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SEEKING REDRESS FOR GENDER-BASED BIAS CRIMES—CHARTING NEW GROUND IN FAMILIAR LEGAL TERRITORY

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INTRODUCTION

Efforts to incorporate gender-based bias crimes into hate crime schemes have been met with both great progress and discouraging setbacks in recent years. While it should seem self-evident that gender animus can trigger bias-motivated violence much like attacks based on other forms of prejudice, legal recognition of gender-motivated violence as a civil rights violation has developed slowly. Until 1994, when Congress enacted the Civil Rights Remedy of the Violence Against Women Act (VAWA),1 there was no federal redress for gender-based violence

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1. Codified as Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C. § 13981 (1994). The Civil Rights Remedy established that “all persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . .” 42 U.S.C. § 13981(b). It provided for recovery of compensatory or punitive damages, as well as injunctive or declaratory relief for victims of such crimes. 42 U.S.C. § 13981(c). To prevail, plaintiffs had to establish that they were the victims of a crime of violence that rose to the level of a felony, and that the act was gender motivated. 42 U.S.C. §§ 13981(d)(1)–(2).
committed by private individuals outside the workplace. In enacting this law, Congress recognized that gender-motivated violence violates women's civil rights, and that crimes such as domestic violence, rape, and sexual assault are frequently hate crimes just like other forms of discriminatory violence.

Notwithstanding Congress's strong endorsement of women's right to be free from gender-motivated violence, in May 2000, in United States v. Morrison, the Supreme Court struck down the VAWA Civil Rights Remedy as beyond Congress's power to legislate under either the Commerce Clause or Section 5 of the Fourteenth Amendment. The law's constitutionality and the Morrison decision have garnered public attention and debate focused primarily on the Court's increased scrutiny of Congressional power. The legacy of the VAWA Civil Rights Remedy undoubtedly will surround its constitutionality. Nevertheless, cases decided under the Remedy prior to Morrison will continue to have resonance to the extent that the decisions addressed what constitutes a gender-motivated hate crime. Consequently, while the 1994 Civil Rights Remedy no longer is available to victims of gender-motivated crimes, cases decided under the law created an important body of caselaw that can provide a

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2. Before the Civil Rights Remedy was enacted, federal law provided civil rights redress for acts of gender-motivated violence committed by state officials, at work, or as part of a conspiracy to deprive the victim of her civil rights, but none covered the most common form of gender-motivated violence—that committed by private individuals.

3. While both men and women can be the victims of gender-based violence, this Essay shall refer to the victims of such violence in the feminine, since women are the primary victims of such crimes. Notably, the VAWA Civil Rights Remedy was drafted in gender-neutral terms.

4. Congress stated that "[p]lacing this violence in the context of the civil rights laws recognizes it for what it is—a hate crime." S. REP. No. 103-138, at 49 (1993) (citation omitted). It further found that:

   Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims of such violence are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.

Id.

5. 120 S. Ct. 1740 (2000).

foundation for redressing gender-based crimes under alternative statutory schemes.

Despite its similarity to other forms of bias crime, the question of what constitutes a gender-motivated bias crime has confounded legislators and policymakers. Objections to recognizing gender-based violence as a civil rights violation range from the concern that such recognition would open the floodgates to an overwhelming number of cases, to the argument that no such regulation is necessary because it is impossible to distinguish gender-based crimes from those based on lust or personality.\footnote{See Julie Goldscheid, \textit{Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement}, 22 HARV. WOMEN'S L.J. 123 (1999).} Legislators debating the Civil Rights Remedy before its enactment made clear that the law would cover only cases that were gender-motivated, as distinct, for example, from purported "ordinary" acts of domestic violence or "random" crimes.\footnote{See S. REP. NO. 102-197, at 69 (1991) (statement of Senator Biden that the law would not cover "everyday" domestic violence).} Nevertheless, cases decided under the Remedy reveal that courts drew upon other familiar bodies of anti-discrimination law to evaluate whether and when allegations involving violence against women contained sufficient evidence of bias to warrant civil rights enforcement.\footnote{See infra notes 36–89 and accompanying text.} These cases therefore illustrate the kinds of circumstances in which violence against women can be deemed to constitute a form of discrimination, and exemplify how courts can evaluate such claims in the future under state, local, or alternative federal anti-bias laws.

This Essay will analyze how courts have defined gender-motivation, focusing on the Civil Rights Remedy cases decided before the law was struck down, in an attempt to cull from those cases the standards federal courts have used to assess gender-motivation. The article will first provide an overview of existing and proposed laws that offer some form of redress for gender-motivated crimes. It will then analyze cases decided under the Civil Rights Remedy, focusing on two key issues that have arisen as policymakers struggle with whether and how gender-based bias crimes fit in the rubric of hate crimes legislation. The first of these issues is how courts have assessed whether claims of domestic violence reflect discriminatory motivation, and what type of evidence they have found useful in that context. The second issue is how courts treated VAWA civil rights claims based on allegations of sexual assault, and what, if any, evidence, in addition to allegations of sexual assault, they found to indicate gender-motivation.
I. LEGISLATIVE OVERVIEW

The Violence Against Women Act's Civil Rights Remedy was historic in that, through it, Congress announced, for the first time, that violent crimes motivated by the victim's gender are discriminatory and violate the victim's federal civil rights. However, the legislative debate that preceded the law's enactment reflected legislators' concerns that not every act of violence against women, but rather, only those that were gender-motivated, be deemed a civil rights violation subject to federal redress. As a result, the statute defined gender-motivation to require that plaintiffs prove the violent act was committed "because of gender or on the basis of gender" and "due, at least in part, to an animus based on the victim's gender." Congress specifically limited the reach of the law to cases based on gender-motivated crimes, rather than on "random" acts of violence against women.

10. The Civil Rights Remedy stated:

(b) All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . (c) A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate. 42 U.S.C. § 13981 (b)-(c).


12. 42 U.S.C. § 13981 (d)(1). Throughout this Essay, in discussing the Civil Rights Remedy, the terms "gender" and "sex" are used interchangeably. The Ninth Circuit Court of Appeals recognized the functional interchangeability of these terms in Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). In that case, the court referenced Congress's explicit modeling of the Civil Rights Remedy on Title VII of the Civil Rights Act of 1964 and adopted the Supreme Court's analysis in the Title VII context that "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See id. at 1202 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)). The Court in Price Waterhouse held that the statute's prohibition of sex discrimination includes discrimination because one fails to act in the way expected of a man or a woman. See id. at 1202. The Ninth Circuit's ruling in Schwenk reflects the important recognition that sexual stereotypes can result in discrimination transcending the bounds of biological identity. For example, individuals who are not biologically female can suffer sex discrimination if they do not conform to the gender roles assigned to their biological identity. See generally Mary Ann C. Case, Disaggregating Gender from Sex and Sexual Orientation: the Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 86–94 (1995).

13. 42 U.S.C. § 13981(e)(1) states:
While the Supreme Court in *Morrison* struck down the VAWA Civil Rights Remedy on constitutional grounds, the question of when gender-based crimes warrant civil rights treatment remains alive as victims seek alternative avenues of relief. Legislative proposals have been introduced in Congress that would create a cause of action that retains the essential elements of the 1994 VAWA Civil Rights Remedy—providing civil redress for gender-motivated crimes—but would require that each case involve some explicit link to commercial activity. If enacted, that law unquestionably would afford more limited relief than the 1994 law, but it would nevertheless provide a basis for federal civil rights recovery. Other than the invalidated Civil Rights Remedy, the only federal bias crime law currently in place that recognizes gender-based bias crimes is a provision of the Violent Crime Control and Law Enforcement Act of 1994, which directs the United States Sentencing Commission to enhance sentences for bias-motivated crimes, including those based on gender. Yet only one reported decision has addressed whether a crime was gender-motivated under the terms of the Act, and that court rejected the claim under reasoning that appears contrary to Supreme Court precedent.

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (Within the meaning of subsection (d) of this section).

14. H.R. 5021, 106th Cong. (2000). In addition, the law would enable the United States Department of Justice to intervene upon a showing that local authorities' response to gender-based crimes was discriminatory. Id.


16. In United States v. Boylan, 5 F. Supp. 2d 274 (D.N.J. 1998), a municipal court judge was alleged to have coached single, poor, Hispanic or light-skinned Black female municipal court defendants charged with traffic violations to lie about their offenses in order to get reduced fines and penalties in return for sexual favors. The court declined to treat the judge's crime as a hate crime for sentencing purposes, because it was not persuaded that "the primary motivation for the offense was a hatred of the municipal court defendants." Id. at 283. That reasoning is incorrect in at least two respects. First, the court confused "hatred" with the discriminatory bias with which the sentencing guidelines are concerned. The Supreme Court has recognized that discriminatory motivation is distinct from maliciousness or hatred. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269–70 (1993). In addition, the court's factual analysis failed to evaluate whether the judge's treatment of the defendants was informed by their gender or racial
Substantive federal criminal law permits federal prosecution of certain bias crimes based on race, color, religion, or national origin, and the federal Hate Crimes Statistics Act requires reporting of hate crimes based on these categories as well as on sexual orientation and disability.\(^\text{17}\) Neither cover bias crimes based on gender. In June 2000, the Senate passed the Hate Crimes Prevention Act (HCPA), an amendment to the current hate crimes law.\(^\text{18}\) That legislation would strengthen the existing hate crimes law by permitting federal criminal prosecution of bias crimes committed because of a person's real or perceived sexual orientation, gender, or disability, and by removing overly restrictive jurisdictional obstacles to federal involvement.\(^\text{19}\) A similar amendment has been introduced in the House of Representatives.\(^\text{20}\) In legislative hearings addressing the scope of the acts that would be covered under the HCPA, supporters urged that gender-motivation be assessed using the same type of inquiry specified under the VAWA Civil Rights Remedy and employed in other discrimination and bias crime cases.\(^\text{21}\)

At the state level, while some state laws provide redress for gender-motivated violence, coverage is far from uniform and the laws have not been widely used. As of 1999, 40 states and the District of Columbia had enacted some form of bias crime law, but only 19 included a provision for gender-bias crimes.\(^\text{22}\) Ten states and the District of Columbia provide identity. Accordingly, the decision sheds no light on the extent to which gender will be considered as a motivating factor that can influence sentencing in criminal cases.


\(^{19}\) See Hate Crimes Statistics Act. Currently, the federal hate crime bill permits federal prosecution of hate crimes based on race, color, religion or national origin that interfere with the target's enjoyment of one of the federal rights enumerated in the statute. See 18 U.S.C. § 245 (2000).


civil remedies for victims of gender-bias crimes. Yet despite these civil remedies, there are no reported decisions awarding civil relief to a victim of a gender-motivated crime. In the wake of the Morrison ruling, several state legislatures have considered state civil rights provisions with language tracking that of the VAWA Civil Rights Remedy. New York City enacted such a law in December 2000. This legislative activity illustrates the enduring interest in legislative redress for gender-based bias crimes and the consequent vitality of judicial inquiries into the nature of gender-motivation.

II. Violence Against Women as Gender-Based Violence

Concerned about limiting the cases subject to federal jurisdiction, Congress incorporated two elements of proof in the VAWA Civil Rights Remedy. A plaintiff first had to establish that she was the victim of a "crime of violence" of sufficient severity. In addition, she had to prove


27. See 42 U.S.C. 13981(d)(2). The Statute contains a two-part definition of "crime of violence." First, the plaintiff must establish that the "act or series of acts . . . would constitute a felony against the person" or "against property if the conduct presents a serious risk of physical injury to another." 42 U.S.C. § 13981(d)(2)(A). In addition, the act must come within the meaning of 18 U.S.C. § 16 (1994) ("Section 16"), a federal statute defining a "crime of violence" that has been used principally in the sentencing context. The Section 16 definition bolsters the Civil Rights Remedy's requirement that only sufficiently violent acts will be covered, by providing that the predicate felony
that the act was “motivated by gender.”28 This section of the Essay examines how courts interpreted the gender-motivation element of claims brought under the Civil Rights Remedy. In requiring proof of the connection between the defendant’s violent acts and the victim’s gender, the gender-motivation requirement itself had two parts. The victim had to prove that the violent act was committed: (1) “because of gender or on the basis of gender,” and (2) “due, at least in part, to an animus based on the victim’s gender.”29 That two-part analysis notwithstanding, the legislative history indicated that the statutory elements were drafted with the goal of ensuring that only gender-motivated violent acts, rather than “random” acts of violence, warrant recovery.30 Courts addressing the “animus” and “because of gender” determinations similarly addressed the two as a single inquiry.31 One court went so far as to reject defendant’s argument that gender-motivation must be proven according to a heightened standard because of the “animus” language, further supporting the singular inquiry.32

Congress intended the VAWA Civil Rights Remedy’s gender-motivation element to be treated much like “bias” elements contained in other federal civil rights laws. According to Congress, proof of gender-motivation under the Civil Rights Remedy would “proceed in the same ways proof of race or sex discrimination proceeds under other

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29. Id.
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civil rights laws. Congress specifically referenced caselaw interpreting statutes such as 42 U.S.C. §§ 1981, 1983, 1985(3) and Title VII of the Civil Rights Act of 1964, as sources of the type of circumstantial evidence that could help establish that an act was "gender-motivated" rather than "random."

The Civil Rights Remedy was built on a long history of federal legislative interventions to redress bias-motivated conduct. Both federal and state courts routinely analyze cases involving harassment and violence, using circumstantial evidence to determine whether the conduct at issue was motivated by bias. In those cases, as well as cases litigated under the VAWA Civil Rights Remedy, the type of evidence found reflective of bias is remarkably consistent regardless of the particular statutory formulation at issue or the forum in which the case was heard. Courts infer discriminatory motivation from evidence such as epithets, patterns of behavior, statements evincing bias, and other circumstantial as well as direct evidence reflecting gender-based bias. Although the volume of caselaw is not extensive, the VAWA Civil Rights Remedy cases reveal that courts followed Congress's direction regarding what type of evidence to use to assess gender-motivation.

A. Gender-bias in Domestic Violence Cases

Many of the reported decisions involving VAWA Civil Rights Remedy claims stem from circumstances involving domestic violence, but only three of those decisions directly addressed the gender-motivation elements. In Ziegler v. Ziegler, a federal district court in Washington found ample evidence of gender bias to support a VAWA civil rights claim. In addition to allegations of rape, the court cited the following evidence: gender-specific epithets and acts that perpetuated stereotypes of women's submissive roles, such as defendant's controlling all of the family's financial information and documents, holding all of

34. Id.
35. See Goldscheid, supra note 7, at 132-42.
38. Id. at *10-11
plaintiff’s personal documents such as her passport, not placing her name on title documents, not disclosing insurance information to her, and becoming angry if she questioned him about the family affairs.\textsuperscript{39} Applying the standards identified by Congress for recognizing hate crimes, the court relied on evidence of severe and excessive attacks on the plaintiff, especially during her pregnancy, and allegations that the violence was often without provocation and specifically at times when the plaintiff asserted her independence.\textsuperscript{41} While acknowledging that “there may be many causes of violence within a marital relationship,” the court found that the alleged facts “present more than conclusory allegations” and supported an inference of gender-motivation.\textsuperscript{42}

A Northern District of Illinois court found allegations of marital rape probative of gender-motivation. In \textit{Kuhn v. Kuhn},\textsuperscript{43} the court referenced and agreed with two other district court decisions, both of which recognized that alleged criminal sexual assaults are generally motivated by gender.\textsuperscript{44} Specifically, the \textit{Kuhn} court concluded that “[w]e too have little doubt that an alleged criminal sexual assault is motivated by gender and that cases in which a criminal sexual assault is not motivated by gender are few and far between.”\textsuperscript{45} The court suggested it might find subtle difficulties in other domestic violence cases when it stated that “[t]he interplay between plaintiff’s gender and her status as a wife will require a greater evidentiary exposition.”\textsuperscript{46} However, at the time the Supreme Court struck down the Civil Rights Remedy, no court had provided any greater analysis of defendants’ frequent arguments that purported violence was because the target was his wife rather than a woman.

The third decision to address gender-motivation summarily rejected the claim, but did so because the plaintiff failed to allege that the acts of violence constituted a felony.\textsuperscript{47} Nothing in the decision indicates that the complaint included any evidence of gender-motivation beyond the allegations of domestic violence. Given the Civil Rights Remedy’s legislative history indicating that some circumstantial evidence of gender-motivation beyond a bare allegation of domestic violence would be needed to sustain a claim, the court’s rejection of this case is unremarkable.

\textsuperscript{39.} \textit{Id.} at *9–10.
\textsuperscript{40.} \textit{Id.} at *10 (citing S. REP. No. 102-197, at 50 n.72 (1991) (referencing generally accepted guidelines for identifying hate crimes as useful in analyzing gender-motivation)).
\textsuperscript{41.} \textit{Id.}
\textsuperscript{42.} \textit{Id.}
\textsuperscript{44.} \textit{Id.} at *6 (citing Mattison v. Click Corp. of America, Inc., 1998 WL 32597 (E.D. Pa. 1998), and Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997)).
\textsuperscript{45.} \textit{Id.}
\textsuperscript{46.} \textit{Id.}
\textsuperscript{47.} Dolin v. West, 22 F. Supp. 2d 1343, 1351 (M.D. Fla. 1998).
Courts applying state anti-bias laws also have relied on circumstantial evidence, such as derogatory comments, to assess whether a particular case of domestic violence is "gender-motivated." For example, in State v. Aboulez, a Massachusetts court issued an injunction under that state's anti-bias law after considering significant evidence of gender-motivation. While there was no written opinion in that case, affidavits submitted by the defendant's wife and other former partners reflected a pattern of repeated violence committed against them, combined with evidence of misogynic epithets and other statements evincing stereotypical views of women.

In addition to the evidence described above, domestic violence cases may contain other indicia of gender bias. The coercion and control that typify domestic violence frequently reflect men's attempts to ensure that their partners conform to traditional gender roles. They may insist that their partners stay home, dictate their manner of dress, and limit their interactions with others. They may berate their partners if they depart from traditional gender-specific roles such as cooking or cleaning, and they often interfere with women's working lives, dramatically inhibiting their independence. Similarly reflecting conduct that targets a

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49. Id. at 1–2 (issuing injunction prohibiting batterer from taking various actions against "any woman who is a resident or visitor to the Commonwealth").

50. See Compl., State v. Aboulez, No. 94-0985H, (Mass. Super. Ct. Feb. 23, 1994) (on file with the Michigan Journal of Race & Law). Along with physical abuse, the complaint alleged that the defendant called the women he was involved with and women in general "whores," "bitches," "sluts," and "no good," and said things such as "you're not as smart as me," and "you'll never be as smart as me." Id. at ¶8. He told one of the women that she was "just like all the rest of them, cheap... easy," and said that women in general were weaker and not as smart as men. Id. at ¶16. In several of his relationships, he threatened to kill his partner if she ever left him, saw anyone else, or sought a restraining order against him. Id. at ¶¶8, 16, 26, 35. He refused to allow the women to leave their apartments alone and dictated how they should dress. Id. at ¶¶18, 26, 35. He also stated that he had the right to beat a woman because she was his wife. Id. at ¶9. He regularly forced his partners to engage in sexual intercourse against their will. Id. at ¶9, 28.


woman's "femaleness," batterers may subject a woman to violence when she is pregnant. While not every instance of intimate violence may reflect stereotypic gender roles, the few cases that address the question confirm that discriminatory motivation in domestic violence cases can be judicially cognizable.

B. Gender-bias in Sexual Assault Cases

Notwithstanding a debate about whether every act of rape or sexual assault is gender-motivated analogous to that surrounding domestic violence, almost all courts evaluating whether rape or sexual assault were "gender-motivated" under the VAWA Civil Rights Remedy reasoned that sexual assault or other unwanted sexual conduct reflected gender-motivation. Given the extent of debate about the issue, it is perhaps surprising that most of these courts did not look beyond the allegation of rape or sexual assault itself, apparently deeming it self-evident that such crimes are inherently gender-motivated. One or two opinions, however, suggested that the analysis might be more complex in cases involving acquaintance rapes. Overall, these decisions reflect some advances in judicial understanding of the connection between gender bias and sexual assault, but also suggest that stereotypes still prevail.

Perhaps the most widely publicized VAWA civil rights sexual assault case is United States v. Morrison, litigated in the lower courts as Brzonkala v. Va. Polytechnic Institute. Notwithstanding the lower courts' different
conclusions about the Civil Rights Remedy’s constitutionality, each of the courts that considered the case determined that Christy Brzonkala’s allegations that she was gang raped described a crime of violence that was “gender-motivated” under the meaning of the statute. For example, the trial court followed Congress’s direction to evaluate the “totality of the circumstances” and to apply criteria used to assess other forms of hate crime. Accordingly, it found salient the fact that Brzonkala alleged that the defendants were virtual strangers, that neither used a condom, and that Morrison later made comments indicating his disrespect for women. Among the comments the court found significant was one made after the third rape, when Morrison threatened Brzonkala by stating, “You better not have any fucking diseases.” In the months following the rape, Morrison announced publicly in the dormitory dining hall that he “like[d] to get girls drunk and fuck the shit out of them.” While the trial court took pains to distinguish these allegations from those of an acquaintance rape, which it postulated “could involve a misunderstanding and is often less violent than stranger rape,” it concluded that the circumstantial evidence alleged reflected “gender disrespect” and warranted upholding a claim of gender-motivation.

originally brought by Christy Brzonkala, asserting Civil Rights Remedy claims against defendants Morrison and Crawford, as well as a claim against Virginia Tech for violating her rights under Title IX of the Education Amendments of 1972, which bars gender discrimination in education. The Title IX claim was not before the Supreme Court and was settled between the parties. The United States intervened as a party in the lawsuit to defend the constitutionality of the Civil Rights Remedy.

55. In the district court, Judge Kiser concluded that Brzonkala’s complaint stated a VAWA civil rights claim, but struck down the law as unconstitutional, finding that Congress lacked authority to enact the law under either the Commerce Clause or Section 5 of the Fourteenth Amendment. Brzonkala, 935 F. Supp. at 801. The Fourth Circuit panel, in a 2-1 decision, reversed on the constitutional issue, holding that Brzonkala had stated a claim under the VAWA Civil Rights Remedy and that Congress constitutionally exercised its Commerce Clause powers when it enacted the law. Brzonkala, 132 F.3d 949 (4th Cir. 1997). The panel decision was vacated, and, in a 7-4 en banc decision written by Judge Luttig, the Fourth Circuit also held that Brzonkala had stated a VAWA civil rights claim but that the law was unconstitutional under both the Commerce Clause and Section 5 of the Fourteenth Amendment. Brzonkala, 169 F.3d at 889. The dissenting judges would have upheld the law under the Commerce Clause and therefore did not address the Section 5 argument, but they concurred that Brzonkala had stated a claim of gender-motivation.

57. Id.
58. Id. at 785.
59. Id.
60. Id. at 784–85. See infra notes 82 to 85 for a further discussion of this analysis of acquaintance rape.
61. Id.
On appeal, a panel of the Fourth Circuit Court of Appeals upheld the claim based on similar reasoning, noting that a "gang rape itself constitutes an attack of sufficient severity" to fit within the classic criteria for assessing hate crimes, and that the acts were committed without provocation. The panel further relied on a concession by one of the assailants during a college disciplinary hearing that Ms. Brzonkala twice told him "no" before the alleged rape, and the fact that there was no other apparent motive for the attack, such as robbery or theft. Like the trial court, the appellate panel cited comments by one of the defendants during and after the rape as further evidence of gender-motivation. Based on that evidence, the court concluded that "[v]irtually all of the earmarks of 'hate crimes' are asserted here," and it upheld Brzonkala's claim. The en banc panel similarly concluded that Brzonkala had stated a claim; however, it was less emphatic in its reasoning. Although the court agreed that Morrison's comments supported an inference of gender-motivation, it added the caveat that those allegations "do not necessarily compel the conclusion that Morrison acted from animus toward women as a class . . . ."

While not as well-publicized as the Morrison case, a decision by the Ninth Circuit Court of Appeals most explicitly articulated the view that sexual assault, and particularly rape, is inherently gender-biased. In Schwenk v. Hartford, the court considered a charge of attempted rape of a transsexual prison inmate by a prison guard. After reasoning that "gender-based animus" is present wherever a "strong emotional response" to the victim's gender or sexual identity underlies the assault, the court stated that rape and attempted rape are, sui generis, animated by gender-animus. The court seemed to presume that rape and sexual assault are gender-motivated, but its reference to a "strong emotional response" to the victim's gender identity raises the question whether such an emotional response would be an additional required element of the claim. One would hope that the court was not implying that a plaintiff would have to establish that the perpetrator's actions were based on

62. Brzonkala, 132 F.3d at 964.
63. Id. at 963.
64. Id.
65. Brzonkala, 169 F.3d at 830.
66. 204 F.3d 1187 (9th Cir. 2000).
67. Id. at 1203.
68. Id. at 1202–03. The court opined that it would be both impossible and unnecessary to determine whether particular rapes are due in part to gender-based animus, as "the nature of the crime dictates a uniform, affirmative answer to the inquiry." Id. at 1203. The court in Schwenk went on to state that prison rape in particular occurs "because of gender," due in part to the gender assignment associated with prison rapists and their victims. Id. at 1203 n.14 (citations omitted).
an emotional response in order to establish that sexual violence was gender-motivated. 

A federal district court in Utah provided the most detailed explanation, albeit in dicta, of why unwanted sexual contact is gender-motivated, as contemplated by the VAWA civil rights statute. In *McCann v. Rosquist*, the district court considered claims by several women that they were repeatedly sexually harassed and assaulted by the chiropractor for whom they worked. Although the court rejected the women’s claims because they failed to establish the “crime of violence” element of the Civil Rights Remedy, it opined that the claims would satisfy the “gender-motivation” element, stating that:

> [t]he notion that non-consensual sexually-oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong. . . . In fact, the perception that a man is somehow less culpable in taking inappropriate liberties with a member of the female gender if his motivations are amorous, seems to be just the type of “animus” that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that

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69. Another court evaluated a VAWA Civil Rights Remedy claim based on same-sex sexual assault; however, it rejected the claim, finding no circumstantial evidence of gender-bias. See *Wilson v. Diocese of New York*, No. 97 Civ. 2400 (JGK), 1998 U.S. Dist. LEXIS 2051, at *41 (S.D.N.Y. Feb. 23, 1998). While the *Wilson* court reached its decision with virtually no analysis, the decision may reflect a presumed, though perhaps incorrect, distinction between male-female and same-sex sexual assault. Whereas male-female sexual assault may be treated as gender biased with virtually no analysis, this decision indicates that same-sex sexual assault cases may not receive the same presumption. Courts may require circumstantial evidence and other factual allegations showing that discriminatory motivation was a factor. Such an approach would be similar to that employed in some Title VII cases involving same sex sexual harassment. See generally *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80–82 (1998); see also Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STANFORD L. REV. 691 (1997) (contrasting judicial treatment of same-sex versus opposite-sex sexual harassment cases).


71. Id. at 1252. Employing an analysis that flies in the face of empirical data on the nature of sexual harassment at work, the district court determined that the sexual assaults were unlikely to create a risk that force would be used because they allegedly took place at work. Id. at 1152–53. Fortunately, that conclusion was rejected on appeal. *McCann v. Byron L. Rosquist, D.C., P.C.*, 185 F.3d 1113, 1116–21 (10th Cir. 1999) (reversing district court and holding that forcible sexual abuse carries a substantial risk of physical force), vacated and remanded for consideration in light of *United States v. Morrison*, 120 S. Ct 1740 (2000).
rise to the nature of those alleged in this action are laden with disrespect for women.\textsuperscript{72}

A federal court in Iowa took a slightly different approach but also recognized the bias inherent in unwanted sexual advances. In \textit{Doe v. Hartz},\textsuperscript{73} a case involving allegations of sexual assault of a parishioner by a priest, the court undertook an examination of VAWA's legislative history as part of its assessment of gender-motivation. It recognized that unwanted or unwelcome sexual advances are "demeaning and belittling, and may reasonably be inferred to be intended to have that purpose or to relegate another to an inferior status, even if the advances were also intended to satisfy the actor's sexual desires . . . ."\textsuperscript{74} The court noted that allegations of a sexual assault alone might not be enough to establish gender-motivation under the VAWA civil rights statute, given the legislative history requiring proof of discriminatory motivation.\textsuperscript{75} However, after analyzing Congress's directive to draw from other anti-discrimination and hate crime paradigms, the court deemed a view that unwanted sexual attention is "merely a 'signal of affection,'" a form of "romantic paternalism."\textsuperscript{76} The court rejected any such argument as reflecting the type of stereotype impermissible under equal protection analysis, and concluded that unwanted sexual advances "relegate[] women as a group to an inferior status without regard to their individual qualities."\textsuperscript{77} In its final analysis, the court found that the plaintiff had adequately pled gender-motivation.

In several VAWA civil rights cases, sexual assaults in the workplace were also found to satisfy the gender-motivation element of the statute. Crediting circumstantial evidence similar to that used in other hate crime cases, one court relied on the fact that a woman was raped at her workplace by a "total stranger" who used sexual language and commented on her figure and breasts, grabbed her hair, breasts, and buttocks, fondled her breasts, buttocks and stomach, and kissed, pinched, and pursued her after she expressed a lack of consent.\textsuperscript{78} The court also noted the defendant's history of making unwanted sexual advances towards women,

\begin{enumerate}
\item Id. at 1252–53.
\item 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998).
\item Id. at 1408.
\item Id. at 1406.
\item Id. at 1408 (citation omitted).
\item Id. (citing Frontiero v. Richardson, 411 U.S. 677, 687 (1973)).
\item Id. at 1408–09.
\item Id. at *10–11.
\end{enumerate}
which it found underscored the fact that his actions against the plaintiff were motivated by a gender animus towards women. 81

In other cases involving workplace sexual assaults, courts deemed the sexual assault probative of gender-motivation, without requiring any additional proof. For example, an Illinois federal district court concluded that a woman who alleged that her employer made inappropriate sexual advances, including fondling, attempting to remove her clothing, grabbing her breasts, and assaulting and attempting to rape her, stated a VAWA civil rights claim. 82 Another court found that allegations that a male supervisor called a female employee a “dumb bitch” and later shoved her to the ground would allow a reasonable jury to infer gender-motivation. 83 Similarly, two different courts concluded with virtually no analysis that “sexual harassment of any kind” would satisfy VAWA’s statutory requirement for gender-motivation. 84

Courts’ determinations that rape and sexual assault are probative of gender-motivation are not surprising given the treatment of rape in other sex discrimination cases. For example, in cases asserting sexual harassment in the workplace, a single incident of rape or sexual assault can be enough to warrant a court’s conclusion that the act was “because of sex,” as that term is defined under Title VII. 85 Since the VAWA Civil Rights Remedy’s gender-motivation element tracks Title VII’s requirement that the conduct be committed “because of sex,” and because Congress specifically directed courts to draw on Title VII in evaluating VAWA civil rights claims, the analogy is a logical extension of existing caselaw.

In contrast with these decisions, dicta by the Brzonkala trial court suggests that acquaintance rape cases might fare differently from cases of stranger rape. Citing a concern that “date rape could involve a misunderstanding and is often less violent than stranger rape,” the court theorized that:


[d]ate rape could also involve a situation where a man’s sexual passion provokes the rape by decreasing the man’s control . . . [D]ate rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim’s personality to some extent. 86

Other courts criticized that reasoning as reflecting sweeping generalizations, contrary to Congress’s direction to analyze each case on a case-by-case basis. 87 In addition, the trial court’s position ignores the essential point that forced sexual contact in the name of passion or personality often supports, rather than refutes, a claim of gender-motivation because it shows a disrespect for women. 88 It also contradicts research indicating that acquaintance rapes frequently are premeditated and are predicated on discriminatory biases about male entitlement to coerce sexual relations with women. 89 Nonetheless, the Brzonkala trial court decision illustrates the extent to which stereotypical attitudes toward acquaintance rape persist, and suggests that civil rights cases asserting that such assaults reflect gender-motivation may be more difficult to sustain.

Several VAWA Civil Rights Remedy cases were dismissed for failing to state a claim of gender-motivation. What is striking about those decisions is that none of them rested on a judgment that the plaintiffs’ proffered evidence of gender-motivation was insufficient. Instead, each of those cases rejected VAWA Civil Rights Remedy claims because they lacked any allegation or evidence of gender-motivation. For example, several courts rejected claims that referred to evidence of assault, but contained no allegations that the assault was gender-biased. 90 In one such

86. 935 F. Supp. at 785.
87. See Anisimov, 982 F. Supp. at 541 (critiquing the Brzonkala trial court’s “broad characterizations of rape”). See also Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357, 1362, n.4 (M.D. Ala. 1998) (critiquing the Brzonkala trial court’s distinction between stranger rape and date rape, stating that “rape is rape”).
88. See McCann, 998 F. Supp. at 1252-53. See also supra note 71 and accompanying text.
89. See, e.g., David Lisak, Ph.D., Interview with a Rapist: Transcript from a Study of Acquaintance Rapists (unpublished report, U. Mass. Boston, Clinical Psychology Dept.) (on file with the Michigan Journal of Race & Law) (documenting “techniques” used by “unincarcerated” rapists to target women for invitations to fraternity parties at which they would ply the women with alcoholic beverages, take them to predesignated rooms, and have sexual relations notwithstanding the women’s objections).
case, the court noted that "the record is replete with testimony that [the parties] did not like each [other] because of their respective positions regarding Unions, not because of gender." 91 These cases reflect the unremarkable view that VAWA civil rights allegations asserting violence by a man against a woman cannot be sustained absent some other indication that the act was in some way gender-motivated. 92

CONCLUSION

While many cases brought under the VAWA Civil Rights Remedy focused in large part on the law's constitutionality, others explicated the type of proof that would be required to establish gender-motivation. These decisions brought to light the parallels between gender-motivated crimes and other hate crimes. Although the law enacted in 1994 no longer is available to plaintiffs, the Morrison decision rejecting the law's constitutionality should not obscure Congress's important recognition of the discriminatory nature of these crimes. Cases addressing the meaning of gender-motivation adjudicated during the VAWA Civil Rights Remedy's six-year history undoubtedly will serve as persuasive authority under alternative statutory frameworks as women continue to hold perpetrators accountable in order to recover from the harm that results from gender-based violence.

91. Harris, 97 F. Supp. 2d at 907.
92. One exception is the somewhat anomalous case of Brandon v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998). The court there seemingly accepted that allegations of sexual violence may alone be "indicative of gender animus" and therefore sufficient to satisfy the VAWA civil rights gender-motivation element. Id. at 1362. Nonetheless, the court rejected the plaintiff's claim because it interpreted the VAWA civil rights statute to require that the predicate felony offense itself show proof of gender animus as one of its elements. Id. In addition to lacking any legal support whatsoever, that analysis is illogical because felony statutes generally do not require proof of gender-motivation as an explicitly enumerated element. Fortunately, the court allowed the plaintiff to amend her complaint with particular allegations supporting her claim of gender-motivation. No other court has adopted this, or any similar, analysis.