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EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, “Promising Practices in Criminal Justice” focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran’s Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy’s Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability “to apply a suspect class framework to non-marriage sexual orientation laws.” Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today’s changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon
2015-2016 Editor-in-Chief
Law Journal for Social Justice

CONSTITUTIONAL PROTECTION OF DOMESTIC VIOLENCE VICTIMS REINFORCED BY INTERNATIONAL LAW

Marina Kovacevic, JD*

INTRODUCTION

Ratifying CEDAW remains among the unfinished business of the Civil Rights movement.

Dorothy I. Height
April 13, 2010

The United States may be a first world democracy, but, despite comprehensive laws that attempt to assuage it, domestic violence in the United States continues to be a widespread problem. Professor Jennifer Ulrich of Indiana University explains that the problem of domestic violence is present in many spheres of society. “Violence and the threat of violence are ubiquitous sources of death, injury and stress in the lives of women that cross lines of culture, age, ethnicity, economic status, and national boundary.”¹ In the United States, twenty-five percent of women, across nationally representative samples, experience domestic violence in their lifetime.² If this number continues to rise women will face a greater risk of violence. In order to provide victims of domestic violence with equal protection and due process under the law, the U.S. should adopt Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which will place a higher duty upon the state than the current standard.

In the U.S., there are approximately 237,800 sexual assault victims every year, including Intimate Partner Violence (IPV).³ IPV⁴ has ongoing

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¹ Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic within Reach?*, 7, IND. J. GLOBAL LEGAL STUD. 629, 631 (2000).

² Amy Bonomi et. al., “Meet me at the hill where we used to park”: *Interpersonal processes associated with victim recantation*, 73 ELSEVIER 1054, 1054 (2011) available at <http://www.kingcounty.gov/~media/Prosecutor/documents/2011/2011socialsciencemedicine.ashx>.

³ THE HUMAN RIGHTS INSTITUTE, MIAMI LAW SCHOOL HUMAN RIGHTS CLINIC & THE ACLU WOMEN'S RIGHTS PROJECT, DOMESTIC VIOLENCE & SEXUAL ASSAULT IN THE U.S.: A HUMAN RIGHTS BASED APPROACH & PRACTICE GUIDE 1 (2014) available at

and destabilizing effects on individuals, families and communities, resulting in violations of dignity and human rights.⁵ This paper will show that the U.S. Supreme Court has been lackluster in protecting domestic violence victims. The first section presents a transition of historical common law on women's issues to an intermediate standard of scrutiny in analyzing constitutional equal protection in gender discrimination cases. The paper then correlates equal protection and the discrimination against women in domestic violence by both their abusers and the court system that allows for such abuse.

In the second section, the paper presents a Supreme Court case, *DeShaney v. Winnebago County Department of Social Services*, in which the court cemented that police do not have a constitutional duty to protect citizens. The paper then shows the Supreme Court's distinction between an ongoing emergency, the defendant's right to confront the witness (the victim) and the role that police play. The third section is an overview of CEDAW and American support. The final section provides recommendation that the U.S. Senate ratify CEDAW and lists the reasons why it would provide additional protection to domestic violence victims.

I. THE SUPREME COURT AND EQUAL PROTECTION

A. Historical Supreme Court Protections

The U.S. response to domestic violence specifically and to women's equality issues generally has been a slow one. While women deserve political, economic, social, institutional, and formal recognition by the federal and state governments, existing inequality stems from the US government's failure to grant women equal protection. The long and disgusting past of discrimination against women in American history helps explain why the 19th Amendment to the U.S. Constitution, affording women equal voting rights, was passed relatively recently.

This history includes common law, in which the husband and wife were thought to be one legal body thinking as one—as the man—denying

http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_sa_hr_guide_reduce.pdf.

⁴ Intimate Partner Violence is defined as physical, sexual, or psychological harm by a current or former partner or spouse. This type of violence can occur among heterosexual or same-sex couples and does not require sexual intimacy by the Centers for Disease Control and Prevention. *Intimate Partner violence*, CDC, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/> (last updated May 28, 2015).

⁵ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3, at 1.

women constitutional and political power.⁶ Further, common law was accompanied by religious beliefs that women were created by God to work in the home and men to work outside the home, which influenced the political and legal statuses of women.⁷ The history of romantic paternalism, in which women's workplaces could be regulated for their own safety and protection, also made the path to equality ever more difficult.⁸

B. The Rise of the Intermediate Standard in Gender-Based Discrimination

Today, the U.S. Supreme Court continues to subjugate women by applying intermediate scrutiny when considering issues affecting the equal rights of women rather than the higher standard of strict scrutiny. The Court determines the appropriate level of scrutiny by applying a test that assesses a group's need for protection. The highest form of constitutional analysis based on equal protection is strict scrutiny,⁹ with factors that include immutable traits as targets of discrimination, political powerlessness and a history of discrimination.¹⁰ Strict scrutiny is the highest standard imposed on legislatures to prove that a law is constitutional.¹¹ To pass strict scrutiny, the legislature must create a law to further a compelling governmental interest and that law must be narrowly tailored to achieve that compelling interest.¹² Lower standards are intermediate scrutiny and rational basis. To pass intermediate scrutiny, the purpose of the law must be important and the means to achieve it,

⁶ Hoyt v. Florida, 368 U.S. 57, 82 (1961).

⁷ Bradwell v. Illinois, 83 U.S. 130 (1872). This case illustrates how connected the law was to religious beliefs at the time and how that connection treated women's roles in personal and public life.

⁸ Muller v. Oregon, 208 U.S. 412 (1908). This case discusses the idea of "romantic paternalism," which fueled law and society. The idea was that one person in the marriage knows better than the other and that the role is better for men to take, for the safety and protection of the woman and the family.

⁹ Maher v. Roe, 432 U.S. 464 (1977). Strict Scrutiny is a constitutional analysis in which the Supreme Court determines that a law violates equal protection by violating a fundamental right or targeting a suspect class. To withstand this constitutional muster there must be a compelling state purpose for the law in question, achieved through narrowly tailored means.

¹⁰ United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938) and for immutability, see *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

¹¹ *Id.*

¹² *Id.*

substantially related.¹³ Rational basis is the lowest and least difficult burden to meet, the interest must be rational and the means reasonable.¹⁴

The history of discrimination against women supports the proposition that strict scrutiny should be the applicable standard in gender discrimination cases. Specifically, gender is typically an immutable characteristic and women have endured a history of discrimination with the aid of the law and powerlessness in American politics and important decision-making.¹⁵ For example, Justice Ruth Ginsburg wrote, “When the post-Civil War amendments were added to the Constitution, women were not accorded the vote. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings. The fourteenth amendment left all that untouched.”¹⁶

The court has repeatedly applied a standard less than strict scrutiny when determining the constitutionality of governmental gender classifications. The court decided that intermediate scrutiny would be appropriate for analyzing constitutional violations based on gender, thereby allowing a discriminatory law to pass if it held some important value.¹⁷ Analyzing gender equality claims, in *Kirchberg v. Feenstra*, the court used intermediate scrutiny to invalidate a Louisiana law that gave a husband, as “head and master” of property jointly owned with his wife, the unilateral right to dispose of such property without his spouses’ consent.¹⁸ Further, the court affirmed its insistence on the intermediate scrutiny standard in *United States v. Virginia*, where the court concluded that a “heightened scrutiny” is sufficient for gender discrimination and equality claims.¹⁹ The court determined that a more stringent standard was necessary for gender discrimination than mere rational basis, but still not quite as stringent as racial discrimination. No explanation was given as to why gender discrimination does not deserve the same level of scrutiny as racial discrimination.

¹³ *Id.*

¹⁴ *Railway Express Agency, Inc. et al. v. New York*, 336 U.S. 106 (1949).

¹⁵ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 867 (Vicki Been et al. eds., 4th ed. 2013).

¹⁶ Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L. REV. 161, 162-163 (1979).

¹⁷ *Craig v. Boren*, 429 U.S. 190, 397 (1976). Here, the court provided a definition of the intermediate standard. In order for the state to overcome the intermediate scrutiny standard, it must show that the law or policy challenged furthers an important government interest in a way that is substantially related to that interest; a lower standard to meet than strict scrutiny.

¹⁸ *Kirchberg v. Feenstra*, 450 U.S. 455, 460 (1981).

¹⁹ *United States v. Virginia*, 518 U.S. 513 (1996).

C. The Correlation Between Domestic Violence and Gender Discrimination

A relationship exists between domestic violence and gender discrimination. The Supreme Court perpetuates that relationship by failing to apply the strict scrutiny standard to decisions concerning either of the two. As long as the Supreme Court refuses to afford women a higher protection than the intermediate scrutiny standard in equal protection cases, women will be left vulnerable to violence. A refusal to recognize general discrimination against women as gender discrimination leaves women who are victims of domestic violence at risk of the same judicial treatment as a constitutional analysis of gender discrimination, where the court does not attempt to afford the issue the highest form of scrutiny available.

Domestic violence and sexual assault are two of the most prevalent forms of gender-based violence because they are directed against an individual based on gender or have a disproportionate effect on a group that is identified with a particular gender.²⁰ In this way, domestic violence, which disproportionately affects women, is a form of discrimination against women. When a court allows the continued disproportionate amount of violence toward women by not recognizing that the issue needs the most stringent form of analysis, it allows for discrimination against women. Both of these forms of discrimination are against the Equal Protection Clause of the U.S. Constitution and against international human rights norms.²¹ If courts fail to protect women from their abusers, courts themselves perpetuate the cycle of discrimination because they allow abusers to discriminate violently against their victims.

Judicially allowing violence to occur is a form of discrimination, which is even more egregious if courts recognize domestic violence as a private matter. When the courts or society deem domestic violence a private matter it re-institutionalizes the belief that, what happens in the home, stays in the home. This is an archaic view contiguous with common law notions of the woman as homemaker and romantic paternalism notions that the woman needs watching over. Violence against women feeds off discrimination and serves as reinforcement.

Discrimination in domestic violence manifests in unequal power relations between men and women.²² Violence against women is further

²⁰ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3, at 1

²¹ *Id.*; *see infra* Part III.

²² *End the Cycle of Violence*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/women-s-rights/violence-against-women> (last visited Dec. 1, 2015).

compounded by discrimination on the grounds of race, ethnicity, sexual identity, social status, class, and age.²³ These multiple forms of discrimination further restrict women's choices, increase their vulnerability to violence, and make it even harder for women to obtain justice.²⁴ As long as a state allows domestic violence statistics to rise, the state reinforces discrimination against victims of domestic violence, which are predominantly women.

II. THE SUPREME COURT AND DUE PROCESS

A. Police Duty to Protect

Imagine a woman, who is slapped, kicked, and verbally assaulted every day. She decides one day that she can no longer endure the abuse or due to the abuse it may be her last day alive. She calls the police, but what are the police to do? Though police officers are some of the most courageous people that are willing to protect the innocent, they do not have a judicially recognized duty to do so. According to the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*,²⁵ the police have no duty to protect the public from private violence.²⁵ There, former Chief Justice Rehnquist interpreted the constitution in such a way that provides no protection to the victim if the police officer involved decides against protection by not responding to the call, not arresting either spouse, or simply determining that there is not enough evidence to label it a domestic violence problem. The officer holds the reins in such circumstances.

In *DeShaney*, the court determined, "Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."²⁶ The Clause therefore is limited to a protection from state deprivation of life, not a guarantee of minimal state protection. Thus, its language cannot be extended to impose an affirmative obligation on the State to ensure that those interests are not harmed through other means perpetuated by a private actor.²⁷ Therefore, the police officer has no duty to keep a victim safe from the aggressor.

²³ *Id.*

²⁴ *Id.*

²⁵ *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189 (1989).

²⁶ *Id.* at 194.

²⁷ *Id.*

The *Deshaney* Court overtly admits that the Due Process Clause generally confers no affirmative right to governmental aid. Even where such aid may be necessary to secure life, liberty, or property interests which the government itself may not deprive the individual.²⁸ Therefore, when the abused woman calls the police and the police do not provide safety, she has no recourse because the police have discretion and do not have a duty to protect. This is true even if she is physically injured.

If police departments across the nation relied on this basic *DeShaney* premise that police officers do not have a duty to protect, the future of victims in dangerous situations would be uncertain. Fortunately, hundreds of police departments in the US have developed their own duties and policies and courageously protect victims while enforcing the law. In fact, the Phoenix Police Department's Chief of Police, Daniel Garcia, prides the department as setting the highest professional standard, including a mission to protect the community from harm while ensuring justice.²⁹ This would mean that the department obligates itself to protecting victims in dangerous situations, including domestic violence, on at least a minimal level.

B. Ongoing Emergency vs. Defendants' Rights

The judiciary has been confronted with competing issues between the constitutional guarantee that the defendant has a fair trial and the safety concern of the victim, coupled with the state's need to prosecute wrongdoers. The U.S. court system has been reluctant to rule on the side of the victim in several important cases.

In *Hammon v. Indiana*, the court was asked to determine whether the abuser's right to cross-examine the victim outweighed the need to prosecute the defendant.³⁰ Hershel Hammon was arrested on domestic violence charges after police responded to a call from his wife, Amy, claiming that defendant had beaten her.³¹ While attempting to investigate what had transpired and assuage the ongoing emergency, the police officer at the scene questioned the victim and ultimately gained evidence of abuse.³² While Amy Hammon did not testify at the criminal trial, the

²⁸ *Id.*

²⁹ CITY OF PHOENIX, PHOENIX POLICE DEP'T, POLICING WITH A PURPOSE, *available at* <https://www.phoenix.gov/policesite/Documents/103887.pdf>.

³⁰ *Hammon v. Indiana*, 546 U.S. 126, 131 (2006).

³¹ *Id.*

³² *Id.* at 1218.

police officer testified about what she had told him.³³ Mr. Hammon's attorney objected to the admission of the testimony, but the trial judge allowed it under the "excited utterance"³⁴ exception to the general rule against hearsay.³⁵

Mr. Hammon appealed and the case eventually progressed to the Supreme Court, for which Justice Scalia wrote an opinion in Mr. Hammon's favor. Scalia, speaking for the majority, ruled that the victim's statements to the police were testimonial³⁶ and the Sixth Amendment forbids the victim's testimony to be used against the abuser without her presence at his trial.³⁷ Often, victims of domestic violence are afraid to testify in court against their abusers or do not wish to relive the abuse again, so they opt out of testifying. This proves difficult for the abuser to examine the victim as a witness, so a victim's absence works against her, such as the case for Amy Hammon. The Court reasoned that at the time of questioning, the victim did not face an emergency or a threat to her safety.³⁸ The presence of the officer at the scene made the scene relatively safe and the situation formal enough to qualify the statements made by the victim as testimonial and therefore inadmissible.³⁹

There exists a pattern of peril in a violent relationship, including the tendency of an abuser to return and continually harm the victim or the victim's friends and family. For example, more than three women are murdered by their husbands or boyfriends in the United States every day.⁴⁰ One such case was *Michigan v. Bryant*, which is distinguishable from *Hammon* because the court allowed police testimony based on an ongoing emergency.⁴¹ In *Bryant*, the defendant was arrested for second degree

³³ *Id.*

³⁴ FED. R. EVID. 803(2). An exception to the rule of hearsay, an excited utterance is "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

³⁵ FED. R. EVID. 801(c). Defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence by a party "to prove the truth of the matter asserted in the statement."

³⁶ *Crawford v. Washington*, 541 U.S. 124,177 (2004). This case expresses that the Confrontation Clause in the 6th Amendment prohibits testimony against the defendant that would disallow defendants to cross examine a witness, which would be inadmissible in court.

³⁷ *Hammon*, 546 U.S. at 180.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ H. LIEN BRAGG, U.S. DEP'T OF HEALTH & HUM. SERVICES. CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 16 (2003), <https://www.childwelfare.gov/pubPDFs/domesticviolence2003.pdf>.

⁴¹ *Michigan v. Bryant*, 131 U.S. 1130 (2011).

murder and claimed that his Sixth Amendment right to confrontation was violated when the lower court introduced evidence that the victim identified the defendant to the police before the victim's death.⁴² The police had found the victim at a gas station, severely wounded, and right before dying he told them that Bryant had shot him. The officers' statement recounting what the victim had told them was not deemed testimonial because it was made during an emergency situation with police.⁴³ Justice Sonya Sotomayor delivered the opinion of the court, concluding that the identification and description of the shooter and the location of the shooting the victim stated to police were valuable tools for the police to assess the ongoing emergency.⁴⁴ The Court determined that in this situation, the safety of the victim and of the public outweighed the defendant's constitutional right.⁴⁵

The difference between *Hammon* and *Bryant*, the Court seems to say, is the existence of an ongoing emergency. However, the difference is actually in the facts, that one case is a situation of domestic violence and the other is about random violence. The Court thus made the distinction: a domestic violence victim is essentially afforded less protection than a victim of random violence, unless there is clear evidence of an ongoing emergency. This distinction fails to recognize that in most cases of planned, patterned and coercive control and domestic violence over the victim, there is an ongoing emergency.

III. CEDAW

A. Overview

CEDAW, adopted in 1979 by the United Nations General Assembly, is often described as the international "Bill of Rights" for women.⁴⁶ The treaty is a major push for recognizing women's rights as something deeper than civil rights; it is to recognize them as human rights.⁴⁷ Consisting of a Preamble and thirty articles, CEDAW defines the concept of gender

⁴² *Id.* at 1146.

⁴³ *Id.*

⁴⁴ *Id.* at 1167.

⁴⁵ *Id.*

⁴⁶ *Convention on the Elimination of All Forms of Discrimination Against Women*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Dec. 9, 2015).

⁴⁷ Catherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 509 (1993).

discrimination and acts as a guide to state parties on discrimination legislation.⁴⁸ The fundamental theme of CEDAW is absolute equality.⁴⁹ State parties must ensure such equality in cultural, social, economic, civil and political spheres between the sexes.⁵⁰

By accepting the treaty, states commit themselves to undertake a series of measures to end discrimination against women in all forms.⁵¹ This includes incorporating the principle of equality of men and women in their legal system; abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women; establishing tribunals and other public institutions to ensure the effective protection of women against discrimination; and ensuring elimination of all acts of discrimination against women by persons, organizations or enterprises.⁵² Including the principal of equality into the legal system necessarily extends the obligation to include it into the legislative system, if one exists.⁵³

Article II § 2 of the United States Constitution vests the power in the President and the Senate to ratify a treaty.⁵⁴ The President first signs the treaty, then passes it on to the Senate Committee on Foreign Relations through the State Department.⁵⁵ At that point, the State Department may make specific changes to the treaty.⁵⁶ If the Committee approves the treaty, it may send the treaty to the whole Senate for action.⁵⁷ The Senate may make its approval conditional by including in the consent resolution, amendments to the text of the treaty, its own changes, or other statements.⁵⁸ With two thirds of the Senate's approval, the President can then move forward with the formal process of ratification, which includes submitting documents of the U.S. Government's agreement to abide by the

⁴⁸ *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 46 (explaining CEDAW).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 46.

⁵³ *Id.*

⁵⁴ U.S. CONST. art. I, § 2. (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

⁵⁵ *How Does the United States Ratify Treaties?*, CONVENTION ON THE RIGHTS OF THE CHILD, <http://childrightscampaign.org/why-ratify/how-does-the-united-states-ratify-treaties> (last visited Dec. 2, 2015).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

treaty, as well as any changes.⁵⁹ This process signifies the U.S.'s promise to abide by the treaty's conditions and binds the U.S. to obligations created under the treaty.

B. American Support

American support of CEDAW has been variable. It appears that every time supporters of the treaty attempt to take a step forward, the process of adopting CEDAW takes a step back. On June 24, 2014, the Senate Foreign Relations Subcommittee, chaired by Senator Barbara Boxer, held a hearing, featuring testimony by an unprecedented number of women Senators, who called for action on CEDAW to stem the tide of violence against women and girls.⁶⁰ Influential political leaders such as Senator John Kerry and President Obama called it "a critical tool for the U.S. to speak out against violence and discrimination against women across the globe."⁶¹ Despite such efforts, while the U.S. Senate Foreign Relations Committee voted in July, 2002 to recommend ratification of CEDAW, the treaty has never come before the full Senate for a vote.⁶²

One major argument opponents use against the implementation of CEDAW is that it contradicts the Equal Protection Clause of the US Constitution. They argue that although the gender classifications of the Convention probably serve an important state interest as required by the intermediate scrutiny test, they may not bear enough relationship to the state's objectives.⁶³ Specifically, Senators who rejected CEDAW claim that the Convention may not be necessary since existing U.S. laws already protect women and that the differences in the Convention may not be necessary to achieve equality.⁶⁴ This claim can be rebutted simply by examining existing statistics on gender-based violence mentioned herein throughout, which continue to be a problem. Another argument against the implementation of CEDAW is that the U.S. Senate legitimately fears international control over U.S. sovereign power and freedom to implement its own laws, based on its own notions of human dignity.⁶⁵

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Amnesty International, *A Fact Sheet on CEDAW: Treaty for the Rights of Women* (2005), http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf.

⁶³ Jennifer L. Ulrich, *supra* note 1, at 631.

⁶⁴ *Id.*

⁶⁵ LUISA BLANCHFIELD, CONG. RESEARCH. SERV., RL33652, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): CONGRESSIONAL ISSUES 9 (2006), <https://www.fas.org/sfp/crs/misc/RL33652.pdf>.

However, a less legitimate reason many conservative Senators have opted not to adopt CEDAW is its social implication—that CEDAW will impose too intricately upon private matters within the home. Specifically, some argue that CEDAW dismissed “established moral and ethical principles” and discriminated against “traditional” families who follow religious beliefs.⁶⁶ Lastly, many opponents do not support CEDAW’s insistence on creating education for women on domestic violence issues because these issues should be dealt with in a traditional, family forum. For example, they cite the CEDAW Committee General Recommendation 19, which correlates “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped role” to “practices violence or coercion.”⁶⁷ However, this claim assumes that allowing women to be placed in stereotypical, subordinate roles should be admissible, or left up to the family unit to decide. These conservative views feed into the discrimination that women face in today’s American society, fueled by outdated notions that IPV is something that occurs privately and should be handled as such.

IV. BENEFITS OF ADOPTING CEDAW

A. CEDAW Would Strengthen Equal Protection

Adopting a human rights perspective for IPV victims would alleviate some of the problems Americans face in domestic violence. For this reason, the US Senate should adopt CEDAW with changes it deems appropriate. A human rights perspective within the international community with an emphasis on human dignity, fairness, and equality has long been enforceable. CEDAW recognizes that violence against women is discrimination against women, as evidenced by General Recommendation 19 by the Committee, “[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.”⁶⁸ International human rights law provides a framework to

⁶⁶ LUISA BLANCHFIELD, CONG. RESEARCH. SERV., R40750, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 13 (2011), <https://www.fas.org/sgp/crs/row/R40750.pdf>.

⁶⁷ *Id.* at 13.

⁶⁸ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3 at 32.

evaluate existing problems and identify solutions aimed at preventing gender-based violence.⁶⁹

More generally, human rights principles focus on governmental responsibility to act proactively and take steps to prevent acts of discriminatory, gender-based violence committed by both private and governmental actors.⁷⁰ CEDAW legally binds signatory governments to eliminate all forms of discrimination against women in public and private life, including within the family, and aims to achieve substantive equality where women are able to enjoy the human right to equal access of the law.⁷¹

Narrowly, CEDAW is a tremendously useful tool for eliminating domestic violence against women. To deal with gender-based violence meaningfully, countries must adopt a discourse that questions the continuation of that violence and the roots of IPV, which extend deeply into institutionalized laws regarding IPV.⁷² This includes the way the Supreme Court and police have treated instances of IPV, especially the way the Supreme Court itself has discriminated against women, and IPV victims specifically. Though CEDAW does not specifically regulate domestic violence, it generally prohibits any sort of discrimination against women, which includes violence. Violence is a form of discrimination against women, by both the abuser and the authority that allows it to continue. The General Assembly Resolution on CEDAW explains that IPV is a piece of a whole system of discrimination against women, “violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women”⁷³ If the state allows for private violence against women, it condones an unequal treatment of women in society. If the state then does not allow due diligence, it discriminates against the woman and thereby violates CEDAW.

Violence against women is perpetrated when legislation, law enforcement and judicial systems condone or do not enforce domestic violence laws. CEDAW defines discrimination as “any distinction, exclusion or restriction made on the basis of sex...in the political,

⁶⁹ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3 at 5.

⁷⁰ *Id.* at 6.

⁷¹ *WURN Mission Statement*, WOMEN’S UN REPORT NETWORK, <http://www.wunrn.com> (last visited Dec. 9, 2015).

⁷² Jennifer L. Ulrich, *supra* note 1, at 631-32.

⁷³ Declaration on the Elimination of Violence Against Women, U.N. Doc. A/RES/48/104 (Dec. 20 1993).

economic, social cultural, civil or any other field” committed by both private and governmental actors.⁷⁴ The Convention explicitly acknowledges that “extensive discrimination against women continues to exist,” and emphasizes that such discrimination “violates the principles of equality of rights and respect for human dignity.”⁷⁵ In Article 3, CEDAW gives positive affirmation to the principle of equality by requiring State parties to take “all appropriate measures . . . to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”⁷⁶ CEDAW manifests the necessity that state parties take a proactive, positive role in enforcement of discrimination in a domestic violence shape.

Under International Human Rights law, the legal obligation of states is not only to refrain from continuing human rights violations, but also to protect victims of human rights violations against them.⁷⁷ CEDAW recognizes fundamental rights associated with domestic violence: the right to physical integrity, which may implicate the right to life, and the right to equality before the law.⁷⁸ The state’s unwillingness to recognize and address violent discrimination, or worse, the state’s own continuance of the cycle of discrimination through the use of relaxed constitutional analysis standards, is a violation of CEDAW and these fundamental human rights. The element of inequality before the law strengthens the argument that fundamental human rights have been violated not only because gender discrimination adds another human rights violation, but also because the victim’s suffering becomes part of a systematic failure on the part of the state to protect women’s rights.⁷⁹ Institutional allowance of domestic violence in the form of lack of prosecution or police intervention perpetuates the continuation of domestic violence, manifesting an institutional violation of human rights.

Human rights principles insist that gender-based violence, which disproportionately impacts women and sexual minorities, should receive the same treatment, attention and resources as other serious crimes of violence.⁸⁰ If the U.S. adopted the human rights perspective of CEDAW,

⁷⁴ *Id.* at 6.

⁷⁵ UN WOMEN, *supra* note 46.

⁷⁶ U.N. Doc. A/RES/48/104, *supra*, note 73, art.3.

⁷⁷ Catherine M. Culliton, *Finding a Mechanism to Enforce Women’s Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT’L L. J. 507, 513–14 (1993).

⁷⁸ *Id.* at 514.

⁷⁹ *Id.*

⁸⁰ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3, at 1.

the Supreme Court would have a duty to create some higher standard than intermediate scrutiny when analyzing gender discrimination in equal protection cases. Comparable to discrimination based on a suspect class with immutable traits and a history of discrimination, gender discrimination would need to be addressed parallel to race classifications. This would call for strict scrutiny.

When violence targeting a specific race or nationality occurs and it is perpetuated by state or federal law, the Supreme Court has applied the strict scrutiny formulation. The Court has not done so for gender-based violence because it is done by a private actor rather than the state or federal government. International Human Rights Law, specifically CEDAW, imposes liability upon a government for entirely private acts of private individuals if it can be shown that it did not do all it could or should have to prevent such actions, or failure to investigate and punish them after the event.⁸¹ Under CEDAW, the US Supreme Court would have to adopt a human rights perspective and eliminate its own form of discrimination that results from the use of a lowered analytical standard.

B. CEDAW Would Strengthen Due Process

If the U.S. adopted CEDAW, it would create an obligation of due process that would protect victims of domestic violence. International law recognizes that a state has a commitment to due diligence and due process. Due diligence calls for laws, policies, programs and practices that empower survivors of human rights violations, such as gender-based violence, and alleviate sources of disempowerment and discrimination that can occur on an individual or systemic level.⁸² These include a government obligation to protect individuals from harm and calls for effective investigations and remedies when violations occur.⁸³ Governments must prevent and respond to domestic and sexual violence committed by public as well as private actors.⁸⁴ Under this framework, government responsibility ensues when it knew or ought to have known of a real and immediate risk to an identified individual and it fails to take reasonable steps to prevent the harm.⁸⁵

In correlation with equal protection, the adoption of CEDAW would afford due process rights on a grander scale with the systematic

⁸¹ PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 193 (2013).

⁸² *Id.*

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ *Id.*

implementation of steps to both avoid domestic violence and punish abusers. If the state accepted international due diligence mandates, it would decrease the amount of gender discrimination now in existence. This is because due diligence requires governments to (1) take all appropriate measures to prevent gender-based violence from occurring; (2) offer appropriate protections to potential targets; (3) investigate violence when it does occur; (4) hold offenders to account for their actions; and (5) provide remedies and compensation for victims.⁸⁶

Even if a state insists domestic violence is a non-legal or private matter left to society to cure, it still must apply higher standards to comply with CEDAW. Article 5(a) of CEDAW states:

States Parties shall take all appropriate measures... [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁸⁷

In international cases where countries have adopted CEDAW, the CEDAW Committee has found that a country violates the anti-discrimination aspect of CEDAW where it fails to protect the victim from her abusive husband. More specifically, the Committee concluded that these failures amounted to a violation of petitioner's right to life and right to mental and physical integrity, both of which are specific protections in CEDAW.⁸⁸ Therefore, the CEDAW and the international due diligence standard would require more serious protective measures be afforded to domestic violence victims.

The due diligence standard would protect the victim in cases such as the *DeShaney* case because it would impose a duty on state actors to protect victims from further violence. Due diligence imposes a governmental obligation to protect its citizens from harm and to investigate the wrongdoing. If this attitude were adopted, the police would have to undergo steps to assure that the victim is protected. Further, if this due diligence view were adopted, police discretion would likely presume at minimum investigation of the identity of the aggressor.

The Special Rapporteur on the Violence of Women, Rashida Manjoo, explained that the state has a duty to protect women from domestic

⁸⁶ *Id.* at 7.

⁸⁷ UN WOMEN, *supra* note 46, at art. 5(a).

⁸⁸ THE HUMAN RIGHTS INSTITUTE, ET AL., *supra* note 3, at 12.

violence by holistically institutionalizing their safety. She explains: “[T]he UN Declaration on Elimination of Violence against Women requires States to ‘exercise due diligence to prevent, investigate, and in accordance with national legislation punish acts of violence against women whether those actions are perpetrated by the State or private persons. . . .’”⁸⁹ To achieve this, States must develop penal, civil, and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women.⁹⁰ In this way, the state has a positive duty to punish perpetrators. Otherwise, the state will be held accountable by the international human rights community.⁹¹ The state, therefore, would be obligated to implement a system where the victim is afforded a deeper protection than the *DeShaney* decision and various current police practices.

The due diligence standard would recognize that emergency situations like those addressed in *Hammon* and *Bryant* would allow police officers to continue their investigation and ensure that ongoing emergencies are prevented. If a police officer knew or ought to have known that a risk was imminent, the officer would be required to take reasonable steps to prevent that risk. A domestic violence victim whose abuser was nearby, corroborated by a previous pattern of abuse and intimidation, would be protected by reasonable steps by the police officer to protect her. In such a case, the police officer could testify in court as to his or her determination whether there was an ongoing emergency, and this testimony would not be considered hearsay if the victim failed to appear in court.⁹²

CONCLUSION

The United States Senate should ratify CEDAW for the protection of domestic violence victims because current Supreme Court precedents have failed to effectuate total equality between the two genders. The Supreme Court has not only allowed private discrimination, but has also discriminated against women by not affording them equal protection through its use of intermediate scrutiny in equal protection cases dealing with gender discrimination. Thus, the Supreme Court has violated

⁸⁹ *Id.* at 3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² FED. R. EVID. 803. Exceptions to the Rule Against Hearsay, subsection 1 Present Sense Impression: A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. FED. R. EVID. 803(1). Here, the officer would have been collecting information from the victim to ascertain the level of emergency and to locate the perpetrator, so the victim’s statement would be describing the events that transpired for that purpose.

women's equal protection and due process rights. Such a problem could be assuaged by the adoption of CEDAW, which views domestic violence as a form of discrimination against women and values the fundamental rights of human dignity and equality.

