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## TRUTH SEEKING: THE LENAHAN CASE AND THE SEARCH FOR A HUMAN RIGHTS REMEDY

MARGARET B. DREW\*

### INTRODUCTION

When Jessica Lenahan (formerly Gonzales) brought her petition to the Inter-American Court of Human Rights (“IACHR”), she had already exhausted all of the possible procedural steps in an effort to obtain justice within the U.S. legal system.<sup>1</sup> The U.S. Supreme Court had recently affirmed the dismissal of her case filed against the Town of Castle Rock, Colorado for failure to enforce a protection order against her husband, Simon.<sup>2</sup> Dismissed before discovery was conducted,<sup>3</sup> Ms. Lenahan’s suit against the town had failed to provide her with any relief, including information that could have been obtained as part of the litigation process. Most importantly, Ms. Lenahan did not receive answers to her many questions surrounding the deaths of her three young girls. The girls died after they were unlawfully taken by their father.<sup>4</sup> Later, in 2005, Ms. Lenahan sought redress from the IACHR.<sup>5</sup> That body, in employing a human rights framework, focused on the State’s accountability, based upon the government’s obligation to protect those at risk.<sup>6</sup> In seeking relief through the IACHR, Ms. Lenahan introduced domestic violence advocates to a new form of justice seeking.<sup>7</sup> Many advocates experienced for the first time U.S. human rights advocacy in a forum outside of the traditional U.S. legal system. While those who previously advocated for U.S. survivors of gender violence had intuitively, and sometimes consciously, used the language of human rights advocacy, it was

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1. Jessica Lenahan (Gonzales) v. United States, Case 12.626, Merits, Inter-Am Comm’n H.R., Report No. 80/11, ¶ 41 (July 21, 2011).

2. Town of Castle Rock v. Gonzales, 545 U.S. 748, 769 (2005).

3. Caroline Bettinger-López, Jessica Gonzales v. United States: *An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 184 (2008).

4. See *infra* notes 56–70 and accompanying text (discussing facts of the Lenahan case).

5. *Lenahan*, Report No. 80/11, ¶ 1.

6. Bettinger-López, *supra* note 3, at 188.

7. *Id.* at 190–91.

not until *Lenahan v. United States* that many U.S. domestic violence advocates incorporated the human rights framework in a conscious and organized way.<sup>8</sup>

Part I of this essay addresses the role of determining truth as part of human rights remedies. Truth is essential so that all involved may provide appropriate remedies to those harmed, as well as to open a gateway to whatever level of healing and change is possible under the circumstances. Part II discusses the procedural history of *Town of Castle Rock v. Gonzales* and explores the comparative findings and goals of the U.S. legal system within the human rights framework. The U.S. and IACHR *Gonzales-Lenahan* cases are used as comparative exemplars. The application of truth seeking principles to the *Lenahan* case is then discussed. Part III addresses needed change within the U.S. civil law systems if the country is to affectively adopt a human rights perspective in matters of domestic violence and other human rights abuses.

## I. THE ROLE OF TRUTH

### A. *The Right to Truth*

Much commentary exists on truth not being singular. What is reality for one may not be “true” for another. Philosophers and psychologists debate how to define “truth” and whether “truth” is capable of definition.<sup>9</sup> Thus, the common focus is on finding one’s individual truth.<sup>10</sup> But truth is important to psychic healing. As one researcher notes: “We feel guided by truth and driven toward it; we cannot define it clearly and yet persist in searching for it.”<sup>11</sup> Truth is an integral part of calming the mind: “[W]hat *truth satisfies are not states of affairs, but rather states of mind.*”<sup>12</sup>

Despite the philosophical debate, some truths can be determined. In the legal realm, evidence is submitted at trial to determine truth. Documentary evidence may support some fact testimony (“the truth”) and discredit other versions. Independently, some facts can be uncovered, such as those surrounding the origins, the actors, and the specific acts of human rights abuses. Often those facts can be established conclusively, particularly where scientific or other independent support exists. These are often the truths that the violated and their

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8. “Jessica Gonzales’ [IAHCR] case has spurred domestic violence advocates at home and abroad to expand the scope of their traditional advocacy and re-frame their work in human rights terms.” Bettinger-López, *supra* note 3, at 191.

9. See Donald Davidson, *The Folly of Trying to Define Truth*, 93 J. PHIL. 263, 265 (1996).

10. Natasha Dern, *What Is Your Truth?*, HUFFINGTON POST: THE BLOG (updated Nov. 17, 2011), [https://www.huffingtonpost.com/natasha-dern/what-is-your-truth\\_b\\_721292.html](https://www.huffingtonpost.com/natasha-dern/what-is-your-truth_b_721292.html) [<https://perma.cc/6X23-PC3Q>].

11. Shlomit Yadlin-Gadot, *(E)ffacing Truth: Between Philosophy and Psychoanalysis*, 37 J. THEORETICAL & PHIL. PSYCHOL. 1, 1 (2017).

12. *Id.* at 3.

families seek as part of their search for remedy and relief.<sup>13</sup> Mourning is onerous enough without unanswered questions surrounding the violation of a loved one. While no process will ever remove all suffering from violent personal loss, truth helps move the mourning process.<sup>14</sup> For these reasons, uncovering truth plays a fundamental role in human rights process and remedies.

The right to truth coincides with the U.S. founders' understanding of truth's essentialism in creating and maintaining democracy.<sup>15</sup> Some may see an international legally enforceable right to truth as separate from democratic societal interests in knowing the truth;<sup>16</sup> however, in the United States those principles are interdependent. Democratic autonomy cannot be maintained if residents do not have access to the truth.<sup>17</sup> Likewise, access to the truth is necessary to the establishment of autonomy through democratic political organization.<sup>18</sup>

The right to truth is well-established<sup>19</sup> and is embedded in various human rights documents.<sup>20</sup> The role of the IACHR in establishing the right to truth for individual victims, their families, and their societies is significant. "[E]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed,

13. *Right to the Truth*, ORG. AM. STATES, [http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156& \[https://perma.cc/9M59-REBL\]](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156&[https://perma.cc/9M59-REBL]).

14. For a discussion on the right to truth and its relationship with mourning, as well as classifications of truth, see generally Danushka S. Medawatte, *Chasing Tails, Establishing the Right to Truth, Mourning and Compensation*, 46 CAL. W. INT'L L.J. 69 (2016).

15. See Dermot Groome, *The Right to Truth in the Fight Against Impunity*, 29 BERKELEY J. INT'L L. 175, 175 n.1 (2011). Mr. Groome quotes James Madison: "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or comedy; or perhaps both." *Id.*

16. *Id.* at 175.

17. See *id.* ("[D]emocracies function best when their constituents have truthful information."); see also Report: The Right to Truth in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.152, doc no. 2 ¶ 44 (Aug. 13, 2014) (describing "absence of complete, objective and truthful information" as an obstacle to democracy historically).

18. Inter-Am. Comm'n H.R., *supra* note 17, ¶ 45 ("[T]he OAS member States have recognized the importance of respecting and guaranteeing the right to truth.")

19. For example, see Working Grp. on Enforced or Involuntary Disappearances, Office of the U.N. High Comm'r for Human Rights, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, [http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf) [https://perma.cc/RH7L-HPWV].

20. Pablo de Greiff (Special Rapporteur on the Human Rights Council), *Rep. on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 18, U.N. Doc. A/HRC/24/42 (Aug. 28, 2013). For example, the right to truth is noted in G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, at ¶ 22 (Dec. 16 2005), and the International Convention for the Protection of All Peoples from Forced Disappearance art. 24 ¶ 2, Dec. 20, 2006, 2716 U.N.T.S. 3.

in order to prevent repetition of such acts in the future.”<sup>21</sup> Additionally, victims and individuals are entitled to relief when the State interferes with the family’s efforts to seek the truth.<sup>22</sup> When Ms. Lenahan failed to access the answers to her questions surrounding the deaths of her daughters through the U.S. legal system, she turned to the IACHR, where uncovering the truth is prioritized.

Victims of gross violations of human rights and serious violations of international law, and their families, have the right to effective remedy. This includes the right to know the truth about the abuses they have suffered, including the identity of the perpetrators, the causes that gave rise to the violations, and, if appropriate, the ultimate fate or whereabouts of the forcibly disappeared.<sup>23</sup>

### B. *The Need for Truth*

Truth is a fundamental focus in both the religious<sup>24</sup> and legal systems in the United States. Religion entwined itself in the U.S. legal system from the country’s early days.<sup>25</sup> Religion’s ongoing influence in U.S. culture and the importance of truth remains significant.<sup>26</sup>

21. Greiff, *supra* note 20, ¶ 19 (quoting Annual Report 1985–86, Inter-Am. Comm’n H.R., AS Doc. No. OEA/Ser.L/V/II.68, doc. 8 rev. 1 (Sept. 26, 1986)) (internal quotation marks omitted).

22. See Groome, *supra* note 15, at 178.

23. INT’L CTR. FOR TRANSITIONAL JUSTICE, TRUTH SEEKING: ELEMENTS OF ESTABLISHING AN EFFECTIVE TRUTH COMMISSION 3 (Eduardo Gonzales & Howard Varney eds., 2013).

24. For example, Buddhism rests on the Four Noble Truths: the truth of suffering; the truth of the origin of suffering; the truth of the cessation of suffering; the truth of the path to the cessation of suffering. *The Four Noble Truths*, BBC (updated Nov. 17, 2009), [http://www.bbc.co.uk/religion/religions/buddhism/beliefs/fournobletruths\\_1.shtml](http://www.bbc.co.uk/religion/religions/buddhism/beliefs/fournobletruths_1.shtml) [https://perma.cc/3AGF-89P6]. According to the St. James Bible, Jesus espoused truth: “I am the way, the truth and the life . . .” *John* 14:6 (King James). Zoroastrianism holds there is only one path and that path is the truth. Various denominations of Judaism have differing perspectives on truth. Orthodox Judaism holds that Truth is revealed in the word of God. Hasidic belief is that Truth is found in the words of the rebbe, while Reform Judaism has an expanded view, believing that seeds of truth may be found in a variety of religions foundations.

25. For example, in early colonial days, only members of the Congregational Church could vote at town meetings. *Congregationalism*, UNITED CHURCH CHRIST, [http://www.ucc.org/about-us\\_short-course\\_congregationalism](http://www.ucc.org/about-us_short-course_congregationalism) [https://perma.cc/Z3Z7-UYHG].

26. The 2016 election and subsequent events exemplify the ongoing consequences of both religion’s political influence and the search for truth. The current administration dwells on “fake news” and “alternative facts.” Aaron Blake, *Kellyanne Conway and the White House’s 100-Day Alternative Facts*, WASH. POST: THE FIX (Apr. 26, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/kellyanne-conway-and-the-white-houses-bogus-100-day-alternative-facts/?utm\\_term=.4de6f87e7484](https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/kellyanne-conway-and-the-white-houses-bogus-100-day-alternative-facts/?utm_term=.4de6f87e7484) [https://perma.cc/6VYM-X7EK]; Joe Concha, *Trump Advisor: Administration Will Continue to Say ‘Fake News,’* THE HILL (Feb. 7, 2017 12:35 PM), <http://thehill.com/homenews/administration/318286-trump-adviser-admin-will-continue-to-say-fake-news> [https://perma.cc/6NX2-ZAHS]. Neither concept seeks “truth” but instead creates a substitute for truth. Christian evangelicals, rightly or wrongly, are identified as supporters of the administration and played a significant role in the 2017 Alabama senatorial election. *Exit Poll*

Religious and civil perspectives on truth have influenced U.S. legal systems since their inception. U.S. justice systems demand truth of witnesses, who swear to tell the truth, the whole truth, and nothing but the truth.<sup>27</sup> Some oaths included “[s]o help me God.”<sup>28</sup> Religion and law are noticeably blended in this version of the courtroom oath. The religious reference, from the sixteenth century oath, was based upon the belief that fear of God’s retribution would be sufficient to make witness testimony truthful.<sup>29</sup> While the reference to God and swearing on a bible are no longer requirements of courtroom oaths, the requirement of truth telling is paramount.<sup>30</sup> One prevailing belief is that truth will lead us to justice and is foundational to an ordered society. “A commitment to moral truth is the most powerful restraint on immoral behavior. When that commitment is lost—when we no longer believe in objective truth—we reap weaken[ed] informal social controls and unleashed criminal impulses.”<sup>31</sup>

More contemporary justice philosophy recognizes truth as a goal. For example, the principles of restorative justice are closely aligned with human rights law with a focus on restoration and remedy tailored the individual harms.<sup>32</sup> One pillar of restorative justice is acknowledgment of truth.<sup>33</sup> Before restoration can occur, there must be an acknowledgement by the person who caused the harm that indeed their acts were harmful.<sup>34</sup> Next must come an

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*Results: How Different Groups Voted in Alabama*, WASH. POST (updated Dec. 13, 2017 1:15 PM), [https://www.washingtonpost.com/graphics/2017/politics/alabama-exit-polls/?utm\\_term=.cafa3ec5d610](https://www.washingtonpost.com/graphics/2017/politics/alabama-exit-polls/?utm_term=.cafa3ec5d610) [https://perma.cc/4QFT-ZK34].

27. Brendan Koerner, *Where Did We Get Our Oath*, SLATE (Apr. 30, 2004), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2004/04/where\\_did\\_we\\_get\\_our\\_oath.html](http://www.slate.com/articles/news_and_politics/explainer/2004/04/where_did_we_get_our_oath.html) [https://perma.cc/5A5W-7D2L].

28. The Presidential Oath has long been followed with the words “So help me God.” Holly Munson, *Who Said That? A Quick History of the Presidential Oath*, NAT’L CONST. CTR. (July 12, 2011), <https://constitutioncenter.org/blog/who-said-that-a-quick-history-of-the-presidential-oath> [https://perma.cc/LD9T-6CBB]. The inclusion of this by Chief Justice John Roberts when President Obama took the oath in 2008 was the subject of a lawsuit brought by atheist thinker Michael Newdow. The U.S. Supreme Court refused to hear the case. *Newdow v. Roberts*, 131 S. Ct. 2441 (2011).

29. Koerner, *supra* note 27.

30. FED. R. EVID. 603 (“Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.”). Witnesses must tell the truth. *Going to Court as a Witness or Victim in a Criminal Matter*, GOV’T N.W.T. (Can.), <https://www.justice.gov.nt.ca/en/going-to-court-as-a-witness-or-victim/> [https://perma.cc/K2NX-748M].

31. Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1, 3 (1998).

32. *Id.* at 8.

33. CORR. SERV. CAN., RESTORATIVE JUSTICE 1 (Can.), <http://www.csc-scc.gc.ca/restorative-justice/092/fsrjr-3-eng.pdf> [https://perma.cc/Y8XH-WKSK]. (“This requires, to the degree possible, an ability to hear all points of view and understand the ‘truth’ of what occurred.”).

34. Christina L. Lyons, *International Momentum*, 26 CQ RESEARCHER 134, 135 (2016).

acknowledgement that those actions caused serious harm to the target and to others affected by those actions.<sup>35</sup> Thus, both “truths” must align.

The requirement of acknowledging harm as an essential component of remedy is probably most popularly recognized in the human rights context through Truth and Reconciliation Commissions<sup>36</sup> or, more appropriately, simply Truth Commissions.<sup>37</sup> The latter title acknowledges that reconciliation is not always possible nor appropriate.<sup>38</sup> Because the term “reconciliation” is sometimes interpreted to require forgiveness by the violated, the expectation of reconciliation is best confined to communities and nations.<sup>39</sup> Forgiveness is more easily achieved by a nation that can find consensus on moving forward.<sup>40</sup> Even implicitly demanding forgiveness by individual victims can be an additional burden on those harmed.<sup>41</sup> Such an expectation removes autonomy from the victims, all of whom at one point had control over their lives extracted from them.

Within U.S. movements, remedies for past civil rights violations include the need for truth. Searching for answers on behalf of those killed in the United States due to racism is analogous to the searches by families of those who “disappeared” under rulers who would not tolerate political dissent. Those who survive deceased civil rights workers and African Americans killed by white supremacists also look for justice by exposing truth.<sup>42</sup> Justice cannot be had without revealing the truth and receiving an acknowledgement of wrongdoing.<sup>43</sup>

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35. Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 190–91 (2016).

36. The Truth Commission best recognized by U.S. residents is that organized in South Africa following apartheid. *Truth Commission: South Africa*, U.S. INST. PEACE (Dec. 1, 1995), <https://www.usip.org/publications/1995/12/truth-commission-south-africa> [<https://perma.cc/BQ8D-BWW2>].

37. Eric Brahm, *Truth Commissions*, BEYOND INTRACTABILITY (June 2004), <https://www.beyondintractability.org/essay/truth-commissions> [<https://perma.cc/DNX4-X9XK>]. One goal of Truth and Reconciliation Commissions is to permit a country to move forward as a nation without the divisions created by past human rights abuses preventing united action as a nation. *See id.*

38. Jina Moore, *Truth Commissions: Can Countries Heal After Atrocities?*, 4 CQ RESEARCHER 1, 8 (Jan. 2010). “To expect survivors to forgive is to heap yet another burden on them.” *Id.* (quoting MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998)).

39. Moore, *supra* note 38.

40. *Id.*

41. *Id.*

42. *See, e.g.*, Debbie Elliot, *Truth and Reconciliation in Neshoba County*, NPR (June 17, 2004, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=1962220> [<https://perma.cc/UWE7-MCYX>].

43. *See* Margaret Burnham, *Doug Jones: A Civil Rights Deep Diver*, C.R. & RESTORATIVE JUST. PROJECT: THE HEADLIGHT, <https://crjproject.com/2017/12/18/doug-jones-a-deep-diver-in-civil-rights/> [<https://perma.cc/64ML-GRG8>] (noting “designed” truth-seeking processes).

For this reason, one goal of truth finding for individuals is to find reconciliation with the State, not necessarily with the individuals who perpetrated the violations.<sup>44</sup> This is exactly what Ms. Lenahan sought. Not only did the State have the power of remedy, but the State was a party to the harm entrenched in both the events that led to the girls' deaths and the obstruction of the ensuing investigation.<sup>45</sup> The search for truth could not be separated from either justice or remedy.

Before examining the application of the right to truth in the case involving the town of Castle Rock, a comparative review of the U.S. and IACHR findings is necessary.

## II. PROCEDURAL HISTORY AND COMPARATIVE FINDINGS

### A. Town of Castle Rock v. Gonzales

Ms. Lenahan (Gonzales) brought suit against the town of Castle Rock, Colorado, seeking remedies and damages for the deaths of her three young girls, Katheryn, Rebecca, and Leslie.<sup>46</sup> The girls were killed after being taken from their yard by their father, Simon Gonzales.<sup>47</sup> Under the terms of a Colorado civil protection order, Simon Gonzales was restrained from being with the girls, except as ordered by the court.<sup>48</sup> One of the terms of the protective order permitted Simon access to the children for a midweek dinner at a time arranged by the parents.<sup>49</sup> On the day that Simon took the children, Ms. Lenahan had not arranged for or had notice of either the father's visit or his taking the children.<sup>50</sup>

Despite having approximately eight<sup>51</sup> hours to do so, the town of Castle Rock failed to enforce the protection order terms and did little to attempt to locate Simon and the girls after their mother reported both that the girls were missing and that their father had taken them in violation of the protection order.<sup>52</sup>

In 2001, Ms. Lenahan filed suit in the Federal District Court for Colorado.<sup>53</sup> The Town of Castle Rock's Motion to Dismiss was allowed citing Ms.

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44. Moore, *supra* note 38.

45. The actions of the Castle Rock Police Department will be discussed further in Part III.

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

47. *Id.* at 753–54.

48. District Court of Douglas County, Colorado, Docket No. 98-868, Div. M-1. A copy of the order may be found at <http://www.law.columbia.edu/human-rights-institute/inter-american-human-rights-system/jessica-gonzales-v-us/gonzales-case-page> [<https://perma.cc/N88Q-4H59>].

49. *Gonzales*, 545 U.S. at 752.

50. *Id.* at 753.

51. This time estimate stated in the U.S. Supreme Court case is disputed. The subsequent IACHR opinion notes that Ms. Lenahan first called the police around 5:50 pm. Jessica Lenahan (Gonzales) v. United States, Case 12.626, Merits, Inter-Am Comm'n H.R., Report No. 80/11, ¶ 25 (July 21, 2011).

52. *Id.* at 753–54.

53. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1098 (10th Cir. 2004).



Lenahan's failure to state a claim that she had a positive right to enforcement and thus had not met the substantive or procedural due process tests.<sup>54</sup> The Tenth Circuit Court of Appeals ultimately reversed the District Court's ruling.<sup>55</sup> The Defendant, Castle Rock, appealed to the U.S. Supreme Court.<sup>56</sup> The case was accepted, and Justice Scalia wrote for the majority.<sup>57</sup>

Because the facts as reported by the court are integral to the comparative analysis of the U.S. Supreme Court and the Inter American Commission's approach to justice, a summary of facts as found by the U.S. Supreme Court majority follows:

A temporary restraining order issued against Simon Gonzales on May 21, 1999 and was served on him on June 4, 1999.<sup>58</sup> The permanent order entered on the same date permitted visitation between Simon and the girls on alternate weekends, two weeks over summer vacations, and during a midweek visit to be arranged between the parents.<sup>59</sup> Simon could pick up the girls for the midweek visit.<sup>60</sup> Ms. Lenahan called the Castle Rock police on June 22, 1999 to report that her three girls were missing.<sup>61</sup> The call was made about two hours after Simon took the children from the yard.<sup>62</sup> The police responded to Ms. Lenahan's home, were shown the restraining order and informed Ms. Lenahan that there was nothing they could do about enforcing the order, and Ms. Lenahan should call them at 10 p.m. if the children were not returned by then.<sup>63</sup> At 8:30 p.m. Ms. Lenahan called the police to report that she has spoken with Simon who said he had the children to a Denver amusement park.<sup>64</sup> Ms. Lenahan asked that someone be sent to the amusement park but was told again to call at 10 p.m.<sup>65</sup> At 10:10 p.m., Ms. Lenahan called the Castle Rock police and was told to wait until midnight to call again.<sup>66</sup> Ms. Lenahan called at midnight and goes to Simon's apartment, found it empty and called the police at 12:10 a.m.<sup>67</sup> She was told to wait for an officer to arrive.<sup>68</sup> The police did not arrive and Ms. Lenahan

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54. *Id.*

55. *Id.* at 1095.

56. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751, 754-55 (2005).

57. *Id.* at 750.

58. *Id.* at 751.

59. *Id.* at 752.

60. *Id.* at 752-53.

61. *Gonzales*, 545 U.S. at 753.

62. *Id.* It should be noted that the IACHR report references an earlier call by Ms. Lenahan to the police. *See Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Merits, Inter-Am Comm'n H.R., Report No. 80/11, ¶ 25 (July 21, 2011).

63. *Gonzales*, 545 U.S. at 753.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 753 (2005).

went to the police station and filed a report at 12:50 a.m.<sup>69</sup> The officer who took the report went to dinner, making no “reasonable” effort to enforce the restraining order.<sup>70</sup> At 3:20 a.m., Simon arrived at the police station and fired at the police with a semiautomatic handgun he purchased that evening.<sup>71</sup> The bodies of the three girls, whom Simon had already murdered, were found inside his truck cab.<sup>72</sup>

While the decision itself has been criticized as a misapplication of *DeShaney*,<sup>73</sup> Justice Scalia cannot be faulted for stating the facts as narrowly as he did, despite serious factual omissions. The federal process for deciding a motion to dismiss looks to the pleadings for allegations.<sup>74</sup> Justice Scalia followed that practice. The Supreme Court needed only as much of the facts that set the groundwork for a motion on whether there existed a cause of action that should survive a motion to dismiss.<sup>75</sup> The justices need not assess the harm done because of incriminating facts, even though Justice Scalia noted that the facts are “horrible.”<sup>76</sup> Under American jurisprudence, the horror of the acts and any State involvement that permitted or enhanced those acts are considered irrelevant to the procedural issue.<sup>77</sup>

The facts as found by the U.S. Supreme Court were an incomplete, but not an inaccurate, reading of the pleadings.<sup>78</sup> The holding of the majority shielded the Town of Castle Rock, particularly the police, from liability for the acts that resulted from their blatant refusal to enforce Ms. Lenahan’s protection order.<sup>79</sup> The Court went on to reverse the findings of the Tenth Circuit and said that Ms. Lenahan lacked a due process “property interest” in having the terms of her protection order enforced.<sup>80</sup> In tying the right to police enforcement to a property

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69. *Id.* at 753–54.

70. *Id.* at 754.

71. *Id.*

72. *Id.*

73. See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989). See generally Geneva Brown, *Ain’t IA Victim? The Intersection of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 *CARDOZO L. J.* 147, 180 (2012); Laura Oren, *Some Thoughts on The State-Created Danger Doctrines: DeShaney Is Still Wrong and Castle Rock Is More of the Same*, 16 *TEMP. POL. & CIV. RTS. L. REV.* 47, 61 (2006).

74. At the time of the court’s decision, the standard for dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) was as articulated in *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”).

75. *Id.*

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

77. *Id.* Justice Scalia writes that the facts are “horrible.” *Id.*

78. See Complaint ¶¶ 6–16, *Gonzales v. City of Castle Rock*, No. 00–D–1285 (D. Colo. June 23, 2000), 2000 WL 35529077.

79. See *Gonzales*, 545 U.S. at 769, wherein the Supreme Court overrides the Tenth Circuit’s reversal of the dismissal of the case.

80. *Id.* at 768.

interest, the Court based its finding upon legal theory that subtly ties justice to privileges of ownership and wealth.<sup>81</sup> Rather than focusing on holding the State accountable, the Court focused on whether Ms. Lenahan had a right to hold the State accountable.<sup>82</sup> The Court decided that no such federal right exists.<sup>83</sup> The facts as found by the IACHR, however, resulted in more expansive fact-finding and a significantly different focus on the rights of the individual.

#### B. Lenahan v. United States

In 2005, Ms. Lenahan (Gonzales) filed suit against the United States with the IACHR. The Commission reported, among other determinations, that the State failed to properly investigate Ms. Lenahan's claims, that the State engaged in discrimination against Ms. Lenahan as a woman, and that officers who failed to protect Ms. Lenahan and her daughters had not been held accountable.<sup>84</sup> The facts found by the Commission provide a fuller picture of the human rights violations. A portion of those facts are repeated here:

The Castle Rock police were aware that Simon Gonzales had attempted suicide on at least one prior occasion.<sup>85</sup> In general, Simon had a history with the Castle Rock Police Department ("CRPD").<sup>86</sup> Incidents of which they were aware included road rage with his daughters in the car; two break-ins to Ms. Lenahan's (formerly Gonzales) house; and charges of trespassing on private property.<sup>87</sup> In the weeks before his taking the children, the Castle Rock police had several encounters with Simon and were well aware of his volatility and his prior suicidal behavior.<sup>88</sup>

Since obtaining the restraining order in May 1999, Ms. Lenahan contacted the Castle Rock police on many occasions, reporting that Simon had violated the order requiring him to remain 100 yards away from her residence.<sup>89</sup> Her calls were largely ignored.<sup>90</sup> On the day that Simon took the children from their yard, Ms. Lenahan made her first call to the police at 5:50 p.m.<sup>91</sup> Ms. Lenahan called the police again at 7:40 p.m. and notified them that she had a restraining order against Simon Gonzales.<sup>92</sup> Police arrived at her home at 7:50 p.m. and were

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81. *Id.* at 766. Interest does not have any "monetary value." *Id.*

82. *Id.* Without a property interest, Ms. Lenahan did not have a due process right to enforcement. *Id.*

83. *Id.* at 768.

84. Jessica Lenahan (Gonzales) v. United States, Case 12.626, Merits, Inter-Am Comm'n H.R., Report No. 80/11, ¶ 201 (July 21, 2011).

85. *Id.* ¶ 69.

86. *Id.* ¶ 19.

87. *Id.* ¶¶ 19, 67–69, 77.

88. *Id.* ¶¶ 67–69.

89. *Lenahan*, Report No. 80/11, ¶ 20, 21.

90. *Id.* ¶ 21.

91. *Id.* ¶ 25.

92. *Id.*

shown a copy of the restraining order, which expressly ordered them to arrest Simon upon violation of the order.<sup>93</sup> Jessica Lenahan explained clearly to the officers how Simon had violated the restraining order, and still police claimed that because the children were with their father, they could do nothing.<sup>94</sup> They promised to go by Simon's apartment to see if Simon and the girls were there.<sup>95</sup>

Around 8:30 p.m., Ms. Lenahan spoke with Simon by telephone and learned that he and the girls were at a Denver amusement park.<sup>96</sup>

Rosemary Young, Simon's girlfriend, called Ms. Lenahan asking about Simon's mental health history, his capacity for harming himself or his children, and his access to firearms.<sup>97</sup> She also told Ms. Lenahan that Simon had threatened to drive off a cliff earlier in the day.<sup>98</sup>

Ms. Lenahan called police a third time, and was told an officer would be sent to her house, but the officer never arrived.<sup>99</sup> Ms. Lenahan spoke with the officer who had been to her house earlier and further communicated her concerns.<sup>100</sup>

Ms. Lenahan called the police a fourth and fifth time before 10:00 p.m., requesting that officers be dispatched to Denver to locate Simon and the girls.<sup>101</sup> She asked that the Denver Police be contacted and that a statewide bulletin be put out to locate Simon and the children.<sup>102</sup> She asked that Rosemary Young be contacted.<sup>103</sup> None of these requests were acted upon.<sup>104</sup>

Ms. Lenahan called the police a sixth time around 10:00 p.m., reiterating the existence of the restraining order and was scolded by the dispatcher, who told her her to call back on the non-emergency line.<sup>105</sup>

At midnight, Ms. Lenahan called the police for a seventh time, reporting from Simon's apartment that no one was home and relaying her fears.<sup>106</sup> She was told that an officer would be dispatched but no officer ever arrived.<sup>107</sup>

Ms. Lenahan then went to the police station, reporting again about the restraining order's existence.<sup>108</sup> She informed the police of her fears that Simon

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93. *Id.* ¶ 26.

94. *Lenahan*, Report No. 80/11, ¶ 26.

95. *Id.*

96. *Id.* ¶ 27.

97. *Id.*

98. *Id.*

99. *Lenahan*, Report No. 80/11, ¶ 28.

100. *Id.*

101. *Id.* ¶ 29.

102. *Id.*

103. *Id.*

104. *Lenahan*, Report No. 80/11, ¶ 29.

105. *Id.* ¶ 30.

106. *Id.*

107. *Id.*

108. *Id.* ¶ 31.

had “lost it” and that he might be suicidal.<sup>109</sup> Officers told Ms. Lenahan that Simon has a right to spend time with his children as their father.<sup>110</sup> Ms. Lenahan filed an incident report.<sup>111</sup>

Around 3:15 a.m., Simon drove to the police station, waited in his vehicle for ten to fifteen minutes, and then began shooting at the police station.<sup>112</sup> Police returned fire, killing Simon.<sup>113</sup> Police then discovered the bodies of the three girls in the cab of the truck.<sup>114</sup> They were apparently shot to death.<sup>115</sup>

Following Simon’s death and the discovery of the girls’ bodies, the State, through the police, took the following actions: refused initially to confirm her daughters’ deaths to Ms. Lenahan; for twelve hours refused her pleas to see her daughters’ bodies;<sup>116</sup> and caused the quick destruction of Simon’s vehicle despite the evidence contained within the vehicle.<sup>117</sup>

The facts as found by the IACHR established a wide spectrum of culpability of the CRPD. The department’s cavalier attitude toward enforcement of the civil protection order was astonishing. The IACHR made no presumption as to whose bullets killed Rebecca, Katheryn, and Leslie.<sup>118</sup> Importantly, the IACHR acknowledged that Ms. Lenahan is unable to inscribe the girls’ gravestones with a date of death because the State never disclosed on which day the girls died.<sup>119</sup> The IACHR’s acknowledgement that the CRPD’s failure to enforce a valid court order as a failure on the part of the State, accomplished a significant goal of Ms. Lenahan and her family.<sup>120</sup>

### C. *The Right to Truth as Applied to Lenahan*

The Right to Truth involves several fundamental explorations. Among the queries to be answered are those that seek the truth of how the harm was caused. Answers to the following are necessary in determining the fates of those who have died because of the actions or inactions of government.<sup>121</sup>

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109. *Lenahan*, Report No. 80/11, ¶ 31.

110. *Id.*

111. *Id.*

112. *Id.* ¶ 32.

113. *Id.*

114. *Lenahan*, Report No. 80/11, ¶ 32.

115. *Id.*

116. *Id.* ¶ 33.

117. *Id.* ¶¶ 187, 189.

118. *Id.* ¶ 32. *Compare* the IACHR writes the girls were found “apparently having been shot to death,” *id.*, with Justice Scalia noting that the police found the bodies of the girls, “whom [Simon] had already murdered.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 754 (2005).

119. *Lenahan*, Report No. 80/11, ¶ 33.

120. *Id.* ¶¶ 150, 199.

121. For the following discussed principles, see Groome, *supra* note 15, at 176, n. 3–4; U.N. Comm’n on Human Rights, Report of the Independent Expert Diane Orentlicher, *Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, ¶ 14–17, February 8, 2005, E/CN.4/2005/102/Add.1 (addressing Principle

### 1. Knowing the Identity of the Perpetrators

There was no need for the Town of Castle Rock to destroy Simon's vehicle. The vehicle would have yielded information as to which bullets and casings were inside the truck. Importantly, an examination of the truck, combined with a prompt examination of the deceased children, would have determined whose bullets lay in the children's bodies. The U.S. Supreme Court failed to address the Castle Rock police interference with what should have been otherwise routine protocols for collection of evidence.<sup>122</sup> Despite the power of U.S. courts to order compliance with discovery and other remedies to unearth the facts of a case,<sup>123</sup> the U.S. legal system's adherence to narrow procedural doctrine effectively denied Ms. Lenahan any further recourse to uncover the terrible, but important, truth of how and when her children died.

### 2. The causes that led to the abuses

This inquiry is compelling. What were the root causes of the failure of the Castle Rock police to enforce a valid court order? Some causes can be inferred, such as command's failure to prioritize protection order enforcement. More speculative is what role misogyny and racism propelled the disregard of the danger and the disrespect of Ms. Lenahan.<sup>124</sup> It is unknown whether lack of education on the dynamics of abusive behavior factored into the police failure to search for the girls. Lack of protocol on how to place an alert for the missing children is likely a contributing factor given that, when, after midnight, the dispatcher was finally instructed to issue an alert, she did not know how to do so.<sup>125</sup> Why the Castle Rock police did not even make a telephone call to the Denver police upon learning of the girls' location may have been a combination of all the cited possible causes. In *Town of Castle Rock v. Gonzales* the Court emphasized the need for police discretion.<sup>126</sup> Yet the need for discretion in the Gonzales case was irrelevant where there were no competing emergencies that warranted lack of investigation of Simon Gonzales' violations of the protection

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3, Duty to Preserve Memory, and Principle 4, Victim's Right to Know). See generally U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶10, U.N. Doc. A.HRC/5/7 (June 7, 2007); United Nations High Commissioner for Human Rights, Human Rights Resolution 2005/66, "Right to the truth," April 20, 2005, E/CN.4/RES/2005/66; Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002).

122. See generally *Gonzales*, 545 U.S. 748.

123. See FED. R. CIV. P. 37.

124. Ms. Lenahan, in addition to being female, is of Native American and Latina origin. *Human Rights Hero*, U.S. HUM. RTS. FUND, <http://www.racialjustice.org/convening-human-rights-hero.php> [https://perma.cc/749Z-HNX8].

125. *Lenahan*, Report No. 80/11, ¶ 80.

126. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).

order.<sup>127</sup> The U.S. Supreme Court failed to acknowledge the State's disregard of individual safety in favor of shielding the town of Castle Rock from liability. This approach ignores fundamental human rights of safety and truth. The legal justifications opined by the U.S. Supreme Court are detached from the reality of Ms. Lenahan's circumstances.

### 3. The circumstances and facts of the abuses

It is unknown how the State was permitted to fail in its enforcement of the underlying court order. It is unestablished whether an order was given for the police to ignore Ms. Lenahan's pleas. Without access to additional information, we may infer, but not substantiate, that the officers involved were not committed to enforcing the rule of law, despite their duty to uphold the law. We can assume that this perspective was either ignored or fostered within the CRPD culture.

### 4. The Ultimate Fate and Whereabouts of Victims in the Event of Forced Disappearances

This matter is not analogous to political disappearances because the State was not a party to the children's initial kidnapping. But the State's failure to provide adequate forensic evidence to support the likely time of death, deprived Ms. Lenahan of the certainty of knowing on which date Rebecca, Katheryn, and Leslie died.

Without enforcement of the right to truth, Ms. Lenahan will not have the answers that might help resolve some of the angst that accompanies her loss.

## III. CREATING SOLUTIONS WITHIN THE U.S. LEGAL SYSTEM TO REMEDY STATE-INVOLVED HARMS

As in *Lenahan*, as well as other civil legal cases in the U.S. system, facts are assessed for whether a cause of action exists that accommodates those facts. Whereas, a proper human rights analysis begins with an examination of the harm suffered, the extent of the harm, and the role of State involvement.<sup>128</sup>

A shift to analysis of the State's involvement in serious human rights violations is essential to determining whether those who have suffered egregious harms will find effective remedies within the U.S. civil courts. Adopting a human rights perspective requires a commitment to truth, as well as a willingness to begin what many in the U.S. legal system may determine to be a "backwards inquiry."

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127. *Id.* at 754.

128. For example, see Business and Human Rights Resource Centre where assessment begins with impact of policy and production. See *About Us*, BUS. & HUM. RTS. RESOURCE CENTRE, <https://business-humanrights.org/en/about-us> [<https://perma.cc/DYZ4-TFNS>]. The Universal Declaration of Human Rights looks to the obligations of the state. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

Application of a human rights perspective begins with a determination of whether the State participated in creating the harm.<sup>129</sup> If the State was involved, the subsequent determination focuses on whether the State's involvement in creating the harm was a consequence of necessity, negligence, or intention. If negligent or intentional, then the issues to be determined are the level of State culpability in creating the harm and what role the State will play in creating or implementing effective remedies.

Looking at the *Lenahan* case through this lens, one can hardly imagine that the State would have any culpability if the sole police role in the events was returning fire to Simon Gonzales after he entered the station parking lot and began shooting at police. Self-defense is within the State's necessary powers.<sup>130</sup> While reasonableness of implementing the defense can always be examined, Simon fired on police using an automatic weapon, leaving the police little choice but to defend.<sup>131</sup> If there had been no other State involvement, the inquiry would end here. In this instance, however, the State's inaction in attempting to find Simon and the girls, thus possibly preventing the deadly outcome, demands further answers.

Whether the Castle Rock police failed to act out of negligence or intention was not determined because Ms. Lenahan's right of inquiry was terminated by the court.<sup>132</sup> Either negligence or intentional causation would entitle Ms. Lenahan to effective remedies under the human rights framework, with the difference being the degree of certain remedies (for example, firing employees versus training them).

A floodgate argument<sup>133</sup> that courts would be overwhelmed with litigation against the State fails, particularly in the context of the circumstances presented in the *Lenahan* case. Inability to provide protection is easily distinguished from intentional failure to provide protection. Failure to enforce a protection order

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129. Universal Declaration of Human Rights, *supra* note 128.

130. "Self-defense is a basic right . . ." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

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"Suicide by cop" is a term used by law enforcement officers to describe an incident in which a suicidal individual intentionally engages in life-threatening and criminal behavior with a lethal weapon or what appears to be a lethal weapon toward law enforcement officers or civilians to specifically provoke officers to shoot the suicidal individual in self-defense or to protect civilians. . . . Thirty-nine percent of cases involved domestic violence. H.R. Hutson et. al., *Suicide by Cop*, 65 ANNALS EMERGENCY MEDICINE 665, 665-69 (Dec. 1998), <https://www.ncbi.nlm.nih.gov/pubmed/9832661> [<https://perma.cc/9S4V-T6M7>].

132. The U.S. Supreme Court decision effectively terminated all Ms. Lenahan's legal recourse within the U.S. system. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 769 (2005). *See also* *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Merits, Inter-Am Comm'n H.R., Report No. 80/11, ¶¶ 40, 41 (July 21, 2011).

133. *See* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. R. 1007, 1008 (2013).



because of an approaching dinner break<sup>134</sup> is markedly different from failure to enforce the order due to serious understaffing and simultaneously competing emergencies. Common sense separates the two, and so would juries. When the State is culpable for having caused harm, then the State could participate in the remedies. The State actors who caused or contributed to the harm are often in the best position to provide resolution.

Financial compensation is but one part of a remedy in human rights cases.<sup>135</sup> Non-financial remedies, such as acknowledgement of responsibility, can be equally important to those who are harmed.<sup>136</sup> Indeed, when truth seeking is a goal of litigation, the State is in a unique position of power to uncover and reveal the truth.

In the *Lenahan* case, disclosure of all forensic analysis might reveal the date of the girls' death. Acknowledgment of the self-serving motivation for destroying evidence<sup>137</sup> and the impact that action had on the grieving mother would also be part of an effective remedy, along with an apology. Mandatory training of police officers and enforcement of a comprehensive policy for handling domestic violence calls would address a desire to prevent future law enforcement failures. Firing those who failed to investigate Ms. Lenahan's reports might be an important remedy. Firing, as well, police who fail to follow implemented domestic violence protocols could prevent future harm.

Under a human rights framework, both parties would have an opportunity to propose and shape remedies. If the State acknowledges not only its role in causing harm, but how the State can effectively prevent the same harm from recurring, the potential for reconciliation is created.<sup>138</sup>

#### CONCLUSION

The above measures are easily adapted into the U.S. civil legal system. Judges and juries are already experienced in determining liability as well as differing levels of liability.<sup>139</sup> Judges, juries, parties, and attorneys will be free to fashion remedies tailored to each case. For those who envision a less formal disposition, opportunity is created for commissions and other alternative entities

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134. See *Gonzales*, 545 U.S. at 754.

135. See generally G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006). For example, Sec. III(4) addresses the state's obligation to investigate.

136. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 27 (3d ed. 2015).

137. See *Lenahan*, Report No. 80/11, ¶¶ 187, 189.

138. In the IACHR, each side was presented with an opportunity to propose remedies. *Id.* ¶ 53.

139. See Ken Lopez, *The Litigation Consulting Report: 4 Ways That Juries Award Damages in Civil Cases*, A2L CONSULTING (Oct. 15, 2013 9:13 AM), <http://www.a2lc.com/blog/bid/72847/4-ways-that-juries-award-damages-in-civil-cases> [<https://perma.cc/RFF6-FUYF>] (discussing the various methods used by jurors is awarding damages).

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to explore circumstances and uncover truth. Those entities could also assess accountability and fashion remedies. Adapting a human rights framework in order to provide effective remedies to those whose rights have been violated is a necessary step in accomplishing both truth and remedy.

The outrage<sup>140</sup> of the U.S. *Lenahan* case is not only that the police ignored Ms. Lenahan's requests for help, but that she suffered such horrific harm after extensive State involvement, yet was without legal recourse within the U.S. civil legal system. The proposed adjustments in legal perspectives and practices will ensure that U.S. claims of State-involved human rights abuses will include a right to truth and a right to effective remedy.

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140. See Bettinger-López, *supra* note 3, at 184. "*Castle Rock v. Gonzales* prompted a swift, intense, and united reaction across a range of constituencies." *Id.*