

DOMESTIC VIOLENCE

Access to Court Proceedings

Response to the Periodic Report of the United States
to the United Nations Committee on the Elimination
of Racial Discrimination

February 2008

DOMESTIC VIOLENCE & ACCESS TO JUSTICE

This Committee's General Recommendation 25 addresses the double discrimination women of color face as a result of the intersection of racial and gender discrimination, specifically noting that women may face disparate access to remedies and requests State parties address this problem. The Committee has recognized that violence against women, including domestic violence, is a violation of human rights¹ and State parties have an obligation to protect and provide access to justice for victims of domestic violence.²

Under article 5(a) of the Convention, the United States has a responsibility to ensure "the right to equal treatment before the tribunals and all other organs administering justice." Where domestic violence is involved, these institutions play a necessary role in protecting the right, under article 5(b), "to security of person and protection by the State against violence or bodily harm . . . by any individual group or institution."

Yet every year in the United States, an estimated four million women are battered by an intimate partner.³ Though violence against women spans all economic, racial, religious, and age divides, minority women and women of lower socio-economic status bear the brunt of these injustices. There is evidence that women in the lowest income bracket are seven times more likely to be victims of domestic violence than women in the highest income bracket.⁴ Additionally statistics suggest that African-American women experience intimate partner violence at a rate 35% higher than white females⁵ and Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in general.⁶ Finally, Latina, South Asian, and Korean immigrant women are estimated to experience domestic violence at rates of 30% to 60%,⁷ compared with 22.1% of "all" women nationally.⁸

Negative and discriminatory experience with law enforcement and the court system, however, dissuades women of color from reporting domestic violence incidents. African-American women and Latinas may be reluctant to report domestic violence or sexual assault because of the discriminatory treatment of men in their communities by law enforcement and the

¹ See CERD Committee Concluding Observations, South Africa, CERD/C/ZAF/CO/3, para. 16, Oct. 19, 2006; CERD Committee Concluding Observations, Guatemala, CERD/C/GTM/CO/11, para. 15, May 15, 2006. See also Resolution of the United Nations General Assembly, U.N. Doc. No. A/RES/58/147 (Feb. 19, 2004), Elimination of Domestic Violence Against Women, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/503/40/PDF/N0350340.pdf?OpenElement>.

² On multiple occasions, the Committee has identified the double discrimination faced by women of color and immigrant women who are victims of domestic violence – including in the context of services for victims in remote areas, CERD Committee Concluding Observations, Canada, CERD/C/CAN/CO/8, para. 20, May 25, 2007.

³ *United States v. Morrison*, 529 U.S. 598, 632 (2000) (Souter, J., dissenting).

⁴ Bureau of Justice Statistics, *Special Report: Intimate Partner Violence*, 4 (May 2000).

⁵ Patricia Tjaden & Nancy Thoennes, U.S. Department of Justice, Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>.

⁶ Steven W Perry, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, *American Indians and Crime: A BJS Statistical Profile 1992-2002* (December 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>.

⁷ Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, Legal Momentum, Apr. 24, 2006, available at <http://legalmomentum.org/legalmomentum/files/dvusc.pdf>.

⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

courts.⁹ One study in Arizona found that in sentencing, domestic violence perpetrators were generally less likely to be convicted than those charged with the same crime without a domestic violence designation; however, African-Americans were more likely to be sentenced to prison than Whites.¹⁰ Victims also fear discriminatory treatment. Immigrant women fear deportation as a consequence of calling the police and survivors have themselves been criminalized when they seek protection. One study found that 66% of domestic violence survivors arrested along with abusers (dual arrest cases) or arrested as a result of a complaint lodged by their abuser (retaliatory arrest cases) were African American or Latina.¹¹

Thus, women of color are between a rock and a hard place. Fearful of turning to the state, they lack protection they may need. If they do turn to the state, they inaugurate a series of often discriminatory processes and outcomes.

These issues highlight a critical conflict for those advocating on behalf of women of color victims of domestic violence, illustrative of the double discrimination experienced by women of color.¹² This conflict is a result of the historically discriminatory treatment of communities of color by the US criminal justice system paired with the anti-domestic violence movement's demands for stepping up prosecutorial approaches, such as for longer prison sentences for batterers as a "frontline approach" to stopping violence against women.¹³ In meeting the requirements of compliance with CERD, consideration of how to "combat[] personal *and* state violence [through] develop[ing] strategies for ending violence that *do* assure safety for survivors of sexual/domestic violence and *do not* strengthen our oppressive criminal justice apparatus."¹⁴

Eliminating the role of racism and its intersection with gender in law enforcement and the judicial system is thus critical to protecting the human rights of women of color. At the same time, leaders in the women of color anti-violence movement stress the importance of educational and political approaches to preventing violence through economic, social, educational programs aimed at women's empowerment and ending the culture of patriarchal violence.

In regard to the existing system, the injustice women of color experience is not just violence at the hands of an intimate partner, but also discrimination in their subsequent efforts to

⁹ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 854, 809 n.31, 810 n.32 (2001). See The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Report on Eliminating Racial and Gender Bias From Pennsylvania's Courts 548 (Mar. 3, 2003), available at <http://216.104.174.12/bias.shtml> [hereinafter PA Court Report]. See also Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 819-20 (2000).

¹⁰ David Wells, Domestic Violence Prosecutions: Inequalities by Gender and Race Perpetuated in Arizona, For the Arizona Coalition Against Domestic Violence 1 (September 2003), available at <http://www.asu.edu/news/research/ACADVReport.PDF>. Imprisonment as remedy is not the position advocated for in this report. In fact, with recidivism rates at high as 32% incarceration is clearly inadequate and often inappropriate. See U.S. Department of Justice, Bureau of Justice Statistics, Domestic and Sexual Violence Data Collection: A Report to Congress under Violence Against Women Act (July 1996), available at <http://www.ncjrs.gov/pdffiles/alldom.pdf>.

¹¹ Mary Haviland, et al., Urban Justice Center, The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City (2001), available at http://www.connectnyc.org/cnyc_pdf/Mandatory_Arrest_Report.pdf.

¹² Many activist organizations note that racial justice organizing has generally focused on racism as it primarily affects men, and has often ignored the gendered forms of racism that women of color face. Simultaneously the domestic violence movement has primarily considered a perspective of protecting women devoid of other aspects of identity such as race. See generally Andrea Smith, Beth Richie, Julia Sudbury, Janelle White et al., *Introduction, in THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* (2006).

¹³ *Id.* at 1.

¹⁴ *Id.* at 2.

seek protection and remedy. Among the conditions that restrict access to justice for minority women are: (1) a general lack of information about their legal rights and options; (2) discrimination and inadequate training of judges; (3) lack of access to experienced and adequately trained counsel; (4) insufficient translation and interpretation services; and (5) insufficient access to remedies—including unserved orders of protection. We note that there is a scarcity of data disaggregated by factors including race of the victim in relation to accessing protection and judicial remedies. While extensive congressional findings and state court studies have noted gender discrimination in the courts, particularly relevant in domestic violence cases and duly noted in the dissent in *United States v. Morrison*, data is not disaggregated by race or other factors in a national or systematic manner.

ACCESS TO INFORMATION ABOUT LEGAL RIGHTS AND OPTIONS¹⁵

Preliminary results from a study underway in Massachusetts indicate that many minority and immigrant women do not understand basic court processes and that little is done to assist them in navigating complex proceedings.¹⁶

The original Violence Against Women Act created new legal remedies and penalties, and provided grants for state-implemented programs to combat domestic violence and to assist victims of domestic violence.¹⁷ However, the force of remedies and penalties has been eroded and the funding for community-based support and education is optional and with little to no national monitoring scheme for data collection and accountability.

DISCRIMINATION & INADEQUATE TRAINING OF JUDGES

Congressional findings suggest a pervasive bias in various state justice systems against victims of gender-motivated violence¹⁸ such that a woman victimized by domestic violence seeking judicial remedy faces further injustice. A Massachusetts study and New Jersey task force both found that racial, ethnic, and sexual preference biases were obstacles to seeking and receiving justice for survivors of domestic violence.¹⁹

African-American women victims of domestic violence are less likely to be believed by judges and jurors.²⁰ One study found that “women of color are often not seen as victims and thus do not receive appropriate attention” from judges and advocates involved in their cases, resulting in minimization and dismissal of their allegations of domestic abuse.²¹ The experience of one African-American battered woman is indicative:

¹⁵ See, e.g., Purvi Shah, Executive Director, Sakhi for South Asian Women, Testimony to Matrimonial Commission, May 9, 2005. Sakhi is a New York City community-based organization supporting survivors of domestic violence, primarily immigrant women.

¹⁶ Wellesley Centers for Women, What Do Abused Women of Color Experience During Child Custody Proceedings? (forthcoming 2008) [hereinafter Wellesley Study].

¹⁷ The VAWA grant STOP (Services, Training, Officers, Prosecutors) enables law enforcement to train personnel including judges, establish specialized units and toll-free hotlines. See, e.g., 42 U.S.C. § 3796(g).

¹⁸ *United States v. Morrison*, 529 U.S. 598, 666 (2000) (citing S. Rep. No. 103-138, at 38, 41–42, 44–47 (1993); S. Rep. No. 102-197, at 39, 44–49 (1991); H. R. Conf. Rep. No. 103-711, at 385 (1994)).

¹⁹ *Id.* at 405.

²⁰ Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 57 (Publication forthcoming in Yale Journal of Law and Feminism).

²¹ C. Cuthbert et al., Wellesley Center for Women, Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts 37 (2002). Study participants noted that low-income African-American women are stereotyped as being aggressive, drug-abusing, and lacking in credibility.

I was told to act like a little white girl . . . to look sad, to try to cry, to never look the jury in the eye. It didn't really work for me because the judge took one look at me and said, 'You look pretty mean; I bet you could really hurt a man.'²²

Poor women and particularly poor African-American women are also far more likely to be the subject of charges of child neglect than are other women.²³ One study found that in determining child custody decisions, family court judges and probation officers often do not consider violence toward women relevant and order shared legal custody even when there is a history of partner abuse.²⁴

The quality and consistency of judicial training on domestic violence are crucial to creating effective judicial education programs.²⁵ Judicial training on domestic violence is not mandatory in most states and few domestic violence training programs incorporate discussion of racial bias. Even states at the forefront in providing and requiring education, training, and other preventive/remedial measures for domestic violence are limited by insufficient funding.²⁶

LACK OF ACCESS TO EXPERIENCED AND ADEQUATELY TRAINED COUNSEL

Access to legal services is essential to the protection of victims of domestic violence and has been identified as one of the primary factors in decreasing incidents of domestic violence.²⁷ However, only one jurisdiction, New York, extends a right to counsel in domestic violence cases.²⁸ Even when counsel is available, lawyers—and judges—often fail to understand the economic dependency of a victim upon her batterer or the cultural norms and family relationships that may affect minority and immigrant women.²⁹ Women often complain that their attorneys are not paying attention to their needs and not listening to them.³⁰ Some women who do not qualify for free or low-cost legal services are forced to spend every penny on a lawyer who is not adequately trained and does not provide competent services.³¹

INSUFFICIENT TRANSLATION AND INTERPRETATION SERVICES

A key challenge for women with limited English proficiency is “communicating their experiences to the court. If a court interpreter does not adequately present a survivor’s case, her

²² Goodmark, *supra* note 20, at 16. *See also* Lynn Hecht Schafran, There’s No Accounting for Judges, 58 ALBANY L. REV. 1063 (1995), available at <http://legalmomentum.org/legalmomentum/files/TheresNoAccountingForJudgesHS.pdf> (recounting issues of gender bias in judicial imposition of minimal sentences in domestic violence cases).

²³ Coker, *supra* note 9, at 837.

²⁴ Supreme Judicial Court of Massachusetts, *Gender Bias Study of the Court System in Massachusetts* 59 (1989).

²⁵ A.C. Morrill, J. Dai, S. Dunn, I. Sung, K. Smith, *Child Custody and Visitation Decisions when the Father has Perpetrated Violence Against the Mother*, 11(8) VIOLENCE AGAINST WOMEN 1076 (2005).

²⁶ *See, e.g.*, Massachusetts Court Study, *supra* note 24. In response to the study, a one-day training on domestic violence practice was implemented for all new judges. However, since 1994, the state annual budget for domestic violence education for court personnel has been only \$100,000.

²⁷ Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL’Y 158, 169 (2003), available at <http://www.lanwt.org/pdfs/exdo.pdf>.

²⁸ Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. 269 (July – August 2006).

²⁹ THE MELIOR GROUP, V. KRAMER & ASSOCIATES, FINAL REPORT ON PERCEPTIONS AND OCCURRENCES OF RACIAL BIAS IN THE COURTROOM 5 (2001).

³⁰ Cuthbert et al., *supra* note 21.

³¹ *Id.*

whole life—and her children’s lives—can be affected.”³² Court interpreter certification is nominal at best in many states. Courts often send interpreters without the correct language proficiency to a case and fail to find replacements. Even when a victim is provided with a proficient interpreter, interpreters often engage in offering legal advice, insert unauthorized language into their translations, or even refuse to translate without first “advising” a woman. In a sample study of seven women with twelve different court cases in New York, three out of seven indicated their cases has been delayed for up to nine months due to interpretation issues.³³

The problem of adequate interpretation services has also been noted in New York City Family Courts where, despite advertising multilingual capacities, the Court does not make available interpreters for the crucial first stage: filing for an Order of Protection.³⁴ This problem is a national issue – in California alone seven million people cannot access courts without language assistance.³⁵ In Los Angeles County alone approximately 10,000 proceedings each year are postponed because there is not interpreter available.³⁶

LACK OF JUDICIAL REMEDIES: ORDERS OF PROTECTION

While judicial orders of protection do not eliminate the risk of continuing abuse or homicide, they may decrease it.³⁷ Reports indicate some 86% of the women who receive protection orders state the abuse either stopped or was greatly reduced.³⁸

Service of protective orders issued *ex parte* is inadequate and without service upon the alleged batterer, the order provides no protection whatsoever. One study found that among sixty-five abused women applying and qualifying for a protection order against a sexual intimate, only half of the women actually received the order.³⁹

Even when orders of protection are properly served, their effectiveness has been drastically limited by *Castle Rock v. Gonzales*,⁴⁰ where the U.S. Supreme Court held that arbitrary police refusal to enforce a protective order does not give rise to a right to compensation in federal court. The lack of police accountability has profound negative effects. For example,

³² Shah, *supra* note 15.

³³ *Id.*

³⁴ *Id.*

³⁵ David Udell & Rebekah Diller, Brennan Center for Justice White Paper, Access to Justice: Opening the Courthouse Door 10 (2007), available at http://www.brennancenter.org/dynamic/subpages/download_file_48493.pdf (referencing CAL. COMM’N ON ACCESS TO JUSTICE, LANGUAGE BARRIERS TO JUSTICE IN CALIFORNIA 1 n.2 (2005), available at http://calbar.ca.gov/calbar/pdfs/reports/2005_Language-Barriers_Report.pdf [hereinafter CAL. COMM’N]).

³⁶ *Id.* (referencing CAL. COMM’N, *supra* note 35, at 23).

³⁷ American Bar Association, Commission on Domestic Violence, Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (2007), available at <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>.

³⁸ James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response*, 35(4) CRIME, LAW & SOCIAL CHANGE 363 (2001).

³⁹ J. Gist et al., *Women in Danger: Intimate Partner Violence Experienced by Women That Qualify and Do Not Qualify for a Protection Order*, 19 BEHAVIORAL SCIENCES & LAW 1 (2001). A California study showed that more than 30% of protection orders in large counties and more than 25% of protection orders in small counties were unserved. Report to the California Attorney General, *Keeping the Promise: Victim Safety and Batterer Accountability* 1, 35–36 (2005). A Maryland study found that law enforcement failed to serve *ex parte* orders in 50% of the cases surveyed. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL’Y & L. 499, 509 (2003).

⁴⁰ 125 S. Ct. 2796 (2006).

one study found that 60% of protective orders were violated in the year after issue and nearly a third of women with protective orders reported violations involving severe violence.⁴¹

REMEDIES

As a result of two Supreme Court cases, *Morrison*⁴² and *Gonzales*,⁴³ there is no federal civil remedy to compensate women (1) for violence by private actors or (2) for the failure of a state actor, such as the police, to protect them from preventable domestic violence.

Morrison left victims of domestic violence without a federal civil remedy for the violence perpetrated against them. It found that the provision of VAWA granting a federal civil rights remedy outside congressional power to enact. More than four years of congressional hearings on the issue of violence against women preceded the passage of VAWA, which contained this right to sue private perpetrators of violence in federal courts for damages.⁴⁴ VAWA had the unanimous support of the National Association of Attorneys General⁴⁵ and Attorneys General from thirty-eight states had urged Congress to enact the civil rights remedy, acknowledging that “the current system for dealing with violence against women is inadequate.”⁴⁶ In addition, as a result of *Morrison*, the U.S. cannot use the deterrent of compensation to set minimum standards of protection for victims of domestic violence.

Moreover, the U.S. does not effectively monitor the implementation of services. As the *Gonzales* case “tragically illustrates, the piecemeal system that results falls far short of fulfilling the United States’ obligations” to its citizens and a variety of international agreements⁴⁷ and lacks an adequate system of monitoring results and holding states and localities accountable.⁴⁸

RECOMMENDATIONS

The federal government should:

- ⇒ Support an amendment to Violence Against Women Act that provides funding conditioned on periodic training & monitoring for justice system personnel & court interpreters. Trainings should involve NGOs with expertise regarding domestic violence and gender/race/ethnicity issues.
- ⇒ Collect data disaggregated by race, gender, and socio-economic status on cases involving domestic violence, including information on the impact of interactions with the justice

⁴¹ U.S. Department of Justice, National Institute of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50 (1998) (noting a Colorado study).

⁴² *United States v. Morrison*, 529 U.S. 598 (2000).

⁴³ 125 S. Ct. 2796 (2006).

⁴⁴ Congress heard testimony from experts on domestic violence and sexual assault, including state court judges, law enforcement officers, prosecutors, state attorneys general, law professors, physicians, social scientists, and victims of violence. United States Senate, Subcommittee on Crime, Corrections, and Victims’ Rights, *Ten Years of Extraordinary Progress: The Violence Against Women Act*, A Report by Senator Joseph R. Biden, Jr. (Sept. 2004), available at http://biden.senate.gov/documents/VAWA_Report.pdf.

⁴⁵ See *Violence Against Women: Victims of the System*, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. 37–38 (1991).

⁴⁶ *Morrison*, 529 U.S. at 653 (Souter, J., dissenting). See *Crimes of Violence Motivated by Gender*, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993).

⁴⁷ Petitioner’s Brief, *Jessica Ruth Gonzales v. The United States of America*, before the Inter-American Commission on Human Rights, December 11, 2006, at 35.

⁴⁸ *Id.* at 39.

system on victim safety, dual arrest, neglect proceedings, and assess the disproportionate impact that such violence has on poor, minority, and immigrant women.

⇒ Increase funding for community-based multilingual education on legal rights and remedies directed to women seeking protection from an abuser and addressing the culture of violence and gender inequality that is one of the roots of domestic violence.