic provides representation for residents of the Baltimore community in a range of family law matters. The Clinic has focused particularly on the needs of battered women and their children, representing them in protective order, divorce, custody and child support proceedings and assisting them in understanding and using the criminal sanctions applicable when their partners' actions violate the criminal law. Protective orders assist the Clinic's clients in meeting their goals of safety and autonomy; when those orders are disregarded by those in authority, the lives of the Clinic's clients and their children can be endangered. For that reason, the Clinic joins this brief as amicus curiae.

Amicus the University of California at Berkeley Law School (Boalt Hall) Domestic Violence Practicum was established in 1990. Students work in the community on issues faced by survivors of domestic violence including employment, criminal, immigration, family law, welfare, and other issues. Practicum students have also worked on many policy issues, including California state legislation. Additionally the Practicum has authored or co-authored numerous amicus briefs, both in the California courts and in the U.S. Supreme Court.

Amicus the University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic was established in 2005. The clinic serves victims of domestic violence, sexual assault and stalking. Clinic attorneys and students represent victims in every stage of the protective order process. The clinic's primary focus is on the safety of clients and their children.

Amicus the University of Toledo College of Law Domestic Violence Clinic was established in 1999 to provide free, comprehensive legal services to victims and survivors of domestic violence within a larger, coordinated community response to intimate partner violence.

Amicus the Victim Rights Law Center ("VRLC") is a nonprofit organization based in Boston, Massachusetts, with a satellite office in Portland, Oregon. The mission of the VRLC is to provide legal representation to victims of rape and sexual assault, to help rebuild their lives, and to promote a national movement committed to seeking justice for every rape and sexual assault victim. The VRLC meets this mission through direct representation of victims in Massachusetts (in education, immigration, privacy, employment, housing, physical safety, and other civil and administrative matters) and national legal advocacy, training and education regarding civil remedies for victims of sexual assault. The VRLC has a particular focus on meeting the needs of victims of non-intimate partner sexual assault. The VRLC provides legal counsel to over five hundred clients each year in Massachusetts, and trains and provides technical assistance to hundreds of legal professionals across the United States and US Territories each year. The breadth of VRLC's work reflects the deep and reverberating impact of sexual assault throughout all aspects of a victim's life, as well as the importance of holding offenders accountable for the consequences of their actions. The VRLC submits that many of the issues sited in the immediate amicus brief apply to sexual assault survivors as well, another class of crime victims covered, though inadequately, by the Violence Against Women Act.

SUMMARY OF ARGUMENT

In the recent past, the United States as a nation has made considerable strides in addressing the social, economic, and legal aspects of domestic violence. The most important contribution of the federal government in this area is the Violence Against Women Act of 1994

("VAWA"), which, among other things, funds shelters for victims and their children, funds training for police and prosecutors who deal with batterers, and encourages (but does not require) states to adopt best practices in the investigation and adjudication of domestic violence, such as making petitions for protective court orders free for victims and requiring mandatory arrest of batterers when police receive reports that the batterer has violated a protective order. While these are fine policies, VAWA does not fulfill the United States' duty of due diligence to prevent, investigate, and punish domestic violence. Most importantly, VAWA provides no court remedy when police or batterers fail to take steps to enforce a court order of protection, as they did in the instant case.

Rather, VAWA is primarily a source of voluntary grants which are not monitored for compliance, and which are dependent on interested localities, organizations, and states applying for and implementing them. As a result, VAWA resources and grants go disproportionately to certain cities and states. VAWA vastly underfunds critical services like shelters and civil legal services, and does not secure the right of victims to housing, thereby limiting victims' options for escape from their abusers. Moreover, in the almost 15 years since VAWA was first passed, domestic violence rates in the United States have not been reduced proportionate to overall violent crime rates, civil and criminal law remedies still remain inadequate to protect battered women, and state laws on domestic violence remain inconsistent and do not fill VAWA's gaps. The United States does not fulfill its duty of due diligence to Ms. Gonzales or to domestic violence victims generally through VAWA.

STATEMENT OF FACTS

On June 27, 2005, the United States Supreme Court held that Jessica Gonzales had no remedy under the United States Constitution against police officers of the town of Castle Rock,

Colorado who ignored her many calls for help when, in violation of a valid court-issued domestic violence restraining order, her ex-husband kidnapped their three children, who were later found dead in his truck.[1] Ms. Gonzales had obtained the restraining order in early 1999 because of her husband's threats, unpredictable behavior, and suicide attempt in their home; a judge agreed that the respondent posed a risk of irreparable injury to Ms. Gonzales and the children.[2] Under the law of the state of Colorado at that time, the police were obligated to arrest or seek a warrant for the arrest of any person of anyone who violated any provision of a valid restraining order.[3] Promotion of mandatory arrest laws is one of the goals of VAWA,[4] but in Ms. Gonzales's case, neither the protective order, nor VAWA, nor the Constitution ended up offering protection to Ms. Gonzales and her children.

ARGUMENT

As the Inter-American Commission noted in its admissibility decision,[5] the United States is obligated to implement the principles of the American Declaration on the Rights and Duties of Man[kind].[6] These principles include the right to protection from acts of violence, even private violence; the rights of women and minority racial and ethnic groups to equal state protection as men and those of the dominant culture; and to petition government and receive a prompt response.[7] Finally, every state must provide an effective remedy for acts violating fundamental rights. States have a duty to "*prevent*, *investigate* and *punish*" human rights violations and to

---

1 *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).
2 *See* Gonzales Merits Brief, March 24, 2008, at 6-7.
3 Colo. Rev. Stat. § 18-6-803.5(3) (1999).
4 Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).
5 Admissibility Decision of July 24, 2007 ¶ 56.
6 AG/RES. 1591 (XXVIII-O/98) (June 2, 1998).
7 American Declaration arts. I, II, XXIV.

"*provide compensation* as warranted for damages resulting from the violation," even where these result from the actions of a private party.[8]

The United States has argued in its brief on admissibility that the federal government has formulated a "nationwide response" to domestic violence through a "comprehensive legislative package" known as the Violence Against Women Act,[9] first enacted in 1994[10] and reauthorized with new provisions in 2000[11] and 2005.[12] However, as the Inter-American Court has recognized, "legislation alone is not enough to guarantee the full effectiveness of . . . rights."[13] The passage of the Violence Against Women Act was unquestionably a bellwether moment in the fight against domestic violence in the United States, but on its own VAWA does not and cannot fulfill the United States' obligation to prevent, investigate, and punish violations of women's rights to be physically safe, nor does it provide compensation for damages resulting from failures of the United States to do so.

I. VAWA is a Limited Remedy that Fails to Protect Women or to Discharge the United States' Obligations Under International Law.

The Violence Against Women Act is, as the United States describes it, a comprehensive legislative package that seeks to provide funding for training of police, prosecutors, and advocates in dealing with domestic violence;[14] funds shelters, civil legal services, and other services for domestic violence victims, especially in "demonstration" projects that can be

---

8 Velásquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶ 166 (emphasis added).

9 Response of the United States Regarding Jessica Gonzales at 15-20.

10 Pub. L. 103-322, Tit. IV, 108 Stat. 1796 (1994).

11 Pub. L. 106-386, 114 Stat. 1464 (2000).

12 Pub. L. 109-162, 119 Stat. 2960 (2005).

13 Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 146 (2006) ¶ 167.

14 Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

replicated by other organizations;[15] and encourages best practices by states by conditioning receipt of funding on, among other things, the states' using mandatory arrest policies and removing fees for applying for protective orders; and many other services.[16]

Yet VAWA fails to accomplish four crucial things: (1) it does not provide any direct remedy when abusers or police officers violate victims' rights, (2) it does not require participation by all states or monitor their progress, (3) it does not fully or adequately fund all the services that are needed, and (4) it does not require states to pass or strengthen legislation around civil protective orders or the housing rights of domestic violence victims

A. VAWA Does Not Provide a Federal Court Remedy for Victims of Gender-Based Violence.

As Ms. Gonzales points out,[17] the 1994 version of VAWA authorized lawsuits in federal court against those who "commit a crime of violence motivated by gender."[18] The Attorneys General of 38 of the 50 states supported this measure on the grounds that the state courts were incapable of addressing gender-based violence adequately.[19] In other words, VAWA as originally passed attempted to provide battered women with a federal remedy against perpetrators of violence. Unfortunately, in 2000 the United States Supreme Court invalidated this portion of VAWA, holding that Congress did not have the authority to create such a cause of action as part of its power to regulate interstate commerce under the United States Constitution or its general police power.[20]

---

15 Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, §§ 1201-1202, 114 Stat 1464, 1504-06 (2000); Pub. L. 109-162, § 103, 119 Stat. 2960, 2978 (2005).

16 Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

17 Jessica Gonzales Observations of December 11, 2006 at 44.

18 42 U.S.C. 13981.

19 *See United States v. Morrison*, 529 U.S. 598, 653 (2000) (Souter, J. dissenting) (citing *See* Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34-36 (1993)).

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

Thus did the Supreme Court strike down the United States' first, and so far only, effort to provide a federal venue for punishing private violations of women's right to be free from gender-based violence. The Supreme Court decision in Ms. Gonzales's own case affirms that the United States Constitution also provides no remedy for the state's failure to protect victims of gender-based violence.[21] No one expects that first responders can prevent every act of private violence. But the effect of the *Morrison* and *Gonzales* cases is that even where local and state police are negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call due to negative stereotypes they harbor about victims of domestic violence, or about women in general, there is no federal constitutional or statutory remedy.

B. VAWA is Non-binding on States and Primarily a Source of Grants.

In the absence of any substantive federal remedy for failure to protect women's rights, VAWA's role in preventing and punishing violence against women is limited primarily to making grants to state and local police and advocacy organizations who seek to implement training or programming;[22] funding domestic violence service provision and training;[23] providing immigration relief to non-citizen victims of violence;[24] and coordinating interstate recognition of protective orders.[25] VAWA also issues grants to support domestic violence shelters,[26] rape

---

21 *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).

22 Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

23 Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

24 Pub. L. 103-322, § 40701, 108 Stat. 1796, 1953-54 (1994); Pub. L. 106-386, § 1503, 114 Stat 1464, 1518-22 (2000); Pub. L. 109-162, Title VII , 119 Stat. 2960, 3053-78 (2005).

25 Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, § 1101, 114 Stat 1464, 1492-94 (2000); Pub. L. 109-162, § 106, 119 Stat. 2960, 2981-83 (2005).

26 Pub. L. 103-322, § 40241, 108 Stat. 1796, 1932 (1994); Pub. L. 106-386, § 1202, 114 Stat 1464, 1505-06 (2000). By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

prevention courses,[27] domestic violence prevention and intervention programs,[28] and programs aimed at to strengthening law enforcement, victim services, and prosecutorial and judicial responses domestic violence.[29] The Federal Office on Violence Against Women (OVW) was established to administer grants for projects targeted at improving the issuance and enforcement of Protection Orders, including, as the United States points out, STOP (Services, Training, Officers, and Prosecutors) grants,[30] ARREST Grants to Encourage Arrest Policies and Enforcement of Protection Orders,[31] and other programs aimed at to training professionals to improve their responses to violence against women.[32]

However, as Ms. Gonzales observes, these grants are entirely voluntary.[33] For instance, VAWA "conditions state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders,"[34] as well as those which adopt mandatory arrest requirements in domestic violence situations.[35] But if a state or locality chooses not to apply for the funding, VAWA has no impact at all.

---

[27] Pub. L. 103-322, § 40151, 108 Stat. 1796, 1920-21 (1994); Pub. L. 106-386, § 1401, 114 Stat 1464, 1512-13 (2000); Pub. L. 109-162, § 302, 119 Stat. 2960, 3004 (2005).

[28] Pub. L. 103-322, § 40271, 108 Stat. 1796, 1937-38 (1994); Pub. L. 106-386, § 1106, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 401, 119 Stat. 2960, 3017-23 (2005).

[29] Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

[30] Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

[31] Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

[32] See Pub. L. 103-322, §§ 40152, 40412, 40421, 40607, 108 Stat. 1796 (1994); Pub. L. 106-386, §§ 1401, 1402, 1405, 1406, 114 Stat 1464 (2000); Pub. L. 109-162, § 111, 204, 205, 503, 119 Stat. 2960 (2005).

[33] *See* Gonzales Merits Brief, March 24, 2008, at 53.

[34] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 12 (1999).

[35] Ryan C. Hasanbasic, *Town of Castle Rock v. Gonzales: The Supreme Court Goes to Great Lengths to Ensure Police Discretion, But at What Cost?* 36 STETSON L. REV. 881, 913 (2007).

And indeed, many states do not receive VAWA funding. In 2007, no ARREST grants were made in 19 of the 56 participating states and U.S. territories.[36] Further, in 2007, the median total of grants made by the Office on Violence Against Women to programs within a single state or territory was approximately $4.5 million U.S.D.[37] Alaska, a state with a population of 683,478, received $15.9 million in funding from the Office on Violence against Women; New York, population 19,297,729, received $18.8 million; and Wyoming, population 522,830, received $2.3 million.[38] It should be noted that because many VAWA grants are made to localities and local nonprofit organizations rather than to states, VAWA coverage within each state varies. For example, West Virginia was given $3,617,063 in various VAWA grants in 2007, but $2.6 million of this funding was granted not to divisions of the state government, but to local foundations. The YMCA of Wheeling in and of itself received $255,000. Similarly, in 2007 only $2.9 million of the $5,880,026 total grant money that Georgia received was granted to state-run DV programs.[39]

Without a national scheme mandating legislation and training programs, the level of protection afforded to domestic violence victims varies across jurisdictions, with women in many parts of the country suffering from inadequate levels of protection and services. Yet another problem with the VAWA grant programs is that grants are not adequately monitored. "The National Center for State Courts (NCSC), reviewed surveys provided by state court administrators and found a 'significant number of administrative offices noted that the courts were not receiving all of [a] 5 percent set-aside.' . . . . Delays in spending also continue to plague

---

36 *See* FY 2007 Office on Violence Against Women Grant Activity by State, *available at* http://www.ovw.usdoj.gov/grant-activities2007.htm.

37 *See id.*

38 *See id.*; census figures taken from http://www.census.gov.

39 *See* FY 2007 Office on Violence Against Women Grant Activity by State, *available at* http://www.ovw.usdoj.gov/grant-activities2007.htm.

the efficacy of the funds."[40] Failure to monitor implementation of the grants greatly diminishes VAWA's effectiveness.

VAWA represents a significant funding source for services for victims of domestic violence and their advocates. However, providing funding to encourage states, localities, and agencies to act on a voluntary basis does not by itself fulfill the United States' duty to provide comprehensive human rights protections for domestic violence victims.[41] The voluntary nature of VAWA grants means that money often fails to reach persons most in need, who live in jurisdictions that lack the political will or the resources to navigate the complex terrain funding process.

C. VAWA Grants, while Laudable, do not Fulfill the Critical Needs of Domestic Violence Victims.

The diverse grants made under VAWA are a tremendous help to domestic violence victims around the country, but the grant amounts do not even come close to meeting the total need. This is demonstrated by three basic types of funding: shelter for battered women and their families, supervisors that monitor batters who have visitation rights with their children, and legal counsel to assist with the various civil legal matters that arise from violence within the family.

Before the 1970s, there were few, if any, domestic violence shelters for abused women in the United States.[42] Presently there are shelters in every state, but there are still not remotely enough emergency shelters for women and children fleeing abusive relationships. Since its inception VAWA has helped to fund shelter services for battered women and their children.[43]

---

[40] Leila Abolfazli, *Criminal Law: Violence Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 865-66 (2006).

[41] Velásquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶¶166, 174, 176.

[42] Women/Children Fleeing Abuse, http://www.npr.org/news/specials/housingfirst/whoneeds/abuse.html

[43] See P.L. 103-322 § 40241; P.L. 106-386 § 1202. By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

Yet these are still utterly outstripped by the need for more shelter for domestic violence victims and their families.[44] In 2006, 1,898 families were turned away from domestic violence shelters in Virginia, [45] and in the Greater Richmond area, population 775,000, there were only 4 domestic violence shelters with a total of 56 beds.[46]

Another important problem is the lack of availability of supervisors for batterers' visitation with their children. When a victim of domestic violence flees an abusive home, her abuser is usually eligible for visitation rights with children they have in common. One form of visitation designed to protect women and children from violence or stalking is visitation supervised by social work or mental health professionals at a specially designated center. "Supervised visitation, previously mandated most often in cases of child abuse and neglect, has become much more common in domestic violence cases. Judges may see it as the only responsible arrangement in cases with a history of domestic violence."[47] However, paying supervisors and their facilities is expensive and many poor families cannot afford it. "The most pressing issue with supervised visitation centers is simply an undersupply to meet the demand for centers that can handle domestic violence cases, with the appropriate safety protocols. The undersupply is directly linked to a lack of funding and intermittent funding."[48] Although VAWA began funding supervised visitation centers in 2000 and continued in 2005,[49] these monies have

---

[44] In fact, the Humane Society of America estimates there are three times the number of shelters for homeless animals as for abuse victims. See Haya El Nasser, American Journal: "No Kill' Pet Shelters Grow in Popularity, Detroit News, Sept. 15, 1997, at A2 (stating that there are approximately 5,000 animal shelters in the United States).

[45] *Id.*

[46] Bill Wasson, Abused who leave find few safe places, Times-Dispatch, October 27, 2007, http://www.timesdispatch.com/cva/ric/news.

[47] O'Sullivan et al., *Supervised and Unsupervised Parental Access in Domestic Violence Cases: Court Orders and Consequences,* Final technical report submitted to the National Institute of Justice (March 2006) at 33, *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213712.pdf.

[48] *Id.*

[49] P.L. 106-386 § 1301; P.L. 109-162 § 306.

decreased each year since 2003, as Congress fails time and again to approve the funding amount it previously authorized.[50]

A victim's ability to obtain a civil order of protection may be further hampered by her lack of access to counsel. The United States Supreme Court, in *Gideon v. Wainwright*, [51] established the right of an indigent defendant to state provided counsel in criminal cases, but the right to counsel has not been extended to civil cases.[52] Some states have expanded a civil right to counsel, but nowhere in the United States is the right to counsel in civil cases comprehensive. Funding has been allocated under VAWA since 1998 for civil legal assistance for domestic violence victims,[53] but once again the need vastly outstrips the funding available.

The civil legal matters which entangle the lives of domestic violence victims, often involve a person's interests in "shelter, sustenance, safety, health and child custody," interests which are deemed "fundamental economic and social rights . . . in many of the world's constitutions and in international human rights treaties, but not explicitly protected by the federal United States Constitution."[54] The Charter for the Organization of American States, binding on

---

50 "Assistance for 16.527: Supervised Visitation, Safe Havens for Children (FY 2000-2006)", FedSpending.org, available at http://www.fedspending.org/faads/faads.php?&sortby=r&record_num=all&detail=-1&datype=T&reptype=a&database=faads&cfda_program_num=16.527.

"Funding for the provisions of VAWA is subject to congressional review every fiscal year, a power which Congress has, sadly, sought to wield freely. For example, in 2004, funding for VAWA's supervised visitation centers, educational and training programs, rural and campus violence prevention initiatives, and grants to encourage arrests was less than the authorized amounts, and successive decreases are projected for fiscal years 2005 and 2006." *Defense of Others and Defenseless "Others"*, 17 YALE JOURNAL OF LAW AND FEMINISM 327, 330 n.107 (2005).

51 372 U.S. 335 (1963).

52 *See Lassiter v. Dep't of Soc. Servs of Durham County, N. C.*, 452 U.S. 18 (1981) (no automatic right to civil counsel in termination of parental rights case). In comparison, "[i]n approximately two-thirds of the [Council of Europe] countries, the right to counsel covers a wide spectrum of civil matters [including] family law, housing, consumer and debt cases, personal injury claims, public benefits, [and] employment and labor law" as a result of the European Court of Human Rights' ruling in *Airey v. Ireland*, 32 Eur. Ct. HR Serv A (1979): [1979]2 E.H.R.R. 305. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 779 (2006).

53 See, e.g., P.L. 106-36 § 1201; P.L. 109-162 § 103.

54 Northeastern University School of Law, Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (December 2006) [hereinafter In the Interests of Justice], *available at* http://www.slaw.neu.edu/clinics/RightToCounsel.pdf.

all member states, declares that each state shall "agree to dedicate every effort to the application of . . . [a]dequate provision for all persons to have due legal aid in order to secure their rights."[55]

D. VAWA Does not Secure the Right to Housing of Domestic Violence Victims, Thereby Limiting Victims' Safety.

There is strong correlation between domestic violence and homelessness because "[t]hose women most vulnerable to the loss of housing and least likely to afford replacement housing are at the greatest risk of domestic violence."[56] Statistical evidence clearly shows that, although women from all income brackets experience domestic violence in the United States, domestic violence *disproportionately* affects poor women. For instance, women "with household incomes of less than $7,500 [U.S.D.] are seven times as likely as women with household incomes over $75,000 [U.S.D.] to experience domestic violence;"[57] women who are renters are three times as likely to be victims as women who own their own homes;[58] and women who live in poor communities are generally more likely to be victims than those who live in wealthy communities.[59] Between 22% and 57% of homeless women identify domestic violence as the immediate cause of their homelessness.[60]

The sheer number of homeless women and children who have experienced domestic violence makes it impossible to ignore three facts: first, that domestic violence is a primary cause of homelessness in the United States; second, that battered women and children are not afforded

---

55 Charter of the Organization of American States art. 45(i), Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119.

56 Emily Martin, *Preventing Homelessness through Civil Rights Law*, Cornerstone (2006), *available at* http://www.aclu.org/pdfs/fairhousingforbatteredwomen072806.pdf.

57 ACLU, Women's Rights Project, *Domestic Violence and Homelessness* (March 21, 2006) [hereinafter Domestic Violence and Homelessness]; (citing Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (2000)), *available at* http://www.aclu.org/pdfs/dvhomelessness032106.pdf.

58 *Id.*

59 *Id.*

60 *Id.*

adequate safeguards against eviction and housing discrimination; and third, that area shelters available cannot meet, and have not met, the needs of this huge homeless population. In order to combat domestic violence effectively, battered women's housing issues *need* to be addressed both with respect to temporary and permanent housing. When women who choose to leave are faced with homelessness without promise of refuge in a domestic violence shelter[61] or alternate housing, they may conclude that returning to their abusers is the only way to put a roof over their head and the heads of their children.

1. Domestic violence victims are commonly evicted under laws prohibiting criminal activity in the home.

A major cause of homelessness for victims of domestic violence is the ability of landlords in both public and private housing to evict DV victims using tenancy laws proscribing criminal activity. In 1988, Congress amended the National Housing Act governing public housing to allow "public housing authorities ["PHA's"] and landlords in federally assisted housing projects to evict tenants for the criminal activity of others on their lease, guests, and persons under their control."[62] In 2002, The Supreme Court, in *Department of Housing & Urban Development v. Rucker*, upheld this policy even as to "innocent" tenants, i.e. tenants who were unaware of the criminal activity on the part of their guests or family members, "affirming the broad discretion to institute eviction actions under this law conferred upon PHA's and, by extension, other public

---

[61] Often, there is no shelter space, particularly for victims with children, or the shelter policy dictates that victims must quit their jobs to be admitted. Such misguided policies are based on the premise that abusers will follow victims from their place of employment to the shelter, thus endangering not only the victim, but other residents and staff as well. See Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARVARD W.L.J. 201, 223 (1996) (stating that "some shelters require women to quit their jobs once they enter a shelter so that the abuser cannot follow them from work to the shelter").

[62] Elizabeth M. Whitehorn, *Comment: Unlawful Eviction of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 NW. U.L. REV. 1419, 1420-21 (2007).

landlords."[63] This holding has had severe consequences for victims of domestic violence living in public housing throughout the United States.

One strike policies and zero tolerance lease provisions permit PHA's and other landlords to evict female domestic violence victims solely based on the criminal activity of their abusers. This problem has become so severe that Congress has acknowledged the prevalence with which women and children are evicted from public and subsidized housing based on violence perpetrated against them.[64] Statistical research has confirmed these findings as well. A recent study in Michigan found that women currently or formerly receiving welfare who had experienced recent or ongoing domestic violence were far more likely to face eviction than other women.[65]

Congress responded to some of these concerns in by reauthorizing VAWA in 2005.[66] Under VAWA, public housing authorities and Section 8 landlords can only evict a tenant based on domestic violence perpetrated against her if they can prove there is an 'actual and imminent threat' to other tenants or staff if she is not evicted.[67] VAWA permits public housing authorities and Section 8 landlords to "bifurcate" a lease, i.e. evicting the batterer while permitting the rest of the household to stay.[68]

---

63 *Id.* at 1421.

64 *Id.* at 1421.

65 Domestic Violence and Homelessness, *supra* note 57, at 2.

66 42 U.S.C. §§ 1437d, 1437f.

67 ACLU, Women's Rights Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing* [hereinafter Rights of Domestic Violence Survivors], *available at* http://www.aclu.org/pdfs/womensrights/subsidized_housing_2008.pdf; *see* Legal Momentum, *Housing Protections for Victims of Domestic and Sexual Violence* (2008) [hereinafter Housing Protections], http://www.legalmomentum.org/site/DocServer/Housing_02_27_07.pdf?docID=1041 (last visited September 2008).

68 Rights of Domestic Violence Survivors, *supra* note 67, at 2. *But see* California Apartment Association, Policy Statement 13: Domestic Violence (stating while domestic violence often occurs between signors on a lease and action may be appropriately taken against the abusive tenant, California law does not permit landlords to exercise "partial eviction").

However, the protections provided by VAWA do not apply to women in *private* housing. Some states provide a defense against eviction to victims of domestic violence, thereby protecting women in private housing as well. But only fourteen out of the fifty states[69] and Washington D.C.[70] provide domestic violence victims protection from, or an affirmative defense against, eviction based on her status as a victim of domestic violence. Still other states give victims the ability to break their lease agreements prematurely as a result of domestic violence.[71] Such laws are important, but they do not offer refuge to victims who have nowhere to escape, nor do they make up for the lack of federal leadership on this issue.

2. VAWA does not prevent discrimination on the basis of victim status in private housing.

In addition to revoking existing leases because of domestic violence, landlords frequently refuse to offer new leases to women who have protective orders or are otherwise identifiable as a survivor of domestic violence.[72] VAWA 2005 prohibits ***public*** housing authorities and Section 8 housing authorities[73] from denying admission to a person because she has been a victim of domestic violence.[74] But, again, VAWA does nothing regarding private landlords, and states vary on the rights afforded to survivors of domestic violence against housing discrimination.[75] A few states outright *prohibit* housing discrimination against victims of domestic violence,[76] although the majority do not.

---

69 *See, e.g.*, Housing Protections, *supra* note 67.

70 *Id.*

71 *Id.*

72 National Coalition Against Domestic Violence, *Domestic Violence and Housing*, *available at* http://www.ncadv.org/files/housing.pdf (last visited Sept. 12, 2008) (citing *Interviews with State Coalitions and Local Shelter Programs*, National Coalition Against Domestic Violence (2003)).

73 Rights of Domestic Violence Survivors, *supra* note 67.

74 *Id.*

75 Kristen M. Ross, *Note: Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249 (Summer 2007).

76 *See, e.g.*, Housing Protections, *supra* note 67.

Discrimination against prospective tenants because of past abuse is not a theoretical problem, but persists throughout the country. In June and July of 2005, the Anti-Discrimination Center of Metro New York conducted a study to determine whether or not housing providers were discriminating against domestic violence survivors based on their status as a DV survivor. The Center found that 27.5% of landlords contacted,

> either flatly refused to rent, or failed to follow up as promised . . . In yet another 20% of cases, housing providers voiced stereotypical concerns with questions and comments such as to the potential renter's mental stability and concern for the safety of the renter, other tenants, and the housing providers themselves. One typical response from a landlord was, "We don't want no husband to come and beat her up."[77]

The Center determined that the study understates the extent of housing discrimination since the study was limited to discrimination expressed on the *first contact*. There are still many more opportunities for a domestic violence victim to be discriminated against before securing housing. The Center concluded that,

> [b]eyond the 27.5% of cases of 'first instance' discrimination, and beyond the 20% of cases where qualms that would have likely blossomed into later discrimination, are those housing providers who initially concealed their biases . . . In view of the foregoing, it is likely that the incidence of housing discrimination against survivors *purely on the basis of their status* is in excess of 50%.[78]

Another survey in 2005 "of 76 legal and social services providers around the country found that 28% of all housing denials handled by these advocates, and 11% of all evictions,

---

[77] The Anti-Discrimination Center of Metro New York, *Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence* (Aug. 2005), *available at* http://antibiaslaw.com/DVReport.pdf.

[78] *Id.*

resulted from domestic violence against the tenant."[79] The United States has not made any effort to coordinate state policy in this area.[80]

II. VAWA Has Not Been Adequately Implemented or Reduced Domestic Violence.

While VAWA is laudable legislation, it has not, working alone, been successful at combating domestic violence with regard to several important indicators. Since the passage of VAWA in 1994, domestic violence rates have not been reduced in proportion to other violent crimes. Despite all the training initiatives that VAWA has funded, significant problems remain in the investigation and prosecution of domestic violence cases. Furthermore, despite the legislative reform VAWA has promoted, state laws regarding domestic violence remain contradictory and frequently fail to protect women as necessary.

A. Domestic Violence Rates Have Not Been Reduced Proportionate to Violent Crime Since VAWA's Implementation.

Despite the United States' assertions in its Response Brief, domestic violence rates have not decreased because of VAWA. Here, the Government cites a "Family Violence Statistics" study from the Bureau of Justice Statistics which says that between 1993 and 2002, the rate of family violence fell from 5.4 to 2.1 victims per 1,000. However, the same report states that "[f]amily violence as a proportion of all violent victimizations has remained fairly stable over the past 10 years. Between 1993 and 2002 about 1 in 10 violent crimes were committed by family members."[81] The overall level of crime has fallen which has resulted in the statistical drop in family offenses. But the overall proportion of family offenses *remains the same*, despite the passage of VAWA in 1994.

---

[79] National Law Center on Homelessness & Poverty, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions across the Country*, at 3 (Feb. 2007), *available at* http://www.nlchp.org/content/pubs/NNEDV-NLCHP_Joint_Stories%20_February_20072.pdf.

[80] Velásquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶ 166.

[81] *See* Durose et al., U.S. Dep't of Justice, NCJ 207846, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, at 12 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs02.pdf.

The scope of domestic violence in the United States is still shocking. About one in 250 households is affected by domestic violence,[82] with women constituting the majority of victims of such violence. In fact, of 691,710 nonfatal violent crimes committed by intimate partners in 2001, 85% of the victims were women.[83] Domestic violence also constitutes a significant proportion, 20%, of all *nonfatal* violence against women in general, whereas domestic violence makes up only 3% of all nonfatal violence against men.[84] Domestic violence also accounts for 33% of murders of women.[85] Women across the United States file approximately 2 million domestic violence incident reports each year.[86] Although there can be no conclusive number due to underreporting and the fact that most domestic violence reporting ignores teen, elderly, disabled, and gay and lesbian victims; roughly 2 million adult women are abused annually.[87]

B. Civil Orders of Protection are Inadequately and Inconsistently Enforced.

By 1992, prior to the enactment of VAWA, every state had passed civil protection order laws, "providing a powerful tool that allows abused adults to petition a court for protection from further abuse."[88] Civil protection orders empower domestic violence victims who, for a variety of reasons, choose not to seek criminal relief. Yet, VAWA-funded training initiatives have not resolved the limitations of civil orders of protection, especially the police's unwillingness to enforce them; the prevalence of dual arrests in mandatory arrest states; and problems affecting

---

82 Patsy Klaus, U.S. Dep't of Justice, NCJ 211511, *National Crime Victimization Survey: Crime and the Nation's Households, 2004* at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cnh04.pdf.

83 Callie Marie Rennison, U.S. Dep't of Justice, NCJ 197838, *Intimate Partner Violence*, 1993-2001, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

84 *Id.*

85 *Id.*

86 Neal Miller, *What Do[] Research and Evaluation Say About Domestic Violence Laws?*, Draft, at 38 (December 2005), *available at* http://www.ilj.org/publications/dv/DomesticViolenceLegislationEvaluation.pdf.

87 *Id.* at 35.

88 Nicole M. Quester, *Refusing to Remove and 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, 399 n.69 (2007).

the enforcement of orders issued in different states than the victim currently resides; or judges' issuance of dual orders of protection.

However, as the present case demonstrates, the power of a civil order of protection, once obtained, is determined by the police's ability and will to enforce it. Studies indicate that

> [p]olice departments across the country fail to enforce civil protection orders. When police officers do respond to protection order violations, police officers seek only to placate the parties and tell abusive spouses to 'take a walk around the block' to cool down. Police remain reluctant to arrest. This practice leaves victims unprotected and perpetuates the cycle of violence, giving abusers the message that their conduct is acceptable.[89]

The United States notes that it now funds "Jessica Gonzales Victim Assistants" who serve in local law enforcement agencies as liaisons with domestic violence victims.[90] Needless to say, amici applaud this program, but again it is not mandatory. The surer method of encouraging police to respond consistently to calls from women with protective orders would be to hold them liable for their willful failures to do so. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[91]

Although VAWA specifically requires states to grant full faith and credit to orders of protection issued from another state, treatment of such orders varies from state to state. Federal efforts at creating a central repository for orders of protection, so that women may travel safely from state to state and still have their orders enforced, have largely failed. The Federal Bureau of Investigation operates a central repository of protection orders for law enforcement officials seeking to establish the existence and validity of an order from foreign jurisdictions, without which police may be unwilling to arrest an alleged abuser. The Federal Bureau of Investigation

---

89 Quester, *supra* note 64, at 400.

90 United States Response at 17.

91 *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

reports receiving over one million copies of orders of protection each year, but eight states do not report to the FBI program at all, and many others severely underreport.[92] For example, in Texas "25 percent of the counties do not report"[93] and in California, "17 counties show low numbers of protection orders entered into the state database because they gave no reliable procedure for entering their orders into the database."[94]

Another problem is *over-* or *mis*enforcement of protective orders, focusing in particular on arresting victims, arresting both parties to a dispute regardless of which is the aggressor, and mutual orders of protection.[95] Arrests of women, most often the victims of domestic violence, have increased dramatically as a result of mandatory arrest policies.[96] "Forced to arrest someone, [police] . . . 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 aggressor."[97] In some states dual arrests constituted 1/3 of all arrests for domestic violence.[98] Furthermore, women of color, including African American, Native American, and Latina women, are more likely to be arrested and jailed than their white counterparts.[99]

Despite all the funds for training of prosecutors that have been disbursed under VAWA, some prosecutors have failed to be sensitized, leading to abuse of prosecutorial power against the

---

92 Miller, *supra* note 86, at 39.

93 *Id.*

94 *Id.* at 40.

95 Emily J. Stack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680-86 (2004).

96 Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration*, VAWnet: Applied Res. F. (Nat'l Res. Ctr. on Domestic Violence, Harrisburg, Pa.), Dec. 2002, *available at* http://new.vawnet.org/category/Main_Doc.php?docid=412.

97 Stack, *supra* note 95, at 1680.

98 Buzawa *et. al.*, *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases,* Report Submitted to the U.S. Department of Justice, April 2007, at 9 (stating "after the state of Washington enacted its mandatory arrest law in 1984, dual arrests increased and constituted one third of all arrests made for domestic violence offenses . . . .When New York enacted its mandatory arrest law in 1995, dual arrests were reported to have had similar increases"); *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf.

99 Gilfus, *supra* note 96.

very victims that prosecutors mean to help. Some women refuse to participate in prosecutions on the grounds that they fear for their safety, and some prosecutors have responded by compelling victim participation thorough "use of subpoena power to compel their appearance at trial, and use of contempt power if victims fail to comply."[100] Some victims report that their failure to testify has yielded threats by prosecutors to institute child neglect proceedings.[101] These threats are often carried out, and many victims who fail to comply with prosecutors are subsequently accused of "failing to protect" her children from domestic violence, that is, the mother has failed to protect her children from witnessing the abuse perpetrated against her. These civil charges may result in the removal of the child from the home, knowledge of which may further drive the victim from seeking out the help of the criminal justice system.[102]

Moreover, many victims continue to have problems with "mutual" orders of protection. In the past, judges had frequently awarded both parties orders of protection as a matter of course reasoning that no harm can come to the *real* victim if both parties are ordered to stay away from each other. [103] VAWA had attempted to deal with this problem by making protective orders ineligible for interstate full faith and credit if the party benefiting from it had not affirmatively filed a petition asking for one.[104] However, now many abusers, when served with orders of protection, simply cross-file for protective orders against their victims, and accuse the victim of being the primary aggressor. Batterers may view having an order of protection as an advantage in custody and divorce proceedings or in criminal cases founded on the same underlying event.[105] There can be very real consequences to victims of having such an order against them,

---

100 Stack, *supra* note 95, at 1681.
101 *Id.*
102 *See generally Nicholson v. Williams*, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002).
103 Stack, *supra* note 95, at 1683.
104 18 U.S.C. 2265(c).
105 Stack, *supra* note 95, at 1682.

including "risk of deportation, risk of a criminal charge if a violation of the order is alleged, and use of the protection order against the victim in a separate custody or divorce proceeding," [106] causing many victims to withdraw an order of protection in order to avoid prosecution by their abusers. Judicial training has not resulted in an abatement of this problem.

C. Criminal Law Remedies Are Inadequate to Protect Battered Women.

Although intimate partner violence is now proscribed by criminal law, the legal system's indifference is characterized by low prosecution and conviction rates.[107] One factor contributing to low conviction rates is anachronistic evidentiary rules that exclude prior domestic violence acts within the same relationship.[108] As Professor Myrna Raeder has noted, "our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words or deeds."[109] Because prosecutors are not permitted to introduce key relevant evidence at trial, securing a conviction has become even more difficult.

1. Procedures protecting the safety of domestic violence victims in criminal investigations were recently banned by courts.

In response to the high numbers of domestic violence victims understandably afraid to take part in the court process, prosecutors in the early 1990s began focusing on comprehensive evidence collection to facilitate the trial going forward even without direct victim testimony.[110] Known as "evidence-based prosecution," this effort was premised on law enforcement officers procuring sufficient evidence in the course of their investigation to focus the court's attention on

---

106 *Id.* at 1683.

107 *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1523-24 (1998).

108 Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1465 (1996) (footnote omitted).

109 *Id.*

110 *See* 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, 17-18 (2004).

the batterer's criminal conduct, rather than the victim's absence, minimization, or recantation. In some jurisdictions, the practice emerged as the primary means by which prosecutors brought domestic violence cases forward, using hearsay exceptions such as excited utterances,[111] or statements as to physical or mental condition,[112] when the victim was not available to testify for the state. For those jurisdictions that adopted the practice, evidence-based prosecution had improved the state's ability to hold perpetrators responsible for their family violence crimes,[113] while taking victims out of the danger loop.

However, in the 2004 case of *Crawford v. Washington*, the United States Supreme Court decided that if testimonial statements are to be admitted at trial, the accused must have had an opportunity to confront the declarant *and* that witness must be unavailable to testify.[114] As a result of *Crawford* and its progeny, *Davis v. Washington* and *Hammon v. Indiana* (decided together)[115] and *Giles v. California,*[116] domestic violence offenders have increased their witness tampering because they are more often rewarded with case dismissal. No category of prosecutions has been more severely hampered by the *Crawford, Davis* and *Giles* cases than those involving domestic violence.[117] Because they receive so little state assistance to combat prolific witness tampering, 80–90 % of abuse victims are unable to testify at trial.[118]

---

111 Most states model their excited utterance statutes after the Federal Rule of Evidence 803(2), *see, e.g.*, IND. R. EVID. 803(2) defining "excited utterance" as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

112 *See* FED. R. EVID. 803(3).

113 *See* Goodmark, *supra* note 110, at 18.

114 *Crawford v. Washington,* 541 U.S. 36 (2004).

115 *Davis v. Washington & Hammon v. Ind.,,* 547 U.S. 813, 832-33 (2006) ("This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.").

116 *Giles v. California*, 128 S.Ct. 2678 (2008).

117 Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 215 (2005); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 281 (2006).

118 Lininger, *Reconceptualizing Confrontation After* Davis, *supra* note 117, at 281 ("Approximately eighty percent of accusers in domestic violence cases refuse to cooperate with the government at some point in the

2. Criminal prosecutions rarely lead to felony sanctions against batters, creating a culture of impunity that further imperils domestic violence victims.

The *Crawford-Davis-Giles* cases increase victim danger on many fronts.[119] First, the primacy of live witness testimony provides heightened incentive for batterers to obstruct victim access to prosecutors and courts. Second, because *Davis* imposes a stringent "emergency-only" standard of admissibility for victim statements, government agents may attempt to protract initial investigations. Third, in *Giles,* the U.S. Supreme Court held that even if a batterer kills his victim, he can still keep her past statements out of the trial, pursuant to his confrontation rights, unless the state can prove his intent was to prevent her testimony.[120] Finally, some misguided prosecutors are now using material witness warrants to jail victims as a means of ensuring they will be present at trial.[121] These trends present ever-increasing obstacles that are often overwhelming enough to prevent victims from filing charges even when facing grave danger.[122]

Domestic violence victims thus face greater peril as a result of recent Supreme Court jurisprudence and many hard won gains are diminished. By imposing new testimonial and cross-

---

prosecution"); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (citing figure that 90% of domestic violence victims do not cooperate with prosecutors); Lisa Marie DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 370 n.64 (1996) (noting that victims' noncooperation rate in domestic prosecutions is between 80% and 90%).

[119] Tom Lininger, *Reconceptualizing Confrontation After* Davis, *supra* note 117, at 284-85.

[120] *Giles,* 128 S.Ct. at 2687-88 (holding that the theory of forfeiture by wrongdoing is not an exception to the 6th Amendment's confrontation requirement because it was not an exception established by the Founders).

[121] See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 787 (2005) (discussing the regrettable practice of jailing victims, one respondent to a recent survey of district attorneys' offices noted, "[u]nfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society" (internal quotation marks omitted)); Percival, *supra* note 117, at 241 (discussing harm to the accuser when prosecutor jails her to assure her attendance at the trial of the alleged batterer).

[122] *See* Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1366 (2005) (arguing that difficulties created by the Supreme Court's new confrontation jurisprudence dissuades some victims from participating in criminal cases); Percival, *supra* note 117, at 241 ("Victims, particularly those already familiar with the criminal justice system, will begin to distrust prosecutors and the system and will be less likely to report future crime. Fear of prosecutors taking extreme measures could cause domestic violence advocates and shelters to advise victims against coming forward.").

examination paradigms on the admissibility of hearsay statements in criminal cases, well-intentioned prosecutors are greatly hampered in their efforts to go forward when victims are too frightened to testify.[123]

If permitted to proceed in court, domestic violence case dispositions often fall far short of a conviction, instead opting for unproven treatment programs and no sanctions for the criminal conduct.[124] Some batterers are sent to diversion programs, meaning the charges will be dismissed and there is no guilty finding if they comply with minimal restrictions.[125] Since there is usually no monitoring to determine batterer compliance with court mandates, absent arrest he can flaunt to the victim his disobedience of court orders.[126] It is no wonder that many victims do not turn to the courts, given that their calls for help typically result in neither arrests nor prosecutions, and, thus, appallingly dismal rates of conviction.[127] Dispositions frequently have not reflected the severity of the batterer's crimes, in part because the cases are undercharged as misdemeanors, even if clearly meeting felony elements.[128] When courts routinely dismiss cases or render inadequate sentences for intimate partner crimes,[129] they contribute to further endangering victims.

Given the potentially grim consequences of inadequate assistance to abuse victims and prosecutor's monopoly on accessing remedies in criminal court, it is unconscionable to condone

---

123 *See, e.g.*, David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Mar. 12, 2004 ("The *Crawford* decision, by insisting on the right of an accused to confront the witness, rather than just a tape recording or police report, wipes away a judge's ability to admit any of this evidence without the actual witness being subject to cross-examination."), *available at* http://www.slate.com/id/2097041.

124 Hanna, supra note 107, at 1526 (noting batterer's counseling programs are more typical).

125 Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 104 (1994).

126 Stack, *supra* note 95, at 1726.

127 *See* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 327 (2005).

128 Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 566 (1996).

129 *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 65 (1992).

the dearth of safety-enhancing sentences. Yet, sentences – even for recidivist batterers – remain relatively lenient.[130] Even when judges' improper decisions do not rise to the level of misconduct, the results of those light dispositions may, nonetheless, greatly endanger victims.[131] Problematic judges disregard precedent, misuse evidentiary rules, and block admissible expert testimony, among other troublesome practices.[132] Judicial gate keeping gone awry bodes ill for battered women trying to stay alive by relying, at least in part, on the legal system.

D. State Protections for Domestic Violence Victims Lack Uniformity and are Often Sorely Inadequate.

Despite VAWA's attempts to encourage best practices in local legislation by offering funding incentives to states with well-drafted laws, local laws protecting women still vary significantly from state to state and municipality to municipality. Therefore, what may constitute a crime in one state may not be so considered in another, and a woman's ability to seek police protection or legal redress for violent assaults may depend upon which state she calls her home. Moreover, attempts of advocacy organizations to promote uniform legislative best practices have not been successful, even though legislative models exist, such as the National Council of Juvenile and Family Court Judges' (NCJFCJ) Model Code on Domestic and Family Violence, a comprehensive proposal drafted by multi-disciplinary experts from across the country.[133]

For instance, as of June 2004, only "12 states and the District of Columbia ha[d] explicitly abolished the marital defense to charges of sexual assault," and another 20 states had

---

130 Cynthia D. Cook, *Triggered: Targeting Domestic Violence Offenders in California,* 31 MCGEORGE L. REV. 328, 333 (2000).

131 *See* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 234 (2003).

132 *See* Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81 (2001).

133 *See* NCJFCJ Model Code on Domestic and Family Violence, *available at* http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.pdf.

implicitly repealed the exemption.[134] Shockingly, 18 states still permitted a marital exemption as a limited bar to criminal prosecution. While no firm numbers exist, some studies report that "between one-quarter and one-half of domestic violence victims have suffered from forced sexual relations."[135]

Some states aggressively punish domestic violence abusers, making domestic violence a felony offense after 1 to 3 convictions.[136] But in 16 states, repeated domestic violence convictions are not treated as felony violations, irrespective of the number of incidents for which the batterer has been convicted. Even in states where repeat violations *are* charged as felonies, it is often difficult to tell which prior convictions are for domestic violence if the state's penal code does not have separate domestic violence codes (i.e. if assault is charged, it is unclear to judge or prosecutor on a subsequent occasion if the assault charged was a domestic violence assault or a simple assault).[137]

Mandatory arrest laws also vary by jurisdiction. Only 31 states have mandatory arrest policies for court issued orders of protection whereas 16 states give discretion to the police.[138] Even in the 21 states claiming to have mandatory arrest, arrest is only triggered by unrealistic, outdated criteria. For example, Texas is often cited as a mandatory arrest state, yet the only condition requiring arrest is when an officer actually witnesses violation of a protective order.[139] In the 29 remaining states, a victim of domestic violence, who has already obtained an order of

---

134 Neal Miller/Institute of Law and Justice, Domestic Violence: A Review of State Legislation Defining Police Prosecution Duties and Powers, June 2004, at 8, *available at* http://www.ilj.org/publications/DV_Legislation-3.pdf.

135 Miller, *supra* note 86 at 58.

136 *Id.* at 55-56.

137 *Id.* at 56.

138 Review of State Legislation Defining Police Prosecution Duties and Powers, *supra* note 134, at 31.

139 Texas Code of Criminal Procedure § 14.03(b) ("A peace officer **shall** arrest, without a warrant, a person the peace officer has probable cause to believe has committed an offense under Section 25.07, Penal Code (violation of Protective Order), or Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is committed in the presence of the peace officer.") (emphasis added).

protection, could still be left in the company of her abuser, despite having called 911 and requested police intervention.

States also differ in their passage and implementation of domestic violence specific law. For instance, several states criminalize interference with 911 calls or trespass at a domestic violence shelter.[140] Kentucky criminalizes fleeing the scene of a domestic violence incident[141] and Illinois has made it a criminal offense to report the address of a victim if doing so could put her in danger.[142] These protections demonstrate foresight by state legislatures in addressing the problem of domestic violence and curtailing it by limiting an abuser's ability to escape punishment. However, because these laws are available in only a limited number of jurisdictions, they protect only a small percentage of the overall number of victims of domestic violence across the 50 states.

CONCLUSION AND RECOMMENDATIONS

The Violence Against Women Act is a landmark piece of legislation. Nonetheless, it cannot bind states or provide federal causes of action under United States jurisprudence, is unevenly implemented, and is used primarily as a voluntary funding source. Consequently, VAWA falls well short of meeting the United States' obligations to prevent, investigate, and punish those who violate women's rights to physical safety and to provide victims with a court remedy. By failing to protect women from violence and hold their batters accountable the United States flouts the American Declaration and basic precepts of international law which secure the rights to life and to family life.

---

140 Miller, *supra* note 86, at 66.

141 *Id.* at 66; Ky. Rev. Stat. § 520.095.

142 Miller, *supra* note 86, at 66; 720 ILCS 5/45-2.

The United States can use VAWA to better meet its obligations of due diligence to domestic violence victims by:

(1) Performing a comprehensive analysis of which states and localities have consistently failed to apply for VAWA grants, and contacting them to encourage them to apply for VAWA funds for training and service provision;

(2) Tracking criminal justice statistics, including rates of reported violence and conviction rates in domestic violence-related criminal cases, to determine which states or localities are most clearly in need of initial or additional VAWA-funded training and assistance, and contacting those states or localities to encourage them to apply for VAWA funds for training and service provision;

(3) Including in the next VAWA re-authorization incentives for states to prohibit housing discrimination against domestic violence victims in public and private housing; and

(4) Including in the next VAWA re-authorization additional funding for domestic violence shelters, supervised visitation staff and facilities, and civil legal services for domestic violence victims across a spectrum of civil legal needs.

Dated: October 17, 2008
New York, New York
U.S.A.

Yisroel Schulman
Christina Brandt-Young
Amanda Beltz
+1.212.613.5086
New York Legal Assistance Group
450 W. 33rd St., 11th Floor
New York, New York 10001 U.S.A.

Sarah M. Buel
Clinical Professor of Law
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
+1.512.232.9326

Attorneys for Amici Curiae

NEW YORK LEGAL ASSISTANCE GROUP Inc.

450 West 33RD STREET NEW YORK, NY 10001-2603

TELEPHONE: (212) 750-0800 FAX:(212) 750-0820

CONFIDENTIALITY NOTE

****

FAX TRANSMITTAL SHEET

Transmitted to: Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights

Fax Number: 202.458.3992 Office Phone No: _____

Date: 10/17/08 Total Number of Pages: 38 including cover sheet

Transmitted from Christina Brandt-Young, 212.613.5086

☐ Please call to confirm receipt.

☑ Acknowledgment of receipt not required.

Comments: Re: Gonzales v. United States, Case No. 12.626

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0024
RECIPIENT ADDRESS	912024583992
DESTINATION ID	
ST. TIME	10/17 18:43
TIME USE	05'58
PAGES SENT	38
RESULT	OK

NEW YORK LEGAL ASSISTANCE GROUP Inc.

450 West 33RD STREET NEW YORK, NY 10001-2603

TELEPHONE: (212) 750-0800 FAX:(212) 750-0820

CONFIDENTIALITY NOTE

****

FAX TRANSMITTAL SHEET

Transmitted to: Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights

Fax Number: 202.458.3992 Office Phone No: _____

Date: 10/17/08 Total Number of Pages: 38 including cover sheet

Transmitted from Christina Brandt-Young, 212.613.5086

☐ Please call to confirm receipt.

☑ Acknowledgment of receipt not required.

Comments: Re: Gonzales v. United States, Case No. 12.626