A "SUPREMER" COURT?: HOW AN UNFAVORABLE RULING IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SHOULD IMPACT UNITED STATES DOMESTIC VIOLENCE JURISPRUDENCE

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ABSTRACT

After her substantive and procedural due process claims were dismissed in the U.S. Supreme Court, Jessica Gonzales took the unprecedented step of filing a claim with the Inter-American Commission of Human Rights. Gonzales's case has implicated two hot-button issues in modern U.S. jurisprudence: domestic violence prevention and the role of international law in domestic courts. Several scholars have looked at Gonzales's case as it relates either to domestic violence or international law, but few have looked at the interplay between both issues. Specifically, academic discussion of the issue largely ignores how international law should be used to shift U.S. policy toward domestic violence prevention. This article suggests that U.S. courts should follow a model similar to that used in evaluating cruel and unusual punishment. For juvenile death penalty, the Supreme Court looked at emerging international consensus to help determine "evolving standards of decency."

This precedent, as well as other "law-related human questions" where international law has been used, ought to provide a model that courts should follow in domestic violence prevention. This model can be used to slowly shift U.S. law to be consistent with the international community in requiring the government to protect its citizens from domestic violence perpetrated by private actors. Such a policy would be consistent with ABA Standards for Criminal Justice, as it would uphold states' mandatory enforcement statutes where they create a special relationship between citizens and the government—something that the Court overlooked in Gonzales's case when it arguably misapplied these

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standards. This article suggests that by deciding to enforce statutes like the one at issue in *Gonzales*, the United States would take a small, but definitive, step towards bringing its domestic violence policies in line with modern standards of decency.

I. HISTORY OF JESSICA GONZALES'S CASE

The facts in *Town of Castle Rock v. Gonzales* are, in the words of the Supreme Court, "horrible" and "undeniably tragic."[1] While pursuing a divorce, Jessica Gonzales obtained a restraining order against her husband. The restraining order required that Ms. Gonzales's husband, Simon Gonzales, remain at least one hundred yards from his wife and their young children.[2]

A. GONZALES'S MANDATORY RESTRAINING ORDER AGAINST HER HUSBAND

The specific language of the restraining order is particularly important, as it detailed Colorado's requirements pursuant to its mandatory arrest statute. On the reverse side of the restraining order, there was a section directed at the restrained party, Jessica Gonzales's husband, labeled "**WARNING**," which stated:

> **A KNOWING VIOLATION OF A RESTRAINING ORDER IS A CRIME** . . . . A VIOLATION WILL ALSO CONSTITUTE CONTEMPT OF COURT. **YOU MAY BE ARRESTED** WITHOUT NOTICE IF A LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT YOU HAVE KNOWINGLY VIOLATED THIS ORDER. IF YOU VIOLATE THIS ORDER THINKING THAT THE OTHER PARTY OR A CHILD NAMED IN THIS ORDER HAS GIVEN YOU PERMISSION, **YOU ARE WRONG**, AND CAN BE ARRESTED AND PROSECUTED. THE TERMS OF THIS ORDER CANNOT BE CHANGED BY AGREEMENT OF

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[1] Town of Castle Rock v. Gonzales, 545 U.S. 748, 751, 755 (2005).

[2] Summary of Petitioner's Argument, Gonzales v. United States, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 at 2 (2007), http://www.aclu.org/files/pdfs/womensrights/gonzales_summary_20070302.pdf [hereinafter Summary of Petitioner's Argument].

> THE OTHER PARTY OR THE CHILD[REN]. ONLY THE COURT CAN CHANGE THIS ORDER . . . . **YOU MAY NOT GO INTO THE HOME UNLESS A LAW ENFORCEMENT OFFICER IS WITH YOU.**[3]

Additionally, there was a notice on the reverse side of the order directed at law enforcement personnel, which included, in relevant part:

> NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER . . . . YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL OR DETENTION FACILITY UTILIZED BY YOUR AGENCY. YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT OR ARRANGE TRANSPORTATION FOR THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM'S CHILDREN TO SHELTER.[4]

B. SIMON GONZALES VIOLATES THE RESTRAINING ORDER AND THE CRPD FAILS TO ENFORCE IT

On June 22, 1999 at around 5:00 or 5:30 p.m., Simon Gonzales took his three daughters from their home without Jessica Gonzales's

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[3] Town of Castle Rock v. Gonzales, 366 F.3d 1093, 1144 (10th Cir. 2004) (en banc).

[4] *Id*. at 1144.

knowledge.[5] At approximately 7:30 that evening, she notified the Castle Rock Police Department (CRPD) that Mr. Gonzales had taken the children, and she showed two police officers a copy of the restraining order.[6] Over the next ten hours, the children remained missing, and Ms. Gonzales repeatedly called the CRPD requesting that they take action to enforce the restraining order and safely return her children.[7]

At approximately 8:30 p.m., Ms. Gonzales received a phone call from her husband telling her that he had the children at an amusement park in Denver.[8] The Castle Rock police refused to contact any police departments with jurisdiction in Denver who might be able to find Mr. Gonzales and the children.[9] Instead, the CRPD told Ms. Gonzales to call back at 10:00 p.m. if the children had not yet returned, which she subsequently did, at which time the CRPD told her to wait until midnight.[10] At 3:20 a.m., Mr. Gonzales went to the CRPD station and opened fire, leading to a shootout with CRPD officers, after which the police found the bodies of the Gonzales' three daughters in the back seat of his car.[11]

Ms. Gonzales requested an investigation into the murder of her daughters, but it was never conducted. The police department concluded that Simon Gonzales had murdered the three girls before the shootout with the CRPD officers ensued, never responding to Jessica Gonzales's repeated requests for an actual investigation.[12] There were many different bullet shells and casings found at the scene and in the car, but no one investigated whose bullets actually caused the death of Gonzales's daughters. The police made their determinations despite the fact that multiple witnesses reported hearing screams during the shootout that

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5 *Gonzales*, 545 U.S. at 753. Because the case was dismissed for failure to state a claim upon which relief could be granted, the Supreme Court considered the facts in the light most favorable to the Plaintiff, Jessica Gonzalez. *Id*. at 751. Therefore, the actual facts were never disputed by the CRPD in United States courts.

6 *Id*. at 753.

7 Summary of Petitioner's Argument, *supra* note 2, at 2.

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

9 *Id*.

10 *Id*.

11 *Id*. at 754.

12 Final Observations Regarding the Merits of the Case, Case No. 12.626, Gonzales v. United States, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 at 33–34 (2008), http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=1570&rtcontentdisposition=filename%3D3.24.08%20GONZALES%20MERITS%20BRIEF.pdf
[hereinafter Gonzales Merits Brief].

might have come from the girls.[13] Additionally, Simon Gonzales's bullet-riddled truck was removed from the scene and presumably disposed of, never having been thoroughly investigated.[14] The CRPD refused to comply with Jessica Gonzales's repeated requests for records and other information regarding her daughters' death.[15]

C. COLORADO'S MANDATORY ARREST STATUTE AS IT RELATES TO GONZALES'S CLAIM

In an attempt to prevent this sort of domestic violence in similar situations, the Colorado Legislature passed Colorado Revised Statute 18-6-803.5, which made police enforcement of restraining orders mandatory.[16] The language of the criminal statute is similar to the language printed on the reverse side of Ms. Gonzales's restraining order. At the time of the incident at issue in Gonzales's case, the statute read:

> (a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a restraining order.
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> (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
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> (I) The restrained person has violated or attempted to violate any provision of a restraining order; and
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> (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.
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> (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid restraining

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[13] *Id*. at 34–36.
[14] *Id*. at 34–35.
[15] *Id*. at 37.
[16] COLO. REV. STAT. § 18-6-803.5(3) (1999).

> order whether or not there is a record of the restraining order in the registry.[17]

Colorado was one of twenty states to pass similar laws in 1994 for the specific purpose of increasing police protection from domestic violence by removing their discretion to enforce restraining orders.[18] Thus, taken at face value, it appeared as though the CRPD violated the language of the Colorado statute by failing to enforce Jessica Gonzales's mandatory restraining order.

D. GONZALES UNSUCCESSFULLY TRIES HER CASE IN U.S. COURTS

As a result of this tragic incident, Jessica Gonzales brought a claim under 42 U.S.C. § 1983 alleging that the Town of Castle Rock violated her Fourteenth Amendment right to due process. Gonzales argued that due to the police department's policy or custom of failing to enforce mandatory restraining orders, the CRPD ignored her requests for help, resulting in the death of her three daughters.[19] She brought procedural and substantive due process claims, both of which the District Court dismissed.[20]

On appeal, the Tenth Circuit affirmed the dismissal of the substantive due process claim but reversed the dismissal of the procedural due process claim.[21] In particular, the Tenth Circuit noted that the restraining order required the police department to arrest Mr. Gonzales for violating the restraining order "with only the narrowest exceptions."[22]

Without spending much time on Gonzales's argument that the CRPD violated her right to substantive due process, the Supreme Court followed its holding in *DeShaney v. Winnebago County Department of Social Services*, stating that "the so-called 'substantive' component of the Due Process Clause does not 'requir[e] the State to protect the life,

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[17] *Id.*

[18] Allison J. Cambria, *Defying a Dead End: The Ramifications of* Town of Castle Rock v. Gonzales *on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155, 179 (2006).

[19] Town of Castle Rock v. Gonzales, 545 U.S. 748, 754 (2005).

[20] *Id.*

[21] *Id.* at 754–55.

[22] Town of Castle Rock v. Gonzales, 366 F.3d 1093, 1105 (10th Cir. 2004).

liberty, and property of its citizens against . . . private actors.'"[23] The Court devoted more time to Gonzales's procedural due process claim. To have a procedural due process claim for denial of a "benefit," the Court requires "more than an abstract need or desire" and "more than a unilateral expectation of it. [The Plaintiff] must, instead, have a legitimate claim of entitlement to it."[24]

Although Ms. Gonzales's restraining order was a "mandatory" restraining order stating that the CRPD "shall" arrest or seek a warrant for the arrest of Mr. Gonzales if they had probable cause to believe he violated its terms, the Supreme Court found that the restraining order was not, in fact, mandatory.[25] The Court noted that the "well established tradition of police discretion" meant that there would need to be some stronger indication from the Colorado Legislature that the police had no discretion in the enforcement of restraining orders under this statute.[26] The majority opinion further explained that there are many reasons that "mandatory" enforcement statutes should not actually be considered mandatory, including "legislative history, insufficient resources, and shear physical impossibility."[27]

The Supreme Court chose not to defer to the Tenth Circuit's interpretation of the statute and its legislative history.[28] The Court further asserted that even if Gonzales had an entitlement to police enforcement, she was not denied a property right since there is no "ascertainable monetary value" attributable to a restraining order.[29] Ultimately, the

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[23] *Gonzales*, 545 U.S. at 755 (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989)).

[24] *Id*. at 756 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

[25] *Id*. at 760.

[26] *Id*. at 760–61. The Court explicitly declared, "We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*." *Id*. at 760.

[27] *Id*. at 760 (quoting STANDARDS FOR CRIMINAL JUSTICE § 1-4.5 at 1-125 (2d ed. 1980)). See *infra* Part IV.C.iii for a discussion about whether these ABA Standards applied to the Colorado statute at issue in Gonzales's case.

[28] *Gonzales*, 545 U.S. at 756–57. The Supreme Court stated that "[t]he Tenth Circuit's opinion . . . did not draw upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state-legislative-hearing transcript." *Id*. at 757. The Court did not further elaborate as to why this meant that it would be inappropriate to defer to the Tenth Circuit's interpretation of the statute. Oddly, the Court continued by saying that "if we were simply to accept the Court of Appeals' conclusion, we would necessarily have to decide conclusively a federal constitutional question (*i.e*., whether such an entitlement constituted property under the *Due Process Clause* and, if so, whether [the CRPD's] customs or policies provided too little process to protect it)." *Id*. at 757–58. The Court did not explain why the fact that it would have to decide a federal constitutional issue prevents it from deferring to the Tenth Circuit's interpretation of state law.

[29] *Id*. at 766–67.

Supreme Court, by a 7–2 majority with Justice Stevens and Justice Ginsburg dissenting,[30] reversed the Tenth Circuit's finding of a procedural due process claim and dismissed Gonzales's complaint for failure to state a claim.[31]

E. GONZALES ASSERTS A HUMAN RIGHTS VIOLATION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

After exhausting her appeals in the United States court system, it appeared as though Jessica Gonzales had no additional recourse. In an unprecedented move, however, Gonzales, with the aid of the ACLU, brought a claim to the Inter-American Commission on Human Rights (IACHR or "Commission"), a body within the Organization of American States (OAS).[32] This marked the first time that an individual had filed a complaint against the United States alleging a human rights violation as a victim of domestic violence before an international human rights body.[33]

Gonzales filed her claims under the auspices of the OAS Charter and its American Declaration of the Rights and Duties of Man, which the United States has signed.[34] The IACHR cannot issue binding decisions, but it "can issue findings and observations setting out its conclusions with regard to particular issues or petitioners, suggestions for changes in practices, and recommendations to states [sic] parties with regard to future actions."[35] In typical cases, after the Commission issues its findings, the parties may submit the case to the Inter-American Court of Human Rights. Because the United States has not ratified the American Convention on Human Rights, however, this court would not have

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[30] Justice Stevens's dissent repudiates the majority for "providing its *own* answer to [a central state-law question]," rather than defer to the Tenth Circuit's interpretation of a Colorado statute in direct conflict with the Court's tradition of judicial restraint. *Gonzales*, 545 U.S. at 774 (Stevens, J., dissenting). He then continues by asserting that the mandatory arrest statute was enacted by the Colorado Legislature expressly for the purpose of eliminating police discretion in situations like the one that Jessica Gonzales encountered, making enforcement, in fact, mandatory. *Id.* at 781–82. Because the mandatory enforcement statute created an entitlement, Justice Stevens argues that Gonzales had a property interest in the enforcement of her restraining order, consistent with other procedural due process precedent. *Id.* at 789.

[31] *Id.* at 769.

[32] Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 29 (2008) [hereinafter *Human Rights at Home*].

[33] Cambria, *supra* note 18, at 155–56.

[34] *Human Rights at Home*, *supra* note 32, at 30. As a signatory of the OAS Charter, the United States is bound to adhere to the Declaration's provisions. *Id.*

[35] Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 FORDHAM L. REV. 529, 549 (2008).

jurisdiction over the Gonzales matter.[36] Thus, the only remedy available to Jessica Gonzales through the IACHR hearing would be "something akin to declaratory relief, attention to an issue, and international shaming."[37]

The IACHR system consists of two phases: the admissibility phase and the merits phase.[38] In the admissibility phase, the IACHR decides whether it can properly hear the claim.[39] In her petition to the IACHR prior to the admissibility phase, Jessica Gonzales alleged that the United States violated eight different articles of the American Declaration on the Rights and Duties of Man. The first six alleged violations related to the United States' failure to fulfill its "affirmative obligation to protect the rights guaranteed in the American Declaration by not only the state or its agents, but also, under certain circumstances, from violation by private actors."[40] Gonzales argued that when "a State fails to effectively prevent domestic violence . . . and compensate [victims] for when law enforcement authorities fail to effectively prevent . . . domestic violence . . . a State incurs liability for the acts of private actors."[41] She further claimed that this obligation was well established under international human rights law and is therefore a principle of customary international law.[42] Finally, Gonzales alleged that the United States violated Articles XVIII and XXIV of the American Declaration by failing to provide an "adequate and effective remedy" for the violation of her protected rights.[43]

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[36] *Human Rights at Home*, *supra* note 32, at 33.

[37] Lapidus, *supra* note 35, at 549.

[38] *Human Rights at Home*, *supra* note 32, at 32.

[39] *Id*.

[40] Gonzales v. United States, Admissibility Decision, Petition No. 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, ¶ 2 (2007), http://www.cidh.oas.org/annualrep/2007eng/USA1490.05eng.htm [hereinafter Admissibility Decision]; Summary of Petitioner's Argument, *supra* note 2, at 3. Article I of the American Declaration ensures the right to "life, liberty and the security of his person." American Declaration of the Rights and Duties of Man art. I, May 2 1948, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V./II.86 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration]. Article II ensures the right to equality, "without distinction as to . . . sex." *Id*. art. II. Article V preserves "the right to the protection of law against abusive attacks upon . . . private and family life." *Id*. art. V. Article VI protects "the right to establish a family . . . and to receive protection therefor." *Id*. art. VI. Article VII promises the "right to special protection, care and aid" for women and children. *Id*. art. VII. Article IX ensures "the right to inviolability of [one's] home." *Id*. art. IX.

[41] Summary of Petitioner's Argument, *supra* note 2, at 3.

[42] *Id*.

[43] Admissibility Decision, *supra* note 40, ¶ 2; Summary of Petitioner's Argument, *supra* note 2, at 3.

The United States responded that it had no duty under the American Declaration to take affirmative steps to prevent the crimes committed by Mr. Gonzales, a private actor.[44] In addition, the United States asserted that it did not fall below the global standards of due diligence in preventing domestic violence.[45] Finally, the United States argued that Ms. Gonzales had not exhausted all of her available domestic remedies because she never did anything more than file a complaint in federal court alleging a violation of her Fourteenth Amendment rights.[46] Although the Supreme Court dismissed her claim against the Town of Castle Rock, the United States asserted that she had other potential sources of judicial relief that she did not pursue, such as filing a complaint against the CRPD.[47]

In October 2007, the IACHR declared that Gonzales's claim was admissible because she had "exhausted all domestic remedies available within the United States legal system," and that any further remedies that might have been at her disposal "ha[d] no reasonable prospect of success."[48] Specifically, the IACHR declared her claims admissible under Articles I, II, V, VI, VII, XVIII, and XXIV as possible United States violations of the American Declaration.[49]

After this decision, the second phase—the merits phase—of the hearing commenced to determine whether the United States had actually violated Gonzales's human rights under the American Declaration.[50] In her brief, Gonzales set out facts similar to those set forth in her initial U.S. suit, as well as her brief prior to the admissibility decision.[51] Gonzales alleged a systemic problem with preventing domestic violence in the United States, ultimately arguing that the United States did not do its proper "due diligence" to protect Gonzales and other domestic

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[44] Admissibility Decision, *supra* note 40, ¶ 32; Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Jessica Gonzales, Petition No. 1490-05, Inter-Am. Comm'n H.R. at 25 (2006), http://www.aclu.org/files/pdfs/womensrights/gonzales_govtresponse20060925.pdf [hereinafter United States Response].

[45] United States Response, *supra* note 44, at 36–37.

[46] Admissibility Decision, *supra* note 40, ¶ 33; United States Response, *supra* note 44, at 37.

[47] Admissibility Decision, *supra* note 40, ¶ 34; United States Response, *supra* note 44, at 37–38.

[48] *Human Rights at Home*, *supra* note 32, at 38 (citing Admissibility Decision, *supra* note 40).

[49] Admissibility Decision, *supra* note 40, ¶ 3.

[50] *Human Rights at Home*, *supra* note 32, at 32.

[51] *Compare* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005), *with* Observations Concerning the September 22, 2006 Response of the United States Government, Gonzales v. United States, Petition No. 1490-05, Inter-Am. Comm'n H. R. (2006), http://www.aclu.org/files/pdfs/gonzales_finalbrief.pdf [hereinafter Final Admissibility Brief], and Gonzales Merits Brief, *supra* note 12.

violence victims.[52] Gonzales argued that the United States failed to meet the international standards previously set forth by the IACHR to determine whether a nation is liable for the actions of private actors.[53] She further averred that the United States "knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party" and "failed to take reasonable steps within the scope of its powers, which might have had a reasonable possibility of preventing or avoiding the risk."[54]

Prior to the IACHR hearings, only Jessica Gonzales's version of the facts had been argued in legal proceedings. This was because the U.S. proceedings ended at the motion to dismiss stage where all facts were viewed in a light most favorable to Ms. Gonzales.[55] Consequently, when the United States responded to Gonzales's petition to the IACHR, it was the first time that the Town of Castle Rock, the CRPD, and the U.S. government had the opportunity to refute any of her factual contentions.[56]

Ms. Gonzales's opponents took full advantage of the opportunity to dispute the facts. First, and perhaps most importantly, the United States asserted that Jessica Gonzales had actually agreed to let her husband visit her children on the night of June 22, 1999, which was consistent with the guidelines of the restraining order that gave Mr. Gonzales permission to have a "mid-week dinner visit" so long as it was

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[52] *Human Rights at Home*, *supra* note 32, at 44–45; Gonzales Merits Brief, *supra* note 12, at 57; Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988), http://www1.umn.edu/humanrts/iachr/b_11_12d.htm [hereinafter Velásquez Rodríguez].

[53] *Human Rights at Home*, *supra* note 32, at 46 (citing Velásquez Rodríguez, *supra* note 52, ¶ 172). After the Inter-American Court issued a ruling in *Campo Algodonero* in 2009, Gonzales filed a supplemental brief to the IACHR. Jessica Gonzales's Supp. Br. re Campo Algodonero & U.S. Asylum Law (Feb. 19, 2010). Gonzales stressed the court's reiteration of its holding from *Velázquez Rodríguez*, noting that the court found states have a duty to "prevent, investigate . . . [and] punish" violations of human rights by private actors. *Id*. at 2 (citing *Gonzales & Others (Campo Algodonero) v. Mexico*, Case Nos. 12.496, 12.497, 12.498, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 206 (Dec. 10, 2009)).This duty would have obligated the U.S. to protect Gonzales and her daughters from her husband.

[54] *Human Rights at Home*, *supra* note 32, at 46 (citing Pueblo Bello Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 123–24 (Jan. 31, 2006)).

[55] *Gonzales*, 545 U.S. at 751.

[56] The United States made its factual contentions in its response to Jessica Gonzales's petition for admissibility. *See generally* United States Response, *supra* note 44, at 3. Although at that time the issue was whether the IACHR had the competence to hear Gonzales's case, the United States made what amounted to an additional merits-based factual argument, possibly as a sort of preemptive means of protecting itself from further international consequences. *Human Rights at Home*, *supra* note 32, at n.74.

pre-arranged between him and Ms. Gonzales.[57] Contrary to Ms. Gonzales's claims, the United States further asserted that she made her first call to the CRPD at 7:40 that evening, at which time she told the dispatcher that she had consented to her husband picking up the children for a mid-week dinner visit, and she later repeated the same to CRPD officers when they went to her house.[58] Additionally, the United States contended that when officers were dispatched to Ms. Gonzales's home, they also went to her husband's home in an unsuccessful attempt to find him and the children.[59]

Although Jessica Gonzales said the CRPD refused to make any effort to apprehend her husband at the Denver amusement park, the United States disputed that she ever requested such actions and insisted that the CRPD had no reason to believe the children were in danger.[60] Contrary to her claims, the United States argued that, during the time CRPD officers were at Jessica Gonzales's home, she never showed the officer a copy of her restraining order, and that once she finally did tell the officers about the order later that evening, she admitted that her husband had not violated its terms because she had given him permission to take the girls.[61] The Government added that at almost 10:00 p.m., Ms. Gonzales again called the CRPD saying "she was a 'little wigged out,'" but conceded that the restraining order did not have any clauses dealing with her current situation.[62]

The United States contended that, over the course of the night, Jessica Gonzales repeatedly admitted that her husband had not in any way violated the restraining order.[63] Furthermore, the CRPD was never made aware of the threatening behavior Mr. Gonzales had demonstrated towards Ms. Gonzales and her children, and, throughout most of the evening, she "did not appear to be concerned about the safety of her children."[64] The United States alleged that it was not until around 12:30 a.m. that Ms. Gonzales said she was concerned for her children's safety, and the CRPD dispatched an officer as quickly as possible, following

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[57] United States Response, *supra* note 44, at 4.

[58] *Id.*

[59] *Id.* at 5.

[60] *Id.* at 6.

[61] *Id.* at 5–6.

[62] *Id.* at 7 (quoting Investigator's Progress Report, Castle Rock Police Department, Castle Rock, Colorado, Third call at 2157 hrs, CR# 99-3226, Tab D).

[63] *Id.* at 7.

[64] *Id.* at 7–8.

other pending calls.[65] At that time, however, the United States claimed Jessica Gonzales explicitly told the dispatched officer that she did not think her husband would hurt her children.[66] As a precaution, though, the CRPD did attempt to put out a signal to other jurisdictions to watch for Mr. Gonzales but was unable to do so in the one hour and forty-five minutes prior to Mr. Gonzales arriving at the department.[67] Based on these facts, the United States maintained that the CRPD did not violate Jessica Gonzales's rights pursuant to her restraining order.[68]

In October 2008, the IACHR held its merits hearing in Gonzales's case.[69] As of this writing, the IACHR has not yet issued its findings. In the event that the IACHR finds for Jessica Gonzales, she has requested that the Commission recommend several different remedies. First, she requests individual remedies, including compensatory relief for the violation of her rights and loss of her children, an investigation into the deaths of her children and the actions of the CRPD, and access to documents and evidence surrounding her children's death.[70] She then requests a series of what she calls "Legal and Programmatic Reform."[71] As part of this suggested reform, Ms. Gonzales wants the IACHR to authorize investigations of Colorado's and the United States' domestic violence policies, to request that the Inter-American Court issue an advisory opinion, and to recommend that the United States ratify a series of human rights treaties.[72]

Finally, Gonzales's most extensive list of requested remedies pertains to the systemic reforms that she suggests the United States ought to enact. Gonzales wants the United States to "[p]ublicly recognize that its current laws, policies, and practices too often condone domestic violence" and "[p]romote and protect the human rights of women and children and exercise due diligence in responding to domestic violence."[73] Among other things, Gonzales suggests that the United States should improve its enforcement of restraining orders, better train police officers, judges, and prosecutors, enact stronger legislation in

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[65] *Id*. at 8.

[66] *Id*. at 9.

[67] *Id*. According to the United States, this was not due to a lack of effort by the CRPD, but merely an inability to do so. *Id*. at 9–10.

[68] *Id*. at 40.

[69] *Human Rights at Home*, *supra* note 32, at 49.

[70] Gonzales Merits Brief, *supra* note 12, at 155.

[71] *Id*. at 156.

[72] *Id*. at 156.

[73] *Id*.

accordance with international standards, provide better services to victims of domestic violence, adopt more stringent affirmative measures to eliminate the causes of domestic violence, and provide better funding to programs already in place to prevent domestic violence.[74] It is not immediately clear which, if any, of these reforms could or would be enforced domestically in the event the IACHR finds for Gonzales.

II. THE SUPREME COURT'S PRECEDENT OF RELYING ON INTERNATIONAL LAW

The Supreme Court seems to be conflicted as to how much weight it should give international law when formulating decisions. Several current justices have discussed their conflicting views of the relevance of international law, both within their formal opinions and in other fora.

Justice Kennedy has made it clear he believes that although international law is not binding, the United States cannot pretend that it does not exist.[75] If the United States expects the rest of the world to adapt to its principles of democracy, freedom, and other ideologies, Kennedy believes it must then also be receptive, at least to a certain degree, to the prevailing views of the rest of the international community.[76] Justices Ginsburg and Breyer tend to support this philosophy.[77] On the opposite

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[74] *Id.* at 156–58.

[75] Russell G. Murphy, *Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, 32 SUFFOLK TRANSNAT'L L. REV. 599, 613 (2008) (quoting Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 48).

[76] *Id.* at 613.

[77] *Id.* at 613–15 (quoting Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, 64 CAMBRIDGE L.J. 575, 576 (2005)). Justice Ginsburg has noted:

> [n]ational, multinational and international human rights charters and courts today play a prominent part in our world. The US judicial system will be the poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.

Ginsburg, *supra*, at 576. She continues, "What the United States does, for good or for ill, continues to be watched by the international community." *Id.* at 578. Interestingly, Justice Ginsburg noted that, although he later altered his stance, Chief Justice Rehnquist expressed a similar opinion in 1999:

> [F]or nearly a century and a half, courts of the United States . . . had no precedents to turn to except their own . . . . When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States . . . for developing their own law. But now that constitutional law is solidly grounded in so many

end of the spectrum, Justice Scalia has been outspoken in arguing that there is no place for foreign law in the interpretation of the United States Constitution and that he will only base his decisions on "[t]he standards of decency of American society— . . . not the standards of decency of other countries."[78]

A. USE OF INTERNATIONAL AND FOREIGN LAW IN EIGHTH AMENDMENT DECISIONS

The Supreme Court as a whole, however, has shown an increased willingness to consider international law when rendering decisions, at least in some circumstances. This is especially evident with the evolution of the Supreme Court's decisions relating to the Eighth Amendment's prohibition against cruel and unusual punishment, particularly as the Court has slowly shifted its stance towards juveniles. In the 1988 case *Thompson v. Oklahoma*, in a judgment finding a death penalty without a minimum age requirement to be cruel and unusual, Justice Stevens's plurality opinion considered a number of other Western nations that had completely abolished juvenile death penalty when making its decision.[79]

> countries . . . it [is] time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.

Id. at 577 (quoting William H. Rehnquist, *Foreword* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW vii (Vicki C. Jackson & Mark Tushnet eds., 2002).

[78] Murphy, *supra* note 75, at 614–15 (quoting *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 526 (2005) [hereinafter *Relevance of Foreign Legal Materials*]).

[79] Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988). The Court further considered various human rights treaties and other acts, most of which the United States had not ratified. *Id*. at 830 nn.31 & 33–34. In her concurring opinion, Justice O'Connor similarly considered international agreements, particularly focusing on article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which the United States ratified, agreeing to a minimum age of eighteen for capital punishment in instances of occupation during wartime. *Id*. at 851 (O'Connor, J., concurring) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 3560 (1955)). She did not otherwise consider the weight of international law within her decision. In his dissent, Justice Scalia criticized the plurality's use of international law, arguing that

> where there is not first a settled consensus among our own people, the views of other nations . . . cannot be imposed upon Americans through the Constitution . . . therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 . . . is of no more relevance than the fact that a majority of them would not impose capital punishment at all.

Id. at 868 n.4 (Scalia, J., dissenting).

In 1989, the Court appeared to take a step back from the use of international law in its judgment in *Stanford v. Kentucky*. Without referencing any international standards, Justice Scalia wrote a plurality opinion holding that capital punishment for sixteen and seventeen year olds was not cruel and unusual under the Eighth Amendment.[80] In the dissent, however, Justice Brennan cited to the policies of other nations around the world, as well as several international agreements, in support of his argument against any juvenile death penalty at any age under eighteen.[81]

Then, in the 2005 case *Roper v. Simmons*, where in a 5–4 decision the Supreme Court reversed its decision from *Stanford* and found that the juvenile death penalty at any age under eighteen is cruel and unusual, Justice Kennedy's majority opinion extensively discussed the influence of international law.[82] In no uncertain terms, the Court declared that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling of our outcome, does provide respected and significant confirmation for our own conclusions."[83] As would probably be expected, this assertion was met with varying degrees of dissention among other justices,[84] but the

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[80] *See* Stanford v. Kentucky, 492 U.S. 361 (1989). Interestingly, in her concurring opinion in this decision, Justice O'Connor did not make reference to any international law. *See id*. at 380–82 (O'Connor, J., concurring).

[81] *Id*. at 389–90, n.10 (Brennan, J., dissenting) (noting that since 1979, only eight juveniles in the world had been executed, which included three from the United States, and five others in Pakistan, Bangladesh, Rwanda, and Barbados).

[82] *See* Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (noting that the United States was the only country in the world that officially sanctioned the juvenile death penalty). The Court specifically noted that the weight of international law is not controlling, but it was instructive to aid in the interpretation of the Eighth Amendment. *Id*. at 575. After noting that no other country seems to support the juvenile death penalty at any age, the Court noted that, "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." *Id*. at 577.

[83] *Id*. at 578. In 2002, a six to three majority of the Court similarly invoked world opinion in the majority opinion of *Atkins v. Virginia*, where the Court noted that the international community as a whole has predominantly rejected the death penalty for persons with mental retardation. 536 U.S. 304, 316 n.21 (2002). The Court noted that this alone was not dispositive, but did "lend[] further support to [their] conclusion." *Id*. at 317 n.21.

[84] *See Roper*, 543 U.S. at 604 (O'Connor, J., dissenting) (disagreeing with majority's assertion that an international consensus "confirms" the Court's interpretation, but also disagreeing with Justice Scalia's assertion that international law has no place in Eighth Amendment jurisprudence). Although Justice O'Connor said that international law had no confirmatory role in American constitutional interpretation, she maintained that it is relevant to assess the "evolving standards of decency" in civilized society. *Id*. *But cf*. *id* at 624 (Scalia, J., dissenting) (asserting that American law need not conform to the rest of the world). Justice Scalia goes on to

fact remains that international law had some influence in the Supreme Court's decision-making. In a not-so-subtle response to the dissenting justices' condemnation of the use of international law, Justice Kennedy concludes his analysis by announcing, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[85]

In another recent opinion that Justice Kennedy authored, the Court continued its trend of looking at international law in Eighth Amendment cases. In the 2010 case *Graham v. Florida*, the Court held 6–3 that sentencing a juvenile who did not commit homicide to life without parole constitutes cruel and unusual punishment under the Eighth Amendment.[86] Like in *Roper*, Justice Kennedy noted that "there is support for our conclusion in the fact that . . . the United States adheres to a sentencing pattern rejected the world over."[87] Presumably in an effort to preemptively rebut his opponents, Justice Kennedy explicitly stresses that the weight of international law is not controlling, but he also emphasizes that it "is also 'not irrelevant.'"[88] Interestingly, Justice Kennedy's use of foreign and international law in this decision drew significantly less criticism in concurring and dissenting opinions than those Eighth Amendment cases previously discussed. In his concurrence, Chief Justice Roberts makes no reference at all to the majority opinion's use of foreign sources.[89] In his dissent, Justice Thomas notes that he will "confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in *this* Nation."[90] While this does not indicate an actual change in the Court's perspective on the use

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list several legal principals with which U.S. jurisprudence conflicts, including illegal seizure of evidence, establishment of religion, and abortion rights. *Id*. at 624–25. Justice Scalia goes so far as to say that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand." *Id*. at 624.

85 *Roper*, 543 U.S. at 578.

86 Graham v. Florida, 560 U.S. ___, 31 (2010).

87 *Id*. at 29.The opinion then cites studies finding that eleven countries authorize life without parole for juvenile offenders under any circumstances, and only the U.S. and Israel ever actually impose the punishment. *Id*. at 29–30. Israel has only imposed the sentence on juveniles who are convicted of homicide or attempted homicide. *Id*. at 30.

88 *Id*. at 29 (citing Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)).

89 *See generally Graham*, 560 U.S. at ___ (Roberts, C.J., concurring).

90 *Id*. at ___, n.12 (Thomas, J., dissenting).

of international and foreign law, Justice Thomas' footnote might suggest that the conservative justices have decided that opposing other issues is more of a priority. One opinion does not mean a lot, but it bears watching whether it becomes a trend for conservative justices to ignore the use of international law.

While the Supreme Court has considered international law in some of its decisions relating to death penalty jurisprudence, it should be noted that the Court has never fully adapted the United States' laws to comply with international law. For example, the weight of international law is decidedly against the death penalty in nearly all circumstances.[91] Among others, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the United Nations Convention on the Rights of the Child, and the European Convention on Human Rights all ban capital punishment.[92] Nevertheless, the Court has not used this as an argument that the death penalty in its entirety should be found unlawful, demonstrating that there is a limit to the weight that Supreme Court justices assign to foreign and international law in their decision-making.

B. USE OF INTERNATIONAL AND FOREIGN LAW IN CASES RELATED TO OTHER RIGHTS

The Supreme Court has shown a willingness to consider foreign and international law in other circumstances as well. Of particular interest, in *Lawrence v. Texas*, the Court considered foreign laws and international trends when conducting a due process analysis to determine whether a Texas statute prohibiting same sex-sodomy violated the Fourteenth Amendment.[93] In overturning the earlier, contradictory decision of *Bowers v. Hardwick*, the Court specifically noted that:

> the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed . . . its own decision in *Dudgeon v. United*

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[91] Murphy, *supra* note 75, at 609.

[92] *Id.* (citing International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 52 (Mar. 23, 1976); American Convention on Human Rights, art. 4, §§ 2-6, Nov. 22, 1969, 1144 U.N.T.S. 123; Convention on the Rights of the Child, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/44/49, art. 37 (Nov. 20, 1989); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 1, 1985, E.T.S. No. 114.

[93] Lawrence v. Texas, 539 U.S. 558, 572–73, 576–77 (2003).

> *Kingdom* . . . . Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct . . . . The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that *in this country* the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[94]

The majority explicitly mentioned that there is no apparent reason for policies to be any different in the United States than in other Western nations.[95] This foreign and international law was not binding on the Court, but it did help persuade the majority.[96]

In another 2003 decision, *Grutter v. Bollinger*, Justice Ginsburg relied on international law to support her concurring opinion agreeing with the decision to uphold the University of Michigan Law School's race-based affirmative action policy.[97] Ginsburg began her concurring opinion by pointing out that the Court's opinion was consistent with that of the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States had ratified.[98] Under Article 2, Section 2 of the Convention, parties agreed to "take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. . . ."[99] For Justices Ginsburg and Breyer, who joined Justice Ginsburg's opinion, this international agreement helped justify the University of Michigan's program.

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[94] *Id*. at 576–77 (emphasis added, citations omitted).

[95] It should also be noted that this use of international law was responding to the reliance in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Chief Justice Burger said the opinion was consistent with the views of Western civilization. *Lawrence*, 539 U.S. at 572. Justice Breyer has publicly stated this as the reason he believes international law was cited. *Relevance of Foreign Legal Materials*, *supra* note 78, at 531. Justice Kennedy, who wrote the majority opinion, has not made similar limiting statements. *Lawrence,* 539 U.S. at 558–79.

[96] *See Relevance of Foreign Legal Materials*, *supra* note 78, at 536. Justice Breyer lists a number of factors with varying levels of importance that influence his judgments. *Id*.

[97] Grutter v. Bollinger, 539 U.S. 306, 344 (2003).

[98] *Id*. at 344.

[99] International Convention on the Elimination of All Forms of Racial Discrimination art. 2, § 2, Sept. 28, 1966, 660 U.N.T.S. 195.

III. THE SUPREME COURT JUSTICES' VARYING PERSPECTIVES AS TO THE ROLE OF INTERNATIONAL LAW

If the IACHR issues a finding against the United States, the government and domestic court system will face an interesting question in deciding how to react. There is no obvious answer as to how Congress, various U.S. agencies, state and local governments, and, in particular, courts of all jurisdictions could, should, or will respond to such an "international shaming."

The decision of the IACHR will not have any sort of binding authority on the United States. As a result, the United States courts will not be required to adopt its findings. The United States is subject to IACHR proceedings by having signed the OAS Charter, and, as signatories of the charter, the American Declaration on the Rights and Duties of Man governs the state.[100] The IACHR, however, does not issue binding judgments.[101] Therefore, the United States cannot be legally obligated to follow the IACHR's decision. Thus, the question remains as to what options exist following an unfavorable IACHR finding.

Because the IACHR's decision cannot be binding, the weight of its findings would be something equivalent to the weight given to decisions of foreign courts, international treaties that the United States has not ratified, and other sources of international law. At most, the decision can be persuasive, leaving the Court to decide how much weight it should assign to any recommendations. On one end of the spectrum,

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[100] Lapidus, *supra* note 35, at 548.

[101] *Id*. at 548.The Inter-American Court on Human Rights may issue binding decisions after being referred cases from the IACHR, but before it may do so, the party State must have ratified the American Convention. *Id*. The United States has not done this, so it is not subject to the Inter-American Court's jurisdiction. *Id*. Even if the United States had ratified the American Convention, however, U.S. courts might not recognize the Inter-American Court's decisions as binding. Following the Supreme Court's 2008 decision in *Medellin v. Texas*, the United States' policy is that even when, via ratified treaty, the nation consents to the jurisdiction of international courts to issue binding international decisions, "not all international law obligations automatically constitute binding federal law enforceable in United States courts." Medellin v. Texas, 552 U.S. 491, 504 (2008). The Court held that unless the treaty is self-executing, then its decisions "can only be enforced pursuant to legislation to carry them into effect." *Id*. at 505 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)). The standard for determining when a treaty is self-executing is still somewhat unsettled, but the *Medellin* decision shows that it amounts to requiring "the equivalent of a clear statement before it would find that the treaties at issue gave domestic effect to the judgment of the [international court]." John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L.J. 1712, 1715 (2009). Thus, even if the United States ratified the American Convention and the Inter-American Court ruled for Gonzales, its decision likely would not be enforceable domestically due to a lack of a clear statement from Congress that it intended for the American Convention to be enforced as such.

the United States could decide to ignore the IACHR's decision in its entirety. To the opposite extreme, the United States could decide to fully enforce all of the IACHR's recommendations. Additionally, there is the option of taking some sort of middle ground by enacting some of the IACHR's recommendations while refusing others.

Even though the Supreme Court has used international law to influence its decision in the foregoing cases, a question remains as to whether the Court should be willing to allow an IACHR decision to influence its due process jurisprudence in general or specifically related to domestic violence. Justice Scalia noted that the Court has used foreign law selectively, rather than across the board in all cases.[102] Is this selective use of foreign and international law simply a case of pro-international law justices being hypocritical as Justice Scalia seems to suggest,[103] or is something else going on? Is there any discernable pattern for when the Court will use international law? There is probably no definitive answer, but one can at least get a sense of the types of cases where the pro-international law justices might refer to foreign and international law, including those—as mentioned by Justices Scalia and O'Connor—which address "evolving standards of decency."

Justice Breyer has offered some insight into his thought process. He has stated that he will use the opinions of foreign judges when interpreting legal problems that "protect certain basic human rights."[104] In explaining one particular case where he cited foreign law in his dissent, in which the issue was whether keeping a murderer on death row for more than twenty years was cruel and unusual, Justice Breyer explained that he thought "that the issue [was] not technically legal, but rather a law-related human question," and all nations were "dealing with a somewhat similar human problem."[105] Further discussing foreign law,

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[102] *Relevance of Foreign Legal Materials*, *supra* note 78, at 521 (noting that the Court cited foreign law when overturning a ban on homosexual sodomy, but not when overturning bans on abortion).

[103] *Id*. at 521 (suggesting the Court only uses foreign law when "it agrees with what the justices would like the case to say," but not when the converse is true).

[104] *Id*. at 523 (stating that judges abroad face "difficult questions without obvious answers," so their views can be helpful when American justices interpret similar legal issues). Justice Breyer later added that "[h]uman rights . . . has become a more international subject," suggesting that international law may be properly used in deciding domestic cases. *Id*. at 533.

[105] *Id*. at 528. Justice Breyer was discussing *Knight v. Florida*, where the Court denied a petition for writ of certiorari. *See* Knight v. Florida, *cert. denied,* 528 U.S. 990 (1999). In his dissent, Justice Breyer discussed recent decisions in India, Zimbabwe, the United Kingdom, Canada, and Jamaica to support the notion that the Court should at least consider whether keeping a convicted murder on death row for more than twenty years while awaiting execution violated his Eighth

Justice Breyer called it "relevant in the sense I described. A similar kind of person, a judge, with similar training, tries to apply a similar document with similar language . . . in a society that is somewhat similarly democratic and protective of basic human rights. . . . '[C]ruel and unusual punishment' [is not] an arcane matter of contract law where differences in legal systems are more likely to make a major difference. . . . I doubt that Americans are so very different from people elsewhere in the world in respect to such matters."[106]

Justice Breyer went on to compare the use of foreign and international law to that of legislative history, explaining that, if used properly for what it is, it can aid a judge in making a sensible decision.[107]

The other Supreme Court justices have not been so outspoken in explicitly stating their views in public fora, but some insight can be gained. Justice Kennedy, for instance has asked rhetorically, "Why should world opinion care that [the United States] wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some . . . underlying unified concept of what human dignity means?"[108] Justice Kennedy is essentially saying that when the Supreme Court uses foreign law in its decisions, it serves as a signal to other countries that the United States shares similar values.[109] So, although it is uncertain whether Justice Kennedy would use foreign law for the specific purpose of aligning U.S. laws with other nations, he has shown a willingness to at least cite it to show the rest of the world where the United States does share the same values and laws.

In a dissenting opinion to *Roper v. Simmons*, Justice O'Connor argued that courts should only use foreign and international law to assess "evolving standards of decency" when considering cruel and unusual punishment because the Eighth Amendment "draws its meaning directly from the maturing values of society."[110] She further elaborated that "[the United States'] evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values

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Amendment right against cruel and unusual punishment, as these nations had found. *See Knight*, 528 U.S. at 993 (Breyer, J., dissenting).

[106] *Relevance of Foreign Legal Materials*, *supra* note 78, at 529.

[107] *Id.* at 530.

[108] Toobin, *supra* note 75.

[109] *Id.*

[110] *See generally Roper*, 543 U.S. at 604–05 (O'Connor, J., dissenting). Although Justice O'Connor's views may not be identical to those of the sitting justices, she seems to analyze and clarify the approach that past courts have taken, and conceivably could take in the future. *Id.*

prevailing in other countries."[111] As she said, where the international community has reached a consensus with regards to "fundamental human rights," those standards of international law can help confirm an emerging American consensus.[112]

Although he disapproves of the policy, Justice Scalia seems to echo Justice O'Connor's assessment that the Supreme Court has recently used international law to help determine "evolving standards of decency."[113] Conversely, Justice Thomas, in a concurring opinion, has suggested that justices only turn to international law "out of desperation" when there is no American law supporting such a ruling, which he finds inappropriate.[114]

IV. HOW THE UNITED STATES COULD RESPOND TO AN IACHR RULING

Any ruling by the IACHR will invariably entail some statement on the United States Supreme Court's constitutional interpretation of the Fourteenth Amendment. An unfavorable ruling would, at least to some degree, pronounce that the IACHR disapproves of the United States' due process jurisprudence. Thus, the Supreme Court would face a question of how to treat such a pronouncement.

A. RESPONDING AT EITHER EXTREME

The first extreme—that the Court should ignore the decision entirely—can be explained in a fairly straight-forward manner, particularly by relying on Justice Scalia's argument against the use of foreign and international law. Using this standard, foreign and international law has no place in interpreting American constitutional law.[115] Under his self-proclaimed originalist philosophy, Justice Scalia says, "[T]he Federalist Papers . . . are full of statements that make very

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[111] *Id*. at 605.

[112] *Id*.

[113] *Relevance of Foreign Legal Materials*, *supra* note 78, at 525. Justice Scalia expressly stated that he does not believe constitutional interpretation should change based on these "evolving standards of decency," but nevertheless, he noted that this is how the Court uses foreign and international law. *Id*. at 525–26.

[114] *Id*. at 528 (discussing Knight v. Florida, 528 U.S. 990). Justice Breyer did not refute this assertion outright. He simply argued that judges should look at these decisions and take them "for what they are worth." *Id*. at 528

[115] *Id*. at 521–22.

clear the framers didn't have a whole lot of respect for many of the rules in European countries,"[116] therefore they should not be used to interpret the Constitution today. Justice Scalia further adds that, even if one believes that the Constitution is an evolving standard, the only relevant standards are those of American society, "not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views."[117] Thus, it is very clear that from this perspective that the IACHR's ruling should have no impact on domestic law.

Conversely, the United States could adopt all of the measures recommended by the IACHR. This is very improbable, as even Jessica Gonzales's attorneys seem skeptical that this would actually happen.[118] Such recommendations would include the individual compensation and other remedies Gonzales seeks, in addition to programmatic reforms and changes in constitutional interpretation. None of the current Supreme Court justices have offered public statements that would indicate support for such action.

B. GRANTING JESSICA GONZALES INDIVIDUAL COMPENSATION

Assuming that the United States wants to adopt some of the IACHR's recommendations, there are a wide range of options available. First, it could somehow grant Jessica Gonzales the individual compensation she requests in her petition.[119] This could lead to several potential difficulties. Regardless of whether the outcome was correct, Jessica Gonzales's case was fully tried in the U.S. domestic court system, and she did not receive a favorable result. Article III of the U.S. Constitution expressly states that "[t]he judicial Power of the United States, shall be vested in one supreme Court."[120] As such, the Supreme Court is the final decision-maker, and giving compensation to Gonzales would seemingly turn the IACHR into a sort of "fourth-level" appellate court.

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[116] *Id.*

[117] *Id.* at 526.

[118] *Human Rights at Home*, *supra* note 32, at 55–56 ("Yet lurking in the background . . . are legitimate concerns over how (and whether) the U.S. Government will respond to the Commission's ultimate merits decision.").

[119] Summary of Petitioner's Argument, *supra* note 2, at 4. It is unclear from Gonzales' petition how or who would grant and enforce such compensation, but for argument's sake, it is an available remedy.

[120] U.S. CONST. art III, § 1.

Thus, even if it were possible to do so, this article argues that Jessica Gonzales should not be given any individual compensation. Throughout her petitions, she does not specify any mechanisms for obtaining compensation, but, nevertheless, it is one of her requests.[121] Unfortunately for Jessica Gonzales, as emphasized by the IACHR in its admissibility decision, she already lost her case in domestic courts, and the United States should not set a precedent that will allow international bodies to reverse the Supreme Court's decisions.

C. CHANGING U.S. JURISPRUDENCE

Additionally, Congress and state legislatures can choose to adopt many measures by ratifying human rights treaties and passing other legislation to prevent domestic violence. These can include increased funding for programs or could entail increasing protection for women and children, such as more stringent enforcement of restraining orders. A logical question, then, is what happens if legislatures enact strict enforcement measures? Will the courts uphold these laws? In particular, it is unclear how the Supreme Court would react to other mandatory arrest statutes similar to the statute at issue in *Town of Castle Rock v. Gonzales*.[122] Therefore, another possible change is that the Court could revise its Fourteenth Amendment jurisprudence relating to its interpretation of substantive due process, procedural due process, or both, and attempt to shift U.S. jurisprudence to be consistent with evolving standards of decency around the world. In direct contrast to the Court's findings in *DeShaney*, the American Declaration and other sources of international law support the notion that a government has an affirmative obligation to protect its citizens.[123] Furthermore, an

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[121] Summary of Petitioner's Argument, *supra* note 2, at 4.

[122] The majority opinion said "a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or . . . seek a warrant')." *Gonzales*, 545 U.S. at 761 (citations omitted). The majority, however, did not elaborate as to what further language would be necessary to ensure that the statute would be found to remove police discretion, so future statutes could face similar barriers. To be sure, general mandatory enforcement statutes like the Illinois statute cited in the ABA Standards would be too broad to be enforced, but states face a serious challenge in determining what language is sufficiently strong to make enforcement mandatory. *See infra* Part IV.C.3.

[123] *See, e.g.,* Gonzalez & Others (Campo Algodonero) v. Mexico, Judgment, Inter-Am. Ct.H.R. (Ser. C) No. 12.496, 12.497, 12.498, ¶¶ 287-90 (Nov. 16, 2009); Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 162-68 (July 29, 1988); *and* Osman v. United Kingdom (No. 98), 1998-VIII Eur. Ct. H.R. 3124.

unfavorable ruling in *Gonzales v. United States* would contradict the Supreme Court's holding that lack of police enforcement of a mandatory restraining order does not violate an individual's due process rights.

Accordingly, it would not be unfathomable to conceive that certain justices on the Court would allow this international law to influence their understanding of the meaning of "due process." Justice Scalia presumably would not do so, as he is on record as stating that he believes the definition of due process comes only from old English law.[124] Other justices, however, might be amenable to using international law as a means of understanding what due process encompasses.

In *Michael H. v. Gerald D.*, Justice Kennedy and Justice O'Connor disagreed with Justice Scalia's historical interpretation of the Due Process Clause, stating, "I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."[125] This presumably leaves the door open for international law to impact a due process analysis. As previously discussed, Justice Breyer supports referencing international law in "law-related human question[s]," which could also potentially encompass this analysis.[126] It could certainly be argued that protection of citizens from acts of domestic violence is as much a "law-related human question" as is the question of defining cruel and unusual punishment.

There are two primary ways the Court could adapt its Fourteenth Amendment due process jurisprudence that would protect people in Ms. Gonzales's position in the future. First, it could overturn its substantive due process interpretation from *DeShaney* and find that the government does, in fact, have an affirmative obligation to protect its citizens. Second, the Court could take a more moderate approach. For example, it could find an affirmative obligation in specific circumstances where the state has created an entitlement, such as when the legislature passes domestic violence statutes requiring enforcement of restraining orders.

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[124] *Relevance of Foreign Legal Materials*, supra note 78, at 525.

[125] Toobin, *supra* note 75 (citing Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) (citations omitted)).

[126] *Relevance of Foreign Legal Materials*, supra note 78, at 528.

1. REVERSING *DESHANEY* AND FINDING THE UNITED STATES HAS AN AFFIRMATIVE OBLIGATION TO PROTECT ITS CITIZENS FROM PRIVATE ACTORS

To be fully in accord with international law, the United States would have to overturn its holding from *DeShaney*, where it dismissed a substantive due process claim when the government failed to affirmatively act to protect a child from injuries by his father, a private actor.[127] Ever since its decision in 1989, *DeShaney* has been a source of criticism as being contrary to both United States law and international human rights law.[128] Under the American Declaration and other international human rights law, the State has an affirmative obligation to protect its citizens from harm, and the State must act with due diligence to protect its citizens from harm caused by third parties.[129] Thus, some advocates have argued that Gonzales's case should be the trigger for normative shifts in U.S. domestic law.[130] Of course, this would require revising more than twenty years of Fourteenth Amendment jurisprudence, premised predominantly on international law, which a majority of the Supreme Court might not be inclined to do.

2. USING AN IACHR RULING TO SHIFT U.S. DOMESTIC VIOLENCE POLICIES TOWARDS INTERNATIONAL STANDARDS OF DECENCY

Much like the United States has used international standards to move closer to conforming to world trends regarding the death penalty, the Supreme Court is more likely to take small steps to conform to international standards of decency in affirmatively protecting its citizens. The Court can adapt its jurisprudence to be more lenient in finding an individual "entitlement" to protection by the government, particularly when a legislature has enacted a law similar to the Colorado mandatory arrest statute. In such a circumstance, the Court could find that it does have an affirmative obligation to protect its citizens from private actors when states create such an entitlement.

In fact, the United States has recently demonstrated what is arguably a shift in its policy relating to protection from private actors. In

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[127] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989)).

[128] *Human Rights at Home*, *supra* note 32, at 62.

[129] Lapidus, *supra* note 35, at 549; *see also Human Rights at Home*, *supra* note 32, at 45–46 (citing various international standards).

[130] *Human Rights at Home*, *supra* note 32, at 62–63.

a brief to the Board of Immigration Appeals, the Department of Homeland Security noted that, in certain circumstances, domestic violence victims could constitute a cognizable social group, thus requiring special protection—asylum—in the United States when the laws of their home country are deficient.[131] Gonzales subsequently filed a supplemental brief to the IACHR asserting that this position is an implicit recognition by the United States that states bear a responsibility to protect their citizens, at least in domestic violence cases.[132] There are, however, some important distinctions between the situations. As the United States responded, *Matter of LR* dealt specifically with immigration law, rather than protection of citizens.[133] Additionally, the United States formulated its stance in *Matter of LR* based on a finding that seven Mexican states had not even criminalized domestic violence, while an additional fifteen states only sanctioned repeat offenders.[134] Despite the many criticisms of U.S. domestic violence policies, U.S. law cannot be said to be comparably lacking. Nevertheless, the Department of Homeland Security seemingly declared that Mexico's domestic violence protections do not comport with its perception of the standards of decency in modern society by urging the granting of asylum where foreign laws are deficient. As such, the United States' position in *Matter of LR* at least demonstrates that the government recognizes some degree of state responsibility to prevent domestic violence. Similarly, the United States' policy does not comport with the "standards of decency" or obligations to citizens outlined in the American Declaration, as reaffirmed in *Campo Algodonero*.[135] It would therefore not be inconsistent with those standards for the government and courts, in particular, to uphold this responsibility where a state establishes mandatory enforcement statutes.

Since the Court has been willing to refer to international law to influence "evolving standards of decency" under the Eighth Amendment, it would not be a huge leap to suggest that the Court should consider international standards to influence its Fourteenth Amendment jurisprudence. The Court has done so before in *Lawrence v. Texas*, a

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[131] Supplemental Brief of Dep't of Homeland Security at 12, *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf [hereinafter DHS Brief].

[132] Jessica Gonzales' Supp. Br. re Campo Algodonero & U.S. Asylum Law, Feb. 19, 2010, at 2.

[133] U.S. Gov't Resp. Br. re Jessica Gonzales' Letter of Feb. 19, 2010, Apr. 2, 2010, at 5.

[134] DHS Brief, *supra* note 131, at 17–18.

[135] Gonzalez & Others (Campo Algodonero) v. Mexico, Case Nos. 12.496, 12.497, 12.498, Judgment, Inter-Am. Ct.H.R. (Ser. C) No. 205, ¶¶ 238-415 (Nov. 16, 2009).

Fourteenth Amendment analysis that was presumably as much a "law-related human question" as the death penalty in *Knight v. Florida*.[136] That majority specifically noted that there was no specific reason or interest for the United States to restrict human rights in a manner different from other Western nations.[137] Domestic violence statutes have similarly evolved such that Colorado decided to pass a mandatory arrest statute in 1994.[138] Although *Lawrence* was a circumstance of the government restricting an individual right, there has similarly been no showing that in the United States the governmental interest in not enforcing mandatory restraining orders is "somehow more legitimate or urgent" than in other nations.

3. PROBLEMS WITH THE SUPREME COURT'S DECISION IN *GONZALES* SUPPORTING A SHIFT TOWARD INTERNATIONAL STANDARDS

As Justice Stevens noted in his dissent, Colorado's statute was enacted specifically for the purpose of forcing police to make arrests in order to prevent domestic violence.[139] Justice Stevens wrote, "[I]t is hard to imagine what the Court has in mind when it insists on 'some stronger indication from the Colorado Legislature'" to suggest the statute was meant to be truly mandatory.[140] Justice Stevens further criticized the majority for ignoring Supreme Court practice of deferring to state legislatures to interpret their own laws.[141] Consequently, in spite of the seven to two vote, the majority opinion in *Town of Castle Rock v. Gonzales* rests on shaky ground under the lens of international law.

Additionally, in performing its analysis and determining that the CRPD maintained discretion in spite of the Colorado mandatory arrest statute, the majority also relied on questionable authority. Justice Scalia's opinion quoted the American Bar Association's Standards for Criminal Justice to support the notion that police maintain discretion, "even in the

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[136] *See* Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (noting "values we share with a wider civilization" when discussing human freedoms around the world).

[137] *Lawrence*, 539 U.S. at 576–77.

[138] Town of Castle Rock v. Gonzales, 545 U.S. 748, 781 (2005) (Stevens, J., dissenting) ("[W]hen Colorado passed its statute in 1994, it joined the ranks of 15 States that mandated arrest for domestic violence offenses and 19 States that mandated arrest for domestic restraining order violations").

[139] *Id*. at 781–82.

[140] *Id*. at 782.

[141] *Id*. at 774.

presence of seemingly mandatory legislative commands."[142] Although it is unclear how heavily the majority relied on this non-binding authority, it is important to note the context from which the quote was taken. The ABA commentary was discussing "Full-Enforcement Statutes," which exist in "each and every state."[143] These are not the same as the type of mandatory enforcement statute at issue in Gonzales's case.[144] The statutes discussed in the ABA Standards are those that assign a general duty to police officers "to make an arrest *whenever the officer has grounds to believe a crime has occurred*."[145] In explaining this concept, the ABA Standards cite Illinois Revised Statute Chapter 125, Section 82, entitled "Duty of officers," which required that "[i]t shall be the duty of *every* policeman . . . when *any criminal offense* . . . is committed or attempted in his presence, forthwith to apprehend the offender . . . to be dealt with according to law."[146] The majority opinion, however, ignored another portion of the commentary within the same section, which specifically noted that *"[a]bsent the creation of a special relationship to the private citizen*, the police have no duty to enforce the law for the benefit or protection of any individual."[147] This commentary did not discuss mandatory arrest statutes for specific crimes or specific circumstances (such as violation of a restraining order), but the statute at issue in *Town of Castle Rock v. Gonzales* certainly can be argued to have created a "special relationship" between the CRPD and Jessica Gonzales so that she may have been entitled to protection. Nevertheless, the majority opinion used these guidelines to support its holding.[148]

It would not require significant revisions to Fourteenth Amendment jurisprudence for the Court to fulfill Gonzales's request that

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[142] *Id.* at 760–61 (majority opinion) (quoting STANDARDS FOR CRIMINAL JUSTICE §1-4.5 cmt. at 1-124 to 1-125 (2d ed. 1980)).

[143] STANDARDS FOR CRIMINAL JUSTICE § 1-4.5 at 1-124 to 1-125 (2d ed. 1980).

[144] These standards were written in 1980 and supplemented in 1986. *Id.* The first-ever mandatory arrest statute for domestic violence was enacted in Oregon in 1977. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM L. & CRIMINOLOGY 46, 63 (1992) (citing OR. REV. STAT. §§ 133.055(2), 133.310(3) (1989)). The latest date of any footnoted source in the ABA Standards was 1979. *See* STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980). The ABA Standards never mention Oregon's domestic violence statute, let alone criticize its mandatory enforcement provision. *See id.* It would not be an unreasonable extrapolation to say that these standards were written before anyone truly knew how mandatory arrest statutes specifically directed at domestic violence would play out, such that they are irrelevant to the discussion surrounding narrowly tailored statutes like Colorado's.

[145] STANDARDS FOR CRIMINAL JUSTICE § 1-4.5 at 1-124 (2d ed. 1980) (emphasis added).

[146] ILL. REV. STAT. ch. 125, § 82 (1977) (emphasis added).

[147] STANDARDS FOR CRIMINAL JUSTICE § 1-4.5 at 1-125 (2d ed. 1980) (emphasis added).

[148] Town of Castle Rock v. Gonzales, 545 U.S. 748, 760-61 (2005).

the Court uphold similar mandatory arrest statutes as actually being mandatory. The Colorado General Assembly specifically enacted this statute in 1994 as part of a nationwide trend to remove police discretion in order to curb domestic violence.[149] If the Court were to hold that where statutes are specifically enacted for this purpose, even without "some stronger indication" of intent by the legislature, it could then create an individual entitlement to police enforcement of restraining orders.[150] As long as individuals have a legitimate claim of entitlement to enforcement of restraining orders, the order would be a property right protected under procedural due process.[151]

Simply put, the majority opinion in *Town of Castle Rock v. Gonzales* set a high threshold for state laws to meet before they would supersede a presumption of police discretion. Following an IACHR finding, the Supreme Court could revise its requirements, instead making the threshold substantially lower for upholding these criminal statutes requiring mandatory enforcement of restraining orders. The Court could similarly revert to its earlier policy of giving deference to the appellate courts to interpret state laws, especially where mandatory enforcement statutes are at issue. Absent a showing that the Circuit Court is "clearly wrong" in its finding that a state law requires police enforcement of restraining orders,[152] the Supreme Court can give deference and find that an individual has an entitlement to police enforcement of mandatory restraining orders.

CONCLUSION

It may not be in the United States' best interests to fully adopt all of the IACHR's recommendations. Doing so could set a dangerous precedent, as it would amount to a sort of *de facto* reversal of the Supreme Court, thus opening the door for individuals to use the IACHR as an appellate court after receiving unfavorable domestic decisions. Indeed, during the Admissibility Hearing, the United States argued that any finding in favor of Gonzales would do exactly this, although

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[149] *Id*. at 779–81 (Stevens, J., dissenting).

[150] *See id*. at 789 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

[151] *Id*. (showing various intangible interests in which individuals can have a vested property interest).

[152] *Id*. at 775.

Gonzales refuted that it would occur.[153] Already, following in Gonzales's footsteps, a group of American women filed a petition with the IACHR, claiming to have lost custody of their children due to a bias in United States courts against victims of domestic violence.[154] While the IACHR determined that hearing the case would not "open the floodgates" against the United States, if the United States were to adopt all of the IACHR's recommendations, it could open the door to even more filed petitions. This could effectively turn the IACHR or other international bodies into fourth-level appellate courts, or "Supremer" courts, something that would amount to a blatant constitutional violation.

The United States, however, should not completely ignore the IACHR's decision—even though it would not be the first time it did.[155] If the United States wants to continue to set a standard for the rest of the democratic world, how can it justify completely ignoring a statement by the international community that some of its policies are insufficient and substandard in protecting the human rights of American victims of domestic violence? As Justice Kennedy said, "If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us."[156]

Thus, one fairly drastic option for the United States to adapt to international standards would be for the Supreme Court to revisit its entire substantive due process jurisprudence from *DeShaney* onwards, amending its stance to find an affirmative obligation for the government to protect its citizens. This, however, would be a dramatic change, and it is unlikely that the Court would be willing to do so simply based on the recommendations of the IACHR and the influence of other foreign and international law. A course of action like this would be akin to the Court abolishing the death penalty in its entirety based solely on the weight of international law. It is simply improbable.

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[153] Lapidus, *supra* note 35, at 552 (citing Gonzales v. United States, Observations Concerning the March 2, 2007 Hearing Before the Commission, Inter-Am. Ct. H.R. (ser. C) No. 1490-05, at 22–25).

[154] 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, 192 (2008) (citing Petition to Inter-American Commission on Human Rights on Behalf of Battered Mothers (May 11, 2007)).

[155] *Human Rights at Home*, *supra* note 32, at 49 (citing Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Serv.L./V/II.117, doc. 1 rev. 1 ¶ 150 (2002) (finding that the United States violated Dann's human rights by taking their property)).

[156] Toobin, *supra* note 75, at 50.

A more moderate—and practical—response would be for Congress, state legislatures, and other agencies to improve existing programs or implement new ones to prevent domestic violence. Many of Gonzales's requests could be implemented if the legislatures so desire. These include things like providing full funding for existing programs, collecting data, facilitating support services, and increasing education programs.[157] Similarly, the Senate and the President could choose to ratify the various treaties and conventions that Gonzales suggests.[158] These are decisions that domestic legislatures can make, and they would likely have the effect of improving the United States' image in the international community as a leader against domestic violence.

A question, though, arises as to whether legislatures should bother passing criminal statutes similar to Colorado's mandatory arrest statute. If the courts will not uphold the language of these statutes, there would not seem to be any point in doing so. Given the Supreme Court's lack of clarity as to what specific language it would uphold as establishing a truly "mandatory" arrest requirement in the face of Colorado's seemingly explicit language, state legislatures might be disinclined to pass similar laws.

What the Supreme Court should do, accordingly, is revise its position on statutes dictating the mandatory police enforcement of restraining orders. Without reversing its entire post-*DeShaney* jurisprudence, the Court could lower the threshold required to demonstrate that legislatures intended to remove police discretion. As a result, criminal statutes with language similar to that of the Colorado statute, stating that "[a] peace officer shall arrest, or . . . seek a warrant for the arrest" of a person violating a restraining order, would actually give the owner of the restraining order a legitimate entitlement to its enforcement, thus obligating police to arrest or seek a warrant for the arrest of violators of these orders or else be subject to § 1983 suits. This would also be consistent with the United States' stated policy in its brief from *Matter of LR*.[159]

It would also be consistent with the ABA Standards for Criminal Justice cited by the *Town of Castle Rock* majority to find that mandatory arrest statutes create the sort of "special relationship to the private

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[157] Summary of Petitioner's Argument, *supra* note 2, at 6–7.

[158] *Id*. at 5. This would certainly require further analysis as to the various obligations that these treaties would create and what sort of effects there would result from ratifying them. Nevertheless, it is an available option, should the Senate and President decide to pursue it.

[159] DHS Brief, *supra* note 131, at 14.

citizen" that will mandate police enforcement.[160] If that were the case, a domestic violence victim in Jessica Gonzales's situation would have a valid claim against a police department for a violation of her Fourteenth Amendment procedural right to due process. This would be tantamount to the Court's use of international law to abolish the juvenile death penalty; the Court would be taking a small step to more closely align with the prevailing world opinion as to current "standards of decency." In doing so, the United States would not only be sending a clear signal to the international community that it is fully intent on maintaining the sovereignty of its domestic courts, but also that it takes the problem of domestic violence very seriously, ideally preventing further tragedies like that suffered by Jessica Gonzales.

[160] STANDARDS FOR CRIMINAL JUSTICE §1-4.5, at 1-124 to 1-125 (2d ed. 1980).