An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act

David Frazee
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/mjgl
Part of the Civil Rights and Discrimination Commons, Law and Gender Commons, Law and Race Commons, and the Legislation Commons

Recommended Citation
Available at: http://repository.law.umich.edu/mjgl/vol1/iss1/11

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlawrepository@umich.edu.
AN IMPERFECT REMEDY FOR IMPERFECT VIOLENCE: THE CONSTRUCTION OF CIVIL RIGHTS IN THE VIOLENCE AGAINST WOMEN ACT†

"David Frazee"

I. Developing the Models • 171
   A. The Gender Gap in Current Federal Civil Rights Laws • 171
      1. Conspiracy, State Action, and Private Violence
      2. Deprivation of Rights and State Involvement
      3. Gender-Motivated Violence and Citizenship
      4. The Title III Remedy
   B. The Gender Gap in Current Bias Crime Laws • 188
   C. Three Public-Private Splits • 197
      1. The Location of the Violence
      2. Relationship Between the Parties
      3. The Nature of the Violence
   D. The Dangers of Adding Gender to the Models • 206

II. Specific Problems of Applying the Models • 212
   A. The Construction of Women's Identities • 213
   B. Differential Treatment Test Fails to Understand Violence Against Women • 219
   C. An Excessive Force Requirement for Gender Motivated Violence • 225
   D. Racism and the Violence Against Women Act • 231
      1. A Brief History of Race and Sexual Violence
      2. “Reform” Cannot Support the Racist Meanings of Sexual Violence

† I would like to thank those who advised this project, read drafts of this article in various incarnations, or helped to answer questions about relevant laws: Annie Roskin, Mary C. Dunlap, Susan Okin, Mark Kelman, Joe Saul, Ann Noel, Noah Feldman, Lee Medovoi, Estelle Freedman, Jane Collier, Paul Lomio, Christina Whitman, Sally Goldfarb, Steven M. Freeman, Victoria Nourse, and the members of the San Francisco Intergroup Clearinghouse Subcommittee on Gender and Hate Violence. Thanks also go to the Michigan Journal of Gender & Law staff, especially Bentina Chisolm, Sarah Greden, Ian Kremer, Rachael Meny, and Stacey Mufson.

III. Reforming the Violence Against Women Act • 241

A. Reforming the Cause of Action • 241

1. Expand the “Crime of Violence” Language
2. Enumerate Some Crimes of Violence
3. Create a New Structure for Litigation

B. Clarifying the Scope and Direction of the Act • 247

1. Relationship of the Parties
2. Counteracting the VAWA’s Racist Potential

C. Why a Civil Rights Remedy is Necessary • 251

D. Conclusion • 256

Along with the Civil Rights Act of 1964 and the Americans with Disabilities Act, the Violence Against Women Act (VAWA) could be the most significant addition to federal civil rights laws in the last century. While potentially revolutionary, the VAWA’s civil rights remedy forges two problematic legal concepts—traditional civil rights jurisprudence and “perfect” violence—into a super-remedy that risks combining the worst aspects of each. Those who utilize and interpret the Act can avoid this outcome by situating individual violent acts in the broader social and historical context of gender-motivated violence.

Under current law, gender-motivated violence outside the workplace escapes civil rights protection because it infringes no recognized civil right, and often involves single perpetrators, instead of conspiracies. Title III of the VAWA attempts to correct these problems. First, in section 302(b), “Right To Be Free From Crimes Of Violence,”


2. As of the last editing of this article in mid-January 1994, the future of the VAWA’s civil rights provisions has become uncertain. The Senate passed its version of the VAWA as titles XXXII-XXXVII of the Senate Crime Bill in November 1993. H.R. 3355, 103d Cong., 1st Sess. (1993). The House also passed its version of the VAWA in November, but without the civil rights title. Though the House VAWA, including the civil rights provisions, had 222 co-sponsors—a majority of the Representatives—key Democrats on the Judiciary Committee balked at the last minute, alleging that they had not had enough time for extensive hearings on the provisions. The conflicting versions of the Act will go to a conference committee. Since the civil rights provisions may not pass on their own, inclusion of the Senate’s version of title III into the final conference bill is vital.
the VAWA creates a positive statutory right: "All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . ." In its next section, the VAWA establishes its own cause of action:

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) 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.

Unlike other civil rights statutes for private violence, this statute contains no conspiracy requirement. An individual person, such as a rapist or batterer acting alone, may deprive another person of the right to be free from gender-motivated violence. On paper, the VAWA fills the "gender gap" in current civil rights laws.

In practice, the success of the VAWA's civil rights remedy will depend on how judges interpret the Act in actual cases. One might argue, perhaps cynically, that judges will interpret the VAWA as narrowly as possible, either because they dislike having a broad range of "domestic" cases filling otherwise busy dockets, or because they are

5. In 1991, the Judicial Conference of the United States officially opposed the VAWA's civil rights provisions because they would "embroil the federal courts in domestic relations disputes." REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 1 (Sept. 1991). Moreover, the provisions would "flood [federal courts] with cases that have been traditionally within the province of state courts." REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE, supra at 7. In his year-end report, Chief Justice Rehnquist stated that federal courts should be "reserved for issues where important national interests predominate." William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 THE THIRD BRANCH 1 (1992). He then endorsed the Judicial Conference's opposition to the VAWA, and reiterated that it "could involve the federal courts in a whole host of domestic relations disputes." Rehnquist, supra at 3.

The Judicial Conference noted with approval the official opposition of the Conference of Chief Justices of the States. These state judges opposed the VAWA's civil rights provisions because they would "be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is. . . . The issue of inter-spousal litigation
largely unsympathetic to gender-based claims. However, given the enforcement of previous civil rights laws, such as Title VII, most judges will probably read the Act in a good faith attempt to construe its appropriate meaning. In the case of the VAWA, this process will involve judges interpreting the Act as the intersection of two legal concepts: traditional civil rights jurisprudence and gender-motivated violence. Because of the "gendered" historical development of each

Not only have you improperly read the statute, your comments verge dangerously close to the kind of stereotypes we condemn. To put the collective force of the federal judiciary behind the assumption that women—unlike other groups—will file false and vindictive civil rights claims suggests the very gender-biased stereotypes that my legislation was intended, in part, to dispel.

Letter from Sen. Biden to Hon. Thomas M. Reaveley, then Chair of the Ad Hoc Committee on Gender-Based Violence of the Judicial Conference (Sept. 20, 1991) (on file with author).


Not surprisingly, Rehnquist's and McKusick's sentiments on the VAWA are not shared by all their colleagues. The 1000-member National Association of Women Judges endorses the legislation: "The National Association of Women Judges believes that the creation of a federal civil rights remedy will provide needed congressional recognition that gender-based violence is a national problem. [The VAWA helps] achieve this without interfering with the administration of justice in either the state or federal courts." Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 63 (1993) (statement of the Honorable Judith Billings, Judge of the Utah Court of Appeals and President of the National Association of Women Judges).

Aside from the overt sexism of some judges, federal courts structurally exclude gender in a number of ways from the "domestic relations exception" to the relative absence of women from key jobs. See generally Resnik, supra note 5. See also Bonnie Moore, Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters, 31 UCLA L. Rev. 843 (1984).
concept, in practice they often work to the detriment of women.

Traditional civil rights models are gendered because they were developed to remedy harms directed primarily against men. To the extent that women suffered the same harms, they received civil rights protection. Harms unique to women or disproportionately suffered by women largely fell outside of civil rights scrutiny. It is not accidental that traditional civil rights models excluded many gender-related harms, such as rape. Too often civil rights doctrines have worked in conjunction with other social institutions to trivialize the importance of gender-based violence by labeling such violence as aberrant, private, personal, or individual and therefore outside of the realm of violence that merits serious legal remedies.

Likewise, the legal construction of what constitutes gender-motivated violence often functions to distort its reality. "Perfect" violence fits a narrow legal narrative of gender-motivation. "Real rapes" count as bona fide gender-motivated crimes, as do serial murders of women. As Professor Susan Estrich discusses, "real rape" is a conception of sexual violence which evokes a black stranger who brutally attacks a white woman, leaving scars and bruises, while she resists to the utmost. Anything "less" than this paradigmatic example often fails to satisfy the socio-legal demand for the extreme "perfect" case. The "perfect" case is not only gendered, but also racial, as sexual assault has been defined historically in racial terms.

Good faith interpretation of the VAWA’s civil rights remedy might reflect this gendered logic and deprive many women of the remedy promised by the legislation, unless judges understand and actively reject it. The limited range of cognizable civil rights violations depends on complex public-private dichotomies that exclude from judicial review those actions deemed private, such as violence against women. Further, traditional civil rights arguments may fail to address the historical context of gender-motivated violence, the multiple motivations behind it, and the nature of the harms it causes.

Civil rights actions under the VAWA will most likely succeed against two types of violence: those acts of gender-motivated violence which resemble either racially-motivated violence or those which resemble what Estrich labels "real rape." The "strongest" cases will resemble both. Cases which do not fit these models may escape judicial remedy. It would be tragic if those acts which comprise the bulk of

gender-motivated violence—such as domestic battering and acquaintance rape—make for the “weakest” cases.

Gendered logic is not irreversibly built into the foundation of civil rights theory. New legal constructions of civil rights which respond to the empirical reality of gender-motivated violence can transform unresponsive legal theories, but only if historically grounded. Civil rights laws may appear irredeemably sexist, but they are not. Indeed, unless judges move beyond contemporary legal understandings that marginalize gender, the Act is scarcely more than an empty consecration of unusable doctrine. The legislative history as a whole simply does not support such a narrow reading.

For victims of gender-motivated violence, a federal civil rights remedy will provide a critical legal tool for articulating individual and group harm while challenging institutional complicity in that harm. Even with the dangers of utilizing a rights-based argument to claim remedies for victims of gender-motivated violence, civil rights jurisprudence provides the best available legal tool—short of a radical legal revolution—for ensuring the safety of those harmed by such violence. The test of a new civil rights law should be its ability to address concrete historical disadvantages and provide protection to those most socially powerless.8

Section I explores the legal models previously developed to address civil rights violations. The VAWA remedies the obvious structural barriers to granting a civil rights cause of action to victims of gender-motivated violence. In many ways, the VAWA extends the logic of sex-based remedies available under Title VII beyond the workplace and adds protections for gender-motivated violence analogous to those found in other civil rights laws.

Ironically, the VAWA implicitly relies on a model of collective violence that structurally excludes many forms of gender-motivated violence. It does this by transferring the model of “bias” or “hate” crimes, developed to address racially and religiously motivated actions, to gender-motivated violence. The classic hate crime scenario covers certain forms of “bias” violence that are societally conditioned and institutionally supported to the exclusion of others that are no less invidious. Only “public” acts impede citizenship and deserve civil rights remedies. Acts that are “private” and individualized, defensible as

"personal animosity," do not constitute discrimination. Civil rights violations are theorized as collective, as when someone is randomly selected for violence based on their membership in a group. In the case of violence motivated by gender, this psychologically unsophisticated narrative of violence will work against women. Violence against women is often defined as private and personal, no matter how tenuously acquainted the parties involved are. The original radicalism of Reconstruction civil rights statutes—which embodied the idea of the centrality of bodily security from private violence as a prerequisite for civic participation—has been lost. The gendered nature of the model of bias violence makes it unresponsive to gender-motivated violence. The addition of gender to theories developed to address other forms of violence can transform the theories, but only if the theories confront gender-motivated violence on its own terms.

Section II explores four specific problems in the application of the VAWA. The first two problems result from the use of a differential treatment test in civil rights jurisprudence. Discrimination is measured by a differential treatment test which asks whether a person would not have experienced an action "but for" an identified characteristic. The first result of this analysis is that it cuts identities apart. VAWA plaintiffs may have to choose either sex or race—but not both—as the basis of their claims. Second, not only does the differential treatment test fail to construct lives as they are lived—why must an African-American woman when raped by a white man choose race or sex as the basis of her legal claim when neither suffices?—but also, when applied to sexual violence, this test obscures the nature of inequality and abuse. The differential treatment approach relegates questions of sexuality and power inequalities to the periphery. A battering husband, for example, may not batter all women with whom he comes into contact, so his behavior may look more like "personal animosity" than discrimination.

The other two problems arise from the legal narrative of gender-motivated violence. First, the VAWA creates a force requirement for its cause of action—crimes of violence must be violent felonies, which exclude most domestic violence. Because of the VAWA's excessive definition of force, victims might have to prove force beyond the definition of the crime itself, risking that courts will read into "force" requirements similar to ones traditionally used in criminal rape trials. The definition of "crime of violence" also relies upon state law definitions. This perpetuates the worst aspects of federalism by creating a federal civil rights remedy dependent upon the very state laws whose
inadequacies are part of the justification for the federal remedy itself.

Second, the VAWA carries forward the tragic history of race and sexual violence by subtly incorporating discourses of racism into its conception of violence against women. The effect is not only that men of color—especially Native American men, who are disproportionately affected by federal law—will incur greater penalties under the VAWA than white men, but also that women of color will not receive the protection they should. Congress must work against racist meanings of sexual violence in order to curtail perpetuating the potentially racist uses of the Act.

Section III outlines a number of suggested changes to the statutory language and scope of the VAWA. Without more congressional guidance, courts may interpret the Act narrowly. The section concludes by outlining twelve reasons why a civil rights remedy is needed for gender-motivated violence.

Throughout these three sections, the article develops an implicit notion of what should constitute gender-motivated violence. Gender encompasses more than biological sex; it includes the social construction of sex-role behaviors, attitudes, and expectations, as well as the social relationships that result from those behaviors, attitudes, and expectations. Gender-motivated violence, therefore, is not simply violence that occurs primarily against women. As used in this article it includes: (1) certain enumerated crimes, such as rape, sexual assault, sexual abuse, abusive sexual contact, battering of spouses or intimate partners, and stalking; (2) violence committed to modify the victim’s sex-role behaviors or attitudes; (3) violence committed because of the perpetrator’s sex-role behaviors or attitudes in order to control the victim’s thoughts, beliefs, or actions, or in order to punish the victim for resisting the perpetrator’s control; and (4) violence motivated in whole or in part by the sex or gender of the victim. An investigation into gender-motivation must necessarily focus on the historical, political, psychological, and cultural meanings of the violence, because many acts of violence often appear personal, private, or random when viewed independently, even when the acts form part of a broader pattern.

The VAWA defines “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of

9. This language derives from various authors. One example is Andrea Brenneke. See Brenneke, supra note 8. The sources of each component of the definition are cited below as they are discussed.
Read against the history of civil rights jurisprudence and stereotypes about sex-based violence, this legal formulation will potentially exclude more gender-motivated violence than it includes.

I. DEVELOPING THE MODELS

Until the law reflects an understanding of relationships of inequality and underlying power structures, those who experience gender-motivated violence, especially from acquaintances, will not receive full protection from the legal system. Simply adding gender to existing models of discrimination may not be enough to ensure an adequate legal remedy for gender-motivated violence.

A. The Gender Gap in Current Federal Civil Rights Laws

The civil rights provisions of the VAWA grow out of traditional civil rights jurisprudence, developed primarily by Congress and courts to address certain forms of racial discrimination. Throughout the historical development of these doctrines, this jurisprudence has not addressed gender-motivated violence. The VAWA can only be understood as an outgrowth of existing laws and its vitality will depend on how courts interpret it against this background. Courts will apply many of the limitations of current doctrines to the VAWA, absent more specific statutory language and congressional guidance.

The authors of the VAWA wrote it to correct a perceived “gender gap” in current civil rights laws. This section explores what they identified as the reasons for and sites of the gap, the mechanics of the VAWA’s gap fillers, and the possible limits of these corrective measures. The authors correctly identified many of the surface reasons for the gap. However, they ignored deeper structural problems, which unfortunately leave courts with ample opportunity to deny a broad reading of the VAWA’s civil rights remedies.

Two federal statutes provide most of the limited civil rights remedies that exist for “private” violence: section 2 of the Ku Klux Klan Act of 1871, codified as 42 U.S.C. § 1985(3), “conspiracy to interfere

with civil rights,’”12 and Title VII of the Civil Rights Act of 1964.13 Section 1985(3) has little practical application to victims of gender-motivated violence. First, based on the Court’s turbid analysis of the meaning of sex under § 1985(3), it is unclear whether the Ku Klux Klan Act’s remedies against violent discrimination apply to women. Second, § 1985(3) covers only conspiratorial attacks, which account for very little of gender-motivated violence. Instead, the most “common and damaging form of gender discrimination [is] acts of violence committed by private individuals acting alone.”14 Finally, recent court decisions have emphasized that § 1985(3) applies only to a narrow range of actions which contains no element of state involvement or complicity. Although Title VII covers private action, it applies only to work-related acts, and therefore excludes most gender-motivated violence taking place in the home and in the streets.

1. Conspiracy, State Action, and Private Violence

Aside from § 1985(3) and Title VII, most federal civil rights statutes contain an explicit “state action” requirement. For example, 42 U.S.C. § 1983, also part of the Ku Klux Klan Act of 1871, provides a civil rights cause of action for any person deprived “of any rights, privileges, or immunities secured by the Constitution and laws” by another person who acts “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.” The 1960 case of Monroe v. Pape15 clarified “under color of law”: “‘Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.’”16

12. Section 1985(3) is now codified as 42 U.S.C. § 1985(c) (1988), though it is customary to refer to it by its old name.
13. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988). In this context “private” violence is not distinguished from “public” violence, but rather from violence that contains an element of state action. Within this meaning, “private” is better rendered as “non-state,” in the sense of persons acting on their own.
16. Id. at 184 (quoting United States v. Classic, 313 U.S. 299, 326).
For example, state agents, such as police officers, who misuse their official powers come under the jurisdiction of these statutes. According to Justice Blackmun, the legislative history of the Ku Klux Klan Act indicates that the 42d Congress enacted a state action requirement in § 1983 because it "was concerned that state instrumentalities could not protect those [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." Uncaring, ignorant, hostile, or even actively oppressive state and local governments might choose to avoid enforcing individual rights, necessitating a federal response.

The 42d Congress did not believe that governments posed the only threat to individuals’ civil rights; it also believed that conspiracies not committed "under color of" state law could also deprive persons of federally protected rights. Indeed, such "private" acts might be the primary barrier to exercising these rights. Thus, it enacted § 1985(3) as a private non-state action counterpart to § 1983. Section 1985(3) provides that:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.18

As understood by the 42d Congress, "private" acts of violence during Reconstruction, such as Klan terrorism, deprived both newly emancipated blacks and whites who supported blacks' civil rights of the means to exercise their federal rights. Though state and local laws nominally outlawed much of the violence that became actionable under §§ 1983 and 1985(3), patterns of non-enforcement and local complicity justified the creation of a federal civil rights remedy.

During the Ku Klux Klan Act's first century, however, § 1985(3) lay dormant because the Supreme Court in 1883, in United States v. Harris,19 nullified the Act's private conspiracy language.20 Not until the 1971 case of Griffin v. Breckenridge21 did the Supreme Court resurrect § 1985(3) to provide a cause of action for private non-state conspiracies.22 In Griffin, the Court created a four-part test to establish a § 1985(3) claim:

To prevail a plaintiff must prove that the defendants: (1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right or privilege of a citizen of the United States.23

Under the Griffin test, § 1985(3) is not a "general federal tort law" because the "language requiring intent to deprive of equal protection, or equal immunities" requires proving "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."24 Since only members of a protected class may seek remedies under this section, not all actions which deprive persons of their rights will be actionable. Under Griffin, § 1985(3) also does not cover situations in which perpetrators act alone, even if they deprive a person in a protected category of a protected right—two or more persons must

---

19. 106 U.S. 629 (1883).
20. Id. at 644.
22. Id. at 101.
commit actions in furtherance of the conspiracy.\textsuperscript{25} Although \textit{Griffin} did reject the rigid "state action" requirement, it replaced it with a "state involvement" requirement\textsuperscript{26} that may pose similar problems.

Though designed for the Reconstruction South, the Ku Klux Klan Act does not protect only blacks. The Act’s sponsor, Senator Edmunds of Vermont, stated that if "it should appear that this conspiracy was formed against this man because he was a Democrat . . . or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it."\textsuperscript{27} In practice, the Court has only extended § 1985(3) to classes of individuals covered by traditional equal protection analysis, namely "those so-called ‘discrete and insular’ minorities that receive special protection under the Equal Protection Clause [of the Fourteenth Amendment] because of inherent personal characteristics."\textsuperscript{28} For example, classifications based on race, illegitimacy, alienage, and national origin all command strict judicial scrutiny. Courts do not include sex and sexual orientation on this list. Distinctions based on sex receive some scrutiny, though not strict scrutiny, while distinctions based on sexual orientation receive no judicial scrutiny at all.\textsuperscript{29}

Historically, Fourteenth Amendment-based remedies, such as § 1985(3), have afforded little protection for women. The legislative history of the Fourteenth Amendment indicates that women were not considered “persons” when Congress debated the amendment in 1866:

In debates on the ratification of the Fourteenth Amendment, congressional repudiations of the notion that it would guarantee women’s rights centered on suffrage, with little consideration of whether section 1 would grant women equal protection of the laws in areas other than the vote. In the exchanges, Senator Howard claimed that Madison would have granted suffrage to the “whole negro population as a class.” Senator Johnson asked whether Madison would have included women, given that he used the term “persons.” Senator Howard responded, “I believe Mr. Madison was old enough

\begin{itemize}
\item \textsuperscript{25} Brown, \textit{supra} note 23, at 860.
\item \textsuperscript{26} Brown, \textit{supra} note 23, at 860.
\item \textsuperscript{27} Brown, \textit{supra} note 23, at 859 (quoting \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 567 (1871)).
\item \textsuperscript{28} Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980). “Discrete and insular” as a category of minorities was first discussed in \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 153 n.4 (1934).
\item \textsuperscript{29} Bowers v. Hardwick, 478 U.S. 186 (1986).
\end{itemize}
Perhaps because of the Court's reliance on the same "law of nature," it was not until 1971 that it concluded that unequal treatment of women might violate the Constitution's guarantee of equal protection.  

Whether and how § 1985(3) applies to women are questions that the Supreme Court has never fully answered despite last term's decision in Bray v. Alexandria Women's Health Clinic. In Bray, a clinic that provides abortions brought suit against anti-choice blockaders, contending the blockaders violated § 1985(3) by conspiring to deprive the civil rights of women using the clinics. Justice Scalia wrote for the majority:

[The Clinic's] contention . . . is that the alleged class-based

30. Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1283 n.12 (1991) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866)). The contradictions were evident during the proceedings, though conspicuously underplayed. For example:

During the February [1866] debates in the House, Robert Hale of New York, one of the Republicans who opposed the "necessary and proper" draft, challenged Bingham and Stevens on this point. Would the amendment strike down the legal disabilities imposed on married women? No, replied Stevens; not as long as all married women and all unmarried women were treated alike, "where all of the same class are dealt with in the same way, then there is no pretense of inequality." This admission was fatal, and Hale saw it right away: "... then by parity of reasoning it would be sufficient if you extended to one negro the same rights you do to another, but not those you extend to a white man." Stevens did not respond to this logic and neither did anyone else.

JUDITH BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 90 (1983) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866)).


32. 122 L. Ed. 2d 34 (1993). The Court stated:

We said that "the language [of § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."

We have not yet had occasion to resolve the "perhaps"; only in Griffin itself have we addressed and upheld a claim under § 1985(3), and that case involved race discrimination.

Id. at 46 (citation omitted).
discrimination is directed not at 'women seeking abortion' but at women in general. We find it unnecessary to decide whether that is a qualifying class under § 1985(3), since the claim that petitioners' opposition to abortion reflects an animus against women in general must be rejected.  

The legislative history of § 1985(3) provides limited guidance. During the 1871 debate on the Ku Klux Klan Act, Representative Buckley stated that "[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the Whites also; yes, even women." Aside from the conspiracy requirement, which limits the utility of § 1985(3) for most victims of gender-motivated violence, the fundamental question of whether it even covers women makes it unattractive as a remedy.

2. Deprivation of Rights and State Involvement

Assuming women qualify as a class under § 1985(3), they still face obstacles to using it as a remedy. Section 1985(3) does not itself provide substantive rights, instead, it remedies deprivations of rights, privileges, and immunities originating outside the statute. In the case of gender-motivated violence, this creates an insurmountable burden for victims. For example, no federal court has ever held that rape is a civil rights violation motivated by gender—unless the rapist were a supervisor, in which case the rape might establish a sexually hostile working environment to support an employment discrimination claim. Never has a gang rape or conspiratorial rape been the basis of a successful § 1985(3) action.

Aside from establishing a specific constitutionally protected right, a victim of gender-motivated violence might have to prove "state involvement" for a § 1985(3) claim. The Court in United Brotherhood of Carpenters & Joiners, Local 610 v. Scott ruled that when plaintiffs assert

33. Bray, 122 L. Ed. 2d. at 46.
36. Researching or proving a non-occurrence, of course, presents problems of completeness. Based on thorough research, however, it seems unlikely that a gang rape has ever been the basis of an unsuccessful § 1985(3) action.
deprivation of a right that is constitutionally protected only against state interference (such as First Amendment speech rights), they must prove the state "was somehow involved in or affected by the conspiracy." This "state involvement" requirement is not the same as the "state action" requirement found in other civil rights jurisprudence. Justice Blackmun defined state involvement by stating that "if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3)."

The decision in *Carpenters* will likely deny victims of gender-motivated violence a remedy under § 1985(3). Professor Derrick Bell views *Carpenters* as "effectively depriv[ing] the statute of any force it once had" and rendering the section "virtually useless as a civil rights remedy." To Bell, the state involvement language amounts to a de facto state action requirement. In *Bray*, the Court emphasized that only involuntary servitude and interference with interstate travel are exceptions to the state involvement requirement:

The statute does not apply, we said, to private conspiracies that are "aimed at a right that is by definition a right only against state interference," but applies only to such conspiracies as are "aimed at interfering with rights . . . protected against private, as well as official, encroachment." There are few such rights (we have hitherto recognized only the

---

38. *Id.* at 833.
39. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979). In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), Justice Rehnquist devised a test for the stricter "state action" requirement by stating that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. This "nexus" is loosened in state involvement cases.
41. *Bell, supra* note 40, at 321.
Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel). The right to abortion is not among them.\textsuperscript{43}

Overturning lower courts' decisions, the \textit{Bray} Court rejected the claims that interference with interstate travel occurred during the clinic blockades and that the anti-choice blockaders' tactics prevented the local authorities from guaranteeing equal protection of the laws for women.

This miserly interpretation will limit the applicability of § 1985(3) in future cases of private, non-state conspiracies. Derrick Bell argues that without reaching private conspiracies, civil rights statutes safeguard nothing: "Any legislation that premises relief upon proving affirmative governmental complicity fails to reach the vast majority of conduct which threatens protected rights."\textsuperscript{44} Archibald Cox adds that:

The struggle for civil rights makes it all too plain that Equality requires more than abstractly equal status in terms of legal doctrine. . . . Bare legal rights . . . carry little meaning for the victim of intimidation and reprisals in a hostile community. . . . Any government committed to the promotion of racial equality and other human rights must concern itself, if it can, with the activities of private individuals.\textsuperscript{45}

Having to prove either state action or state involvement makes it difficult for women to bring actions under § 1985(3). Assuming that the Supreme Court will find "women as a group" a "qualifying class" for § 1985(3) analysis,\textsuperscript{46} such victims would need to prove they have been

\textsuperscript{43} Bray v. Alexandria Women's Health Clinic, 122 L. Ed. 2d 34, 52 (1993) (citations omitted).

\textsuperscript{44} BELL, supra note 40, at 321.

\textsuperscript{45} BELL, supra note 40, at 321 (quoting Archibald Cox, \textit{The Supreme Court 1965 Term Forward: Constitutional Adjudication and the Promotion of Human Rights}, 80 HARV. L. REv. 91, 108 (1966)).

\textsuperscript{46} The majority opinion in \textit{Bray} suggests that rape would not count as a violation of women's civil rights, but merely as a tort that affects a group of otherwise unrelated persons. "[T]he class 'cannot be defined simply as the group of victims of the tortious action.' "Women seeking abortion' is not a qualifying class." \textit{Bray}, 122 L. Ed. 2d at 46 (citation omitted). By this reasoning, "women who have been raped" is not a qualifying class, as they are merely victims of a tort that affects "a group of unrelated persons," especially since violence against a woman is often understood as a private, individual act. Changing the group to "women who have been or may someday be raped" transforms the analysis, as would changing the group under \textit{Bray}.
deprived of a protected right by a conspiracy of two or more persons. For a victim of a conspiratorial act of violence motivated by gender—such as a gang rape—finding a deprivation of rights cognizable under § 1985(3) is a difficult task. A victim of a gang rape could argue that her rights of association were denied. But, since this First Amendment right is not among those protected from purely private non-state conspiracies, she would have to demonstrate state involvement, a nearly impossible burden given the decisions cited above. To avoid having to prove state involvement, a gang rape victim might alternately argue that her attack was a badge and incident of slavery under the meaning of the Thirteenth Amendment, because her attack results from a status rooted in a history analogous to involuntary servitude or slavery. This argument would require an ahistorical reduction of womanhood to antebellum slavery, and has doubtful potential to command a majority on a federal court.47

A gang rape victim’s remaining cognizable claim is that her rapists deprived her of the constitutional right to interstate travel: forcibly held and repeatedly raped for a period of time.48 However, the interstate travel argument is less plausible after Bray, since it strictly reads the requirements set out in United States v. Guest.49 In Guest, the Court created a predominant purpose test to measure interference with interstate travel:

[A] conspiracy to rob an interstate traveler would not, of

to “women who seek or may someday seek abortions.”


itself, violate [the criminal counterpart to § 1985(3)]. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then the conspiracy becomes a proper object of [this] federal law . . . .

The Bray Court also stated:

Our discussion in Carpenters makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not “for the purpose” of denying equal protection simply because it has an effect upon a protected right. The right must be “aimed at.”

A victim of gang rape would have to prove that the rapists aimed at depriving her of her right of interstate travel—that such “impairment [was] a conscious objective of the enterprise”—an implausible scenario. Moreover, how does one convince a jury not versed in the highly nuanced intricacies of federally-protected civil rights that interstate travel has anything to do with sexual violence? Except in the case of gang rapists who attack a victim with the conscious intent to deprive her of the right to interstate travel, § 1985(3) is a remedy with little or no utility for gender-motivated violence.

3. Gender-Motivated Violence and Citizenship

Gender-motivated violence is not yet understood as a civil rights issue because courts do not understand that it involves any deprivation of rights necessary for the exercise of citizenship. In Griffin, the Court defined an “animus” requirement for civil rights actions against private violence under § 1985(3). It quoted Representative Shellabarger’s statement during the congressional debates on the Ku Klux Klan Act that § 1985(3) applied only,

to the prevention of deprivations which shall attack the

50. Guest, 383 U.S. at 760.
52. Bray, 122 L. Ed. 2d at 50.
equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies... 

Existing civil rights laws remedy state deprivation of rights—such as speech rights or voting rights—because such deprivations, as viewed by the Court, "strike down the citizen." Existing civil rights laws may also reach private violence, but only if the courts believe the violence rises to this same level of public harm. The animus requirement ensures that other private deprivations of rights fall outside of civil rights scrutiny, unless they include a sufficient level of state involvement. Under the VAWA, a crime of violence must "be due, at least in part, to an animus based on the victim's gender," so the meaning of animus will have an important effect on the scope of the legislation.

In practice, what "animus" means is unclear. The majority in *Bray* reiterated that: "We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex... ." These comments suggest two problems for victims of gender-motivated violence. First, the scope of actions that justify a judicial remedy must have the effect of striking down the citizen.

54. *Griffin*, 403 U.S. at 100 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. at 478 (1871)).
56. *Bray*, 122 L. Ed. 2d at 46. Justice Stevens believes that the majority's argument—that animus could be found if sex-based intent existed—still excludes many "invidiously discriminatory" actions:

The . . . proposition [that animus exists if there is sex-based intent] appears to describe a malevolent form of hatred or ill-will. When such an animus defends itself as opposition to conduct that a given class engages in exclusively or predominantly, we can readily unmask it as the intent to discriminate against the class itself. *Griffin* itself, for instance, involved behavior animated by the desire to keep African-American citizens from exercising their constitutional rights. The defendants were no less guilty of a class-based animus because they also opposed the cause of desegregation or rights of African-American suffrage, and the Court did not require the plaintiffs in *Griffin* to prove that their beatings were motivated by hatred for African-Americans.

*Id.* at 78 (Stevens, J., dissenting) (citation omitted).
Which harms count in civil rights analysis depends on which harms courts believe impede a person’s exercise of citizenship. When perpetrated by private individuals, involuntary servitude and deprivation of interstate travel deny citizenship—sexual violence apparently does not. Second, what constitutes animus may have important consequences for which actions courts recognize as motivated by gender. In both cases, the meaning of “animus” will help determine the scope of the VAWA civil rights provisions. Since the Court’s definition of animus defines civil rights and citizenship in terms of each other, even if the VAWA contained no animus language, courts might incorrectly imply it anyway.

Legal scholar Brande Stellings argues that the concept of citizenship, which “is about responsibility to the community and the community’s responsibility to its members,” requires that gender-motivated violence be understood as a civil rights violation: “Recognizing that sexual violence infringes upon women’s civil rights is not only consistent with the idea of citizenship but is required by it. The commitment to public participation and deliberation which is integral to any theory of citizenship requires acknowledgment of ‘rights that bridge the personal and the political.’” Such violence merits public attention because it denies its victims the ability to participate in democratic society: “Practices which substantially impair the capacity of a group to participate in the democratic process on the same terms as others prevent this group from fulfilling its responsibilities and exercising its rights.” Civil rights and citizenship can only be understood in terms of each other. Because of this relationship, civil rights laws must sometimes redress forms of violence committed by private individuals.

This recognition of the interrelationship of private violence and impairment of citizenship rights is not new. Stellings notes that the Congress during Reconstruction understood this connection as it related to blacks:

One lesson to be drawn from this historical example is that control over bodily autonomy is a core concern of citizenship. Certainly, the legacy of slavery made this lesson more ap-

58. Stellings, supra note 57, at 209 (quoting Frank Michelman, Law’s Republic, 97 YALE L.J. 1493, 1535 (1988)).
59. Stellings, supra note 57, at 209.
parent. Physical shackles had not long been removed when they were replaced by the shackles of physical intimidation and terrorization. The connection between overt and covert subjugation was not lost on the public consciousness: in 1866 Congress passed a Civil Rights Act that guaranteed, among other rights of citizenship, “equal benefit of all laws and proceedings for the security of person.”

Stellings observes: “What is remarkable about the Ku Klux Klan Act is its willingness to reach private conduct and its recognition that private acts of terror threaten the public role of the citizen.” As argued below, gender-motivated violence denies the core concern of citizenship, bodily security, and creates impediments to civic participation. The VAWA recognizes this connection, as it must, to establish the legitimacy of a civil rights remedy. A reading of the VAWA premised on citizenship can give it a broad scope to address gender-motivated violence.

4. The Title III Remedy

The VAWA avoids many of the problems in current civil rights cases by creating its own statutory right rather than relying upon rights protected outside the statute. For example, in Carpenters the Court refused to interpret § 1985(3) as encompassing conspiracies based on “economic or commercial animus.” It determined that such conspiracies are outside the bounds of the legislative history of § 1985(3) or any subsequent congressional action. The Court added in Carpenters that “If we have misconstrued the intent of the 1871 Congress, or, in any event, if Congress now prefers to take a different tack, the Court will, of course, enforce any statute within the power of Congress to enact.” Section 302(b) of the VAWA creates the federal right “to be free from crimes of violence motivated by gender.” The Carpenters opinion said that “if § 1985(3) had itself created the rights in question . . . instead of operating as a mere conduit for rights created elsewhere,

60. Stellings, supra note 57, at 211 (quoting Civil Rights Act of 1866, reprinted in KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 50 (1989)).
63. Carpenters, 463 U.S. at 839.
64. S. 11, 103d Cong., 1st Sess. § 302(b)(1993).
Congress would have been clearly empowered to act against private violence.\textsuperscript{65}

Congress has rooted the VAWA's Constitutionality in the commerce clause\textsuperscript{66} and the Fourteenth Amendment. Arguments under the latter identify gender-motivated violence as a citizenship question, because women are denied equal protection of the laws through either state action or state involvement. Professor Catharine MacKinnon argues that, as currently applied, "[t]he equal protection clause is inconsistent with state law that promotes sex inequality. The law of sexual assault commands Fourteenth Amendment scrutiny."\textsuperscript{67} If the VAWA succeeds in creating full Fourteenth Amendment scrutiny for state sexual abuse laws, women may have the possibility of "massive actions":

[Giving sexual abuse Fourteenth Amendment scrutiny] supports a constitutional appeal whenever a court engages in judicial sexism in a sexual assault trial, a basis for massive civil litigation under federal civil rights statutes for nonenforcement and misenforcement of sexual assault laws on the basis of sex, and a foundation for challenging the facial unconstitutionality of biased state criminal laws that adopt a male perpetrator's point of view to the systematic disadvantage of female vic-

\textsuperscript{65} Violence Against Women Hearing, supra note 5, at 99 (testimony by Burt Neuborne).

\textsuperscript{66} Under the commerce clause, Congress may regulate specific examples of a general class of activity, noting the cumulative effect of similar local activities. Perez v. United States, 402 U.S. 146, 154 (1971). So long as someone reasonable could find that the legislation affected interstate commerce, courts will defer judgment. Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

The VAWA explicitly tries to connect gender-based violence with interstate commerce. Section 302(a)(5) finds that this violence affects commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce." Section 302(a)(6) further finds that "gender-motivated violence has a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." The Senate Report cites, for example, a study finding that "almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 197, supra note 14, at 54 (citing E. Ellis, B. Atkeson, & K. Calhoun, An Assessment of Long-Term Reaction to Rape, 90 J. Abnormal Psychol. 264 (1981)). Within the commerce clause, the VAWA has solid constitutional ground.

\textsuperscript{67} MacKinnon, supra note 30, at 1307. It is not just states' sexual assault laws that MacKinnon believes promote sex inequality, as other laws may also perpetuate women's inequality.
MacKinnon contends that the complicity of the state, whether by the acts of government officials or by its "criminal statutes and their interpretation," makes the law of sexual assault and the treatment of sexual assault victims "government action" under the Fourteenth Amendment. She concludes that the law of sexual assault, by its terms and enforcement, directly meets the more burdensome state action requirement, and therefore should be covered by the Fourteenth Amendment.

To use the Fourteenth Amendment, as the VAWA does, to address gender-motivated violence committed by private individuals, Congress must rely on some concept similar to MacKinnon's theory of state complicity. One of the Fourteenth Amendment arguments advanced by the Senate Report is that the VAWA "provides a 'necessary' remedy to fill the gaps and rectify the biases of existing State laws." The Senate Report argues that states have failed to provide equal protection of the laws for women:

For example, [in] many States, rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle; they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private life and intimate conduct to win a damage award unlike any other civil litigant; and, finally, in some cases, they are barred from suit altogether by tort immunity doctrines and marital exclusions. Moreover, since these burdens are disproportionately borne by women, they should fail traditional standards for scrutinizing gender discrimination.

The Senate Report advocates a "remedial" reading of the Fourteenth Amendment, advocated by Professor Cass Sunstein.

68. MacKinnon, supra note 30, at 1308.
69. MacKinnon, supra note 30, at 1307 n.117.
70. MacKinnon, supra note 30, at 1307.
73. Congress can exceed the self-executing provisions of the Fourteenth Amendment by outlawing practices it finds to violate section 1, even if the courts have specifically ruled that such practices do not violate the Fourteenth Amendment. According to The Civil Rights Cases, 109 U.S. 3 (1883), "If the laws themselves make any unjust discrimination . . . Congress has full power to afford a remedy under that amend-
Sunstein testified about an earlier version of the VAWA that “title III should be rewritten to emphasize legislative findings of equal protection violations, instead of or as well as violations of the privileges and immunities clause.” Including these findings “would make it altogether unnecessary to ask the complex, controversial, and unresolved question of whether section 5 of the Fourteenth Amendment allows Congress to reach purely private action.” The current version of the VAWA contains numerous findings indicating that violence against women is an equal protection problem. Section 302(a) of the VAWA lists eight specific Congressional findings, including:

(4) existing bias and discrimination in the criminal justice system often deprives victims of gender-motivated crimes of equal protection of the laws and the redress to which they are entitled . . . (7) a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws

Yet, Cass Sunstein warns that after Katzenbach a “majority of the Court has not accepted this broad, substantive view of congressional power.” Violence Against Women Hearing, supra note 5, at 119 (testimony of Cass Sunstein). As such, he argues against defending civil rights protection for gender-motivated violence with the substantive view. Sunstein argues instead for a remedial reading of Congress’ power to interpret the Fourteenth Amendment, also developed in Katzenbach and later used in City of Rome v. United States, 446 U.S. 156 (1980). In Rome, the Court held that Congress could regulate discriminatory practices which themselves might not violate the Constitution since they were not accompanied by discriminatory intent. Id. at 173. According to the Court, “Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.” Id. at 173 (emphasis added). This is a weaker view than the substantive approach because Congress tries to remedy situations the court would find to violate the Fourteenth Amendment, though it does so by legislating against a broad class of actions, some of which might individually pass Constitutional muster. The Court again uses a rational basis review to determine whether the legislation seeks to correct demonstrable inequalities. Violence Against Women, supra note 5, at 119.

74. Violence Against Women Hearing, supra note 5, at 121–22 (testimony of Cass Sunstein).
75. Violence Against Women Hearing, supra note 5, at 122 (testimony of Cass Sunstein).
and to reduce the substantial adverse effects of gender-motivated violence on interstate commerce; and (8) victims of gender-motivated violence have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.\textsuperscript{76}

These findings should indicate sufficient state involvement to mollify federal courts. As Sunstein casts the issue, “Congress is responding to an equal protection problem in the administration of state and local law by state and local governmental authorities.”\textsuperscript{77} From a constitutional standpoint, the question of purely private action therefore becomes moot. He explains this convolution of constitutional law: “[The Violence Against Women Act] is not responding to private acts at all—no more than the equal protection clause itself does so by requiring states to protect blacks as well as whites from private violence.”\textsuperscript{78}

The “surface” problems with existing civil rights laws—the statutory exclusion of gender, the requirement of conspiracy, and the requirement of state involvement in private actions—are all solved by the VAWA. But, simply adding gender may not be enough. The fact that the institutions are so hostile to including gender is not an anomaly or quaint bias of the 42d Congress; this hostility is an active force that is a structural problem. By relying on these same institutions, those who use the VAWA’s civil rights provision may encounter unexpected problems. More importantly, courts will still need to determine which specific acts constitute gender-motivated violence that “strikes down the citizen.” To answer this question, the VAWA relies upon an analogy to bias crimes.

\textbf{B. The Gender Gap in Current Bias Crime Laws}

The VAWA relies upon a bias violence model for its civil rights cause of action. Indeed, the first legislative finding in title III is “crimes motivated by the victim’s gender constitute bias crimes in violation of

\textsuperscript{76} S. 11, 103d Cong., 1st Sess. § 302(a)(1993).

\textsuperscript{77} Violence Against Women Hearing, supra note 5, at 122–23 (testimony of Cass Sunstein).

\textsuperscript{78} Violence Against Women Hearing, supra note 5, at 122–23 (testimony of Cass Sunstein).
the victim’s right to be free from discrimination on the basis of gender.”79 The legislative history of the VAWA shows that it purports to do nothing more than extend to women civil rights which others already have. The Senate Report notes that title III “is modeled [on] Title VII, and 42 U.S.C. 1981, 1983, and 1985(3),” and extends similar protections to private gender-based violence.80 Each of these laws currently contributes to a gender gap in civil rights protection for violence committed by private individuals. The Senate Report also notes that the gender gap extends to state bias crime laws:

More recent legislation has not filled the ‘gender gap’ left by traditional anti-bias crime laws. In the past 10 years, almost every State has passed laws that increase criminal penalties, some of which also provide civil remedies for the victims of hate crimes, but less than a dozen cover gender bias.81

In addition to state laws, the Congress itself passed the Hate Crimes Statistics Act in 1990, which requires “the collection of statistics on crimes motivated by race, ethnicity, national origin, and sexual orientation” but not on crimes motivated by gender.82

To remedy these gaps, the VAWA recognizes gender-motivated violence as a bias crime: “Placing this violence in the context of the civil rights laws recognizes it for what it is—a hate crime.”83 The Senate Report justifies including gender-motivated crimes as bias violence because the result is often the same as recognized forms of hate violence:

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.84

---

83. S. Rep. No. 138, supra note 11, at 49 (quoting Violence Against Women Hearing, supra note 5 (testimony of Burt Neuborne)).
The problem with this understanding, regardless of its actual merit as a psychological or sociological description of gender-motivated violence, is that it limits a plaintiff’s ability to prevail in a civil rights action. An individual woman, for example, must prove that she is a representative of all women. In acquaintance situations, especially in “domestic” situations, proving that one was selected for an attack as a representative of one’s entire gender will prove a nearly impossible burden. While trying to understand gender-motivated violence, the VAWA’s authors have unwittingly adopted the gendered logic that permeates model bias crime statutes. As discussed below, some of the results of gender-motivated violence are the same as racially-motivated violence against men, but the processes are not the same.

This section examines the development of the model bias crime and argues that its exclusion of gender reflects a gendered structural logic of the model. The model of a bias crime—developed to address the reality of racially- and religiously-motivated violence that occurs against men in public spaces—is gendered because it does not conceptualize a common experience shared by women. Women are not a group under the classic model because their experiences are atomized into millions of individual private experiences of beatings, abuse, and humiliation—often behind closed doors—which never rise to the level of a recognizable group experience.

Legislative attempts to extend additional protection to victims of discriminatory violent attacks have resulted in a body of bias, or hate, crime laws. These laws, enacted in varying forms by forty-seven states, usually enhance criminal penalties for already punishable crimes when they are motivated by discriminatory intent. Many jurisdictions also include a civil rights cause of action for private individuals victimized by this violence. The best example of the penalty-enhancement scheme is the enormously influential Anti-Defamation League (ADL) model hate crime statute, enacted partially or fully in thirty-one states and the model for the federal Hate Crimes Statistics Act. According to the model statute:

A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates [the Penal Code provision(s) for criminal
trespass, criminal mischief, harassment, menacing, assault
and/or other appropriate statutorily proscribed criminal con-
duct].86

The model statute allows individual states to augment penalties for
cri mes committed with discriminatory intent.

The most striking feature of the model statute, and most state
statutes, is the omission of gender. Though the ADL cites no official
reason for excluding gender as a protected category, a policy back-
ground report suggests possible reasons that may have influenced the
final decision.87 The most important reason is that violence motivated
by gender does not fit the classic hate crime scenario.

The ADL's background report asserts many reasons both for and
against including gender. The following passage argues against inclusion—
the position that the ADL adopted:

[A] substantial majority of women victims of violent crimes
were previously acquainted with their attackers. While a hate
crime against a black sends a message to all blacks, the same
logic does not follow in many sexual assaults. Victims are not
necessarily "interchangeable" in the same way; in cases of
marital rape or date rape for example, the relationship
between individual perpetrator and victim is the salient
fact—whether the defendant is a woman-hater in general is
irrelevant. Furthermore, sentencing alternatives other than a
stepped-up penalty may be preferable in situations when the
perpetrator is also the family's breadwinner. . . . Since sexual
assault crimes are reprehensible under any circumstances, ADL
should not seek to make distinctions. Urging law enforcement
officials to look for additional evidence of a misogynist motive
in cases of domestic violence is not only impractical; it serves

86. LEGAL AFFAIRS DEPARTMENT, ANTI-DEFAMATION LEAGUE OF B'NAI B'RIITH, HATE
87. Steven M. Freeman, Civil Rights Division Policy Background Report, Hate Crimes
Statutes: Including Women as Victims (1990) (unpublished internal document of
Anti-Defamation League of B'nai B'rith, on file with author). This document is not
an official statement of the Anti-Defamation League of B'nai B'rith's position. It is
an internal document with arguments for and against including gender, provided as
a courtesy for background information and should be understood as informing the
ADL's debate. This document is important because arguments for excluding gender
from hate crime laws have rarely been made so explicit. It is difficult to criticize the
exclusion of gender when the real reasons are never made public.
no useful purpose. Such cases simply do not fit the traditional hate crime scenario. Consequently, rather than trying to modify the definition to accommodate domestic violence and other circumstances which cannot neatly be accommodated, the model statute should remain unchanged. ... While some law enforcement officials might dismiss incidents of anti-Semitic vandalism as pranks in the absence of hate crimes legislation, there is no comparable danger when it comes to sexual assaults.  

The ADL’s background report makes four major assumptions. First, that certain violence against one woman does not send a message to many, if not all, women. Second, that the violence is not based on hatred of women in general (or that it isn’t necessary to look for additional motivation). Third, that sexual assaults are already taken seriously. Finally, that the categories and the violence cannot neatly be accommodated. This final assumption relies upon a public model of bias violence that most clearly identifies the theoretical subject of the model’s protection as male.

The ADL’s position paper makes the untenable assertion that gender-motivated violence against women does not send a message to all women. The threat of violence determines the bounds of where and when women may work, live, and study. Women fear for their safety and curtail their activities based on this fear. The irony of women establishing their safety by restricting their movements in public is that “women are most at risk with their intimate partners or friends.”

88. Freeman, supra note 87, at 12–13. Arguments not presented in the document may have crucially shaped the debate, though Mr. Freeman indicated that these reasons, not necessarily in this form, seemed to be the most persuasive. Telephone Interview with Steven M. Freeman, Director of ADL’s Legal Affairs Department (Nov. 24, 1992). Mr. Freeman also added one argument not mentioned in the quoted excerpt: that including gender would be overwhelming because of the sheer number of cases. One can read this argument as either saying that the symbolic value of prosecutions in non-gender cases will be overshadowed, if not lost, were gender included, or that the justice system would be overburdened by such a dramatic number of cases. Either way, the argument is an implicit concession that women are so pervasively abused that we should not deal with it through this legal action—strange how the success of feminism in exposing the extent of abuse against women is being used as a reason not to protect women.


According to Charlotte Bunch, systematic fear of violence deprives women of political power and the ability to participate in society:

Contrary to the argument that such violence is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination, and privilege between men and women in society. Violence against women is central to maintaining these political relations at home, at work, and in all public spheres.\(^9\)

The ADL report removes gender-motivated violence from its well-documented social context when it argues that violence against women is not based at least in part on misogyny. In addition, the ADL report unwittingly accepts an implicit male ownership of women. A Center for Women Policy Studies report responds to the ADL report’s argument by stating:

[T]he suggestion that “the relationship” or acquaintanceship between victim and perpetrator is “the salient fact” and that “whether the defendant is a woman-hater in general is irrelevant” assumes the legitimacy of male ownership and domination of women. The notion that violence committed by an acquaintance or partner cannot, by definition, be motivated in major part by woman-hating in general ignores the reality of these crimes against women.\(^9\)

The ADL report further argues that since “sexual assault crimes are reprehensible under any circumstances,” it is not necessary to look for additional motivation. Doing so, according to the ADL report, simply “serves no useful purpose.” While all sexual assaults may be gender-motivated crimes, it is not true that all gender-motivated crimes are sexual assaults. Moreover, the ADL most probably views lynching and neo-Nazi violence as “reprehensible under any circumstances,” yet must believe that singling out such crimes does serve some useful purpose.\(^9\)

---

91. Center for Women Policy Studies, supra note 90, at 3 (quoting Charlotte Bunch, Women’s Rights as Human Rights: Toward a Re-vision of Human Rights, 12 Hum. Rts. Q. 486 (1990)).

92. Center for Women Policy Studies, supra note 90, at 13. The ADL report does not explain why the relationship is the salient feature. They seem to conflate the staggering number of acts of gender-motivated violence committed by acquaintances with the motivation for the violence.

93. Perhaps the ADL assumes that singling out certain crimes for special attention
serves no useful purpose because legislatures, when they drafted their penal codes, properly contemplated the harm of the crimes and created appropriate sanctions. Professor Mark Kelman poses a similar concern when analyzing penalty enhancement statutes: "[I]f the goal of the proposed revision of criminal law is augmentation of penalties for acts already criminalized, then the specific act must violate not just the interest initially contemplated in the general law . . . but some interest violated only in some sub-class of identifiable cases." Letter from Mark Kelman, Professor of Law, Stanford University Law School, to David Frazee (Aug. 11, 1993). Hence, if all rape and domestic violence oppresses women, then one cannot justly or rationally single out some cases for special punishment. The better legislative response is to punish all rape and domestic violence at a level that adequately reflects their harm. Especially in the criminal law, such an approach would better protect the principle of legality and streamline trials.

But what exactly is "the interest initially contemplated in the general law?" Kelman offers, as an example, that "rape law might protect both autonomy—as 'traditionalists' would argue—and gender equality." Kelman, supra. It seems likely that in the case of rape, however, neither interest was contemplated. Historically, the Anglo-American law of rape derives from men's ownership of women and continues to reflect vestiges of this heritage. In addition, rarely do American criminal laws contemplate an explicit interest in equality. Though the enforcement of criminal laws may serve the ends of procedural or substantive equality, legislatures usually justify crimes with theories of specific deterrence, general deterrence, rehabilitation, assaultive retribution, vengeance, societal retaliation, forfeiture, denunciation, education, or restraint. See Joshua Dressler, Understanding Criminal Law § 2 (1987); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.5 (2d ed. 1986).

Over the last two decades, feminists have emphasized women's equality as a reason to reform rape laws, though it is not clear that legislatures acted for this reason. If they did, they probably did not understand equality the same way the reformers did. Next, even if legislatures contemplated the harm in rape fully, one cannot separate the statutes on the books from the practice of their enforcement and their social meaning. Patterns of prejudice in the judicial system impair carefully crafted criminal laws. See Jeanne C. March, Alison Geist & Nathan Caplan, Rape and the Limits of Law Reform (1982) (study of the 1975 Michigan rape law reform); Wallace Loh, The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, 55 Wash. L. Rev. 543 (1980).

Furthermore, it makes a difference how one justifies, labels, and apportions punishment. Simply saying that a certain form of rape carries a penalty of ten years in prison is not the same as saying that the same rape carries a penalty, for example, of seven years imprisonment for traditional criminal justice reasons and an additional three years for oppressing women. It is precisely the role of legislative bodies to make these determinations, especially when earlier efforts mischaracterized or contributed to the harm inflicted by the crime. Finally, while all rapes and domestic violence might be gender-motivated violence, not all gender-motivated violence consists of these crimes. Not all kidnapping, for example, is gender-motivated, though some is and should be punished more severely because of it. It is important not to equate crimes committed because of sex with sex crimes. In any event, the existence of a criminal penalty, even if fully appropriate for the gravity of the crime committed, does not eliminate the need for a civil rights remedy for gender-motivated violence.
The ADL report assumes that the justice system treats gender-motivated crimes seriously. The report endows police officers and other personnel affiliated with the judicial system with unprecedented sensitivity to sexual assault and other gender-motivated acts despite evidence to the contrary. For example, even the Senate Report finds "widespread gender bias in the courts, particularly in cases of rape and domestic violence."94 The Senate Report states:

Judges, juries, prosecutors, and police officers . . . may require a woman: to have physical injuries; to tell a consistent story; to be willing to take a lie detector test, to not have waited for more than 48 hours before reporting the incident, to not have engaged in premarital or extramarital sex, to have had no previous social contact with her assailant, and not to have reached the location of the rape voluntarily.95

All of these factors make the victim's behavior, rather than the attacker's, the focus of the judicial proceeding. In a domestic battering relationship in which the victim did not flee her home, the question often becomes "Why did she stay?" instead of "Why did he abuse?" Judges and juries may demand corroborating evidence, though it is not required in the law, or they may disbelieve victims of sexual assault more than victims of other crimes.96

Whether a hate crime law creates additional criminal penalties or a civil rights remedy, it performs the socially useful function of labeling the harm caused by the violence. Civil rights laws are an appropriate forum for identifying the forms of oppression we want to attack, especially when state laws, in practice or theory, contribute to the inequality. More is at stake than simply a functional concern about potentially overlapping remedies or how legislatures define social harm by creating penalties for broad classes of crimes. The denial of a civil rights remedy for victims of gender-motivated violence—especially when few other effective options exist—sends a clear message that these victims are not worthy of societal concern. In addition to the direct act itself, the harm of the crime may include an infringement of the political or social equality of the victim. So-called bias crimes have a greater effect than simply the effect on the direct victims. Violent acts against women often affect individual lives and a group of lives for whom the violence has palpable social consequences, such as the fear of experiencing the same violence.

96. S. Rep. No. 138, supra note 11, at 45 (citing Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts; Illinois Task Force, Gender Bias in the Courts 99 (1990); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts 91 (1990)).
Criminal statutes, even hate crimes statutes, are not an adequate substitute for civil rights legislation though they can function well in conjunction with each other. Victims do not have control over hate crimes prosecutions any more than they do over other criminal proceedings. When gender is included in hate crime laws, they may not help victims of gender-motivated violence because judges and juries embody the same attitudes reflected in the ADL’s report or because of the structural reasons discussed below. Also, the wide variation of available remedies among states argues for the necessity of a federal civil rights remedy. State laws cannot create a national standard of anti-discrimination or equality. More importantly, biases in state laws, as well as the administration of justice which deny equal rights to women, create a compelling reason for a federal remedy.

The notion of group violence enshrined in the ADL’s model hate crime statute most clearly reflects the gendered logic behind the law. In the ADL model hate crime, an attacker, or attackers, express hatred for a racial or religious group through the random selection of one particular member of that group to suffer violence. Rather than modify the model, expand the model, make the model conditional upon varying circumstances, or abandon the model, the ADL codified it to the exclusion of many crimes that should be covered—the vast majority of bias crimes—which “cannot neatly be accommodated.”

No good reasons exist to exclude gender from bias crime legislation. However, since the exclusion is no mere oversight, adding gender to the list of protected categories does not guarantee that such laws will adequately address gender-motivated violence. The likely result of simply adding gender is that laws so modified will cover only gender-motivated violence that looks like racially- or religiously-motivated violence that occurs primarily against men.97 The reason the model

97. Violence against women of color receives little or no attention in civil rights analysis because the harms that “matter” occur against men. The Klan often directed its violence during the Reconstruction at black women, a fact known to the Congress. According to one witness, women feared the Klan “[b]ecause men that voted radical tickets they took the spite out on the women when they could get at them.” Stellings, supra note 57, at 211 n.118 (citing BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 183 (Gerda Lerner ed., 1973) (quoting testimony of Harriet Hernandez before the Joint Congressional Committee)). Another woman related the story:

[A]fter while they took me out of doors and told me all they wanted was my old man to join the democratic ticket; if he joined the democratic ticket they would have no more to do with him; and after they had got
cannot neatly accommodate gender is because the model structurally labels violence against women as private.

C. Three Public-Private Splits

The model bias crime and model civil rights violation dichotomize violence along a number of private-public axes. Since only public violence merits the heightened legal remedy contemplated by civil rights doctrines, these dichotomies are hierarchical. A “private” label attached to an act of violence carries with it the judgment that it is a lesser crime, not worthy of the same degree of public protection.

1. The Location of the Violence

The first dichotomy concerns the location of the violence. Most often, violence that occurs in the “home” is private, while violence that occurs outside the “home” is public. This is not a surprising dichotomy, given the historical evolution of public laws of male ownership of property, including women, and the development of privacy doctrine. Legal scholars such as Andrea Brenneke contend that civil rights should be extended to groups such as battered women because “the philosophical tradition of American liberal government supports an argument that civil rights of battered women must be recognized and protected, lest

me out of doors, they dragged me out into the big road, and they ravished me there.

Stellings, supra note 57, at 21 n.118 (quoting Harriet Smirl). Sometimes, violence against women of color becomes a political issue, but rarely on its own terms. Professor Kimberle Crenshaw has written that “[t]o the extent rape of Black women is thought to dramatize racism, it is usually cast as an assault on Black manhood, demonstrating his inability to protect Black women. The direct assault on Black womanhood is less frequently seen as an assault on the Black community.” Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1273 (1991).

Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991). Schneider argues that:

The concept of freedom from state intrusion into the marital bedroom takes on a different meaning when it is violence that goes on in the marital bedroom. The concept of marital privacy . . . historically has been the key ideological rationale for state refusal to intervene to protect battered women. . . . [This is] the dark and violent side of privacy.

Schneider, supra at 974.
the foundation of democratic government itself, the social contract, lose all legitimacy.\(^9\) Brenneke’s argument assumes that all citizens, through the social contract, gain civil rights protected by the state in exchange for giving up their natural rights, protected through self-enforcement.\(^{10}\) According to Brenneke, women “regardless of their legal relationship [to men], also possess [the natural rights of self-preservation].”\(^{11}\) Brenneke blames the failure of law to protect women on the “privatized” institution of the family:

> Although social contract theory establishes that the husband has no right to infringe on the person of the wife with violence that might lead to death, the state’s historical “privatization” of the family has provided the theoretical rationale of non-intervention and non-enforcement of wives’ civil rights when deprived by husbands through domestic violence. . . . It is time that notions of “civil rights” be brought into the so-called “private” realm of the family to end the violent state of nature left by non-enforcement of the laws.\(^{12}\)

The problem with the law, according to this account, is that women have been denied agency and protection from the state of their rights. Since much gender-motivated violence occurs behind millions of closed doors, it is shielded from the same public scrutiny as most racially and religiously motivated violence. The authors of the ADL model had in mind a specific type of violence that often occurs outside the “home.” The places in which anti-Semitic or racist attacks take place, for example, are not always the same places in which misogynist attacks take place. The historical experiences of oppression have differed. Because of these differences, the drafters of the ADL statute may simply not recognize women as having a group identity at all. One important difference between racism and sexism is that the division of social space between women and men which differs from that between different races and religious groups. Women, for example, often live with men.\(^{13}\) Though difficult to document, when the drafters of the

---

99. Brenneke, supra note 8, at 19.
100. Brenneke, supra note 8, at 18.
101. Brenneke, supra note 8, at 19.
102. Brenneke, supra note 8, at 22.
103. I would argue that American slavery may have taken on some of the discourses of private violence because the infantilization and ownership of blacks reduced them to
ADL statute picture anti-Semitic violence, they likely imagine a burning synagogue or a violent attack on a Jewish man on a public sidewalk, not a Jewish woman attacked in her own home. According to Stellings, "Those who stress too much that aspect of citizenship involving political participation omit the importance of the private world of family and the impact of self-ownership on public governance." Violence that occurs in traditionally private space has no less an invidious effect on civil rights than violence in public space.

Historically, women's social space is, by definition, private, which makes this public-private division uniquely harmful to women. Carole Pateman writes, "In a world presented as conventional, contractual and universal, women's civil position is ascriptive, defined by the natural particularity of being women; patriarchal subordination is socially and legally upheld throughout civil life, in production and citizenship as well as in the family." Women do not possess the ability to consent and are, by definition, part of the private realm, shielded from state protection, and vulnerable to men's force.

The "natural foundation" of civil society has been brought into being through the fraternal social contract. The separation of "paternal" from political rule, or the family from the public sphere, is also the separation of women from men through the subjugation of women to men. . . . The fraternal social contract creates a new, modern patriarchal order that is presented as divided into two spheres: civil society or the universal sphere of freedom, equality, individualism, reason, contract and impartial law—the realm of men or "individuals"; and the private world of particularity, natural subjugation, ties of blood, emotion, love and sexual passion—the world of women, in which men also rule.

The decision to value traditionally defined public crimes over private ones has the effect of excluding from civil rights protection most violence that occurs against women.

a similar status as women and children—they were both the property and quasi-family of the slave owner, protected from outside legal interference. They were part of the "home."

104. Stellings, supra note 57, at 209.


106. PATEMAN, supra note 105, at 52.

107. PATEMAN, supra note 105, at 43.
2. Relationship Between the Parties

The second dichotomy concerns the nature of the relationship between the attacker and the victim. The ADL concentrates great theoretical efforts on distinguishing randomly selected victims, who have no prior acquaintance with their attackers, from personally selected victims who have some relationship. This dichotomy suggests that certain types of relationships matter more than others. "Public" business or professional relationships do not diminish the nature of hate crimes, while "private" ones do. Somehow, "in cases of marital rape or date rape . . . the relationship between individual perpetrator and victim is the salient fact."108 Under the ADL report's analysis, by choosing to marry or go on a date, a woman forfeits all civil rights remedies against her partner. Any violence that occurs, by definition, must be private in nature—as if a woman consents to violence when she agrees to go on a date. This division perpetuates the systematic violence already done to victims of gender-motivated acts, for a victim's acquaintance with her or his attacker, however slight, substantially diminishes the chances that the incident will be viewed as a crime109 and most times ensures that the victim will be blamed for the incident.110 This is especially troublesome

108. Freeman, supra note 87, at 12.

109. For an excellent summary of the myths that work against rape victims in the legal system, as well as a summary of the empirical data refuting each myth, see Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 St. John's L. Rev. 979, 985 (1993) ("A great many people . . . do not realize that sexual penetration achieved by force and against the victim's will is rape and a criminal act . . . when the parties are nonstrangers."). Schafran emphasizes that even victims may not label their attacks rape when the perpetrator is an acquaintance, citing a study of 3,187 female students on 32 college campuses. Schafran, supra, at 1014 (citing Mary P. Koss et al., Stranger and Acquaintance Rape, 12 Psychol. Women Q. 1, 4 (1988)) (489 of the sample had been forced to engage in sexual activity that met the legal definition of rape, but only 57% labelled their experience rape). See also ROBIN WARSHAW, I NEVER CALLED IT RAPE (1988) (discussing why people, including victims, believe that sexual violence committed by acquaintances is not really rape).

110. See generally ESTRICH, supra note 7, at 27-79; Schafran, supra note 109, at 984-1026; WARSHAW, supra note 109, at 24-35. In general, we attribute guilt to victims and adopt blaming myths to shift the burden for violence onto those who suffer it. Experimental data demonstrates that "People tend to condemn an apparently blameless victim to reassert their belief in a just world and to lessen cognitive dissonance." Cass R. Sunstein, Three Civil Rights Fallacies, 79 Cal. L. Rev. 751, 759 n.24 (discussing M. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION 50 (1980)). According to Sunstein, "[B]eneficiaries of the status quo" tend to conclude "that the victims deserve their fate, that they are responsible for it, or that the current situation is part of an intractable, given, or natural order."
since most acts of gender-motivated violence are committed by acquaintances. Brenneke argues that victims' internalization of these attitudes may prevent some from understanding violence that occurs against them as gender-motivated: "Because abusers are known intimately by their victims and the violence appears particularized, [title III plaintiffs will have to overcome the impulse to presume violence towards them is personal animosity and not gender motivated action." The relationship of a victim of gender-motivated violence to an attacker diminishes the gravity of the violence though blaming myths, disbelief, and stigma. In these ways, the violence is made personal, individual, and private.

3. The Nature of the Violence

The third dichotomy concerns the nature of the violence itself. As Stellings has observed, the idea that physical violence and coercion deprives rights and liberty usually meets little opposition:

The idea that we are granted rights in our own bodies seems so fundamental that references to a right to be free from physical coercion are usually made fleetingly because the speaker does not anticipate disagreement. Thus, in the Reconstruction-era case *Munn v. Illinois*, Justice Field attempted to define the liberty of the Fourteenth Amendment as "something more . . . than mere freedom from physical restraint. . . ." Justice Field assumed that the Fourteenth Amendment guaranteed, at the very least, freedom from physical restraint. Later, in *Meyer v. Nebraska*, the Court used

---

Sunstein, *supra* at 759.

111. For data on rape, see Schaffan, *supra* note 109, at 984 (the vast majority of rapes are committed by someone know to the victim) (reviewing data in Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* 5 (1992)); Massachusetts Supreme Judicial Court Gender Bias Study Committee, *Gender Bias Study of the Court System in Massachusetts* 100 (1989); Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts, 15 WM. MITCHELL L. REV. 829, 895 (1989). For data on domestic violence, see Majority Staff of Senate Comm. on the Judiciary, 102d Cong., 2d Sess., *Violence Against Women: A Week in the Life of America* 3 (Comm. Print 1992) ("Some experts estimate that a woman has between a 1-in-3 and a 1-in-5 chance of being physically assaulted by a partner or ex-partner during her lifetime; total domestic violence, reported and unreported, affects as many as 4 million women a year.") (citations omitted).

the definition of liberty as "freedom from bodily restraint" as a baseline concession with which all could agree.\textsuperscript{113} However, such agreements have not been so easy in the case of gender-motivated violence, such as sexual violence: "Liberal legal culture has failed women in its obstinate refusal to recognize certain harms because they are different, or privately inflicted. Problems like sexual violence are a misfortune and only actionable to the extent that they are like other crimes of violence."\textsuperscript{114} In short, the law draws a distinction between sexual violence and other crimes of violence.

Such a distinction is made by Professor John Ladd in his article entitled "The Idea of Collective Violence."\textsuperscript{115} In it, he distinguishes "private violence" from "collective violence," which he defines as "the kind of violence that is practiced by one group on another and that pertains to individuals, as agents or as victims, only by virtue of their (perceived) association with a particular group."\textsuperscript{116} For Ladd, violence against women is not collective violence:

[Collective violence] is quite unlike private violence, for example, \textit{domestic violence} or street violence, in which the victims are selected by the attacker because of some relationship the attacker has to the victim or because of something about the victim that makes him or her a desirable target, such as having money or \textit{being a woman (rape)}. Except in unusual or bizarre cases, and making the usual necessary allowances for borderline cases, group membership (e.g., in a racial or religious group) is not the sole or the crucial factor, as it is with collective violence.\textsuperscript{117}

What distinguishes rape and robbery from collective violence for Ladd is the object of each crime, which Ladd sees as partly instrumental.\textsuperscript{118} Just as robbery has an instrumental value, the acquisition of goods or money, rape has a reason: sex. To repeat Ladd's argument:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{113} Stellings, supra note 57, at 213 (quoting Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
\item \textsuperscript{114} Stellings, supra note 57, at 215.
\item \textsuperscript{116} Ladd, supra note 115, at 19.
\item \textsuperscript{117} Ladd, supra note 115, at 22 (emphasis added).
\item \textsuperscript{118} Ladd, supra note 115, at 22.
\end{itemize}
\end{footnotesize}
"[S]omething about the victim makes . . . her a desirable target, such as . . . being a woman (rape)." Rape is not irrational, ideological, random violence. Rather, rape is the expression of a natural impulse of desire. The mere fact that a woman is a woman makes her a desirable target for rape. By Ladd's analysis, to be a woman is to be "rapeable."

Ladd's analysis begs the question: for whom are women a desirable target of rape? Presumably, the answer is heterosexual men. Whether the nature of gender-motivated violence is indeed private and individual, except in "unusual or bizarre cases," depends upon whose perspective one adopts. This problem of perspectives mirrors the definition of the crime of rape, in which the harm of the act is defined by the meaning of the act to the victim, but the criminality is defined by the meaning of the act to the attacker. Catharine MacKinnon has identified this dichotomy in rape law as a subject-object split. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused . . . . [T]he man's perceptions of the woman's desires determine whether she is deemed violated . . . . With rape, because sexuality defines gender norms, the only difference between assault and what is socially defined as a non-injury is the meaning of the encounter to the woman. Interpreted this way, the legal problem has been to determine whose view of that meaning constitutes what really happened, as if what happened objectively exists to be objectively determined . . . . [R]ape law . . . uniformly presumes a single underlying reality, rather than a reality split by the divergent meanings that inequality produces. Many women are raped by men who know the meaning of their acts to the victim perfectly well and proceed anyway. But women are also violated everyday by men who have no idea of the meaning of their acts to the women. To them it is sex. Therefore, to the law it is sex. That becomes the single reality of what happened.

A woman may feel that she was raped, while a man feels that he has

119. Ladd, supra note 115, at 22 (emphasis added).
120. See generally Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence, 8 Signs 635 (1983).
engaged in sex. However, the legal solution is to “conclude that a rape did not happen.”\textsuperscript{122} Women may perceive the experiences of rape shared by so many victims as collective violence or bias violence. On the other hand, men may perceive this same phenomenon as millions of sexual encounters, some of which, as determined on a case-by-case basis, may not have been consensual and hence, at most, instances of personal violence. As summarized by MacKinnon, “The one whose subjectivity becomes the objectivity of ‘what happened’ is a matter of social meaning, that is, a matter of sexual politics.”\textsuperscript{123} Under this analysis, gender-motivated violence is private because legal ideologies define it that way. The existence of these ideologies provides a powerful justification for the VAWA, though judges may rely on them to undermine the Act’s effectiveness. If VAWA defendants’ perceptions can define whether gender motivated their actions, then VAWA plaintiffs will rarely prevail.

Like Ladd’s argument, the ADL’s model statute excludes gender entirely, precluding as a bias crime all violence against women based on their gender, no matter how public the act, or how much the violence reflects selection of women as objects of misogyny. Even the killing of fourteen women engineering students in Montreal by Marc Lepine would not count as a hate crime, though Lepine, declaring his desire to “kill the feminists,” separated the women from the men in the classroom before opening fire with a 22-caliber automatic rifle while shouting “you’re all fucking feminists.”\textsuperscript{124} The ADL background report even cites this incident in its section that lists reasons for including gender, commenting, “It is hard to imagine a crime which fits the classic model of a ‘hate crime’ any better.”\textsuperscript{125}

\begin{itemize}
  \item \textsuperscript{122} MacKinnon, \textit{supra} note 120, at 654.
  \item \textsuperscript{123} MacKinnon, \textit{supra} note 121, at 183.
  \item \textsuperscript{124} Freeman, \textit{supra} note 87, at 7.
  \item \textsuperscript{125} Freeman, \textit{supra} note 87, at 7. Since it would have been so easy to include gender in the statute, but limit its application to these extreme “classic” situations, a desire to protect the purity of the model seems less credible as the motivation than the disturbing disinterest in the systematic violence committed against women.
  
  It is ironic that an organization founded as a response to the vicious and brutal murder of Leo Frank, a Jewish northern-bred supervisor in Georgia in 1913 lynched by a group of prominent male citizens for the rape and murder of a 13-year-old female worker in his factory, should offer these arguments. Under the ADL model and the arguments above, Leo Frank’s case might not be considered a hate crime. \textit{See supra} notes 86–88 and accompanying text. Though the lynch mob’s actions undoubtedly sent a message to all Jews, Leo Frank was not at all “interchangeable.” The case would not have generated attention, nor would he have been lynched, without his status in the community, his particular history, and the peculiar cir-
Rather than include gender only in the cases in which it does fit the narrow hate crime model—which would be problematic since the ADL does not support limiting application of racially- or religiously-motivated hate crimes statutes only to situations that fit the “randomly selected” model—the ADL chose not to include gender at all. The practical effect of its decision to exclude gender is to endorse Ladd’s reasoning that hate crimes against women do not matter. Though the ADL’s primary mission is to combat anti-Semitism, not misogyny, its decision to exclude gender seriously disadvantages, for example, Jewish women who might need the protection that a comprehensive statute and integrated approach would afford, especially given the difficulty of separating multiple motivations for a crime. The ADL also sacrifices important connections between sexism and the forms of violence its model statute covers, undermining the potential effectiveness of its statute and much of the moral force it might otherwise claim.

It is neither accidental nor a mere oversight that the ADL chose to exclude gender from its nationwide effort to enact bias crime legislation; its theoretical conception of who deserves protection is based on a male bias crime model. The distinction between crimes that count and crimes that do not, in this scheme, is explicitly gendered. Gender-based violence by definition is not a hate crime because the systematic nature of the violence is dissolved into unrelated “private” incidents.

Many hate crime cases only make sense because of a prior acquaintance between the parties involved, especially in status relationships such as employment and education. One interesting case, cited by the ADL itself in its 1992 litigation docket, for which it filed an amicus brief, is State of Florida v. Dobbins, No. 91-1953 (Florida 5th District Court of Appeal). LEGAL AFFAIRS DEPARTMENT, ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH, ADL IN THE COURTS: LITIGATION DOCKET 1992, at 34 (1992) (“[F]ive members of a racist skinhead group . . . were charged with attempted first degree murder . . . for attacking a 17-year-old fellow skinhead, in October 1990, when they discovered that he was Jewish.”).

Just as the prior acquaintances Leo Frank might have had with persons who conspired to effect his lynching should not diminish the horror and nature of the incident, neither should the prior acquaintance of a victim of sexual assault or any other gender-motivated act lessen the impact of the incident.
D. The Dangers of Adding Gender to the Models

Rather than use pretextual judgments about which types of violence matter—which is done by dichotomizing violence as public or private—one should examine the empirical reality of what violence occurs, where it occurs, and what harms result. The resulting information should help determine what constitutes gender-motivated violence, how to identify it, and how to remedy it. Instead, the VAWA’s authors have chosen to rely on a simplistic analogy of gender-motivated violence to racially-motivated violence. In addition, they have chosen simplistic examples of gender-motivated violence that embody extreme stereotypes. In the process, they ignore the everyday reality of violence against women.

The Senate Report on the Violence Against Women Act of 1993\textsuperscript{126} contains two model crimes to illustrate the situations to which the civil rights remedy should apply. No doubt, many judges will look to these examples as the measure of cases that come before them. The first begins with an example of a case of a racially motivated attack:

Consider a case where a black civil rights worker is beaten by an avowed white supremacist who has terrorized a predominantly African-American neighborhood. To prove at trial that the attack was “motivated by racial bias,” the victim’s lawyers will put into evidence the circumstances that demonstrate the bias: that the victim was of one race (African-American) and the attacker was of another (white); that the attacker does not typically assault white people and has a history of assaulting African-American people; that the attacker belonged to a white supremacist organization; and that the attacker shouted racial epithets during the assault. None of these circumstances taken individually is required to prove that the attack was racially motivated, but taken together these factors may show racial bias.

Gender-motivated crimes should be viewed in precisely the same way. Consider the case of a serial rapist who shouts misogynist slurs as he attacks his victims. A victim’s lawyer would prove exactly the same type of evidence that the lawyer in the “race” case proved: that the victim was of a particular

\textsuperscript{126} S. Rep. No. 138, supra note 11.
sex; that the attacker had a long history of attacking persons of that sex, but not those of the opposite sex; and that the attacker shouted antiwoman (or man) epithets during the assault. Bias, in short, can be proven by circumstantial as well as indirect evidence. Again, the jury might not be convinced by any one of these circumstances individually—but could conclude that, taken together, they show gender bias.  

According to the Report, the totality of circumstances must convince the factfinder, whether judge or jury, that the act was motivated by gender. The Senate Report further argues that a woman cannot claim a civil rights violation merely because she was a woman and was harmed; the woman must prove a sex-based animus in order to establish a civil rights violation. To illustrate this point, the Report contains another example, which resembles the Montreal shootings:

For example, she might offer proof that a defendant entered a department store carrying a gun, picked out women in the store and shot her while screaming anti-women epithets, and leaving the many nearby men unharmed. The fact that the attacker in this example verbally expressed his bias against women is helpful, but not mandatory. The fact that the attacker segregated the men from the women and then shot only the women might be evidence enough of his gender-based motivation.  

Though the Report contends that the VAWA covers a wide range of gender-motivated actions, these cases, along with other examples cited below, reveal much about how the authors of the VAWA understand gender-motivated violence. Establishing gender-motivation will certainly present difficult problems of proof and fact-finding. To escape this difficulty, the authors have unfortunately chosen to rely upon facile, but deeply problematic, analogies to race-based civil rights remedies rather than develop concepts of gender-motivation that accurately reflect the reality of the violence.

The authors of the VAWA would presumably condemn the exclusion of gender by the ADL and Ladd. The VAWA does, after all, include gender, which "corrects" the models. The problem is that laws never exist in a vacuum. Dozens of previous Congresses have passed

progressive civil rights laws, only to watch courts interpret them nar-
rowly, if not void them entirely.\footnote{129} Congress cannot merely add gender
to a list of protected categories when the structures, theories, and
justifications of the deficient institutions are all premised upon the
exclusion of gender. Instead, it must fully understand the complex
institutional reasons that a gender gap exists and act deliberately to
counteract those reasons.

The two examples cited in the Senate Report embody all the major
elements of the ADL’s analysis of hate violence and Ladd’s analysis of
collective violence. The first example cited above begins with “a black
civil rights worker [who] is beaten by an avowed white supremacist who
has terrorized a predominantly African-American neighborhood.”\footnote{130}
The victim and attacker belong to different races. The attacker “has a
history of assaulting African-American people” and “does not typically
assault white people.”\footnote{131} The attacker not only “belonged to a white
supremacist organization,” but also “shouted racial epithets during the
assault.”\footnote{132} The Report makes clear that individual factors might not
prove bias, but that “taken together these factors may show racial
bias.”\footnote{133} This is a classic scenario of hate violence. First, the attacker
clearly belongs to a group. In this case, it is organized. Second, he
terrorizes his victims randomly as representatives of all blacks. The
victims are entirely interchangeable and have no unique characteristics
that make the violence personal. Third, he terrorizes them in public
space—maybe in a park or on a street—as he is in a predominantly
African-American neighborhood. He may even attack a few in their
homes, but the point is he does not belong there. Fourth, he made his
motivations unambiguous by shouting his racism for all to hear. Fifth,
he treats blacks differently than he treats whites. “But for” the victims’
race, he would not have attacked them. If he typically assaulted both
whites and blacks, it would not be discrimination under this model.

The lesson of this example becomes clear when the Senate Report
instructs how the VAWA should operate: “Gender-motivated crimes
should be viewed in precisely the same way.”\footnote{134} Both examples of

\footnote{129} See, e.g., Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50

\footnote{130} S. Rep. No. 138, supra note 11, at 52.

\footnote{131} S. Rep. No. 138, supra note 11, at 52.

\footnote{132} S. Rep. No. 138, supra note 11, at 52.

\footnote{133} S. Rep. No. 138, supra note 11, at 52 (emphasis added).

\footnote{134} S. Rep. No. 138, supra note 11, at 52 (emphasis added).
gender-motivated violence cited in the Report demonstrate this lesson. First, both attackers clearly belong to a group, though neither is organized. The group is not simply "men," though it is critical that the attackers and victims be of different groups. The first attacker belongs to the group of "serial rapists" and the second to "mass killers." Second, both terrorize their victims randomly as representatives of all women. The victims are entirely interchangeable and have no unique characteristics that make the violence personal. In particular, the mass murderer shoots the women who happen to be shopping in the store—the women's individual identities do not matter to him. Third, the attackers terrorize women in public spaces. The serial rapist may rape women in a park or on a street. He may even attack a few in their homes, but he does not belong there. Similarly, the mass murderer attacks in the public space of a department store. Fourth, they made their motivations unambiguous by "shout[ing]," "screaming," and "hurl[ing]" misogynist slurs and anti-woman epithets for all to hear.135 Fifth, they treat women differently than they treat men. "But for" his victims' sex, the serial rapist would not have attacked them; "but for" his victims' sex, the mass murderer would not have shot them. The mass murderer "picked out women in the store" to shoot, "leaving the many nearby men unharmed."136 If the serial rapist attacked or if the mass murderer slaughtered both men and women, it would not be discrimination. As extreme as they are, according to the Report, these individual circumstances may not be enough: "Again, the jury might not be convinced by any one of these circumstances individually but could conclude that, taken together, they show gender bias."137 While this model might fit the history of racial violence against men in this country, it does not fit the history of gender-motivated violence, for the reasons discussed above. Nevertheless, the Senate Report applies the ADL bias violence reasoning to gender-motivated violence. Substitute gender for race in the ADL reasoning, and you have the VAWA's model crime.

Applying this reasoning literally can devastate victims of gender-motivated violence. As an example, consider a woman who brings a case against her husband. Part of the justification for the VAWA is the

pervasive abuse suffered by women at the hands of their male partners. The Senate Report begins its discussion of the need for the legislation by listing the harms of domestic violence. In the section entitled “Purpose,” the Report states:

In 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults—including aggravated assaults, rapes, and murders—were committed against women in their homes that year; unreported domestic crimes have been estimated to be more than three times this total. . . . As many as 4 million women a year are the victims of domestic violence. . . . The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. 138

The Report further elaborates that the goal of the legislation is “to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer . . . .” 139 The VAWA’s purpose shows that it should work against stereotypes that blame victims of gender-motivated violence and that treat their violence less seriously than other crimes. All of title II addresses domestic violence as a serious crime of gender-motivated violence. In addition, the purpose of title III is “to provide an effective anti-discrimination remedy for violently expressed gender prejudice.” 140 Despite the progressive intent of the VAWA, some of its sponsors at times reflect the same “archaic prejudices” that the Act seeks to work against. Part of this problem arises because the authors sometimes frame the Act as applying existing doctrine to the analogous problem of gender-motivated violence, rather than understanding this violence on its own terms.

The public-private dichotomies embodied in the ADL model hate crime often surface in the VAWA’s legislative history. In the 1991 Senate Report, Senator Biden, the VAWA’s sponsor, argued that the Act would not flood the federal courts with domestic cases: “title III does not cover everyday domestic cases, nor does it cover random mugg-

ings. . . Indeed, title III expressly bars any cause of action for a *random* crime, *including crimes motivated by personal animosity*.” The Senate Report further states that title III does not cover “random . . . beatings in the home”:

One of the most serious misunderstandings of title III has concerned its scope. For example, some have wrongly suggested that it will cover random muggings or beatings in the home or elsewhere. This argument is incorrect and is belied by the text of the proposed statute: this is a discrimination statute, not a felony protection bill. The cause of action provided under title III is strictly limited to violent felonies “motivated by gender.” A special limitation section added since the original introduction of the bill specifically provides that “random” crimes not motivated by gender are not covered by the statute and do not give rise to a cause of action.

Whatever Biden actually meant by “random beatings in the home” and “everyday domestic violence,” his statements may be a chilling forewarning that few, if any, “beatings in the home” will be actionable as civil rights violations. Biden misunderstood the nature of sexualized abuse. Brenneke argues that his statements provide “shocking reminders that ‘everyday domestic violence’ still can be viewed as something other than discrimination against women and an inherent building block of women’s subordination.” Fortunately, Biden excised these statements from the 1993 Senate Report. Nevertheless, the possibility that violent gender-motivated acts can be construed as caused by “personal animosity” effectively precludes a civil rights remedy in most cases in which the parties know each other. Even without Biden’s statements, the structural logic of the civil rights remedy might lead a judge to make the same conclusions, because battering by an intimate partner or spouse does not resemble other forms of bias violence.

The concept of bias violence, as understood by the term hate crime, is relatively young and can still be transformed. Even though most proponents of the concept have taken great pains to exclude gender, it is possible for advocates of the VAWA to make the concept

---

143. Brenneke, supra note 8, at 70.
of bias violence work for women. Instead of trying to analogize domestic violence to racially-motivated bias violence, advocates should begin with the reality of domestic violence, the ways in which it reflects ideologies of gender, and the manner in which it violates the victim's civil rights.

Part of the problem is that the phrase "hate crime" does not adequately describe the violence. Suzanne Pharr finds national and state hate crime statutes,

inadequate not only because they exclude women but because they do not create a clear definition of hate violence as being violence from those who have power against those who do not. What is also lacking is the role that institutions and societal norms play in the creation of hate violence.\textsuperscript{144}

Pharr argues that the more appropriate term for such violence is "institutionally supported violence."\textsuperscript{145} Rather than use hate, which is a psychological term, "the real issue is systematic oppression. To use hate as the defining term calls up serious questions about strategies," such as relying upon oppressive and violent institutions as a solution.\textsuperscript{146} The term "institutionally supported violence" identifies bias violence as contextual. Group categories only exist and have meaning in a cultural context. Focusing on the role of institutions rather than hate understands social responses to certain groups and power inequalities as social constructions. For judges and advocates, this understanding of bias violence better protects those most vulnerable to gender-motivated violence because it focuses on the power inequalities that make a civil rights response necessary in the first place.

II. SPECIFIC PROBLEMS OF APPLYING THE MODELS

The Senate Report quotes the testimony of Illinois Attorney General Roland Burris to show the need for a civil rights remedy. "Until women as a class have the same protection offered others who are the object of irrational, hate-motivated abuse and assault, we as a society

\textsuperscript{144}. Suzanne Pharr, Redefining Hate Violence 1 (Feb. 1991) (unpublished mailing, on file with author).
\textsuperscript{145}. Pharr, \textit{supra} note 144, at 3.
\textsuperscript{146}. Pharr, \textit{supra} note 144, at 3.
should feel humiliated and ashamed.”\textsuperscript{147} As discussed in Section I, however, simply transferring the model of civil rights developed to address racially-motivated violence to gender-motivated violence may limit the effectiveness of this remedy. This section describes four specific problems that will likely surface in VAWA actions.

The first two problems result from the direct application of the traditional civil rights model to gender-motivated violence. First, this traditional model constructs legal identities in ways that might harm women. Second, this model does not address the reality of gender-based violence.

The final two problems, which result from the concept of “real rape,” will largely determine which actions are recognized as legitimate instances of gender-motivated violence. According to Professor Susan Estrich, legally recognized rapes contain a number of elements. In the strongest case, the rapist is a stranger to the victim, who overpowers her with a weapon or severe, disproportionate physical force while she resists. While often unstated, the rapist in this scenario is a man of color and the victim is white.\textsuperscript{148} The first result of this history is that the definition of a “crime of violence” in the VAWA risks reintroducing force and resistance requirements, which would harm victims. Second, the mixed history of racism and sexism in rape law would make the application of the VAWA model to gender-motivated violence problematic, unless the history is understood.

\textbf{A. The Construction of Women’s Identities}

For victims of gender-motivated violence, choosing a legal identity might prove painful. Ruthann Robson writes that “the insistence on categorization itself violently atomizes us into separate identities.”\textsuperscript{149} Robson cites the following story from the \textit{Advocate} written by a lesbian rape survivor:

\begin{quote}
As I was being raped, I was called a dyke and a cunt. The rapist used those terms as if they were interchangeable. And as I talk to other women who have been raped—straight and gay—I hear similar stories. Was my attack antilebian? Or was
\end{quote}

\textsuperscript{147} S. Rep. No. 138, \textit{supra} note 11, at 49.
\textsuperscript{148} \textit{ESTRICH, supra} note 7, at 8.
it antiwoman? I think that facts are simple. I was raped because as a woman I'm considered rapeable and, as a lesbian I'm considered a threat. How can you separate those two things?  

Under schemes such as the VAWA, which force categorization of acts of violence, lesbians, for example, would have to emphasize a particular aspect of their identity, their sex, at the expense of other aspects. Alternatively, the Hate Crimes Statistics Act includes "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity," a list that includes sexual orientation, but does not include gender. A lesbian rape victim would have to prove she was raped because she was a woman—not because she was a lesbian—to have a chance at a federal civil rights action under the VAWA. However, to have her experience count as a hate crime, she would need to stress her identity as a lesbian and "hope that the FBI statisticians

151. Hate Crimes Statistics Act, supra note 85, at § 1(b)(1).
152. Under current civil rights laws, federal courts do not recognize a connection between sexual orientation and gender. For example, in Dillon v. Frank, 1992 Lab. Rep. (BNA) No. 17, at D-1 (6th Cir. Jan. 27, 1992), the Sixth Circuit dismissed a Title VII claim brought by a Postal Service employee harassed because his coworkers perceived him to be gay (holding that Title VII's "because of sex" standard cannot mean "because of anything relating to being male or female, sexual roles, or to sexual behavior."). See also Carreno v. International Brotherhood of Electrical Workers, Local Union No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. 1990). For a critical discussion of both Dillon and Carreno, see Samuel A. Marcus- 
153. Suzanne Pharr argues that "[t]o be a lesbian is to be perceived as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men." Suzanne Pharr, Homophobia as a Weapon of Sexism, in Race, Class & Gender in the United States: An Integrated Study 435 (Paula S. Rothenberg ed., 1992). Homophobia attempts to control women by labeling as lesbians those whose behavior is not acceptable, whose behavior departs from the social role norm. See Pharr, supra at 436-37. See also SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988); Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, 5 SIGNS 631 (1980). For a discussion of using gender-based civil rights laws for lesbians and gay men, see David Frazee, Civil Rights Remedies for Gender-Motivated Violence (1993) (unpublished A.B. honors thesis, Stanford University, on file with author).
agree with her."153

The legal categories available in relevant statutes, not the experiences of those victimized, determine the narrative structure of events. Simply including both gender and sexual orientation in either statute would not remove the dichotomy of gender and sexuality, as current civil rights laws do not function well when multiple identities overlap.154 Category boundaries rarely permit adequate descriptions of discriminatory acts, whether the rapist, survivor, or statistician chooses the category. This presents a paradox, because the very category boundaries necessary to construct civil rights laws often break down. Though the legal construction of identities may never represent anything called "truth" or "authentic experience" for all involved, the law can better use civil rights categories situationally to address specific cases.155

The VAWA accepts the way that courts have constructed legal identities, potentially excluding cases in which gender-based motivation interacts with other motivations for violence, or cases in which the victims are not white and heterosexual. A number of cases involving black women in Title VII suits illustrate the difficulty of single category analysis. Since the VAWA's authors based its definition of gender-motivation on Title VII, this "body of case law will provide substantial guidance to [VAWA] triers of fact,"156 and will directly bear on how courts will interpret the VAWA.

153. Robson, supra note 149, at 16.
155. A full discussion of a feminist theory of knowledge is beyond the scope of this article. One viewpoint is the radical subjectivity theory which privileges the standpoint of the victim. This solution may provide for more just legal remedies for those harmed, but may not fully describe the social reasons for an event or its consequences. Katharine Bartlett, for example, warns against embracing a victim's standpoint in feminist legal theory because it risks omitting important perspectives necessary for those who wish to end oppression:

I doubt that being a victim is the only experience that gives special access to truth. Although victims know something about victimization that non-victims do not, victims do not have exclusive access to truth about oppression. The positions of others—co-victims, passive bystanders, even the victimizers—yield perspectives of special knowledge that those who seek to end oppression must understand.

In *DeGraffenreid v. General Motors Assembly Div.*,¹⁵⁷ five black female employees challenged General Motor’s seniority system by claiming it perpetuated past discrimination against black women.¹⁵⁸ The court granted summary judgment for the defendant because:

[**P**]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. . . . [T]hey should not be allowed to combine statutory remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.¹⁵⁹

Although General Motors did not hire black women prior to the Civil Rights Act of 1964, it did hire white women.¹⁶⁰ Hence, the court determined General Motors’ seniority system did not perpetuate sex discrimination. After disposing of the claim of sex discrimination, the court dismissed the racial discrimination claim and recommended consolidation of the suit with another case against General Motors brought by black men.¹⁶¹ The court foreclosed the possibility that plaintiffs could remedy multiple layers of oppression through existing laws:

The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of “black women” who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora’s box.¹⁶²

In the *DeGraffenreid* approach, black women may claim legal protection

¹⁵⁷. 413 F. Supp. 142 (E.D. Mo. 1976), aff’d in part, rev’d in part on other grounds, 558 F.2d 480 (8th Cir. 1977).
¹⁵⁸. *Id.* at 143.
¹⁵⁹. *DeGraffenreid*, 413 F. Supp. at 143.
¹⁶⁰. *DeGraffenreid*, 413 F. Supp. at 144.
only insofar as their experiences coincide with that of white women or black men.\textsuperscript{163}

In 1983, in Moore v. Hughes Helicopters, Inc., Div. of Summa Corp.,\textsuperscript{164} the Ninth Circuit did not permit a black woman to bring a discrimination suit on behalf of women because “Moore had never claimed before the EEOC that she was discriminated against as a female, but only as a Black female. . . . [T]his raised serious doubts as to Moore’s ability to adequately represent white female employees.”\textsuperscript{165} Analogously, the D.C. District Court decided in 1986 in Judge v. Marsh,\textsuperscript{166} that a Title VII plaintiff must choose only one category of discrimination for her suit.\textsuperscript{167} Although a white woman does not represent all women any better than a woman of color, courts do not question the ability of a white woman to represent all women. Courts often take race privilege for granted, dismissing “hybrid” cases in favor of “pure” claims of sex or race discrimination.\textsuperscript{168}

Sometimes courts show more sympathy for multiple sources of discrimination. In 1980 in Jefferies v. Harris County Community Action Ass’n,\textsuperscript{169} the Fifth Circuit allowed a black female plaintiff to combine race and sex discrimination, stating “discrimination against black females [could] exist even in the absence of discrimination against black men or white women.”\textsuperscript{170} Similarly, in the 1987 case of Hicks v. Gates Rubber Co.,\textsuperscript{171} the Tenth Circuit decided in a Title VII case brought by a black woman that evidence of racial and sexual harassment may be considered jointly.\textsuperscript{172} These conflicting results from different districts exemplify the difficulty federal courts have trying to understand discrimination.

Whether evidence may be combined or not, the “but for” test used in differential treatment analysis to determine the existence of dis-

\textsuperscript{164} 708 F.2d 475 (9th Cir. 1983).
\textsuperscript{165} Id. at 480 (emphasis added).
\textsuperscript{167} Id. at 780.
\textsuperscript{168} Crenshaw, supra note 163, at 145.
\textsuperscript{169} 615 F.2d 1025 (5th Cir. 1980).
\textsuperscript{170} Id. at 1032.
\textsuperscript{171} 833 F.2d 1406 (10th Cir. 1987), aff’d on reh’g, 928 F.2d 966 (10th Cir. 1991).
\textsuperscript{172} Id. at 1416. See also MacKinnon, supra note 30, at 1291 n.46 (discussing Jefferies and Hicks).
Discrimination fails to detect or measure inequality adequately. If a person would not have experienced some action “but for” some identified characteristic, then the action might be discriminatory. “But for” the person’s race or “but for” the person’s gender uses the most privileged as a model. Men of color become the model for racial discrimination, since “but for” their race, they would be white men; white women become the model for sex discrimination since they too would be white men “but for” their gender.

Professor Kimberle Crenshaw stresses that the problem is not the inability of judges to handle cases in which multiple categories intersect. She notes that “no case has been discovered in which a court denied a white male’s attempt to bring a reverse discrimination claim on similar grounds—that is, that sex and race claims cannot be combined because Congress did not intend to protect compound classes.”173 White men, under the DeGraffenreid framework, should have the same burdens as black women in proving their claims separately. They could not use sex if black men are not discriminated against and could not use race if white women are not discriminated against. According to Crenshaw, the compound nature of claims by white men never occurs to courts.

Yet it seems that courts do not acknowledge the compound nature of most reverse discrimination cases. That Black women’s claims automatically raise the question of compound discrimination and white males’ “reverse discrimination” cases do not suggest that the notion of compoundedness is somehow contingent upon an implicit norm that is not neutral but is white male. Thus, Black women are perceived as a compound class because they are two steps removed from a white male norm, while white males are apparently not perceived to be a compound class because they somehow represent the norm.174

Discrimination doctrine helps those closest to the standard of equality, middle-class white heterosexual men. Those who experience multiple layers of oppression, such as women of color, find little relief in courts in which they must state a single category of discrimination in order to bring suit. Even allowing evidence of racial and sexual harassment to be combined still presumes a summation model of identity: being black

173. Crenshaw, supra note 163, at 142 n.12.
174. Crenshaw, supra note 163, at 142 n.12.
plus being a woman equals being a black woman, as if black women do not have unique experiences, or at least experiences neither shared by, nor predicted by, the experiences of black men and white women. Professor Angela Harris, discussing essentialist thinking in feminist legal theory, concludes that “[t]he result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: ‘racism + sexism = straight black women’s experience,’ or ‘racism + sexism + homophobia = black lesbian experience.’” Identity cannot be constructed by adding the experiences of those closest to the standard of equality, “forcibly fragment[ing]” those whose lives are subject to analysis.

The history of differential treatment analysis suggests that women of color and lesbians may experience difficulty bringing a suit under the VAWA. To win, a victim must prove that she was attacked because of her gender. When multiple motivations plausibly instigated the violence, victims will have to prove gender above the others. This burden makes the legal construction of identities critical to many who might use the Act. The differential treatment model creates a further difficulty, because in some cases it might not detect gender-motivated violence at all.

B. Differential Treatment Test Fails to Understand Violence Against Women

The “but for” model of discrimination when applied to gender-based violence obscures the nature of inequality and abuse. The “but for,” or “differential treatment,” or “disparate treatment,” approach relegates questions of sexuality and power inequalities to the periphery. In the case of sex discrimination, “[t]he sole issue becomes whether the coercion, whatever form it takes, would have been imposed on a man.” Andrea Brenneke faults this approach because “there is no ‘other’ with whom . . . the disparate treatment analysis would treat ‘sex’ as secondary to a ‘but for’ comparison of the way the defendant batters his wife versus other women or men.” Disparate treatment com-

176. Harris, supra note 175, at 589.
177. Brenneke, supra note 8, at 83–84 (citing Susan Estrich, Sex at Work, 43 STANF. L. REV. 813, 820 (1991)).
178. Brenneke, supra note 8, at 84.
parisons often leave plaintiffs with no way of prevailing. Brenneke argues it leads "to an 'indiscriminate violence' defense at best and, at worst, may result in claimant's failure to set forth her claim because there is often no 'other' target with whom to compare the defendant's actions." A battering husband, for example, may argue that he randomly beats some persons with whom he comes into contact "indiscriminately," shielding his actions from charges that he discriminates. Alternatively, he may argue that he beats no one else, so that his violence is not motivated by his victim's membership in a protected category, but is motivated by personal animosity, a non-discriminatory reason.

This supposedly "neutral" framework ignores the social structure in which some are vulnerable to abuse and how violence enforces that structure. For example, heterosexual marriage, as legally constructed, is a gendered institution—so much so that same gender marriage is prohibited in every state. Women in this context are vulnerable because they occupy a social position defined by their gender (wife), with the weight of legal and economic institutions both defining and enforcing that position. Inquiries into motivation for violence should focus on the social function the violence performs, which concentrates legal analysis on the particular power inequalities and role expectations in an abusive relationship.

Similar to the "indiscriminate" violence defense, the model of equal protection has created in Title VII sexual harassment law the specter of the "bisexual harasser," who sexually harasses male and female subordinates equally. For example, in Barnes v. Costle, the court wrote that "[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." Even Judge Bork,

179. Brenneke, supra note 8, at 85.
182. Brenneke, supra note 8, at 85.
184. 561 F.2d 983 (D.C. Cir. 1977).
185. Id. at 990 n.55.
while on the D.C. Circuit, denounced the "bizarre result" that "only the differentiating libido runs afool of Title VII." If one employs a differential treatment test of discrimination, then harassment, no matter how hostile, how sexualized, or how harmful, does not constitute discriminatory conduct, if both women and men are equally exposed to it.

An analysis of male rape, when men rape men, suggests the limitations of a differential treatment test for both male and female plaintiffs under the VAWA. Men as a group are not deprived of civil rights because of rape and other forms of gender-motivated violence the way women are. Yet, Senator Biden has often invoked male prison rape as an example of the type of gender-motivated violence the VAWA would cover. At one press conference, Senator Biden responded to a question about whether all rapes could constitute civil rights violations under the VAWA:

I might add . . . in the issue of rape, a male can bring a civil rights action. There is a good deal of rape in prison of males by males. So although it is a very small portion of the problem, this is literally gender-motivated, and in a strange sense gender-neutral. If the crime is a consequence of gender motivation, and that predicate can be laid down in court, then there can be a civil rights action. In almost all rape you'd find that situation.

Biden colloquially understands male rape as motivated by gender, but effecting this understanding in federal courts may require a careful examination of what constitutes gender-motivated violence—especially since courts usually do not recognize violence which appears in any sense "gender-neutral" as sex-based discrimination. In particular, understanding gender-motivated violence may require understanding why men sexually assault not only adult women and girls, but also, to a

186. Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc).
187. A full development of the contributions that understanding male rape can make to a feminist analysis of sexual violence requires a separate article. See Darieck Scott, Between Men and Women/Between Men and Men: Male Rape and the Law (1993) (unpublished manuscript, on file with author); see Frazee, supra note 152, at 46–65.
lesser extent, adult men and boys.

Available statistics indicate that men are raped, and not just in institutional arrangements like prisons. Limited evidence suggests that up to ten percent of all rape victims are men, and that most of the rapists are heterosexual. Though many have used examples of rape against men to belittle the reality of sexual violence against women, only by acknowledging male rape can one understand critical components of male sexual violence. Insufficient research has been done to determine the extent of rape and other gender-motivated crimes against men, and almost no theory addresses the question of how it should be legally treated. It is important to admit that thorough research might reveal that there are no important experiential differences between male rape and female rape, and, even if there are, that there should be no differing legal understanding. But, assuming this a priori risks missing important elements in the way the conflation of power and sex is constructed, inflicted, and experienced. An analysis of male rape could transform legal understandings of sexual assault, buttress critiques of masculine violence, and provide sophisticated arguments for remedying sexual violence as a civil rights violation for both male and female plaintiffs.

The fact that sexual assault of men involves other men as the attackers in almost all cases seriously upsets the differential treatment analysis recounted in the Senate Report. Senator Biden’s example of prison rape, if it is to be considered motivated by gender, must therefore rely upon a different conception of gender-motivation than that...
suggested by the Report. Even if same-sex rapes were fully covered in civil rights jurisprudence, the model of discriminatory treatment would exclude many cases of male rape. Researchers Groth and Burgess noted that rapists who attacked men showed remarkable similarity to rapists who attacked women. Indeed, many of these rapists did rape women: "The gender of the victim did not appear to be of specific significance to half of the subjects. They appeared instead to be relatively indiscriminate with regard to the choice of victim, that is, their victims included males and females, adults and children."193 Because these rapists do not "discriminate" on the basis of gender, no gender-based discrimination exists under a differential treatment analysis, meaning that victims—female and male—might have no cause of action under the VAWA.

To avoid these problems, the VAWA could allow plaintiffs to focus upon the meaning of the rapist's violent male sexual behavior. Scott summarizes the research on rapists who attack men to conclude the rapists "assaulted their victims because they found conquest and control exciting; because they explicitly found degrading and humiliating their victims erotic; because they were angry with their victims, and desired to punish them; and sometimes, because they felt pressured by their peers to participate in gang rape."194 The sex-based violent masculinity of the rapist could constitute the motivation or animus of the act. Of course, this approach risks reintroducing the subject-object split discussed above,195 which is why it must be rooted in the empirical social reality of the violence.

Aside from producing the "bizarre result" bemoaned by Bork, the differential treatment test also creates uneven decisions. For example, abuse from a gay employer constitutes harassment while abuse of a gay employee does not. EEOC regulations foreclose the possibility of homosexual employees bringing Title VII claims: "If a male supervisor harasses a male employee because of the employee's homosexuality, then the supervisor's conduct would not be sexual harassment since it is based on the employee's sexual preference, not on his gender."196 Homosexual employers' actions, however, are covered:

194. Scott, supra note 187, at 29.
195. See supra note 120, and accompanying text.
196. Marcosson, supra note 152, at 3 n.13 (quoting EEOC Compliance Manual (CCH) § 615.2(b)(3) (July 1987)).
Ironically, while homosexuals are not protected by Title VII, employees are protected from sexual harassment by homosexuals. In *Wright v. Methodist Youth Services, Inc.*, the District Court for the Northern District of Illinois held that a plaintiff who alleges that he was terminated because he refused the sexual advances of his male supervisor states a cause of action under Title VII. The court found that demands by a homosexual supervisor were ones "that would not be directed to a female," and thus involved "the exaction of a condition which, but for his . . . sex, the employee would not have faced."197

The apparent contradiction of these decisions is partly attributable to the normal inconsistency of rulings among federal courts—different persons at different times render different decisions, even when many of the issues are similar. Yet, the decisions fail to address consistently existing power inequalities along the axes of gender and sexual orientation. A homosexual employer who harasses employees should indeed incur sanctions, but not because of the homophobia of district court judges, and not at the expense of sacrificing protection of homosexual employees.

Samuel Marcosson suggests that courts need not resort in these cases to a differential treatment test, but should instead use the hostile environment standard. Under this approach, the sexual nature of the bisexual harasser’s actions and the resulting effect upon the work environment make the employment action "because of sex."198 The introduction of sexually hostile elements into a work environment disfavors employees who are comparatively powerless in relation to their employers or peers, even if the elements are not directed at any particular individual or group. The harassment need only be "sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’ "199

The "hostile work environment" model is one of the better existing legal methods for understanding power inequality in employment situations. It is unlikely, however, that many courts would allow a

197. Marcosson, *supra* note 152, at 10 (citation omitted).
woman battered by her husband or intimate partner to use the model of a sexually hostile environment, especially in a “private” family situation, to prove discrimination under the VAWA. Nevertheless, Andrea Brenneke argues for such a standard:

Courts should impose a standard that violent conduct by a domestic partner that has the purpose or effect of unreasonably interfering with an individual’s work, family or social performance or creates an intimidating, hostile, or offensive domestic environment constitutes a “crime of violence motivated by gender.”

The “sexually hostile home environment” standard solves many of the problems with differential treatment analysis, but would require changing current legal doctrines, which exclude the family from civil rights scrutiny. The hostile environment test assumes what the differential treatment test ignores: unequal relationships of power in gender-motivated violence. The only “bizarre results” are those that do not understand these gender-based inequalities.

C. An Excessive Force Requirement for Gender Motivated Violence

A plaintiff’s ability to establish a successful cause of action under the VAWA relies on a court’s determination that violence committed against her was not a (“random”) domestic affair, motivated by personal animosity, or caused by a prior relationship for which she is to blame. The experience of rape victims in criminal trials demonstrates the practical difficulty of attempts to define rape and other forms of gender-motivated violence as a civil rights violation—juries and judges often demand extraordinary proof before they believe victims of these crimes. Though the standard of proof under the VAWA will differ from criminal trials, the other attitudinal and structural barriers will remain. Being a “perfect victim” means being harmed in ways constructed by the law, a small subset of the ways that those victimized actually experience their violation. Penetration, force, resistance, and consent are limiting notions by which to define sexual violence. Despite the VAWA’s stated goal of working against archaic stereotypes which

200. Brenneke, supra note 8, at 82.
disadvantage women in the legal process, the VAWA’s cause of action inadvertently introduces a force requirement analogous to that used under the common law. This limitation allows courts to exclude all acts except those that meet the traditional standards of force and resistance.

The VAWA, in section 302(b), creates a right to be free from "crimes of violence motivated by gender."202 Section 302(d)(2) defines a crime of violence as "an act or series of acts that would constitute a felony . . . and that could come within the meaning of State or Federal offenses described in section 16 of [T]itle 18, United States Code."203 Rather than define a right to be free from acts of violence, the VAWA uses crimes of violence. This means that victims might have to prove that what occurred to them met criminal standards—though no criminal conviction is necessary. This is especially a problem in states without reformed sexual violence legislation. The variation in laws from state to state would render the VAWA nationally inconsistent. Referring plaintiffs to state criminal statutes also defeats one of the purposes of national civil rights legislation—compensating for state remedies which fail to provide relief to victims of gender-motivated crimes. Specifically, some states still have partial exemptions or lower penalties for marital rape and incest,204 still exclude men from rape statutes, and still require victims to resist.205 The VAWA’s definition perpetuates the worst aspects of federalism by creating a federal civil rights remedy dependent upon the very state laws whose inadequacies are part of the justification for the federal remedy itself.

Additionally, in some cases victims might have to prove force or violence beyond the crime itself. Even if a violent act meets a state’s definition of rape, it might not contain sufficient “force” to allow a

205. IDAHO CODE § 18.6101 (1991) (“Rape is an act of sexual intercourse accomplished with a female . . . [w]here she resists but her resistance is overcome by force or violence.”).
VAWA action. Because the language of the VAWA limits the scope of the civil rights provisions to violent felonies, a vast range of cases that should be included as civil rights violations, such as many instances of "domestic violence," which are often classified as misdemeanors, are excluded.

Section 16 of Title 18 defines a crime of violence as an offense that "is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This standard requires federal courts to examine state and federal criminal codes to determine whether the act committed (1) was a felony and (2) involved a substantial risk of physical force. Section 16(a) alternately defines "crime of violence" as an offense that has "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Even when state sexual assault or rape definitions require only proof of non-consensual sex, federal courts may read in an additional force requirement for VAWA actions.

When courts interpret force requirements, they often require a display of physical force. In the 1985 Pennsylvania case of Commonwealth v. Mlinarich, the court reversed a rape conviction because the defendant had not used physical force. In Mlinarich, the fourteen-year-old victim was released from a juvenile detention center when the defendant agreed to assume custody for her. When the defendant threatened to send her back to the detention center if she refused his sexual advances, she submitted to his requests. In reversing the rape conviction, the court wrote:

The definition we adopt . . . will know no age limitation. . . .
The term "force" and its derivative, "forcible," when used to define the crime of rape, have historically been understood by the courts and legal scholars to mean physical force or

208. See, e.g., Wis. Crim. Code § 940.225(3) (Third degree sexual assault is defined as "sexual intercourse with a person without the consent of that person.").
210. Id. at 403.
211. Mlinarich, 498 A.2d at 396.
violence.

... We hold that rape, as defined by the legislature... requires actual physical compulsion or violence or threat of physical compulsion or violence sufficient to prevent resistance by a person of reasonable resolution.212

Courts are not concerned about the multiple ways in which an assailant may force intercourse upon a victim. Rather, legal norms of physical force and resistance still dictate sexual assault definitions in many cases.213 For the VAWA, evidence of nonconsensual sex may not be sufficient to show it was a “crime of violence.”

The insistence on force embodies archaic stereotypes about sexual violence that disadvantage many victims when they seek judicial remedies. Lynn Hecht Schafran writes that a “mainstay of the myths and stereotypes about rape is that a ‘true victim’ is one who sustains serious physical injury.”214 Presently, jurors “want evidence of substantial physical damage, which they perceive as proof of the victim’s lack of consent. Jurors equate the victim’s injuries with her level of resistance, which they take to be a measure of the rapist’s use of force.”215 Schafran concludes that this understanding of sexual violence excludes the majority of rapes: “physical injuries apart from the rape itself are rare.”216 At least one study shows that seventy percent of rape victims reported no physical injuries beyond the rape itself, while another twenty-four percent reported only minor physical injuries. Only four percent of rape victims reported serious injuries, though forty-nine percent feared either death or serious injury.217 In addition, most rapes involve no weapons.218 Victims may find themselves “literally frozen with fright” during a rape, or they may “black out entirely.”219 In sum,

213. See also *Commonwealth v. Berkowitz*, Crim. No. 241-1988 (Ct. C.P. Monroe County 1990), rev’d, 609 A.2d 1338 (Pa. Super. Ct. 1992) (overturning a rape conviction because no “forcible compulsion” was shown, though the victim “throughout the encounter... repeatedly and continually said ‘no.’”).
217. Schafran, *supra* note 109, at 987 (citing *Crime Victims Research and Treatment Center, Rape In America: A Report to the Nation* 5 (1992)).
218. Schafran, *supra* note 109, at 988. (citing *Caroline W. Harlow, U.S. Dep't of Justice, Female Victims of Violent Crime*, at 12 (1991)).
the reality of rape does not conform to the stereotype of rape.

The excessive definition of force used in the VAWA definition of "crime of violence" ignores the reality in favor of the myth. This does not, in itself, preclude victims from effectively using the Act's civil rights remedy. Judges can, and should, reject the stereotypes in favor of more realistic and psychologically sophisticated understandings of force, but the language of the VAWA does little to encourage this process.

If the VAWA continues to use the phrase "crime of violence," alternatives to the present definition exist. One alternative is the Sentencing Commission Guidelines, which provide a better framework for understanding the phrase. Congress should amend the Act or courts should look to this alternate source for guidance in interpreting the phrase "crime of violence." The Guidelines define "crimes of violence" as:

[A]ny offense under federal or state law punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.220

This definition, while it still relies upon state and federal criminal definitions, has the advantage of only requiring potential risk. Hence, "no specific intent would be required in some cases and reckless endangerment might qualify as a 'crime of violence.' "221 With the current definition, VAWA plaintiffs will need "to prove intent to use force in order to demonstrate commission of a 'crime of violence.' "222

The application notes to the Guidelines indicate that they differ from 18 U.S.C. § 16 in other ways. "Crime of violence" includes not only the direct actions themselves, but also "the offenses of aiding and

---

221. Brenneke, supra note 8, at 61.
222. Brenneke, supra note 8, at 61.
abetting, conspiring, and attempting to commit such offenses."\textsuperscript{223} The Guidelines also contain three independent ways to define a "crime of violence:

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use, of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.\textsuperscript{224}

First, the government may prove that the offense fell into a category of \textit{per se} crimes of violence, such as murder and forcible sex offenses, which are specifically enumerated. Second, the government may prove that the offense included an element of force. Third, the government may prove the offense presented potential risk to another person. This definition, which is not limited to felonies, has given federal courts the ability to use a low threshold of force in determining that a number of acts constitute crimes of violence. Unfortunately, the use of 18 U.S.C. § 16 probably will not allow this flexibility.

Aside from this problem of determining which crimes involve sufficient force, plaintiffs may only bring causes of actions when they have suffered violent felonies. The VAWA limits "crime of violence" to "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another . . . ."\textsuperscript{225}

Many gender-motivated crimes are classified as misdemeanors, though the violence may involve the same level of force as felonies. The Senate Report cites a U.S. Department of Justice report to find that "one-third of domestic attacks, if reported, would be classified as felony rapes, robberies, or aggravated assaults. Of the remaining two-thirds classified as simple assaults, almost one-half involved 'bodily injury at

least as serious as the injury inflicted in ninety percent of all robberies and aggravated assaults." 226 Excluding the ninety percent of simple assaults from the VAWA trivializes the nature of the violence. Andrea Brenneke argues that if this language is upheld "much of the pattern of domestic violence—assault and battery—that women face might not be covered by the VAWA." 227 The violent felony language once more links the federal VAWA civil rights remedy to state criminal law. 228 Again, the irony is that the systematic negligence that states have demonstrated toward domestic violence, through weak or nonexistent statutes—precisely the reason why a federal civil rights remedy is vital—will deprive victims of their chance at a federal cause of action.

To solve the problem of "violent felonies" and "crimes of violence," the VAWA should erase all references to "crimes of violence" and, at a minimum, replace the phrase with "acts of violence." The "crime of violence" language creates an unnecessary hurdle for plaintiffs seeking to use the VAWA and, according to Andrea Brenneke, "demonstrates congressional refusal to promote equal rights for women more generally." 229 The result of the "crime of violence" language is that courts will limit the types of claims under the VAWA to a narrow scope of "perfect crimes." This language reveals the attitudes that the Act's authors elsewhere claim to be combating with the legislation.

D. Racism and the Violence Against Women Act

Since sexual violence in the United States has been defined historically in racial as well as gender terms, why is race absent from Congress' investigations and the VAWA's legislative history? During the hearings on the VAWA, few witnesses mentioned race as a factor in the legislation. The Senate Report, too, barely mentions race, except for the legislation's effect on Native Americans. 230 This omission presents two

227. Brenneke, supra note 8, at 64.
228. Brenneke, supra note 8, at 64.
229. Brenneke, supra note 8, at 66.
questions: (1) to what extent do racial discourses still define unlawful sexual violence?, and (2) should one discuss and legislate gender-motivated crimes with a consciousness of racial discourses?

Ignoring the interrelationship of racism and sexism will undercut much of the VAWA's moral force as a civil rights remedy. The VAWA will operate in a society in which definitions of rape are implicitly, if not explicitly, racial. The result, absent better congressional guidance, is that the VAWA's civil rights remedies will disproportionately burden men of color, while providing an inadequate remedy for women of color.

1. A Brief History of Race and Sexual Violence

Throughout American history, rape has provided a powerful tool for justifying and implementing racial controls. Professors John D’Emilio and Estelle Freedman surveyed the role of sexual violence in American history, concluding: “Patterns differed, but in each region the belief that white sexual customs were more civilized, along with the assumption that Indian, Mexican, and black women were sexually available to white men, supported white supremacist attitudes and justified social control of other races.”

The highly charged issue of interracial sex proved effective in mobilizing both violence against minority communities and legal prohibitions on interracial sexual contact. Spanish and English settlers justified rape of Native Americans as both a means, and a right, of conquest. For white soldiers, warfare with western Native American tribes justified the sexual humiliation of Native American women. In California, near mining areas “where local Indian tribes had been decimated by disease and impoverishment,” sexual interaction between Indian women and white men could take the form of prostitution, but “usually took the form of rape.” Since the testimony of an

232. See generally BELL, supra note 40, at 64–108.
235. D’EMILIO & FREEDMAN, supra note 231, at 92.
Indian could not convict a white of rape (or of any other crime, for that matter), white men raped with impunity. During the late 1800s, the trafficking of Asian women was widespread on the West Coast, creating a "distinctive system of sexual slavery." During slavery, slave owners had "institutional access" to their slave women, as they, by definition, could not rape their own property. Even after slavery, "the rape of Black women by white or Black men . . . was legal." If a complaint did not allege that the victim was white, a court sometimes dismissed an indictment for rape. Additionally, states with statutes criminalizing rape of white women mandated more severe punishments for rapes committed by men of color than for those committed by white men. The Virginia Code of 1819, for example, punished the rape of a white woman by a black man with the death penalty. If a white man raped a white woman, he could only receive up to twenty-one years. Though many states changed their laws following the Civil War, the legal system's treatment of rape differed little from before. 

In the post-Civil War South, "rape and rumors of rape became a kind of acceptable folk pornography in the Bible Belt," as the South developed what one historian labeled the "Southern Rape Complex." The obsession to protect "white women's virtue" from black men justified a system in which white men lynched black men for any "inappropriate contact" with a white woman. Simply being a black man implied that one possessed the intent to rape, even well into the twentieth century. One Alabama court in 1953 wrote, "In determining the question of intention the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix

---

236. D'Emilio & Freedman, supra note 231, at 92.
239. Wriggens, supra note 238, at 106.
240. Wriggens, supra note 238, at 106.
241. Wriggens, supra note 238, at 106 n.15.
was a white woman and the defendant was a Negro man."²⁴⁴ In this case, a black man with no previous arrests was found guilty of an "attempt to commit an assault with an intent to rape."²⁴⁵ The defendant "was accused of muttering something unintelligible and walking within six feet of Mrs. Ted Allen, a white woman."²⁴⁶ While presuming white women were chaste, the legal system presumed that black women were unchaste—hence, unrapable²⁴⁷—and that for white women, being raped by a black man was worse than death.²⁴⁸ Besides disempowering blacks, the Rape Complex, in trying to protect white womanhood, created fear in many white women and helped to maintain their powerlessness and dependence upon white men.²⁴⁹

Recent statistics suggest that men of color are disproportionately likely to be convicted of rape and to serve longer sentences than white men convicted of rape. Between 1930 and 1967, eighty-nine percent of the men executed for rape in the United States were black.²⁵⁰ In addition, thirty-six percent of black men convicted of raping white women were executed, while "only two percent of all defendants convicted of rape involving other racial combinations were executed."²⁵¹ One now-famous study analyzed 1238 rape convictions between 1945 and 1965 and systematically "examined many variables in addition to race, such as presence of a weapon and prior record of the defendant, to attempt to account for the disparate numbers of executions."²⁵² The conclusion of the study was that race was the only factor that could account for the wide disparities. Though the death penalty for rape was finally abolished, black men who rape white women still receive the harshest penalties.²⁵³

Conversely, women of color are the least protected by the judicial process. In the period between 1960 and 1967, forty-seven percent of all

²⁴⁴ Wriggens, supra note 238, at 111 n.52 (citing McQuirter v. State, 36 Ala. App. 707, 709 (1953)).
²⁴⁵ Wriggens, supra note 238, at 111 n.52 (citing McQuirter, 36 Ala. App. at 708).
²⁴⁶ Wriggens, supra note 238, at 111 n.52 (citing McQuirter, 36 Ala. App. at 708).
²⁴⁷ Wriggens, supra note 238, at 121.
²⁴⁸ Wriggens, supra note 238, at 124.
²⁴⁹ Wriggens, supra note 238, at 125.
²⁵⁰ Estrich, supra note 7, at 107 n.2.
²⁵¹ Wriggens, supra note 238, at 112–13.
²⁵² Wriggens, supra note 238, at 112 n.60 (citing Wolfgang, Racial Dimensions in the Death Sentence for Rape, in EXECUTIONS IN AMERICA 114–20 (1974)).
²⁵³ Estrich, supra note 7, at 107 n.2.
black men convicted of committing criminal assaults against black women were released immediately on probation.\textsuperscript{254} According to this study, "the average sentence received by Black men, exclusive of cases involving life imprisonment or death, was 4.2 years if the victim was Black, 16.4 years if the victim was white."\textsuperscript{255} Professor Angela Harris writes:

Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. In contrast to the partial or at least formal protection white women had against sexual brutalization, black women frequently had no legal protection whatsoever. "Rape," in this sense, was something that only happened to white women; what happened to black women was simply life.\textsuperscript{256}

Bias in the judiciary remains. In a study on judges' attitudes toward rape victims, one judge said, "with the Negro community, you really have to redefine rape. You never know about them."\textsuperscript{257}

2. "Reform" Cannot Support the Racist Meanings of Sexual Violence

Structural racism today functions within the legal system, necessitating an awareness of the history of intersections between race and rape. Wriggens argues that "those who work against rape and other forms of sexual coercion must be vigilant not to support [its] racist social meaning."\textsuperscript{258} For example, requiring mandatory sentencing, increasing sentence lengths, and instituting restitution for victims will affect men of color the most, and are likely to help white women predominantly. Men of color are already disproportionately convicted of rape. Legislation which increases prison time will simply require men of color to serve longer terms. Wriggens concludes that, "given the racist content of the social meaning of rape, struggles limited to illegal rape are likely to have the racist repercussions of targeting Black men."\textsuperscript{259}

\textsuperscript{254} Wriggens, \textit{supra} note 238, at 121 n.113.
\textsuperscript{255} Wriggens, \textit{supra} note 238, at 121 n.113.
\textsuperscript{256} Harris, \textit{supra} note 175, at 599.
\textsuperscript{257} Wriggens, \textit{supra} note 238, at 120 n.104 (citing Bohmer, \textit{Judicial Attitudes Towards Rape Victims}, 57 \textit{Judicature} 303 (1974)).
\textsuperscript{258} Wriggens, \textit{supra} note 238, at 133.
\textsuperscript{259} Wriggens, \textit{supra} note 238, at 140.
Does the VAWA perpetuate the racist history of American rape laws? Portions of the VAWA outside of title III involve many regressive features. The increased federal sentences for sexual abuse in title I almost certainly will affect men of color the most, as will the “High Intensity Crime Area Grants.” These grants are targeted to the “most dangerous” areas of the country to increase prosecutions of gender-motivated crimes. The Attorney General will determine these “dangerous” areas through Bureau of Justice Statistics, which uses numbers inflated by the racial bias in the judicial system just described.

The VAWA poses additional concerns for Native Americans since Indian reservations, with some modification, are directly subject to federal law. The Turtle Mountain Chippewa Tribe, represented by the Native Americans Rights Fund, opposes the increased federal sentences in the VAWA because “Indian people would be disproportionately impacted. . . . \[since\] Native Americans comprise the single largest group sentenced under federal law for the sexual offenses addressed by \[the VAWA\].” In one year, between October 1, 1989 and September 30, 1990, the U.S. Sentencing Commission reported that “approximately 60 percent of defendants sentenced for aggravated sexual abuse and 75

262. In § 121, the VAWA creates the High Intensity Crime Area Grants. The VAWA adds new sections, beginning with Section 1711, to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 et seq., as amended by § 4 of Public Law 102-521, 106 Stat. 3404. Section 1711 defines “high intensity crime area” as “an area with one of the 40 highest rates of violent crime against women, as determined by the Bureau of Justice Statistics.” Section 1712(a) directs the Bureau of Justice Statistics to compile a list of the 40 areas “with the highest rates of violent crime against women based on the combined female victimization rate per population for assault, sexual assault (including, but not limited to, rape), murder, robbery, and kidnapping (without regard to the relationship between the crime victim and the offenders).” Section 1712(b) states that the Bureau of Justice Statistics may rely on two sources for making its determinations:

(1) existing data collected by States, municipalities, Indian reservations or statistical metropolitan areas showing the number of police reports of the crimes listed in subsection (a); and
(2) existing data collected by the Federal Bureau of Investigation, including data from those governmental entities already complying with the National Incident Based Reporting System, showing the number of police reports of crimes listed in subsection (a).

263. Violence Against Women Hearing, supra note 5, at 299-300 (statement by the Turtle Mountain Chippewa Tribe).
percent sentenced for sexual abuse under federal law were American
Indian and Alaska Natives.\textsuperscript{264} Two factors account for these high
numbers. First, Indian reservations are the most populated areas subject
to federal jurisdiction.\textsuperscript{265} Second, the law is "followed to the letter
when it is used against Indian people and other people of color."\textsuperscript{266}
"Law and order" measures within the VAWA that target men of color
may undermine the Act's support.

Professor Kimberle Crenshaw argues that efforts to combat violence
against women often appeal to white elites. In a variety of forms, the
message is that the problems of sexual violence do not occur only in
"other" communities. The assumption behind this appeal is that "bat-
tering is a minority problem."\textsuperscript{267} The VAWA, too, relies upon these ap-
peals. Crenshaw cites Senator David Boren’s opening comments in
support of the VAWA:

Violent crimes against women are not limited to the streets of
the \textit{inner cities}, but also occur in homes in the urban and
rural areas across the country.

Violence against women affects not only those who are
actually beaten and brutalized, but indirectly affects all
women. Today, \textit{our} wives, mothers, daughters, sisters, and
colleagues are held captive by fear generated from these
violent crimes—held captive not for what they do or who
they are, but solely because of gender.\textsuperscript{268}

\textsuperscript{264} Violence Against Women Hearing, \textit{supra} note 5, at 300 (statement by the Turtle
Mountain Chippewa Tribe).

\textsuperscript{265} Violence Against Women Hearing, \textit{supra} note 5, at 300 (statement by the Turtle
Mountain Chippewa Tribe).

\textsuperscript{266} Violence Against Women Hearing, \textit{supra} note 5, at 295 (letter from The Women’s
Circle to Senator Joseph R. Biden, Jr., Chairman, Senate Judiciary Committee).

\textsuperscript{267} Crenshaw, \textit{supra} note 97, at 1258 (1991).

\textsuperscript{268} Crenshaw, \textit{supra} note 97, at 1250 n.58 (citing 137 CONG. REC. S611 (daily ed. Jan.
made essentially the same statement shortly after Senator Boren’s comment:

[Rape and domestic violence] are not limited to the streets of our inner
cities or to those few highly publicized cases that we read about in the
newspapers or see on the evening news. Women throughout the country,
in our Nation’s urban areas and rural communities, are being beaten and
brutalized in the streets and in their homes. It is our mothers, wives,
daughters, sisters, friends, neighbors, and coworkers who are being vic-
timized; and in many cases, they are being victimized by family members,
friends, and acquaintances.
This appeal only works to a white audience. Rather than question why abuse has been so long ignored when people thought it occurred only in the homes of “others,” this appeal continues the pattern of neglect “that permitted the problem to continue as long as it was imagined to be a minority problem.” Crenshaw concludes that framing the VAWA in these terms likely ensures that women of color will not receive full benefits from the legislation, even if the legislators behind it intend otherwise:

Senator Boren and his colleagues no doubt believe that they have provided legislation and resources that will address the problems of all women victimized by domestic violence. Yet despite their universalizing rhetoric of “all” women, they were able to empathize with female victims of domestic violence only by looking past the plight of “other” women and by recognizing the familiar faces of their own. The strength of the appeal to “protect our women” must be its race and class specificity. After all, it has always been someone’s wife, mother, sister, or daughter that has been abused, even when the violence was stereotypically Black or Brown, and poor. The point here is not that the Violence Against Women Act is particularistic on its own terms, but that unless the Senators and other policymakers ask why violence remained insignificant as long as it was understood as a minority problem, it is unlikely that women of color will share equally in the distribution of resources and concern.

Legislators must do more to ensure that the VAWA does not reflect a racial logic, as well as a gendered logic. They cannot overlook the

---


269. Crenshaw, supra note 97, at 1260.

270. Crenshaw, supra note 97, at 1260. Crenshaw continues by implying that the “fragility” of the coalition necessary to achieve legislation to combat violence against women ensures it cannot take seriously concerns of diverse groups of women:

It is even more unlikely, however, that those in power will be forced to confront this issue [of distribution of resources]. As long as attempts to politicize domestic violence focus on convincing whites that this is not a “minority” problem but their problem, any authentic and sensitive attention to the experiences of Black and other minority women probably will continue to be regarded as jeopardizing the movement.

Crenshaw, supra note 97, at 1260-61.
reality of violence against women of color, and only examine it when it helps gain "white support for domestic violence programs in the white community."  

Wriggens argues that the devastating consequences of this history of racism are "the denials that black women are raped and that all women are subject to pervasive and harmful sexual coercion of all kinds." One question often faced by women of color is "whose side" to be on. Alice Walker writes, "Whenever interracial rape is mentioned, a black woman's first thought is to protect the lives of her brothers, her father, her sons, her lover. A history of lynching has bred this in her." Angela Harris describes the experience for black women as an ambivalence arising from a history of necessity:

Thus, the experience of rape for black women includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white women, but also a unique ambivalence. Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men.

The history of racism and rape has forced some women into a dilemma about whether to support legislation that works against gender-motivated violence, such as rape, or to support those men whom they perceive as being punished for what white men do with statistical impunity, or whom they perceive as having done nothing at all.

No one is served by failing to convict abusers of women, except the abusers. Some women of color do face a dilemma, but are also the most vulnerable to sexual abuse. The Women's Circle, a group of Native American women working to stop sexual abuse, testified at the Senate Judiciary Committee's hearings:

We recognize that the law enforcement and judicial systems are disproportionally harsh on people of color. We also recognize that the increase in penalties in [the VAWA] will

271. Crenshaw, supra note 97, at 1260.
272. Wriggens, supra note 238, at 103.
273. Wriggens, supra note 238, at 139 n. 228 (quoting Alice Walker, Advancing Luna—and Ida B. Wells, in You CAN'T KEEP A GOOD WOMAN DOWN 85, 93 (1981)).
274. Harris, supra note 175, at 601.
most effect [sic] Indian people. However, while we as Indian women stand side by side with our brothers in the fight against racial oppression, violence against Indian women is causing great and irreparable harm not only to Indian women but to our families and communities as a whole.\textsuperscript{275}

Indeed, their testimony suggests that the problem is \textit{not} that men of color are convicted too often and serve overly harsh terms: "Federal sentences need to be increased because compared to the violence committed, no one is being convicted or sentenced, Indian or non[-]Indian, on or off reservations. . . . Federal courts are presently sentencing below their own guidelines with sentences for nonaggravated sexual assault now averaging 4 years."\textsuperscript{276} Rather, rape convictions are not applied fairly. The biggest injustice is not how severely men of color are punished for rape, but how little white men are. The fundamental problem is that the courts must apply sexual assault statutes fairly, for when women of color protect men of color who have raped, in the belief that the judicial process is unfair, they potentially injure themselves.

This history of racism will affect cases brought under the VAWA’s civil rights title. Given the attitudes discussed above, women of color will find it more difficult to prevail in civil rights actions, especially if the perpetrator is white. Women of color are simply not believed as often as white women in courts.\textsuperscript{277} When women of color do win, they will likely receive smaller damage awards than would a white woman for the same fact pattern. The viability of a woman’s claim will depend upon both her race and her attacker’s race. Crenshaw also argues that the scope of harms recognized as gender-motivated must encompass a race consciousness: "Because Black women face subordination based on both race and gender, reforms of rape law and judicial procedures that are premised on narrow conceptions of gender subordination may not address the devaluation of Black women."\textsuperscript{278} The VAWA will not operate in a vacuum, but in a social context that reflects centuries of

\textsuperscript{275} Violence Against Women Hearing, \textit{supra} note 5, at 295 (letter from The Women’s Circle to Senator Joseph R. Biden, Jr., Chairman, Senate Judiciary Committee).

\textsuperscript{276} Violence Against Women Hearing, \textit{supra} note 5, at 295 (letter from The Women’s Circle to Senator Joseph R. Biden, Jr., Chairman, Senate Judiciary Committee).

\textsuperscript{277} Crenshaw, \textit{supra} note 97, at 1269 (citing \textsc{Gary LaFree}, \textsc{Rape and Criminal Justice: The Social Construction of Sexual Assault} 219–20 (1989)).

\textsuperscript{278} Crenshaw, \textit{supra} note 97, at 1270.
racism in beliefs about sex and violence. Even if never overt, the subtle pressure of racial prejudice will play a tangible, even if small, role in the thousands of cases that arise under the VAWA, resulting in a cumulative race effect in the administration of justice.

III. REFORMING THE VIOLENCE AGAINST WOMEN ACT

Each of the problems discussed above requires a response. Even if Congress neglects to respond after the VAWA passes, advocates and judges should work to ensure that the Act fulfills its broad purposes. Oversights in wording should not nullify clearly positive legislative intent, especially when the problem is not one the drafters carefully considered. Many of these suggested changes clarify what appears to be the congressional intent by foreclosing strict readings of the Act.

This article has referred to the Senate version of the VAWA for consistency. Because the two versions of the VAWA contain slightly different language, this section of the article will sometimes refer to the separate Senate and House versions of the VAWA, S. 11 and H.R. 1133, respectively.

A. Reforming the Cause of Action

The first four suggestions offer new statutory language for § 302, the cause of action.

1. Expand the “Crime of Violence” Language

First, “crime of violence” in section 302(c) should be changed to “act of violence” or, at worst, “act or crime of violence.” The violent felony language should be removed from S. 11 entirely. If the crime of violence language remains, two compensating changes should be made.

One change is that “crime of violence” in title III should be interpreted according to the Sentencing Commission Guidelines instead of 18 U.S.C. § 16. Using the Sentencing Commission Guidelines would limit the scope of title III without limiting the cause of action solely to

279. This section cites the House title III language, though it was cut by the House Judiciary Committee in November 1993. See supra note 2 for a brief legislative history of the VAWA.

violent felonies. "Act of violence" should likewise focus upon the potential for harm to the victim, whether or not the act would constitute a criminal felony. "Act of violence" should include situations which contain only the threat of force. The determination of whether a victim believed in the presence of the threat of force should focus upon the reasons for the victim's belief (such as a previous violent act committed by the other person), the victim's vulnerability in relation to the other person (including economic or emotional dependence), and her or his psychological state during the act. The VAWA should allow evidence of traumatic stress or "battered woman's syndrome" or similar psychological states to help prove a belief in the threat of violence.

Alternately, if the felony limitation remains, an exception should be made for "domestic violence." Section 302(d)(2) would be expanded as follows (new language italicized):

the term "crime of violence" means . . . (C) or, acts of corporal
injury willfully inflicted by a person upon his or her spouse or
intimate partner, or any person who is the mother or father of his
or her child, whether or not such actions involved use of force
likely to produce "serious bodily injury."

This suggested language is adapted from the California Penal Code section entitled, "Infliction of injury on spouse, cohabitee or parent of child." While not ideal, this would at least provide some measure of remedy to those in battering relationships.

2. Enumerate Some Crimes of Violence

Second, S. 11 should conform to the House version of the VAWA, H.R. 1133, by including some enumerated "crimes of violence." H.R. 1133 includes per se violations and defines "crime of violence motivated by the victim's gender" to include "a crime of violence that is rape (excluding conduct that is characterized as rape solely by virtue of the ages of the participants), sexual assault, sexual abuse, or abusive sexual contact." Stalking should also be added to this list as well as battering of spouses or intimate partners. Under no circumstances in these enumerated cases should plaintiffs need to prove additional force beyond what the definition of the crime itself requires. If the crime of

rape requires only non-consensual intercourse, for example, then that is all that the plaintiff need establish for a VAWA cause of action.

Adding a list of enumerated crimes to the VAWA's cause of action ensures victims the chance of bringing suits without having to prove additional force or violence. Even if nationally inconsistent, a list of enumerated crimes would at least create a baseline of offenses that are, by definition, motivated by gender.

Even with this change, plaintiffs would still have to rely upon state and federal definitions of rape, sexual abuse, and sexual assault that do not adequately reflect the reality of the violence. Congress could create a definition of sexual abuse within the VAWA itself, so plaintiffs would not have to rely upon the very criminal laws whose inadequacies are the reason for the Act. This would also make the Act nationally consistent, as plaintiffs would not have to use legal definitions which vary from state to state.

Though potentially expedient, this alternative is short-sighted. If Congress chooses to recognize the inadequacy of criminal sexual abuse laws, it should change them entirely, rather than create a definition solely for the VAWA. Congress should rewrite the federal criminal definition of sexual abuse. While Congress might not be able to persuade states to adopt its model definition in their criminal codes, plaintiffs would at least have the benefit of a progressive federal criminal definition for VAWA civil rights actions.

3. Create a New Structure for Litigation

Andrea Brenneke advocates a "title III" test that plaintiffs may use to establish a prima facie case under the VAWA. Developed to address the needs of battered women, this test avoids many of the problems in traditional civil rights theory. To establish a prima facie title III claim, a plaintiff would prove:

(i) she was a member of a protected class in a battering relationship; (2) she was a survivor of an act or "crime of violence;" (3) and the act or "crime of violence" did or was likely to: (a) control her thoughts, beliefs or actions or punish her for resisting the perpetrator's control; or, (b) cause her to modify her behaviors, duties, attitudes or roles to avoid

Brenneke contends that if plaintiffs meet the above test, this "should be sufficient to shift the burden of proof of intent to discriminate in the title III context." As in some Title VII disparate treatment cases, after a "plaintiff has raised an inference and presumption of discrimination, the defendant may place into evidence a nondiscriminatory reason for the . . . action to avoid a directed verdict." The title III test allows plaintiffs a real chance at succeeding. Brenneke worries that abusers might be able to escape civil rights actions by offering what appear to be valid reasons for their actions, but which are only pretextual excuses.

To avoid this problem, she argues that the “mixed motive” standard should be applied in VAWA actions, especially in acquaintance situations in which many plausible “causes” for taking an action exist.

The mixed motive standard, first developed by the Court in Price Waterhouse v. Hopkins provides that the plaintiff need only “satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision.” In Price Waterhouse, the employer was permitted to make an affirmative “same decision” defense—that is, that the employer would have taken the same action even absent all impermissible factors. Otherwise, “where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we [the Court] are entitled to conclude that gender did make a difference to the outcome.” Though only a plurality opinion, Price Waterhouse established the standard of mixed motives in employment discrimination cases.

The Civil Rights Act of 1991 codified the mixed motive standard for Title VII cases, modifying Price Waterhouse. The 1991 Civil Rights Act emphasized that plaintiffs meet their prima facie burden by proving

284. Brenneke, supra note 8, at 75.
285. Brenneke, supra note 8, at 76.
286. Brenneke, supra note 8, at 76.
287. Brenneke, supra note 8, at 77.
288. Brenneke, supra note 8, at 77.
289. 490 U.S. 228 (1989).
290. Id. at 247 n.12.
291. Price Waterhouse, 490 U.S. at 246 n.11.
that sex was a "motivating" factor. The 1991 amendment states that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." The effect of a mixed motive standard is that if a plaintiff can meet this burden, the burden then shifts to the defendant to prove it was not a factor.

The desired method of proof—mixed motive—should be made consistent within the VAWA and with the Civil Rights Act of 1991. Currently, section 302(d)(1) says:

- the term "crime of violence motivated by gender" means a crime of violence 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.

Though proving animus based on gender, in the second half of the section, follows an "any part" standard, this is not true for the first part of the section, in which plaintiffs must prove that the crime was "because of gender or on the basis of gender." This language and the examples cited in the Senate Report suggest that a differential treatment model of discrimination should be used as a method of proof for this part of title III claims. The language "because of" can mean sole motivation, which would be disastrous for plaintiffs. Instead, courts should employ the "mixed motive" or "any part" standard here as well. A mixed motive approach should follow that used with the Civil Rights Act of 1991.

A suggested new wording for section 302(d)(1) (new language italicized) is:

- the term "act or crime of violence motivated by gender" means an act or crime of violence committed in whole or in part because of gender or on the basis of gender or gender roles.

This new language incorporates three major changes. First, it clarifies that the mixed motive standard is used when interpreting the "because
of gender” language. Second, adding the language “or gender roles” clarifies the meaning of “because of gender” so that it does not simply mean because of biological sex. Often violence is committed against someone because of their gender role behavior. As recognized by the Court in Price Waterhouse, this is just as invidious as other forms of gender-motivated violence and impossible to separate from it. Without this language, many women (and some men) will not be protected under the VAWA. Finally, this language conforms to the definition given in H.R. 1133, which does not contain the term

295. Price Waterhouse, 490 U.S. at 250–51. In Price Waterhouse, the Court decided that stereotypes based on women’s proper role behavior can form discrimination based on gender. The Court noted some of the factors that Price Waterhouse relied upon when it refused to grant Hopkins partnership:

There were clear signs, though, that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school” . . . . But it was the man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision . . . who delivered the coup de grace: in order to improve her chances for partnership . . . Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Id. at 235 (citations omitted). The District Court decided that:

[S]ome of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments . . . . Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping.

Id. at 236–37. The Court upheld this reasoning, and rejected Price Waterhouse’s assertions that sex stereotyping did not matter:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Id. at 251 (citations omitted).
"animus." Given the difficulties that the term "animus" can present for victims of gender-motivated violence, the VAWA should avoid using the term entirely.

The VAWA or its legislative history should contain examples of mixed motive cases, not intended to be exhaustive, to illustrate proper uses of title III. Examples could include a white woman attacked for dating an Asian-American man, or a woman attacked as she leaves a lesbian bar or event. Extreme examples, such as those involving serial rapists who hurl misogynist slurs during their attacks, should be removed from the legislative history, as these examples will prove prejudicial to plaintiffs with less sensational, but no less valid, civil rights claims under title III of the VAWA.

If Congress does not amend the VAWA, it is unclear whether courts will permit title III plaintiffs to utilize the mixed motive standard. Though the Senate Report says that Title VII case law should operate as a guide for interpreting what is gender-based, courts employ a number of different methodologies in Title VII cases. Without further guidance, courts will have great leeway to decide which methods to impose on VAWA litigants. Unless the Congress sets out the methods of proof for title III cases, courts may drag VAWA litigants through the pitfalls of sole motivation differential treatment analysis, especially given the extreme cases cited by the Act's authors as models. Brenneke warns: "[T]he very inclusion [of an extreme example] provides insight into the imagination of those who are creating the legislation and those who will likely be interpreting it."

B. Clarifying the Scope and Direction of the Act

The last two suggestions offer guidance for courts in interpreting the scope of the VAWA's civil rights provisions as a whole.

296. The corresponding House language reads:

the term "act or crime of violence motivated by the victim's gender" means . . . (B) any other crime of violence committed because of gender, or on the basis of gender of the victim.


297. See supra notes 53–56, and accompanying text.

298. See supra notes 127–35, and accompanying text.

299. Brenneke, supra note 8, at 102.
1. Relationship of the Parties

The VAWA's language should clarify that the relationship between the plaintiff and defendant can in no way diminish violence committed by the defendant, nor can "personal animosity" obscure an act motivated by gender. The congressional findings in section 302(a) should be amended to read, in pertinent part, as follows (new language italicized):

The Congress finds that . . . (8) victims of gender motivated violence have a right to equal protection of the laws, regardless of their relationships to their attackers, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.

Congress needs to emphasize to the federal judiciary that violence between acquaintances must be treated as seriously as violence between strangers, especially when the parties are spouses or intimate partners. As a start, Congress should adopt Brenneke's language to add a new finding in section 302(a) (new language italicized):

The Congress finds that . . . violent conduct by a domestic partner that has the purpose or effect of unreasonably interfering with an individual's work, family or social performance or creates an intimidating or hostile domestic environment is no less harmful than such conduct in the workplace.

This finding could come after current congressional finding (2) in the Senate version of the VAWA. Finding (2) states that "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home." Such a finding would indicate Congress' willingness to have the model of a hostile domestic home environment applied in title III cases. Victims of violent subordination by spouses, intimate partners, and acquaintances need to have the federal remedy provided in the VAWA. Under a differential treatment model of discrimination, they probably will not.

2. Counteracting the VAWA's Racist Potential

Congress should express the intent that sexual assault laws be equally enforced, and back that intent with action. The legislative history, including the hearings, should discuss the historical and contemporary connections between sexual violence and racism. The congressional findings in section 302(a) should be amended to include a finding stating that unequal enforcement of the laws based on race undermines the Congressional intent to foster equal justice. One possibility is (new language italicized):

The Congress finds that . . . men of color are more likely than white men to be prosecuted, convicted, and punished for crimes of violence motivated by gender than are white men. Women of color are less likely than white women to see those who commit crimes of violence against them prosecuted, convicted, and punished. Both of these patterns of racial disparities in the enforcement of justice undermine the intent of Congress that all laws be applied fairly.

The Attorney General's Task Force on Violence Against Women\textsuperscript{301} should be charged with studying the racial character of sentencing, and with offering recommendations for remedying structural inequalities in the law. To do this, the Task Force should collect statistics on rates of (a) reporting, (b) prosecution, (c) conviction, and (d) sentencing, broken down by race of both victim and attacker, in combination with each other. This study should focus on whether some patterns exist that fail to provide equal protection (e.g., white men are less likely to be prosecuted and convicted when they rape women of color than when they rape white women). Based on this information, Congress should withhold funds not only from districts that do not prosecute white men as vigorously as men of color, but also from districts that do not protect women of color as much as they protect white women.

In addition, Congress should eliminate the High Intensity Crime Area grants. The money should go instead to victim services, as well as treatment and prevention services for offenders. Intervention in these "dangerous" areas should not focus on prosecution as the only answer. Jurisdictions that receive money for increased prosecution of crimes against women under any of the grant programs in the VAWA should

\textsuperscript{301} S. 11, 103d Cong., 1st Sess. §§ 141-148 (1993).
be required to report their rates of (a) reporting, (b) prosecution, (c) conviction, and (d) sentencing, broken down by race of both victim and attacker, in combination with each other, to help ensure that jurisdictions make efforts to increase prosecutions and protect victims equitably. Next, The Offender Training and Information Programs, which provide treatment for incarcerated men convicted of gender-based crimes, found in H.R. 1133, should be included in S. 11, and the funding for this Chapter should be substantially increased.

This is one area in which history is vital, both for writing law and for enforcing it. Some parts of the VAWA already show some congressional intent to enforce laws more equitably. First, the VAWA grants money to states and Indian reservations for education to increase prosecution, law enforcement, and victim services, as well as public education. Further, the law removes some of the economic, if not psychological, barriers to initiating action by allowing for the recovery of attorney's fees. An intent of the law should be to remove the class, as well as race, disparities in the enforcement of sexual abuse law. Finally, by educating judges, the VAWA might encourage more equitable conviction rates and sentencing. Nevertheless, the VAWA does not do as much to promote racial justice as it should.

303. In § 121, the VAWA allocates funds for the High Intensity Crime Area Grants. See supra note 262. The VAWA adds new sections, beginning with § 1711, to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711 et seq. § 1732(d) authorizes for each of the fiscal years 1994, 1995, and 1996, $100,000,000 to carry out the High Intensity Crime Area grants.
306. Section 303 amends § 722 of the Revised Statutes (42 U.S.C. § 1988) to allow prevailing plaintiffs under the VAWA, as in other federal civil rights actions, to recover attorney's fees at the discretion of courts.
307. Title V, entitled the “Equal Justice for Women in the Courts Act,” allocates up to $1,100,000 to study judicial bias and develop model education programs for state and federal judges and court personnel. S. 11, 103d Cong., 1st Sess. §§ 501, 514, 522 (1993). While § 512 suggests that programs for state judges include enumerated points, such as information on “racial stereotyping of rape victims and defendants, and the impact of such stereotypes on credibility of witnesses, sentencing, and other aspects of the administration of justice,” § 521 omits specific goals for education of federal judges and court personnel. S. 11, 103d Cong., 1st Sess. §§ 512, 521 (1993).
C. Why a Civil Rights Remedy is Necessary

Though this article has focused on the many ways that courts may undermine the effectivenes of civil rights arguments, civil rights actions are still powerful legal tools. Short of a radical legal revolution, civil rights jurisprudence provides the best available legal remedy for ensuring the safety of those harmed by institutionally supported forms of violence, such as gender-motivated violence. Despite the limitations of civil rights theory, no other strategy permits survivors of gender-motivated violence the same chance of achieving even a limited form of justice.

Civil rights arguments are necessary, but we need to change the way we think about civil rights. Properly formulated, a civil rights strategy can have important advantages, if it is historically contingent, is tied to a political theory that focuses upon the subjectivity of those who employ civil rights remedies, and is committed to transforming legal practice. Brenneke accepts that the use of civil rights may disadvantage women in some contexts, but argues that civil rights strategies can work in conjunction with social movements:

Articulation of battered women’s “civil rights,” whether those rights stem from Congressional enactment or state constitution is a passionate expression of the integrity of individual persons and the value of women as a group. It is not a perpetuation of victimization, but an embrace of empowerment. The notion of “rights,”...should be contextualized within the social movement that articulates it.\(^{308}\)

There are at least twelve reasons to employ a civil rights strategy to combat gender-motivated violence, the first six of which are based on advantages Brenneke states in the context of civil rights for battered women.\(^{309}\)

First, a civil rights strategy can link violence against oppressed groups with the historical context of that violence. This is especially true when victims, advocates, and judges use empirical and historical methods to ground inequality. A sophisticated vision of history can capture the interactions of multiple fields of power, as well as the social context of those fields. Often judges and juries do not have the

\(^{308}\) Brenneke, supra note 8, at 101.

\(^{309}\) Brenneke, supra note 8, at 103–106.
necessary expertise to understand the context of gender-motivated violence, which places an extra burden of persuasion on those who use the VAWA. Opponents of the Act will no doubt try to portray acts of violence as random, personal, or quirky, when the acts in fact reflect broader patterns of discrimination and oppression.

Second, the widespread use of civil rights actions will expose the commonness and pervasiveness of the violations. One of the most powerful tools for sustaining oppressive institutions, especially violence against women, is the ability to atomize persons’ experiences, keeping potentially powerful social alliances apart, and encouraging those who experience violence to internalize blame for their circumstances. A widespread use of civil rights as a remedy will also de-sensationalize the extreme, “perfect” cases of discriminatory violence, showing that such violence occurs routinely and in a variety of forms. One of the most numbing aspects of gender-motivated violence is its routineness. Civil rights laws should concern themselves precisely with cases of “everyday domestic violence.” Without trivializing the experience of surviving violence, the routine use of civil rights remedies will expose the interconnectedness of gender-motivated violence in its diverse forms.

Third, use of civil rights can reformulate the character of what is socially appropriate behavior. Rights discourse carries weight in this society. Acts that many once considered trivial or funny become extremely serious when cast in the language of civil rights. The history of the African-American civil rights movement demonstrates this point. From a generational standpoint, this may be the greatest value of a civil rights remedy.

Fourth, a social commitment to preventing institutionally supported violence, even if the commitment depends upon those in the institutions not fully understanding their roles in perpetuating the violence, at least carries the hope of well-funded victim response services, providing real benefits for many persons. Despite the increased need for services for victims of gender-motivated violence, the services remain understaffed and underfunded, easy targets for fiscal austerity. Placing gender-motivated violence in the context of civil rights would give advocates and victims leverage and legitimacy in seeking institutional support.

Fifth, civil rights arguments strike a distinctively moral chord, potentially forcing citizens to question the moral legitimacy of liberal democratic governments that do little to stop gender-motivated violence. The moral weight of civil rights remedies need not lie solely
in an appeal to the liberal legal tradition's "commitment to neutrality and abstractness," which often fails to produce equality in fact for subordinated groups.\textsuperscript{310} Brande Stellings argues for grounding the moral argument underpinning civil rights for gender-motivated violence in a notion of citizenship:

Citizenship provides a place from which to launch the project of recognizing rights, the "process by which hurts that once were whispered or unheard have become claims, and claims that once were unsuccessful have persuaded others and transformed social life." The process of invoking rights not only manifests a person's membership within a community by demanding that a wrong be righted, but also strengthens that tie to the community by expressing the person's faith in placing her fate within the hands of the community. Citizenship shows us that public self-governance begins with private self-governance.\textsuperscript{311}

Stellings' concept of citizenship relies on the alternative liberal "ideals of self-possession and self-governance," rather than neutrality. Gender-motivated violence violates these ideals of bodily integrity and self-possession, which provide a language with which to articulate civil rights arguments.

Sixth, civil rights actions allow individual persons to obtain monetary damages as compensation for their deprivation of rights. Criminal prosecutions rarely involve restitution for the victim. The VAWA civil rights remedy allows "compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."\textsuperscript{312}

Seventh, active use of the VAWA may have another long-term consequence: a decrease both in the number of cases courts process and the social cost of the violence.\textsuperscript{313} Many cite the potential flood of new cases as a reason to oppose the VAWA. This argument not only abandons victims of violence to their "fate," but also assumes that gender-

\textsuperscript{310} Stellings, supra note 57, at 215.


\textsuperscript{312} S. 11, 103d Cong., 1st Sess. §302(c) (1993).

\textsuperscript{313} Mary C. Dunlap originally made this observation in response to concerns that the VAWA would deplete scarce judicial resources. Telephone conversation with Mary C. Dunlap (Summer 1993).
motivated violence does not drain resources elsewhere. Cycles of battering in relationships, for example, may develop until "serious felonies" result. Many men kill or permanently injure their partners when patterns of abuse go unchecked, and many women may feel they have no effective recourse but to protect themselves from an abuser when they have no legal option. In either case, the judicial system will see the results later, only magnified in severity. In addition, the long-term costs to children who grow up in abusive homes are enormous, as are the long-term cost to the health care and criminal justice systems. The Senate Report summarizes the grim statistics:

Our society pays a heavy price for this violence: 1 million women a year seek medical attention for injuries caused by violence at the hands of a male partner; children in homes with family violence are 15 times more likely to be abused or neglected than children in peaceful homes; and finally, estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence. Indeed, for the past 4 years, the U.S. Surgeons General have warned that family violence—not heart attacks or cancer or strokes—poses the single largest threat of injury to adult women in this country.

And these figures only cover "domestic violence." Providing positive routes for victims of this violence is a social and legal investment. Understood this way, the suggestion that the VAWA should not pass because it would flood the courts with mere "domestic relations disputes" is not only short-sighted, but also perverse.

Eighth, civil rights actions allow those harmed to control the legal action. Those groups traditionally powerless in the legal system have at least limited power to control the process and to place themselves, not the state, against their attackers. Criminal trials, when they do occur, are often hostile settings for victims of gender-motivated violence: they may find themselves under more scrutiny than the defendant and have little, if no, say over the strategy which the prosecution pursues.

314. S. Rep. No. 138, supra note 11, at 41 ("One-third of all women who are murdered die at the hands of a husband or boyfriend.") (referring to United States Department of Justice, FBI Crime in the United States 1991: Uniform Crime Reports 19 (1992)).


316. Some have used the term "double victimization" to describe many abuse victims' ex-
Ninth, civil rights actions allow a victim a chance of prevailing in court. The VAWA burden of proof is the “preponderance of the evidence,” which is more favorable than the “beyond a reasonable doubt” standard used in criminal trials. In theory, a plaintiff would only need to prove to a factfinder that it is more likely than not that the violation occurred. In actual practice, judges and juries may demand a higher standard of proof before deciding that a defendant has violated the victim’s civil rights, but the preponderance standard at least gives victims a chance to overcome the attitudinal barriers that often prevent decisions in their favor.

Tenth, civil rights actions are necessary to overcome ineffective state and local laws. The inadequacies of state laws, coupled with their weak enforcement, in part, justify the need for the VAWA. Federal remedies have proven necessary and effective in the past when local jurisdictions were either unwilling or unable to protect the rights of their citizens. In addition, federal courts are often a more effective forum for victims wishing to present claims of civil rights violations, especially when the inadequacy of a state remedy is an issue.

Eleventh, civil rights actions can spur reform in other areas of the law, such as the criminal justice system. Sometimes local legislators respond to the challenge of a tougher national anti-discrimination standard by enacting more effective statutes and enforcing them. Furthermore, the doctrinal development of the VAWA may spur development of civil rights doctrines that courts can apply beyond the VAWA. Many of the problems of applying civil rights remedies to gender-motivated violence are not unique. As courts develop tests to understand the problems in this new field of law, insights from the application of the VAWA may revitalize civil rights jurisprudence in other areas.

Finally, in the absence of other legal remedies, abandoning civil rights sometimes means abandoning women’s lives. Brenneke underscores the bottom line in all attempts to address gender-motivated violence, legally or otherwise: “Despite the risks of civil rights litigation, rights advocacy . . . should not be abandoned—especially where
women's lives are at risk."  

Civil rights cannot replace visionary social programs, nor can they compensate for widely held attitudes that accept gender-motivated violence as normal. Nevertheless, the existence of a civil rights remedy provides a tool that at least some victims can use to achieve real results. Civil rights litigation can only do so much, but it may provide the only potentially effectively alternative for many victims of violence. Under these conditions, failing to use such a tool is unconscionable.

D. Conclusion

Despite its potential, the VAWA has a mixed outlook. Early judicial interpretations might make it effectively unusable or may severely limit its scope. On the other hand, alternative judicial interpretations might liberally construe the Act's purpose, making it a source of progressive litigation. In many ways, the Act might transform American civil rights jurisprudence over the next few decades. The language of the Act and its history are unfortunately not strong enough to ensure such a transformation. Indeed, in many places the Act's language works at cross purposes to its stated goals. At other times, the language in one part of the Act undermines language in another part. Such an outcome often results with legislation that is both lengthy and the product of years of political compromises.

The VAWA exists at the intersection of the dual concepts of traditional civil rights jurisprudence and "perfect" violence. The VAWA does provide a positive remedy, but its application in federal courts will depend upon the interplay of these two themes. In practice, most persons using the remedy will probably succeed to the degree that their harm fits the traditional model of a civil rights violation and that they look like a "perfect" victim. Ironically, the VAWA was drafted to undo this dual burden.

In order to realize the Act's potential, advocates and judges will have to understand the myriad ways that these burdens operate in actual cases, then actively work to counteract them. Doctrines that were not developed to address gender inequality at best map poorly onto the reality of gender-motivated violence. Using these traditional theories as the measure of VAWA violations will ensure that the bulk of gender-motivated violence—battering and sexual assault by acquaintances—

317. Brenneke, supra note 8, at 100.
escapes civil rights scrutiny entirely. The best future for the VAWA is one in which courts fashion doctrine from the concrete social reality of gender-motivated violence to protect those most vulnerable to it.