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Freedom From Domestic Violence as a Fundamental Human Right

The University of Texas School of Law Human Rights Clinic in Association with the Domestic Violence Clinic, the Legislative Lawyering Clinic, and the Austin/Travis County Family Violence Task Force

Executive Summary

The University of Texas School of Law Human Rights Clinic, in conjunction with the Domestic Violence Clinic, the Legislative Lawyering Clinic and the Austin/Travis County Family Violence Task Force are proposing a resolution at the City and County levels that will declare freedom from domestic violence to be a fundamental human right. This resolution will provide a unified philosophical approach to domestic violence services in the Austin/Travis County community, and includes a call to action, which ensures practical measures will be taken to improve current procedures for protecting and providing support to those affected by domestic violence. Acknowledgement that freedom from domestic violence is a human right creates a duty on the part of city and county officials to take affirmative action to protect their citizens from domestic violence.

Domestic violence is the leading cause of injury to women in the U.S. between 15-44. Domestic violence also disproportionately affects minority women. Black women are 35% more likely to experience domestic violence than white women, and 39% of Texas Hispanic Women experience severe abuse in their lifetime. In 2012, 198,366 family violence incidents were recorded in Texas and increased 11.5% from 2011. In 2012, 8,893 family violence incidents occurred in Travis County. In 2012, 114 Texas women were killed as a result of family violence. In 2010 and 2011, domestic violence was a factor in 29% of homicides in Travis County.

Town of Castle Rock, Colorado v. Gonzales was a significant domestic violence case where the United States Supreme Court found that the town of Castle Rock's failure to enforce Jessica Lenahan's restraining order against her ex-husband, resulting in the murder of her three daughters, did not violate her constitutional right to due process. A report by the Inter-American Commission on Human Rights found that the United States, due to Castle Rock's failure to enforce her restraining order, violated several of Lenahan and her daughters' fundamental human rights. This case has been instrumental in sparking a nationwide movement whereby communities are declaring freedom from domestic violence to be a fundamental human right.

The international human rights community, including the United Nations, has acknowledged that freedom from domestic violence is a human right. As such, domestic violence is not a private matter and public authorities should act with due diligence to prevent, protect against and eradicate such violence. Moreover, acts of domestic violence violate other fundamental rights including the right to life, the right to freedom from torture and cruel, inhuman, and degrading treatment, the right to non-discrimination, and the right to judicial remedies.

Other cities and counties have acknowledged that domestic violence abrogates these rights and have passed resolutions similar to the resolution being proposed in Austin and Travis County. The proposed resolution takes the declaration a step further and includes a call to action that ensures practical and quantifiable results. By passing this resolution the City and County will be in a better position to provide more effective support for those affected by domestic violence and have taken a crucial step towards eradicating domestic violence in our community.

I. Introduction

Domestic violence is a longstanding and persistent problem around the globe. Often, domestic violence is treated as a private matter, which isolates and alienates victims.¹ One important step Austin and Travis County can take towards curtailing and eventually eradicating domestic violence is to declare freedom from domestic violence to be a fundamental human right. Reframing the epidemic of domestic violence as a human rights violation removes the issue from the private sphere and sheds public light on the widespread impact of domestic violence. Not only will this alter societal perception of domestic violence, but it provides a unified philosophical approach to domestic violence in Austin and Travis County. This has the power to prompt improvement in the effectiveness of current procedures for protecting and providing support for victims.

II. Why Should Freedom from Domestic Violence Be Declared a Human Right?

The first step in acknowledging freedom from domestic violence as a fundamental human right is to understand the meaning of the term “human rights.” At their core, human rights are the recognition of “the inherent dignity” and “the equal and inalienable rights of all members of the human family.”² Put in plain language, human rights are the immutable rights all human beings possess simply for being human. The Universal Declaration of Human Rights codifies various fundamental human rights, including the right to life, the right to non-discrimination, the right to freedom from torture and cruel, inhuman or degrading treatment, and the right to judicial

remedies.^{3 4} Further, the United Nations has specifically deemed freedom from domestic violence to be a fundamental human right.⁵

A well-known domestic violence case brought the United States' failure to effectively enforce restraining orders, and how it relates to constitutional and human rights, into the international spotlight. In *Town of Castle Rock, Colorado v. Gonzalez*, Jessica Lenahan, a victim of domestic violence, had obtained a protective order against her ex-husband from a Colorado state trial court in 1999.⁶ Her case was eventually appealed to the United States Supreme Court,⁷ which held that Lenahan did not have a constitutional right to enforcement of the protective order. Given this lack of protection, Lenahan took her case to the Inter-American Commission on Human Rights (IACHR),⁸ who issued a report.⁹ The IACHR report found that the State failed to "act with due diligence" to enforce the restraining order against her ex-husband, thereby violating several human rights obligations that the U.S. had assumed.¹⁰ Although many analogous cases exist, this one is particularly relevant because it exemplifies the United States' refusal to recognize the State's failure at the federal, state and local level to act with due diligence in cases of domestic violence.

Just one month after Lenahan procured a restraining order, her ex-husband kidnapped her three daughters while they were playing in front of the house.¹¹ Over the next eight hours Lenahan repeatedly made contact with the Castle Rock Police department, informed them of her restraining order, requested their assistance in locating her daughters and expressed her fears about her ex-husband.¹² The Castle Rock Police department responded in a disorganized, fractured, ill-trained and ineffective manner and failed to find or actively search for her children.¹³ At 3:20 a.m. that morning, her ex-husband drove to the police department where he

exchanged gunfire with officers and was killed.¹⁴ The three daughters were found dead in the back of his truck.¹⁵

Lenahan filed suit against the town of Castle Rock, Colorado, alleging that the failure of local and municipal police officers to effectively enforce her restraining order violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹⁶ The Supreme Court reversed the Tenth Circuit Court of Appeals, who held that Lenahan was deprived of due process and voiced concerns that “police never ‘heard’ nor seriously entertained her request to enforce and protect her interests in the restraining order.”¹⁷ The United States Supreme Court instead held that failure to enforce the restraining order did not violate the Due Process Clause because Lenahan did not have “a property interest in police enforcement of the restraining order.”¹⁸

The case was brought to the Inter-American Commission on Human Rights, who found that “the State failed to act with due diligence to protect” Lenahan and her daughters from domestic violence.¹⁹ The Commission asserted that the U.S. violated its “obligation not to discriminate and to provide for equal protection before the law . . . failed to undertake reasonable measures to prevent the death[s] . . . in violation of the right to life . . . and the [U.S.] violated the right to judicial protection of Jessica Lenahan and her next-of-kin.”²⁰ The obligation of non-discrimination extends “to the prevention and eradication of violence against women, as a crucial component of the State’s duty to eliminate both direct and indirect forms of discrimination.”²¹ “The protection of the right to life is a critical component of a State’s due diligence obligation to protect women from acts of violence,” as is the duty to scrupulously protect female children.²²

Not only is the right to life violated by acts of domestic violence, but often such acts involve cruel and degrading treatment, not only in the form of physical abuse, but also through withholding of financial access, emotional abuse, and sexual abuse.²³ Such treatment violates various other basic human rights. For instance, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has drawn a parallel between domestic violence and acts of torture.²⁴ The report emphasized the element of powerlessness, which is present in both domestic violence and torture.²⁵ The Special Rapporteur defined powerlessness as “the intention to keep the victim in a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy”²⁶

The Commission’s report went on to declare “. . . all States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination.”²⁷ It said that, “Even though the Commission recognizes the legislation and programmatic efforts of the United States to address the problem of domestic violence, these measures had not been sufficiently put into practice in the present case.”²⁸ The U.S. has a responsibility to “act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women . . . [and enact] measures to prevent and respond to the discrimination that perpetuates the problem.”²⁹

As the *Lenahan* case indicates, acts of domestic violence disproportionately affect women. The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to non-discrimination by requiring states to provide equal protection of the law.³⁰ The United States has ratified the ICCPR. Moreover, Article 50 of the ICCPR dictates that all provisions of

the covenant shall extend to all parts of federal States.³¹ Accordingly, individual States, counties and cities, within the United States have a duty under the ICCPR to prevent discrimination against women.

A systematic failure to exercise due diligence in protecting women from domestic violence is, in essence, a failure to provide equal protection, and therefore a violation of the right of non-discrimination. Such a systematic breakdown was evident in the government's failure to adequately enforce a protective order in the *Lenahan* case.³² As that case shows, the failure to exercise due diligence in connection with domestic violence plays a key role in many tragedies that occur and can lead to violations of the fundamental right to life.³³

The *Lenahan* case highlights the need for local entities at the city and county level to provide a coordinated, prepared and swift response in similar situations. In its report on the *Lenahan* case, the Commission notes the failure of the Castle Rock Police Department to take Lenahan's report of her missing daughters seriously enough.³⁴ Rather than assuming the girls were alright because they were with their father, the Commission states that authorities receiving missing persons reports must be aware of the "connection between domestic violence and fatal violence . . . perpetrated by parents," and that they must "understand the seriousness of the phenomenon of violence perpetrated against [children and partners], and act immediately."³⁵ The Commission goes on to state that it knows of no "protocols and/or directives that were in place to guide the police officers at hand on how to respond to reports of missing children in the context of domestic violence" at the Castle Rock Police Department.³⁶

The non-enforcement of Lenahan's protective order represents a violation of her right to access to judicial remedies. The 2013 Annual Report to the UN General Assembly, the Special Rapporteur on violence against women noted several impediments to judicial remedies for those

affected by domestic violence.³⁷ The Special Rapporteur wrote, “Courts rarely have the required levels of specialization in respect to violence against women cases.”³⁸ Moreover, the report states, “Judicial practices frequently do not reflect an understanding of the dynamics of domestic violence nor sensitivity to victims of long-term, repeated violence.”³⁹ Thus, even when the courts are open to those affected by domestic violence, lack of judicial familiarity with the nuances of domestic violence cases may keep individuals from accessing those judicial remedies.

In *Lenahan*, the Commission re-iterated its “principle that the ability of victims of violence against women to access judicial protection and remedies includes ensuring clarification of the truth of what happened.”⁴⁰ The Commission recommended that reparations be awarded *Lenahan* and that a full investigation of her daughters’ deaths as well as the “systemic failures” on the part of the police be performed.⁴¹ The Commission also recommended legislative reform, or the adoption of new legislation at state and federal levels, to make the enforcement of protection and other similar orders compulsory.⁴² It urged that such legislation be attended by sufficient resources for implementation, “regulations to ensure their enforcement; training programs for the law enforcement and justice system officials . . . ; and the design of model protocols and directives that can be followed by police departments.”⁴³ Lastly, the Commission proposed the enactment of programs and policies aimed at shifting the philosophy behind the way public officials approach domestic violence, so as to promote the eradication of stereotypes and discrimination that prevent effective protection against domestic violence on an institutional level.⁴⁴ This case demonstrates the need for decisive action at the local level and has, in part, sparked a movement across the nation whereby communities are taking action to ensure that protection from domestic violence is considered a fundamental human right at home and to prevent tragedies like the *Lenahan* case from occurring again.

II. Local Domestic Violence Issues

Domestic violence disproportionately affects women worldwide. It is the leading cause of injury to women in the United States between the ages of 15 and 44.⁴⁵ The effects of domestic violence in the United States are cyclical and long-term: boys who witness domestic violence are twice as likely to become offenders and 50% of girls who grow up in an abusive home will experience domestic violence again in the future.⁴⁶ Domestic violence is financially harmful as well. According to the Hope Alliance, the United States loses an estimated \$727.8 million annually in productivity due to domestic violence, resulting in “almost 100,000 days of hospitalization, almost 30,000 emergency room visits, and almost 40,000 visits to a physician.”⁴⁷ Family violence costs the United States \$5 to \$10 billion each year in police and court costs, medical expenses, sick leave, absenteeism, shelters and foster care.⁴⁸

Domestic violence disproportionately affects minority women.⁴⁹ Between 1993 and 1998, American black females “experienced intimate partner violence at a rate 35% higher than that of white females, and about 22 times the rate of women of other races.”⁵⁰ A 2002 study by the Texas Council on Family Violence found that 36% of Texas Hispanic women reported experiencing severe abuse in their lifetime.⁵¹ Jessica Lenahan is an Hispanic woman, and the IACHR’s report takes special note of “a historical problem with the enforcement of protection orders; a problem that has disproportionately affected . . . ethnic and racial minorities.”⁵²

Family violence is defined under the Texas Family Code as “an act by a member of a family or household against another member that is intended to result in physical harm, bodily injury, assault, or a threat that reasonably places the member in fear of imminent physical harm.”⁵³ In 2012, 198,366 family violence incidents were recorded in Texas, an 11.5% increase from 2011.⁵⁴ Only 36,831 of Texas adults who experienced domestic violence, however,

received nonresidential services such as legal advocacy or counseling.⁵⁵ In 2012, 114 Texas women were killed as a result of family violence.⁵⁶ Damage caused by domestic violence also extends beyond the people involved in domestic disputes. “In 2011, 287 Texas law officers were assaulted while responding to family violence calls.”⁵⁷

The Texas Department of Public Safety reports that 8,893 family violence incidents occurred in Travis County in 2012, 8,102 of which were handled by the Austin Police Department.⁵⁸ In November of 2011, the *Austin American-Statesman* published an article addressing the rise in domestic-violence related deaths and the increase in demand for domestic violence-related services in the Austin area.⁵⁹ The *Statesman* reported, “In 2010 and so far in 2011, domestic violence was a factor in 29 percent of homicides in Travis County.”⁶⁰

These statistics highlight the severity of domestic violence at the local level and underscore the need for definitive action addressing the issue.

III. Bringing the Human Rights Perspective to Combatting Domestic Violence in Austin

Domestic violence is a worldwide epidemic that also affects the Austin and Travis County community. The University of Texas School of Law Human Rights Clinic, in conjunction with the Domestic Violence Clinic, the Legislative Lawyering Clinic and the Austin/Travis County Family Violence Task Force are proposing a resolution at the City and County levels that will serve to re-conceptualize domestic violence as a human rights issue. Taking this step will benefit our community both symbolically and practically.

The Cincinnati City Council (OH), the Baltimore City Council (MD), the Miami-Dade County Board of Commissioners (FL), city and county officials in Albany (NY), and city and county officials of Montgomery (AL) have all passed resolutions declaring freedom from domestic violence to be a human right.^{lxi lxii} In passing these resolutions, each of these local

government entities has taken an admirable step to thrust the often alienating and isolating issue of domestic violence into the public forum. In addition, such a resolution can serve as a catalyst for further discussion and the improvement of support and protection for domestic violence victims. The resolution proposed in Austin and Travis County is unlike the resolutions passed in other cities because it includes a call to action, which ensures practical measures will be taken to improve the domestic violence situation in Austin and Travis County. This call to action is an embodiment of the goals of this resolution.

There will be at least two symbolic benefits from passing the proposed resolution. First, the resolution will serve as a positive symbol for all those members of our community that are, or have been, affected by domestic violence. These persons will know that their local government is taking steps to protect them and prevent future acts of domestic violence. Second, reframing the problem as a human rights issue removes domestic violence from the private sphere and acknowledges that it is a societal problem requiring a societal solution.

Practically, the resolution will take affirmative steps to improve the domestic violence situation in Austin and Travis County. Passing the resolution is the first of a two-tiered interaction between the local government and its citizens. Once the resolution is passed, the city and county will have acknowledged that freedom from domestic violence is a human right. Upon acknowledging this right, it becomes the duty of the city and county to take affirmative action to protect their citizens from domestic violence.

Additionally, the resolution will provide the city and county with a new and unified approach to working with those affected by domestic violence. For the most part, each service provider currently employs their own preconceived notions when confronted with domestic violence issues. These individual perspectives are not always ideal for working with those

affected by domestic violence because these conceptions often do not fully grasp the complexities of the situation, frustrating cooperation between different service providers. Once passed, the city and county will be able to point to the resolution and the human rights standards articulated therein as the official and unified perspective from which to approach domestic violence. This will ensure that all individuals affected by domestic violence receive the same standard of care from all city and county service providers. Moreover, future domestic violence policies can be built around this framework.

IV. Recommendations

While other municipalities have adopted similar resolutions in recent years, those resolutions do not go beyond recognizing that freedom from domestic violence is a human right. The declaration is a key aspect of the resolution proposed in Austin and Travis County. This resolution, however, goes further and includes a call to action ensuring that the effects of the Austin and Travis County resolutions are quantifiable. Once successfully implemented, the call to action and resolution will potentially spread to other communities, positioning Austin and Travis County as regional leaders in this growing movement.

Had such a resolution, including the call to action, been adopted by the city of Castle Rock, Jessica Lenahan's story may not have ended tragically. A resolution like the one proposed to Austin and Travis County could have provided a more comprehensive philosophy for addressing domestic violence in Castle Rock. It might have better prepared police to understand the serious connection between domestic and fatal violence, to understand the need to act immediately, and might have resulted in better-established protocols for police to follow in that situation. Had local law enforcement been armed with the knowledge that freedom from

domestic violence is a human right, Lenahan’s pleas for help may not have fallen upon deaf ears.

Because of this we recommend that, at a minimum, Austin and Travis County:

1. Adopt the proposed resolution and declare freedom from domestic violence to be a fundamental human right, both at the City and County levels.
2. Carry out, at the City and County level, the call to action contained within the resolution, and appoint a single task force to review and audit the current practices of government in working with those affected by domestic violence.
3. Review, implement, and ensure compliance with the recommended changes to current practices, once the results of the audit have been received.

¹ Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1883 (1996).

² Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

³ *Id.*

⁴ It must be noted that the U.S. was instrumental in passing the UDHR and moreover, the UDHR represents customary law, or law built upon the ubiquitous international custom.

⁵ See Declaration on the Elimination of Violence Against Women, G.A. Dec. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

⁶ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 751–52 (2005).

⁷ *Castle Rock* at 748.

⁸ A principal, autonomous body of the Organization of American States (OAS), the IACHR derives its mandate from the OAS Charter and the American Convention on Human Rights. The Inter-American Commission has a mandate to promote respect for human rights in the region and acts as a consultative body to the OAS in this matter. The Commission is composed of seven independent members who are elected in an individual capacity by the OAS General Assembly and who do not represent their countries of origin or residence.

⁹ Jessica Lenahan (Gonzales) et al. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011) at

http://www.utexas.edu/law/clinics/humanrights/docs/IACHR_Jessica_Lenahan_Report.pdf

¹⁰ *Jessica Lenahan (Gonzales) et al. United States*, ¶160–65, 196.

¹¹ *Castle Rock* at 753.

¹² *Id.* at 753–54.

¹³ *Id.*

¹⁴ *Id.* at 754.

¹⁵ *Id.*

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- ¹⁶ *Id.* at 751.
- ¹⁷ *Id.* at 755.
- ¹⁸ *Id.* at 768.
- ¹⁹ Jessica Lenahan (Gonzales) et al. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶199 (2011).
- ²⁰ *Id.*
- ²¹ *Id.* at ¶120.
- ²² *Id.* at ¶128–29.
- ²³ Bharani N., Domestic Violence and Human Rights, International Research Journal of Social Sciences, Vol. 2(9) at 8 (Sept. 2013).
- ²⁴ Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3 dated 15 January 2008.
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.* at ¶162.
- ²⁸ *Id.* at ¶161.
- ²⁹ *Id.* at ¶126.
- ³⁰ International Covenant on Civil and Political Rights, Art. 26, 999 U.N.T.S. 171 (Dec. 16, 1966).
- ³¹ *Id.*
- ³² Jessica Lenahan (Gonzales) v. United States, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011).
- ³³ *Id.*
- ³⁴ *Id.* at ¶165.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ Report of the UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/23/49 dated 14 May 2013.
- ³⁸ *Id.* at 16
- ³⁹ *Id.*
- ⁴⁰ *Id.* at ¶181.
- ⁴¹ *Id.* at ¶ 1–3.
- ⁴² *Id.* at ¶ 4–5.
- ⁴³ *Id.*
- ⁴⁴ *Id.* at ¶ 6.
- ⁴⁵ *Facts and Statistics*, Hope Alliance (2012), at <http://www.hopealliancetxt.org/education/facts-statistics/>.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*
- ⁴⁹ *Domestic Violence Statistics*, American Bar Association at http://www.americanbar.org/groups/domestic_violence/resources/statistics.html.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*

⁵² Jessica Lenahan (Gonzales) et al. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶161 (2011).

⁵³ *2012 Crime in Texas, Family Violence*, TEX. DEP'T OF PUB. SAFETY 34, <http://www.dps.texas.gov/crimereports/12/citCh5.pdf>

⁵⁴ *Id.*

⁵⁵ *Facts and Statistics*, The Texas Council on Family Violence at <http://www.tcfv.org/resources/facts-and-statistics>.

⁵⁶ *Facts and Statistics*, The Texas Council on Family Violence at <http://www.tcfv.org/resources/facts-and-statistics>.

⁵⁷ *Facts and Statistics*, Hope Alliance (2012), at <http://www.hopealliancetxt.org/education/facts-statistics/>.

⁵⁸ *Id.* at 43.

⁵⁹ *Id.*

⁶⁰ Claudia Grisales, *Domestic violence incidents increased since 2009, officials say*, 6AUSTIN AMERICAN-STATESMAN, Nov. 26, 2011, at <http://www.statesman.com/news/news/local/domestic-violence-incidents-increased-since-2009-o/nRhXf/>.

^{lxi} Human Rights in the U.S.: A Handbook for Legal Aid Attorneys, 4/22/13 version, 64, available at http://www.wcl.american.edu/humright/center/documents/13-04-22LHRLHandbook_FullDraft.pdf

^{lxiii} A compilation of these resolutions is available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_memo.pdf