

CEDAW'S PROMISE FOR STRENGTHENING LAW-ENFORCEMENT ACCOUNTABILITY TO SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE IN THE UNITED STATES

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INTRODUCTION

A domestic-violence survivor receives a call from her former partner, against whom she has an order of protection. He threatens to kill her. Terrified, she takes her young children and plans to go to her grandmother's home. On the way, she calls the police officer familiar with her history of domestic violence to report the violation of the order of protection. He assures her that her former partner will be arrested immediately and that she can go home. She returns to her apartment. The following morning, when she opens the door to take out her garbage, her former partner shoots her repeatedly with a gun. Law enforcement had not made any attempt to arrest him.

This deeply troubling scenario is a real case, resulting in litigation brought by the survivor, Carmen Valdez, against the City of New York.¹ It is the type of situation that the movement to end gender-based violence in the United States, for the last forty years, has sought to prevent. Yet, police fail to carry out laws and policies designed to protect victims of gender-based violence every day, in communities across the country.

This Article discusses how ratification by the United States of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) could strengthen law-enforcement accountability for responding to and preventing violence against women and girls in the United States. Anti-violence advocacy in the United States has primarily focused on and funded criminal justice system interventions to address domestic and sexual violence. But in far too many communities, law-enforcement officers respond to domestic and sexual violence in dismissive, harmful, and biased ways, allowing those who commit violence to do so with impunity and withholding any semblance of governmental protection from survivors. The U.S. Supreme Court and some federal and state courts have contributed to this situation, denying legal remedies to survivors who seek to hold police departments accountable.

CEDAW ratification would empower survivors and advocates in a number of ways. First, CEDAW clearly establishes the government's obligation to protect victims of gender-based violence as a fundamental element of the non-discrimination principle. It also

1. See *infra* text accompanying notes 68-73 (discussing *Valdez v. City of New York*, 960 N.E.2d 356, 368 (N.Y. 2011)). New York's highest court later overturned an \$8 million jury verdict against the city, concluding the police owed no duty to the victim. *Valdez*, 960 N.E.2d at 368.

provides a right to a remedy for the violence once it occurs. As I will discuss further, many U.S. courts resist recognizing a duty of law enforcement to address and prevent violence or discrimination against survivors of gender-based violence as a form of sex discrimination. Similarly, some courts have concluded there is no remedy for survivors who experience police misconduct when addressing domestic or sexual violence, either because police owe no legal duty to survivors or as a result of other legal doctrines that immunize the government from liability.

Second, CEDAW and the human rights framework highlight the intersectionality analysis, which is particularly important in scrutinizing law-enforcement responses to violence. The intersectionality framework, unlike the standard civil rights paradigm, illuminates how multiple forms of discrimination frequently result in problematic policing of domestic and sexual violence in communities of color and immigrant communities, as well as other marginalized communities. For survivors, it is crucial to integrate an understanding of all aspects of their personhood—rather than membership in individual protected classes—to both analyze law-enforcement responses and to move forward with reforms.

Third, CEDAW could be used to transform the current U.S. movement to end gender-based violence, which has often chosen not to confront problematic policing practices. CEDAW provides mechanisms for rallying advocates around an affirmative framework of women's human rights—including positive rights to life, security, and equality—and calling for greater governmental accountability.

I. LAW-ENFORCEMENT RESPONSIVENESS TO GENDER-BASED VIOLENCE IN THE UNITED STATES

As others have described,² modern advocacy against violence against women in the United States originated in feminist thought and activism. Advocates in the late 1960s and 1970s viewed battering as the product of patriarchy and highlighted the government's role in legitimizing and reinforcing the perpetration of

2. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 182-84 (2000); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666.

that violence.³ Yet, as the movement developed, it shifted from one at the margins challenging the state to one in the mainstream. The movement was successful in recharacterizing violence against women—in particular, intimate partner violence—as a crime of public concern requiring a police response.⁴ Much of the law reform work in the United States zeroed in on strengthening how law enforcement addressed gender-based violence. States adopted amendments to the criminal laws to encourage the arrest and prosecution of perpetrators of domestic violence, and the 1994 enactment of the federal Violence Against Women Act created funding streams for law-enforcement agencies as well as advocacy organizations to respond to survivors.⁵ Sexual assault laws were changed to relax requirements that a complainant's report be corroborated and to include rape shield protections.⁶

Despite the significant changes in the legal framework and resources provided to policing domestic violence and sexual violence, it is clear that law-enforcement responses continue to systemically fail survivors.⁷ In 2011, the U.S. Department of Justice (DOJ) found that the New Orleans Police Department had engaged in widespread misconduct in responding to violence against women.⁸ With respect to sexual-violence complaints, officers had failed to follow basic sexual assault investigation processes, misclassified 40%–60% of sexual assault reports as “non-criminal,” questioned

3. SCHNEIDER, *supra* note 2, at 13, 20-22, 182; SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 29-79, 94, 201 (1982); Sack, *supra* note 2, at 1666.

4. SCHNEIDER, *supra* note 2, at 4-5; Sack, *supra* note 2, at 1668-72.

5. SCHNEIDER, *supra* note 2, at 5, 92, 183, 188-90.

6. *Id.* at 189; Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1319 & n.248, 1333 (1994).

7. These failures have led many scholars and activists to challenge the wisdom of overreliance on criminal justice responses. See generally 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 (2004); KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* 37, 56, 161-65 (2008). This Article focuses on the experiences and rights of survivors who do choose to access the criminal justice system, while acknowledging the pressing need to create comprehensive solutions for survivors that move beyond criminalization.

8. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT*, at ix, xi, 32, 43-51 (2011) [hereinafter *NEW ORLEANS POLICE INVESTIGATION*], available at http://www.justice.gov/crt/about/spl/nopd_report.pdf.

victims in a manner that seemed focused on proving a victim's allegations were false, and poorly carried out evidence collection and analysis.⁹ With regard to domestic violence, the department had no guidance in place for officers on how to interact with domestic-violence survivors, did not provide adequate training to police who responded to the scene, and prohibited Domestic Violence Unit detectives from conducting fieldwork.¹⁰

In recent years, other departments' deep-rooted biases against domestic- and sexual-violence survivors also have been exposed. The Puerto Rico Police Department mishandled and misclassified sexual assault complaints, recording fewer sexual assaults than homicides.¹¹ Moreover, the department did little to respond to extremely high rates of domestic-violence homicides as well as officer-committed domestic violence.¹² While ninety-eight officers were arrested for committing domestic violence between 2007 and 2010, eighty-four remained active, sending the message to survivors that the department did not take the offenses seriously.¹³ In Missoula, Montana, police officers consistently failed to gather appropriate evidence, discouraged victim participation in the criminal process, created barriers to trust with victims through their interview methods, and did not coordinate their work with community organizations.¹⁴ And Human Rights Watch documented similar problems at the District of Columbia Metropolitan Police Department, finding widespread misclassification of sexual assault complaints, among other serious deficiencies in police response.¹⁵

9. *Id.* at 45-49.

10. *Id.* at 49-51.

11. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT 57 (2011) [hereinafter PUERTO RICO POLICE INVESTIGATION], available at http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf; AM. CIVIL LIBERTIES UNION, ISLAND OF IMPUNITY: PUERTO RICO'S OUTLAW POLICE FORCE 17 (2012), available at https://www.aclu.org/files/assets/islandofimpunity_20120619.pdf.

12. AM. CIVIL LIBERTIES UNION, *supra* note 11, at 103-17; PUERTO RICO POLICE INVESTIGATION, *supra* note 11, at 58.

13. PUERTO RICO POLICE INVESTIGATION, *supra* note 11, at 17.

14. Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, & Michael W. Cotter, U.S. Attorney, Dist. of Mont., to John Engen, Mayor, City of Missoula, Mont., at 7-14 (May 15, 2013) [hereinafter Missoula County Letter], available at http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf.

15. HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA 3-15 (2013), available at http://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf.

Discrimination against survivors of gender-based violence often intersects with other forms of discrimination to more severely penalize and jeopardize survivors from marginalized communities.¹⁶ Women of color, immigrant women, Native American women, lesbian women, and transgender people can face harsh consequences when reaching out to the police. Women of color requesting police assistance may be arrested themselves, based on racialized stereotypes about who constitutes a threat and who is a victim.¹⁷ Immigrant women may find that their complaints of violence are overshadowed by inquiries into their immigration status, leading to potential deportation.¹⁸ And Native American women's reports of sexual assault by non-Native men frequently go completely unaddressed.¹⁹ Because tribes generally lack authority to prosecute non-Native perpetrators, Native women must depend on federal, and sometimes state, authorities; yet, it is well established that those authorities decline to investigate and prosecute at high rates,²⁰ though tribal advocates have pushed recently for greater action. Lesbian women and transgender and queer people who report intimate-partner or sexual violence to police frequently encounter unsympathetic or antagonistic attitudes; they also are subject to arrest

16. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Her Visit to the United States of America*, ¶¶ 50-66, U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011) (by Rashida Manjoo) [hereinafter Manjoo].

17. *Id.* ¶ 14; Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 23-33 (1998).

18. Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 77-79 (2003); Manjoo, *supra* note 16, ¶ 59.

19. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 4-8, 17 (2007), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>; Manjoo, *supra* note 16, ¶¶ 64-65.

20. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3 (2010); Manjoo, *supra* note 16, ¶¶ 65-66; AMNESTY INT'L, *supra* note 19, at 41-53, 62-75. The Violence Against Women Reauthorization Act of 2013 restored tribal jurisdiction over certain non-Native perpetrators of domestic and dating violence, but not over those who commit sexual assault. INDIAN LAW RES. CTR., RESTORING SAFETY TO NATIVE WOMEN AND STRENGTHENING NATIVE NATIONS 19-22 (2013), available at http://indianlaw.org/sites/default/files/TribalCapacityReport_Final.pdf.

based on bias or misconceptions about how violence in same-sex relationships or against LGBT people is committed.²¹

Police bias against sexual- and domestic-violence survivors does not only manifest itself in the failure to effectively enforce the applicable criminal laws. In many jurisdictions across the country, law-enforcement agencies actively punish survivors who report crimes based on municipal ordinances that penalize tenants for calls to the police or for certain criminal or other activity occurring at the property. Police departments have enforced chronic nuisance ordinances, also known as crime-free or disorderly-behavior ordinances, against victims of domestic violence, threatening them with eviction for reporting abuse and silencing them from making further reports.²² These laws and police enforcement of them exemplify how, despite progress in transforming laws to penalize gender-based violence, other governmental practices dramatically undermine survivors' rights to seek protection from the state and instead empower perpetrators to commit crimes with impunity.

Beyond civilian law enforcement, the military justice system also has ignored and penalized survivors of sexual violence who come forward. While sexual assault is perpetrated at high rates within the ranks, very few cases are ever prosecuted.²³ Many victims do not report, and those who do all too frequently experience retaliation from the chain of command—who may prioritize unit harmony above meting out justice.²⁴ The *Feres* doctrine, set out by

21. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS (NCAVP), LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2012, at 10, 14-15, 20-21, 34, 47 (2013), available at http://www.avp.org/storage/documents/ncavp_2012_ipvreport.final.pdf.

22. Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES, Aug. 17, 2013, at A1; EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES (2013), available at <http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf>; Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117 (2012) (documenting how domestic violence was the third most cited reason for triggering Milwaukee's nuisance ordinance); Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (2008).

23. LINDSAY ROSENTHAL & LAWRENCE KORB, CTR. FOR AM. PROGRESS, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY'S SEXUAL ASSAULT PROBLEM 5, 9, 14-15, 22 (2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaults.pdf>.

24. *Id.* at 11, 14-15.

the U.S. Supreme Court in 1950, bars service members who are sexually assaulted from bringing Federal Tort Claims Act claims against the government.²⁵ The doctrine has also been extended to constitutional claims, depriving survivors of civil remedies when the military justice system fails them.²⁶

Thus, despite the reforms and resources focused on strengthening law-enforcement response to violence against women and girls in the United States, many survivors will experience hostility, distrust, ignorance, dismissal, and direct and damaging consequences when they report the violence to relevant law-enforcement authorities. The need for systemic transformation of criminal justice response is clear. CEDAW ratification would serve as a meaningful tool for such advocacy.

II. HOW CEDAW COULD TRANSFORM U.S. LAW ON LAW-ENFORCEMENT ACCOUNTABILITY

Ratification of CEDAW would allow survivors to rely on the international human rights framework to shift how federal, state, and local law-enforcement agencies address violence. Most significantly, the framework provides a useful response to federal and state courts, which in many instances have set a high threshold for finding that discrimination against survivors of gender-based violence is a form of sex discrimination, refused to recognize a duty of law enforcement to address and prevent violence, and denied any remedy to survivors for police misconduct when addressing domestic or sexual violence. The ability to invoke the non-discrimination and due diligence principles of CEDAW in U.S. advocacy would help reshape our understanding of survivors' rights to equality, protection, and remedies.

A. CEDAW's Approach to Gender-Based Violence

CEDAW provides a strong legal framework governing governmental duty to survivors of gender-based violence. While CEDAW's text does not specifically discuss gender-based violence, it prohibits any form of discrimination against women, including any "distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition,

25. *Feres v. United States*, 340 U.S. 135 (1950).

26. *Chappell v. Wallace*, 462 U.S. 296 (1983).

enjoyment, or exercise by women . . . of human rights and fundamental freedoms.”²⁷ General Recommendations 12 and 19, issued by the CEDAW Committee, explain how this principle applies to violence against women.²⁸ General Recommendation 12 recognizes that governments have an obligation to protect against violence occurring against women within the family or in other areas of social life.²⁹ General Recommendation 19 provides that freedom from gender-based violence, whether committed by private or public actors, is included within the right to freedom from discrimination.³⁰ Articulating freedom from gender-based violence as essential to equality is central to CEDAW’s understanding of violence against women and girls. General Recommendation 19 also describes how gender-based violence implicates other human rights, including:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; . . .
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family; [and] . . .
- (h) The right to just and favourable conditions of work.³¹

CEDAW, and international human rights law generally, emphasizes that “[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation” to the victim.³² General Recommendation 19 further elaborates, stating that governments should, among other measures:

27. Convention on the Elimination of All Forms of Discrimination against Women art. 1, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

28. Rep. of the Comm. on the Elimination of All Forms of Discrimination against Women, 8th Sess., Feb. 20-Mar. 3, 1989, ¶ 392, U.N. Doc. A/44/38, Annex V; GAOR, 45th Sess., Supp. No. 38 (1980) [hereinafter 8th Sess. Report]; Rep. of the Comm. on the Elimination of All Forms of Discrimination against Women, 11th Sess., Jan. 20-30, 1992, at 1-8, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) [hereinafter 11th Sess. Report]. While general recommendations are not legally binding, they serve as guidance on how to interpret CEDAW’s text.

29. 8th Sess. Report, *supra* note 28.

30. 11th Sess. Report, *supra* note 28, at 1-2.

31. *Id.*

32. *Id.* at 2, 6.

take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; . . . ensure that laws against . . . gender-based violence give adequate protection to all women, and respect their integrity and dignity[; provide a]ppropriate protective and supportive services; [provide g]ender-sensitive training of judicial and law enforcement officers; [and provide] effective complaints procedures and remedies, including compensation.³³

The CEDAW Committee has applied these principles in individual cases filed with it.³⁴ In *A.T. v. Hungary*, the Committee found that Hungary's laws and practices did not provide comprehensive or effective protection to victims of domestic violence.³⁵ A.T. had experienced severe physical domestic violence committed by her husband for four years; yet, the police never detained him, and the court cases against him dragged on. Moreover, A.T. was unable to seek a protection order because Hungary's laws did not authorize such orders, and there was no shelter available for her and her children. Invoking the due diligence principle, the Committee concluded that Hungary had violated CEDAW's anti-discrimination guarantees by failing to prevent and protect against violence against women and stated that the government should provide her with "reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights."³⁶ Similarly, in two cases involving Austria—*Goekce v. Austria* and *Yildirim v. Austria*—the Committee concluded that there had been violations of due diligence when the police failed to respond in a timely manner to serious incidents of domestic violence and when the perpetrators were not detained.³⁷ The Committee further

33. *Id.* at 4-5.

34. The Optional Protocol of CEDAW authorizes victims to bring complaints about CEDAW violations before the CEDAW Committee and also allows the Committee to conduct inquiries into serious and systematic abuses of human rights. G.A. Res. 54/4, art. 2, 8, U.N. Doc. A/RES/54/4 (Oct. 15, 1999). While 187 countries have ratified or acceded to CEDAW, only eighty countries have assented to the Optional Protocol. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Mar. 12, 2014).

35. United Nations, Comm. on the Elimination of Discrimination against Women, Communication No. 2/2003, 32nd Sess. Jan. 10–28 2005, U.N. Doc. CEDAW/C/32/D/2/2003 (Jan. 26, 2005) [hereinafter *A.T. v. Hungary*].

36. *Id.* at ¶ 9.6 I(b).

37. United Nations, Comm. on the Elimination of Discrimination against Women, Communication No. 5/2005, 39th Sess., Jul. 23–Aug. 10, 2007, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007) [hereinafter *Goekce v. Austria*]; United Nations, Comm. on the Elimination of Discrimination against Women,

determined that even though the perpetrators were ultimately convicted for killing their former partners, the victims' human rights were violated because no action was taken to prevent the violence or protect the victims when the state had the opportunity to do so.³⁸

Thus, CEDAW takes a holistic view of the rights of women and girls as it relates to gender-based violence. Governments must work to prevent such violence and, when it occurs, to provide protection and remedies for it. Refusing to address violence until it has escalated to extremely serious injury or homicide is insufficient, as by that point the system has failed the victim. And providing services after the fact also does not satisfy the government's duty, as services do not necessarily prevent future violence or adequately compensate for and remedy the effects of violence that has already been committed.

B. Recognizing Gender-Based Violence as a Form of Discrimination Against Women and Girls in the United States

CEDAW's recognition of gender-based violence as a form of sex discrimination provides a compelling lens through which to understand governmental actions designed to end such violence, as well as governmental actions that discriminate against survivors. The concept of gender-based violence as a violation of women's rights to equality has not consistently gained traction in U.S. law. The 1994 Violence Against Women Act created, for the first time, a federal civil rights remedy that could be pursued by survivors of gender-based violence against perpetrators.³⁹ Following years of congressional hearings and investigation, Congress concluded that the remedy was an appropriate exercise of both its Commerce Clause power and under the Fourteenth Amendment. Of particular relevance

Communication No. 6/2005, 39th Sess., Jul. 23–Aug. 10, 2007, U.N. Doc CEDAW/C/39/6/2005 (Oct. 1, 2007) [hereinafter *Yildirim v. Austria*].

38. *Goecke v. Austria*, *supra* note 37, at ¶¶ 12.1.5-12.1.6; *Yildirim v. Austria*, *supra* note 37, at ¶¶ 12.1.5-12.1.6.

39. The provision creating the civil rights remedy reads as follows:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981 (1994).

here, Congress found that discrimination against survivors by state law-enforcement authorities and courts provided a sufficient basis to create a remedy that would confront both the bias inherent in gender-motivated violence and governmental responses to it.⁴⁰ Yet, the U.S. Supreme Court, in *United States v. Morrison*, rejected the equality argument as a ground upon which the law could stand.⁴¹ Instead, the Court narrowed the type of discrimination that could be reached pursuant to the Fourteenth Amendment: the civil rights remedy “is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”⁴² The Court struck down the civil rights remedy based on federalism concerns, limiting the ability of the federal government to give options to survivors who faced discrimination from state justice systems when experiencing violence perpetrated by non-state actors.⁴³

In contrast, CEDAW acknowledges that unless gender-based violence by private actors is prevented and addressed by the government, women cannot be truly equal.⁴⁴ Its ratification could thus be helpful in supporting federal and state equal-protection claims brought by survivors of gender-based violence challenging discriminatory law-enforcement practices.⁴⁵ This type of claim has been brought in many jurisdictions, typically targeting the systematic failure of police departments to respond effectively to domestic and sexual violence. Courts generally have required the showing of a

40. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 70-82, 85-93 (2002).

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

42. *Id.* at 626.

43. Some states, however, have enacted versions of the civil rights remedy. Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 *FAM. L.Q.* 157, 165 n.42, 167 n.55, 180 (2005).

44. 11th Sess. Report, *supra* note 28, at 1-2.

45. While CEDAW, even if ratified, would most likely not be treated as self-executing, it would serve as persuasive authority in U.S. cases. Human rights treaties made under the authority of the United States are the supreme law of the land, U.S. CONST. art. VI, and customary international law shares a similar status. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). United States laws should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252-53 (1984).

policy or practice of providing less protection to victims of gender-based violence than other victims, as well as evidence that discrimination against women was a motivating factor.⁴⁶ Establishing intent can be difficult, though courts have accepted evidence of statistical differences in arrest rates, training of officers to “defuse” rather than arrest in domestic-violence cases, and comments about not blaming a husband for being abusive toward a victim as indicating discriminatory motive.⁴⁷ The DOJ has looked to similar types of evidence when finding equal-protection violations by local law-enforcement agencies.⁴⁸ CEDAW’s recognition of violence against women as a form of sex discrimination would bolster the ability of survivors to establish intent, as it situates both the violence and problematic law enforcement response to the violence in gender bias. This principle could be especially helpful in developing claims in states with Equal Rights Amendments (ERAs). Very few cases have been brought based on ERAs, and it is unclear whether discriminatory intent will be required in most states.⁴⁹ In some states, proof of discriminatory impact on women may be sufficient.⁵⁰ CEDAW’s understanding of non-discrimination in the context of violence against women and girls would contribute meaningfully to the development of law in this area.

C. Recognizing Law Enforcement’s Duty to Protect Survivors of Gender-Based Violence

Another major barrier to holding law enforcement accountable for failures to protect victims of domestic and sexual violence in the United States is the reluctance of courts to impose any sort of duty

46. *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990); *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir. 1996); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1212-13 (N.D. Ohio 1994); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984).

47. *Watson*, 857 F.2d at 695-96; *Balistreri*, 901 F.2d at 701; *Smith*, 857 F. Supp. at 1212.

48. NEW ORLEANS POLICE INVESTIGATION, *supra* note 8, at 32-33; PUERTO RICO POLICE INVESTIGATION, *supra* note 11, at 58; Missoula County Letter, *supra* note 14, at 4-6.

49. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1256-59, 1275-78 (2005).

50. Linda M. Vanzi, *Freedom at Home Revisited: The New Mexico Equal Rights Amendment After New Mexico Right to Choose/NARAL v. Johnson*, 40 N.M. L. REV. 215, 215 n.4, 218 (2010).

on the government when private individuals perpetrate the violence. Thus, in *DeShaney v. Winnebago County*, the Supreme Court concluded that there was no substantive due process right to protection, except where the victim is in the state's control or where the state creates the danger.⁵¹ *Castle Rock v. Gonzales* closed off another constitutional remedy to victims, holding that they have no procedural due process right to enforcement of restraining orders.⁵² Together, these cases absolve governments from a duty to protect many victims of gender-based violence, even when a perpetrator violates a judicial order that is seen as a primary tool to protect victims, and even when state law mandates police action.

In stark contrast, CEDAW clearly sets out a duty to protect survivors.⁵³ Comparing the Supreme Court's discussion of police duty with the CEDAW Committee's illustrates the divergent approaches. In *Castle Rock*, the Court refused to recognize that the police had a duty to enforce Ms. Gonzales's protective order when her ex-husband violated it by abducting their three daughters, despite a long history of domestic violence, even though state law required enforcement.⁵⁴ The Court instead suggested that protection of victims serves private ends that fall outside the Constitution's reach.

Even if the statute could be said to have made enforcement of restraining orders "mandatory" because of the domestic-violence context of the underlying statute, that would not necessarily mean that state law gave respondent an entitlement to enforcement of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. The serving of public rather than private ends is the normal course of the criminal law because criminal acts, "besides the injury [they do] to individuals, strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity."⁵⁵

Only two years later, the CEDAW Committee came to very different conclusions when faced with a petition brought by the family of a domestic-violence victim whose requests for police assistance had largely gone unanswered, resulting in her murder.

[T]he police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an

51. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 197, 199-200 (1989).

52. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

53. 11th Sess. Report, *supra* note 28, at 2, 4.

54. *Gonzales*, 545 U.S. at 753, 759, 768.

55. *Id.* at 764-65 (emphasis omitted) (citation omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Şahide Goekce.⁵⁶

The Committee placed the failure to protect squarely on the government, connecting the duty to protect with their obligations under international human rights law.⁵⁷

Indeed, when Ms. Gonzales (later known as Lenahan) filed a petition with the Inter-American Commission on Human Rights following the Supreme Court decision, the Commission concluded that the government had violated her human rights to life, non-discrimination, and judicial protection.⁵⁸ The Commission's decision echoed the core principle of CEDAW that "a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law."⁵⁹ The Commission stressed that what might be seen as state acts of omission can fuel already dangerous situations: "State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence 'since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.'"⁶⁰ The decision ordered individual remedies for Ms. Lenahan, as well as systemic reforms.⁶¹

CEDAW's articulation of due diligence would strengthen victims' arguments about the duty to protect in the United States.⁶² In federal and state substantive due process cases, victims of gender-based violence typically must establish that an affirmative action by the law-enforcement officer increased the danger they faced in order

56. *Goekce v. Austria*, *supra* note 37, at ¶ 12.1.14.

57. *Id.*

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

59. *Id.* ¶ 111.

60. *Id.* ¶ 168 (quoting *Maria Da Penha Fernandes (Brazil)*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 56 (2001)).

61. *Id.* ¶ 201.

62. Elizabeth M. Schneider et al., *Implementing the Inter-American Commission on Human Rights' Domestic-Violence Ruling*, 46 CLEARINGHOUSE REV. 113, 115-17 (2012); see also Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43, 49-50 (2013).

to fall within the *DeShaney* exception.⁶³ Thus, situations where the officer explicitly or implicitly sanctions private violence by not arresting a domestic-violence perpetrator, despite seeing bruises on the victim, and instead talking about football with him, could qualify.⁶⁴ Or cases involving nuisance ordinances, where the municipality passes a law punishing victims for calling the police and thereby sets up state-protection-free zones around their homes, should satisfy the affirmative act element.⁶⁵

Yet, in other cases, the analysis is more difficult, as misconduct by officers in responding to violence can often be characterized as acts of omission.⁶⁶ For example, in the *Valdez v. City of New York* case,⁶⁷ the case referred to at the start of this Article, if the plaintiff had brought a substantive due process claim, would a court have seen the officer's assurance of an immediate arrest as an affirmative act? Or would a court have dismissed this as a case where the officer failed to arrest? Given this analytical ambiguity, the due diligence obligation can be used to shed light on the contours of substantive due process post-*DeShaney*, for "[t]he search for substantive due process . . . is a search for fundamental 'human rights' [that] invites consideration of international values."⁶⁸ Due diligence offers a more holistic framework through which to interpret state action that creates danger, acknowledging the state's role in sanctioning violence through repeated refusal to carry out laws protecting victims of gender-based violence.

Likewise, in state negligence cases, CEDAW's due diligence standard would help survivors respond to arguments that law

63. See, e.g., *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 427-28 (2d Cir. 2009); *Burella v. City of Phila.*, 501 F.3d 134, 140-41 (3d Cir. 2007); *Wood v. Ostrander*, 879 F.2d 583, 597-600 (9th Cir. 1989).

64. *Okin*, 577 F.3d at 430; see also *Pearce v. Estate of Longo*, 766 F. Supp. 2d 367, 375 (N.D.N.Y. 2011), *aff'd in part, rev'd in part sub nom.* *Pearce v. Labella*, 473 F. App'x 16 (2d Cir. 2012).

65. *Cf. Okin*, 577 F.3d at 429 ("The affirmative conduct of a government official may give rise to an actionable due process violation if it communicates, explicitly or implicitly, official sanction of private violence.").

66. See, e.g., Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1, 25-26 (2007); *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 282 (3d Cir. 2006) (acknowledging that the line between action and inaction may not always be clear).

67. *Valdez v. City of New York*, 960 N.E.2d 356 (N.Y. 2011).

68. Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT'L L.* 1, 80-81 (2006) (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)).

enforcement owed no duty to them.⁶⁹ Victims must generally establish a special relationship with the government in order to overcome the public-duty doctrine bar to municipal liability for negligence.⁷⁰ In *Valdez*, the highest court in New York held that the victim did not establish a special relationship because she had not justifiably relied on the police statement that her abuser would be arrested immediately.⁷¹ The decision is a deeply troubling one, as it sends the message to survivors that police can choose whether to enforce orders of protection and cannot be held to any assurances that they affirmatively make, even in a case where they take no steps whatsoever to do what they said they would do.⁷² Despite state laws that encourage victims to report and that mandate arrest in many domestic-violence situations, the *Valdez* decision sets the bar high, perhaps unreachably high, to establish the “special relationship” between the police and a victim.⁷³

Departing from the New York Court of Appeals in *Valdez*, other state courts have emphasized that the text and intent behind their state domestic-violence criminal laws support finding municipal liability for law-enforcement failure to protect. In Illinois, the highest court concluded that domestic-violence victims could bring suit against the government where police willfully failed to enforce the law.⁷⁴ Similarly, the Washington Supreme Court permitted the estate of a domestic-violence victim to recover where an officer failed to take reasonable safety precautions when serving a protective order.⁷⁵ CEDAW could provide additional persuasive authority for the special-relationship analysis, as a source of law—in addition to state statutes and policies—that supports a finding of law-enforcement duty when the police act negligently in addressing gender-based

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

70. For elaboration on the special relationship inquiry, see Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001); Rogerson, *supra* note 69, at 324-25.

71. *Valdez*, 960 N.E.2d 356.

72. *Id.* at 369-71 (Lippman, J., dissenting).

73. *Id.* at 373-74. Indeed, even if the court had found that Ms. Valdez had established the requisite special relationship with the police, she still would have needed to overcome the general shield of municipal immunity to hold the city liable. *Id.* at 365 (majority opinion).

74. *Moore v. Green*, 848 N.E.2d 1015 (Ill. 2006); *Calloway v. Kinkelaar*, 659 N.E.2d 1322 (Ill. 1995).

75. *Washburn v. City of Federal Way*, 310 P.3d 1275 (Wash. 2013).

violence. The question of whether a special relationship exists must encompass consideration of whether holding law enforcement accountable in a case advances the state's interest in effectively responding to violence. A myopic focus on exempting municipalities from liability ignores the dramatic change in state laws and policies regarding gender-based violence that has taken place over the last few decades. CEDAW places these reforms—as well as litigation challenging law enforcement's failure to carry them out—in context, as tools for fulfilling states' due diligence obligations.

D. Recognizing the Right to a Remedy for Survivors of Gender-Based Violence

As part of the due diligence obligation, CEDAW also stresses providing remedies to survivors of gender-based violence. This not only includes compensation and protection for the individual, but also comprehensively changing the law-enforcement response to ensure that violence and discrimination do not recur.⁷⁶

Access to remedies can take many forms. As discussed above, litigation is certainly one important mechanism within the United States. The duty of the state to provide survivors with remedies should be a factor when courts are interpreting how the law applies to claims brought to hold law enforcement accountable for discriminatory conduct. While *Morrison* ended the federal civil rights remedy, equal protection, due process, and negligence claims remain viable options in many situations,⁷⁷ but largely turn on how courts interpret the state's duty to respond to violence perpetrated by private actors. In this analysis, a key consideration should be whether denying the claim would foreclose any remedy to the survivor—an outcome that CEDAW and international human rights law forbids. In

76. 11th Sess. Report, *supra* note 28, at 1-2.

77. Service members who experience sexual assault present perhaps the starkest examples of survivors with no recourse when confronted with a military justice system that routinely refuses to address violence within its ranks. They have little power to influence any decisions made by the chain of command about their cases, and, thus far, courts have barred them from bringing Federal Tort Act Claims as well as constitutional claims against the government. *See, e.g., Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013); *see also* Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 725, 728-29 (2013); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 79 (2003).

Castle Rock, the Supreme Court suggested that denying survivors the possibility of federal due process claims was mitigated because the state could provide them with a remedy.⁷⁸ However, it did not acknowledge that current Colorado law made any such claim impossible to sustain.⁷⁹ Pointing to hypothetical legislative actions is a far cry from realizing a right to an actual remedy.

Other than private litigation, what remedies currently exist for survivors seeking redress for law enforcement misconduct? The standard state and federal victim-compensation schemes typically provide funds to victims collected from perpetrators, but do not provide a mechanism for survivors seeking to change the way a law-enforcement agency responds to victims.⁸⁰ Survivors may be able to file complaints with police departments for internal investigation or with external police oversight bodies, including civil complaint review boards. However, those mechanisms generally are not designed or prepared to respond to police misconduct relating to gender-based violence.⁸¹

Some jurisdictions have agreed to alternate arrangements through which law-enforcement agencies voluntarily submit to oversight by an external panel of stakeholders. In Baltimore and Philadelphia, the police departments share information about the handling of sexual-assault complaints on a regular basis with a panel that includes sexual-assault advocates for review.⁸² The panel examines how complaints were classified, investigated, and disposed of and communicates with the department about problematic cases.⁸³ Consent decrees entered into by the DOJ with local departments similarly create a monitor who will assess the departments' performances in policing of domestic and sexual violence.⁸⁴

78. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

79. *Jessica Lenahan (Gonzales) v. United States*, Pet. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22 ¶¶ 47-50 (2007).

80. See, e.g., 42 U.S.C. § 10602 (2012).

81. See HUMAN RIGHTS WATCH, *supra* note 15, at 160.

82. POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES, IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT at iv, 16, 36-40 (2012), available at http://policeforum.org/library/critical-issues-in-policing-series/SexualAssaulttext_web.pdf.

83. See *id.*

84. Consent Decree Regarding the New Orleans Police Department, *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (entered January 11, 2013), available at http://www.justice.gov/crt/about/spl/documents/nopd_agreement_1-11-13.pdf; U.S. DEP'T OF JUSTICE, MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE CITY OF MISSOULA REGARDING THE MISSOULA POLICE DEPARTMENT'S RESPONSE TO SEXUAL ASSAULT

International human rights laws focus on remedies that could be used to advocate for similar mechanisms in other jurisdictions with problematic policing practices.

CEDAW's requirement of remedies for survivors could also strengthen arguments for federal oversight over local law-enforcement agencies. For the first time, in 2011, the DOJ exercised its authority to investigate how a police department responds to domestic and sexual violence in New Orleans.⁸⁵ It continued this work pursuant to two federal laws⁸⁶ in Puerto Rico;⁸⁷ Missoula, Montana;⁸⁸ and Maricopa County, Arizona.⁸⁹ Advocates have pointed to this work, as well as the *Lenahan* decision, to urge the DOJ to integrate gender-based violence as a key component of police oversight. The DOJ took an important step forward in June 2013, issuing a statement announcing that addressing gender bias is a top priority of the Civil Rights Division, which is charged with law-enforcement oversight.⁹⁰

And of course, if CEDAW and the Optional Protocol⁹¹ were ratified, the CEDAW Committee itself could be an additional venue to seek individual and systemic relief. The Inter-American Commission served that role with respect to the *Lenahan* case, giving Ms. Lenahan an opportunity to testify and receive an

11-12 (2013), available at http://www.justice.gov/crt/about/spl/documents/missoulapdsettle_5-15-13.pdf; Agreement for the Sustainable Reform of the Puerto Rico Police Department at 82, *United States v. Commonwealth of Puerto Rico*, No. 3:12-cv-2039 (GAG) (D.P.R. July 17, 2013), available at http://www.justice.gov/crt/about/spl/documents/prpd_agreement_7-17-13.pdf.

85. NEW ORLEANS POLICE INVESTIGATION, *supra* note 8, at xi, 43-51; *Landmark Finding of Gender Bias by U.S. Department of Justice in New Orleans Police Department*, WOMEN'S L. PROJECT (Mar. 21, 2011), http://www.womenslawproject.org/NewPages/wkVAW_GenderBias_NOPD.html.

86. 42 U.S.C. § 14141 (2012); *id.* § 3789(d).

87. PUERTO RICO POLICE INVESTIGATION, *supra* note 11, at 57-58.

88. Missoula County Letter, *supra* note 14 (regarding the United States' investigation of the Missoula, Montana police department).

89. Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Bill Montgomery, Cnty. Attorney, Maricopa Cnty., at 15, 16 (Dec. 15, 2011) [hereinafter Maricopa Cnty. Letter], available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (regarding the United States' investigation of the Maricopa County, Arizona sheriff's office).

90. Office on Violence Against Women, *Joint Statement of the Office of Community Oriented Policing Services, the Office for Victims of Crime, and the Office on Violence Against Women on Addressing Gender-Discrimination in Policing*, OVW BLOG (June 20, 2013), <http://blogs.justice.gov/ovw/archives/2406>.

91. G.A. Res. 54/4, *supra* note 34.

adjudication regarding the violation of her rights after the Supreme Court dismissed her case.⁹² The Commission continues to meet regularly with the parties to monitor compliance with its recommendations, including the individual remedies ordered for Ms. Lenahan.⁹³ The CEDAW Committee would be a valuable option for other survivors, particularly given the limited capacity and resources of the Inter-American Commission. Given the United Nations' visibility, the CEDAW Committee's consideration of any violations in the United States would emphasize the importance of access to justice for survivors. While international human rights bodies cannot provide remedies that are fully comparable to domestic remedies, they can play a vital role in offering relief to survivors who otherwise would have no recourse.

III. HOW CEDAW COULD TRANSFORM THE ANALYSIS OF LAW-ENFORCEMENT DISCRIMINATION TOWARDS SURVIVORS OF GENDER-BASED VIOLENCE

Currently, U.S. law typically does not look at how multiple layers of discrimination may intersect. Instead, protected classes—whether race, sex, or national origin—are often analyzed separately, with white people compared to people of color, women to men, and those born in the United States to those who are not.⁹⁴ This lens zooms in narrowly on one aspect of identity and discrimination, while ignoring others. It is this approach that informed the system for law-enforcement response to gender-based violence in place today, including the dearth of mechanisms for accountability.

Reforming law-enforcement responses to gender-based violence in the United States must particularly account for the multiple forms of discrimination and violence that different people experience. As academics and advocates have recognized, anti-violence interventions aimed at addressing only the violence but that do not analyze women's larger realities—including bias they

92. Caroline Bettinger-Lopez, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. GENDER SOC. POL'Y & L. 207, 215-16 (2012); Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 FORDHAM L. REV. 529, 534-35, 552-53 (2008).

93. See Bettinger-Lopez, *supra* note 92, at 215-16.

94. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 765-66 (2011); Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 1002-04, 1017 (2011).

confront based on race, class, sexual orientation, immigration status, and other core aspects of identity and social location—do not challenge the basic inequalities and discrimination that cause gender-based violence.⁹⁵ This is particularly true for policing practices, given the problematic and complicated relationships between law enforcement and many communities.

Many have raised these concerns; yet, law enforcement practices that have a harmful impact on marginalized people in many communities remain entrenched. For example, it is well documented that in some communities, police have enforced domestic-violence laws by arresting both parties, particularly in states with mandatory arrest laws.⁹⁶ This practice disproportionately affects women of color who report domestic violence, leading to even greater distrust of law enforcement.⁹⁷ While many states reformed their laws to disfavor dual arrests and to require police to engage in a primary-aggressor analysis before carrying out an arrest, these changes did not comprehensively address the problem of undue arrests of domestic-violence survivors who are women of color because they do not attack law-enforcement bias.⁹⁸ Immigrant communities have experienced similar issues. While the Violence Against Women Act specifically created new immigration remedies for survivors of gender-based violence that benefit many survivors, other immigration policies—such as the Secure Communities program, which encourages local law-enforcement agencies to detain removable immigrants for U.S. Immigration and Customs Enforcement—can sweep survivors who report violence into removal proceedings.⁹⁹ And many survivors cannot access remedies

95. See, e.g., Manjoo, *supra* note 16, ¶¶ 17-20; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147 (2012); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1507, 1571-72 (1998).

96. David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256 (2007).

97. MARY E. GILFUS, VAWNET, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION 1 (2002), available at http://www.vawnet.org/Assoc_files_VAWnet/AR_Incarceration.pdf.

98. See, e.g., Sack, *supra* note 2, at 1690-91.

99. Leslye E. Orloff & Janice V. Kaguyutan, Immigrant Women Program of NOW Legal Def. & Educ. Fund, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J.

like U Visas, which provide a pathway to lawful permanent residence for victims of crimes like domestic violence who work with law enforcement, because their local law-enforcement agency generally refuses to certify victims' cooperation.¹⁰⁰

International human rights law fortifies advocacy in support of survivors because it places the intersectionality analysis front and center. As Rashida Manjoo, the U.N. Special Rapporteur on Violence Against Women, has written: “[Intersectionality] explicitly interrogates the places where violence against women coincides with multiple and intersecting forms of discrimination and their attendant inequalities.”¹⁰¹ This analysis not only recognizes how gender-based violence constitutes a form of sex discrimination, but also examines how women are subjected to violence based on their race, national origin, ability, religion, sexual orientation, and other identities. It stresses that the “elimination of violence requires holistic measures that address both inter-gender and intra-gender inequality and discrimination.”¹⁰²

How would the analysis of law-enforcement response and accountability in the United States change using an intersectionality lens? The lived experiences of women of diverse backgrounds and communities would be the basis for designing reforms. For women of color, the recognition that they confront police bias and brutality in their communities would influence how law-enforcement interventions would be sought and structured. Policing policies would be examined to see how they might distinctly impact women of color. For example, one study of a chronic nuisance ordinance in Milwaukee found that police enforced the ordinance against domestic-violence victims, leading to their eviction, and that enforcement disproportionately harmed African-American women.¹⁰³

GENDER SOC. POL'Y & L. 95, 97-99 (2002); Stephanie Kang, Note, *A Rose by Any Other Name: The Chilling Effect of ICE's "Secure" Communities Program*, 9 HASTINGS RACE & POVERTY L.J. 83, 96 (2012).

100. Orloff et al., *supra* note 18, at 77-79; Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 392-405 (2010).

101. Manjoo, *supra* note 16, ¶ 50.

102. *Id.* ¶ 20 (“The holistic approach requires rights to be treated as universal, interdependent and indivisible; situating violence on a continuum that spans interpersonal and structural violence; accounting for both individual and structural discrimination, including structural and institutional inequalities; and analyzing social and/or economic hierarchies among women, and between women and men, i.e. both intra- and inter-gender.”).

103. Desmond & Valdez, *supra* note 22, at 118.

The authors concluded that this type of ordinance denied police protection to African-American women and contributed to their housing insecurities.¹⁰⁴ Yet, these ordinances proliferate across the country, with little consideration of their impact on women of color, domestic-violence victims, and domestic-violence victims who are women of color. For immigrants, an explicit prioritization of investigating gender-based violence would restore local law enforcement's role in the criminal justice system and not divert resources toward the removal of immigrants.¹⁰⁵ For all marginalized communities, the inability to hold police accountable for misconduct would highlight the importance of creating mechanisms for oversight when it comes to policing gender-based violence, as well as other law-enforcement interventions. And programs that provide for women's legal, economic, and political empowerment would be given greater weight and resources, so as to tackle the root causes of gender-based violence and the state's refusal to address them.

These are just a few examples of the many shifts in law and policy relating to law-enforcement response and accountability that could occur if stakeholders consistently employed an intersectional analysis. CEDAW's holistic approach to understanding and ending violence would help respond to the failure of U.S. advocacy thus far to fully embrace the lives and experiences of all survivors when crafting criminal justice responses to gender-based violence.

IV. HOW CEDAW COULD TRANSFORM THE MOVEMENT TO END GENDER-BASED VIOLENCE IN THE UNITED STATES

If ratified, CEDAW would not only provide a stronger analytical and legal foundation for reforming policing practices, but could also be a vehicle for transforming the U.S. movement to end gender-based violence. As recognized by many advocates, the current movement has become reactive, focused on punishing individual perpetrators and providing services to individuals rather than creating deeper and more lasting social change.¹⁰⁶ Activists have

104. *Id.* at 137-38.

105. The Department of Justice already has identified this concern, opening an investigation into whether the Maricopa County Sheriff's Office engaged in racial profiling in order to detain immigrants and ignored sexual assault complaints reported by Latinas. Maricopa Cnty. Letter, *supra* note 89, at 6, 7, 15, 16.

106. Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 358 (2008); Goldscheid, *supra* note 62, at 49-50, 57.

called for a radical shift in the movement, pivoting towards visions that place the concerns of historically marginalized women at the center and that work towards a society where all women and girls are safe and valued.¹⁰⁷

Ratification of CEDAW would contribute to this vision by creating a new lens through which most advocates do their work. CEDAW's emphasis on gender-based violence, as rooted in the subordination of women and girls and other forms of discrimination, would revitalize the movement by encouraging political and social action and governmental accountability. Up to this point, policing practices have largely been dictated by law-enforcement perspectives, rather than how survivors and communities want or need to access law-enforcement services or the impact of criminal justice interventions. Thus, the anti-violence agenda has been diverted from assessing how law-enforcement programs should be funded, the biases that often play out in law-enforcement responses, and policing oversight into other criminal justice programs that have not served victims or communities well; for example, the collection of DNA from all arrestees for minor offenses and even as rape kits routinely remain untested. Situating gender-based violence within the human rights framework would also put the spotlight on the government's role in preventing violence, which is not emphasized in current U.S. anti-violence programming.

CEDAW ratification would also create new organizing opportunities for the movement. As others have discussed, much of the advocacy has framed ratification as a symbolic act to affirm the United States in its role as a women's rights leader.¹⁰⁸ Anti-violence

107. See, e.g., Andrea Smith et al., *The Color of Violence: Introduction*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 1*, 9-10 (INCITE! Women of Color Against Violence ed., 2006). In 2010, the NoVo Foundation launched Move to End Violence, a ten-year initiative to build up leadership and social change capacity among advocates working to end violence against women and girls in the United States. *Move to End Violence: A Program of the NoVo Foundation*, MOVE TO END VIOLENCE, <http://www.movetoendviolence.org/> (last visited Mar. 12, 2014). In 2012, Move to End Violence released a vision statement that served as a starting point for hundreds of conversations and debate across the United States regarding the direction of the anti-violence movement. MOVE TO END VIOLENCE, NOVO FOUND., *BUILDING MOVEMENT CONVERSATIONS: A CONVERSATION GUIDE: ENGAGING TO END VIOLENCE AGAINST GIRLS AND WOMEN THROUGH THE MOVE TO END VIOLENCE VISION & PIVOTS*, available at http://www.movetoendviolence.org/sites/default/files/building_movement_conversations_guide_english.pdf.

108. Marsha A. Freeman, Keynote Address at the Michigan State University Law Review Symposium on Whether the U.S. Should Become a Party to the U.N.

advocates, for the most part, have not talked about how ratification would affirmatively support efforts to end violence in the United States. This has been a strategy choice—but thus far, an unsuccessful one. Advocates could use the ratification process to organize around the need to improve the United States' own responses to gender-based violence, including law-enforcement accountability. The process could be a means to engage the public in a more affirmative framework of human rights and positive rights to life, security, and equality to advance the anti-violence agenda.¹⁰⁹ And if CEDAW is ratified, the shadow reporting process (and complaints, if the Optional Protocol is also ratified) to the CEDAW Committee would present a chance to engage communities and create new collaborations. Anti-violence advocates have already used International Covenant on Civil and Political Rights and Convention on the Elimination of All Forms of Racial Discrimination shadow reports to highlight serious problems with how the United States addresses violence against women, and the United Nations Human Rights Committee recently listed two issues relating to violence against women as topics for the United States to address as part of its review.¹¹⁰ While this advocacy usefully linked freedom from violence against women to other civil and political rights, using the CEDAW reporting process would connect gender-based violence with other pressing women's rights issues. It could forge deeper ties between ending gender-based violence and other gender justice work, including reproductive rights and equality in the workplace. These links are vital given the continuing attacks on reproductive freedom for women (including sexual-assault survivors) and the

Convention on the Elimination of All Forms of Discrimination against Women (Nov. 7, 2013).

109. Schneider et al., *supra* note 62, at 117-18.

110. See, e.g., AM. CIVIL LIBERTIES UNION, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 25-28, 30-33 (2006), available at <https://www.aclu.org/files/pdfs/iccrreport20060620.pdf>; AM. CIVIL LIBERTIES UNION, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 25, 27-28, 32, 114-19, 163 (2007), available at https://www.aclu.org/files/pdfs/humanrights/cerd_full_report.pdf; United Nations, Human Rights Comm., List of Issues in Relation to the Fourth Periodic Report of the United States of America (CCPR/C/USA/4 and Corr. 1), 107th Sess., Mar. 11-28, 2013, at 4-5, U.N. Doc CCPR/C/USA/Q/4 (Apr. 29, 2013).

ongoing resistance of many employers to respond to sexual and domestic violence in meaningful ways.¹¹¹

CONCLUSION

International human rights law provides powerful insights for reforming law-enforcement responses to gender-based violence in the United States. While U.S. advocates already are integrating human rights arguments and strategies into their work, CEDAW ratification would add much momentum to these efforts. Survivors and advocates could then point to CEDAW as a source of persuasive authority for understanding gender-based violence as sex discrimination, the government's duty to protect, the right to a remedy, and the need to use an intersectionality analysis. The framing of gender-based violence as a human rights violation, closely connected to other forms of discrimination, would bring the experiences of survivors who face multiple layers of oppression to the fore. This shift is essential in order to transform the experiences of survivors who access the criminal justice system.

111. See, e.g., NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 13, 16, 22-23 (2012), available at <http://www.prochoiceamerica.org/assets/download-files/2011-who-decides.pdf>; *Rape in the Fields*, FRONTLINE PBS (June 25, 2013), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/transcript-46/>; WHITE HOUSE COUNCIL ON WOMEN & GIRLS, KEEPING AMERICA'S WOMEN MOVING FORWARD 18-23 (2012), available at http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf; Meg Hobday, *Domestic Violence Comes to Work: The Need for a Work-Related Response*, BENCH & B. (Mar. 1, 2010), <http://mnbenchbar.com/2010/03/domestic-violence-comes-to-work/>.

