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APPLYING THE DISCRIMINATION MODEL TO VIOLENCE AGAINST WOMEN: SOME REFLECTIONS ON THEORY AND PRACTICE

SALLY F. GOLDFARB*

I. INTRODUCTION

A major contribution of the modern battered women's movement has been to identify domestic violence committed by men against women as a form of sexism. In Professor Elizabeth Schneider's words:

[H]eterosexual intimate violence is part of a larger system of coercive control and subordination; this system is based on structural gender inequality and has political roots. . . . In the context of intimate violence, the impulse behind feminist legal arguments [is] to redefine the relationship between the personal and the political, to definitively link violence and gender.¹

According to this analysis, domestic violence both grows out of and reinforces a pervasive pattern of male power and female subservience within the family and society.² Domestic violence occurs on a

* Associate Professor, *Rutgers University School of Law at Camden*. Copyright 2003 Sally F. Goldfarb. I am grateful to Donna Coker for making helpful suggestions on a draft; to the participants in the "Symposium on Confronting Domestic Violence and Achieving Gender Equality" at the American University Washington College of Law for their insightful comments; and to Rutgers law students Kristin Bricketto, Erin Farrell, Alexa Nasta, and Gigi Scoles for providing excellent research assistance. In my former capacity as Senior Staff Attorney at the NOW Legal Defense and Education Fund, I was involved in the effort to draft and enact the Violence Against Women Act of 1994; however, the views expressed herein are my own.

1. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 5-6 (2000).

2. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 40-41 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; SCHNEIDER, *supra* note 1, at 23. This proposition is not universally accepted, even among feminists. See, e.g., bell hooks, *Feminist Movement to End Violence*, in *FEMINIST THEORY: FROM MARGIN TO CENTER* 117, 117-31 (1984) (placing male violence against women in the context of Western society's general tendency toward "hierarchical rule and coercive authority" and stating that "men and women have together made the United States a culture of

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continuum along with other manifestations of sex discrimination, including inequality in the workplace, deprivation of reproductive rights, and inadequate access to welfare, child support, and child care.³ Every aspect of women's oppression renders them vulnerable to violence, and in turn, violence makes women more vulnerable to other forms of disadvantage.⁴

The challenge for the law is to respond to domestic violence in a way that recognizes and redresses such violence as a deprivation of women's fundamental right to equality. That was the purpose behind the civil rights provision of the Violence Against Women Act of 1994 ("VAWA").⁵ VAWA's civil rights provision declared for the first time that there is a federal civil right to be free from gender-motivated violence.⁶ The provision allowed a victim of a "crime of violence

violence" that manifests itself in war, child abuse, youth violence, and racial violence, as well as male violence against women); see also Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 14 n.53 (2000) [hereinafter Goldfarb, *Persistence of Privacy*] (describing diverse feminist views regarding male violence against women and its relationship to women's position in society).

3. See SCHNEIDER, *supra* note 1, at 23, 198.

4. See *id.* at 12-13 (quoting Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 39-41 (1999)). In addition to the direct physical and emotional damage it causes, domestic violence inflicts other staggering losses on its victims. Domestic violence deprives women of their chances for education, employment, and economic self-sufficiency. See, e.g., Brief of Amici Curiae Equal Rights Advocates et al., *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (documenting the impact of domestic violence on women's economic status); Jody Raphael, *Keeping Women Poor: How Domestic Violence Prevents Women From Leaving Welfare and Entering the World of Work*, in BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 31 (Ruth A. Brandwein ed., 1999) (describing efforts by batterers to sabotage welfare recipients' attempts to enter the labor force). It forces women out of their homes. See S. REP. NO. 101-545, at 37 (1990) (stating that "as many as 50 percent of homeless women and children are fleeing domestic violence"); Wendy R. Weiser, *Sex Discrimination Lawsuit Against Landlord for Policy of Evicting Domestic Violence Survivors*, 7 DOMESTIC VIOLENCE REP. 46 (2002) (describing the case of a woman evicted from her government-subsidized apartment after her husband assaulted her there, because of the landlord's "zero tolerance of violence" policy). Being a victim of domestic violence can even cost women custody of their children. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (granting a preliminary injunction against the New York City child welfare agency's policy of removing children from mothers who have been battered); SCHNEIDER, *supra* note 1, at 168-77 (describing cases in which mothers lost custody to fathers who had battered them).

5. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in relevant part at 42 U.S.C. § 13981). The civil rights provision was part of a lengthy and broad-reaching statute containing dozens of measures addressing violence against women. For a discussion of other provisions of the Violence Against Women Act ("VAWA"), see Sally F. Goldfarb, *"No Civilized System of Justice": The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 504-05 (2000) [hereinafter Goldfarb, *No Civilized System of Justice*].

6. See 42 U.S.C. § 13981(b) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . .").

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motivated by gender”⁷ to bring a civil action in federal or state court⁸ to recover compensatory and punitive damages, injunctive and declaratory relief, attorney’s fees, and “such other relief as a court may deem appropriate.”⁹ Perpetrators of gender-motivated violence were subject to suit regardless of whether they had acted under color of state law¹⁰ and regardless of whether they had been criminally charged or convicted.¹¹

Although it was struck down as unconstitutional by the United States Supreme Court in *United States v. Morrison*,¹² VAWA’s civil rights remedy remains the most ambitious and most visible attempt ever made in this country to apply the discrimination model to violence against women. Therefore, VAWA provides a valuable case study of the promise and pitfalls of situating violence against women within the legal category of discrimination.

7. The phrase “motivated by gender” was defined as an act “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.” 42 U.S.C. § 13981(d)(1). The statute defined “crime of violence” to include an act or series of acts that would constitute a felony against a person, or a felony against property that presents a serious risk of physical injury to a person. 42 U.S.C. § 13981(d)(2)(A). The definition of “crime of violence” also included acts that would meet the foregoing definition but for the relationship between the victim and the perpetrator. 42 U.S.C. § 13981(d)(2)(B). The statute’s title and legislative history emphasized violence against women. However, the civil rights provision covered gender-motivated violence, regardless of the sex of the victim and perpetrator. This Article focuses on male-against-female violence, which accounted for the vast majority of cases filed under VAWA’s civil rights provision.

8. See 42 U.S.C. § 13981(e)(3) (“The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.”).

9. 42 U.S.C. §§ 1988, 13981(c).

10. See 42 U.S.C. § 13981(c).

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for compensatory and punitive damages, injunctive and declarative relief, and such other relief as a court may deem appropriate.

Id.

11. See 42 U.S.C. § 13981(e)(2) (“Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.”).

12. 529 U.S. 598 (2000) (holding that the civil rights remedy exceeded Congress’s powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment). As I have discussed elsewhere, the *Morrison* decision is open to criticism on numerous grounds. See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002) [hereinafter Goldfarb, *The Use and Abuse of Federalism*] (critiquing the Court’s assumption in *Morrison* that VAWA’s civil rights provision was inimical to federalism); Goldfarb, *No Civilized System of Justice*, *supra* note 5, at 519-37 (critiquing the *Morrison* decision’s constitutional analysis and deference to states’ rights).

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II. THE VIOLENCE AGAINST WOMEN ACT IN THEORY AND PRACTICE

Much of feminist legal scholarship and advocacy has been devoted not to fitting new claims into the established framework of legal rights, but rather to crafting new rights that reflect women's needs and experiences.¹³ A number of feminist writers have pointed out that recognition of new legal rights can more readily be achieved through enactment of legislation than through litigation under existing statutes or the Constitution.¹⁴ The civil rights provision of VAWA was an attempt to transform the landscape of women's rights through legislation.¹⁵ As the following discussion will show, both the underlying concept of civil rights relief for gender-motivated violence and the specific statutory language adopted in VAWA represented a significant advance for women, but they also carried significant risks.

A. Civil Rights Relief for Violence Against Women: Strengths and Weaknesses of the Concept

The enactment of a federal statute treating violence against women as an issue of discrimination was a major conceptual breakthrough. While conventional criminal and tort remedies characterize violence as a matter of individual wrongdoing and individual injury, a federal civil rights law positions violence against women as a group-based harm, a practice of social inequality carried out on an individual level.¹⁶ Contrary to the common belief that domestic violence is attributable solely to a couple's interpersonal dynamics or a

13. See generally, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

14. See, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 47-49 (1994) (arguing that dominant legal interpretations of equal protection mask the unconstitutionality of marital rape exemptions and concluding that Congress is a more promising vehicle for marital rape law reform than the courts); Mary E. Becker, *Prince Charming: Abstract Equality*, in *FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE* 99, 130-31 (Leslie Friedman Goldstein ed., 1992) (stating that specific legislative reforms are more likely to be responsive to women's needs than are judicial interpretations of the abstract ideal of equality); Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 60 (1987) ("Although existing constitutional and statutory nondiscrimination doctrine may not embody the anti-subordination principle, new legislation could embody that perspective.").

15. See Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 150 (2000) [hereinafter MacKinnon, *Disputing Male Sovereignty*] (arguing that because the states and the federal judiciary have failed to redress gender discrimination, it is logical for women to turn to Congress for new legislation such as VAWA).

16. See, e.g., SCHNEIDER, *supra* note 1, at 46 ("Defining battering as a civil rights violation reflects a different set of social meanings than an individual ruling.").

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perpetrator's pathology, VAWA's civil rights remedy emphasized that gender-motivated violence is a systemic, political problem and therefore requires a systemic, political solution.¹⁷

Civil rights claims are intrinsically assertive and constitute a demand to be heard.¹⁸ For that reason, they provide a potent antidote to the customary view that victims of domestic violence and rape should remain silent.¹⁹ As Elizabeth Schneider wrote, "For individuals, a claim of right can be an assertion of one's self-worth and an affirmation of one's moral value and entitlement."²⁰ Furthermore, "[r]ights claims assert women's selfhood collectively, thereby giving them a sense of group identity and pride; they make manifest the fact that women can act and claim their place in history."²¹

At the same time that rights claims can change women individually and as a group,²² they also have the capacity to change society as a whole by transforming our cultural frame of reference.²³ Law not only reflects the process of social change, but also can help shape that process.²⁴ By placing the experience of individual female victims of violence within the category of sex discrimination, VAWA's civil rights provision had the potential to counteract a number of damaging beliefs that are still common in our society: that domestic or sexual violence is the victim's fault; that violence against women is a personal, private problem; and that the law and other institutions are

17. See Akhil Reed Amar, *Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 107-08 (2000) (describing VAWA's civil rights remedy as an attempt to dismantle a power structure that creates and sustains conditions of unequal citizenship that systematically disadvantage women).

18. See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1877-80 (1987).

19. See SCHNEIDER, *supra* note 1, at 39-40 (stating that "public claims of legal rights" contribute to overcoming "the pervasive sense of privatization and personal blame" that characterize women's response to victimization).

20. *Id.* at 39; see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991) ("For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human being to social being.").

21. SCHNEIDER, *supra* note 1, at 40.

22. See *id.* at 38 (describing ways in which the articulation of rights assists individual women in the process of self-definition as well as supplying an important sense of collective female identity).

23. *Id.* at 37-38 (describing law's "role in constructing social and cultural life"); see also Minow, *supra* note 18, at 1867 (stating that the crafting of new legal rights is "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").

24. See SCHNEIDER, *supra* note 1, at 37-39.

justified in ignoring or condoning such behavior. Although many types of law perform an expressive function,²⁵ a federal civil rights guarantee has historically been a uniquely powerful medium for communicating support for equality and opposition to discrimination.²⁶ By helping to shift social norms concerning violence against women, VAWA's civil rights provision was capable of altering the sex-discriminatory attitudes and behavior not only of private citizens, but also of officials charged with the task of responding to such violence.²⁷

The context in which VAWA's civil rights measure was passed conveyed a strong message about the central role played by gender-motivated violence within a broader pattern of gender inequality. The numerous hearings and reports produced by Congress during the more than four years when the bill was under consideration highlighted the interrelationship between violence against women and other aspects of gender inequality; the topics of the hearings and reports included women's disproportionate rates of poverty and homelessness, as well as the constraints that actual and threatened violence place on women's ability to travel, work, move freely about the world, and make choices about their lives.²⁸ Particularly significant was Congress's decision to enact the legislation on the basis of its constitutional powers under the Commerce Clause²⁹ and Section 5 of the Fourteenth Amendment.³⁰ In the process of compiling a legislative record in support of its power to legislate

25. For discussion of the power of law to convey a message and thereby affect social norms, see, for example, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1254-65 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). For a critical perspective on the expressive function of law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000). *But see* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (rebutting arguments made by Adler, *supra*).

26. See, e.g., Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. 1, 97-106 (1992); see also S. REP. NO. 103-138, at 44 (1993) (stating that the VAWA civil rights provision "sends a powerful message that violence due to gender bias affronts an ideal of equality shared by the entire Nation").

27. See Goldfarb, *The Use and Abuse of Federalism*, *supra* note 12, at 122-23 (discussing the ways in which VAWA's civil rights provision was designed to improve the response of the state criminal and civil justice systems to violence against women by changing the attitudes and behavior of state officials).

28. See SCHNEIDER, *supra* note 1, at 188 (describing VAWA's legislative history); see also *United States v. Morrison*, 529 U.S. 598, 629-34 (Souter, J., dissenting) (citing legislative history).

29. U.S. CONST. art. I, § 8, cl. 3.

30. U.S. CONST. amend. XIV, § 5.

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under the Commerce Clause, Congress essentially conducted a national seminar on the ways in which violence undermines women's ability to function as economic actors and exacerbates their economic inferiority to, and dependency on, men.³¹ Similarly, the legislative history concerning Congress's authority to act under the Fourteenth Amendment accentuated the pervasive gender bias against female victims of violence within the state criminal and civil justice systems and the ways in which that bias mirrors and compounds the bias of individual perpetrators of violence against women.³²

However, any civil rights law, including VAWA, has intrinsic limitations.³³ Foremost among them is the fact that claiming rights does not necessarily mean that one will obtain them.³⁴ Although law can help change discriminatory attitudes, those same attitudes do not disappear overnight and can hamper the enforcement of even the most revolutionary statutes.³⁵ Legal reforms in favor of historically disadvantaged groups often trigger resistance, as dominant groups

31. See, e.g., S. REP. NO. 103-138, at 54 (1993) ("Gender-based violence bars its most likely targets – women – from full partic[ipation] in the national economy."); S. REP. NO. 102-197, at 53 (1991) (discussing the impact of gender-based violence on women's economic status); S. REP. NO. 101-545, at 33, 37 (1990) (describing the economic effects of violence against women). See also Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 324-25 (2001) (describing congressional proceedings as a form of public education).

32. See, e.g., S. REP. NO. 103-138, at 55 (1993) (giving examples of sex discrimination by state actors against female victims of violence); *id.* at 45-47, 49 (describing "overwhelming evidence" of gender bias against women in the state criminal and civil justice systems); *id.* at 38 (describing "archaic prejudices" against women among "the public and those within the justice system").

33. A full consideration of critiques of rights is beyond the scope of this Article. For examples of such critiques, see generally KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For defenses of rights against critiques, see, for example, SCHNEIDER, *supra* note 1, at 34-42; WILLIAMS, *supra* note 20, at 146-65; Minow, *supra* note 18; Rhode, *supra* note 13, at 632-35; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) [hereinafter Schneider, *Dialectic*].

34. See Minow, *supra* note 18, at 1877 ("The rhetoric of rights draws those who use it inside the community, and urges the community to pay attention to the individual claimants, but underscores the power of the established order to respond or withhold response to the individuals' claims.").

35. See, e.g., Becker, *supra* note 14, at 131 (warning that judges may fail to enforce feminist legislative reforms effectively); Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265 (2001) (stating that social ambivalence about domestic violence leads to inadequate implementation of legislation designed to grant rights to battered women).

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seek to reestablish prior social norms that operated in their favor.³⁶ A claim of legal rights holds out the promise of conferring greater power on members of a subordinated group, but it simultaneously reaffirms the basic elements of the existing legal order, including legal constructs that oppress such groups.³⁷ The Supreme Court's decision in *Morrison* certainly demonstrated the limits of VAWA's ability to alter entrenched patterns of unequal power between men and women.³⁸

Nevertheless, there are indications that VAWA's civil rights remedy has had a positive and lasting effect on the evolution of social and legal responses to violence against women. It changed the terms of the debate. The idea that women have a right to be free of violence directed at them because of their gender, which was once considered a radical notion, has become a familiar, mainstream concept in law and culture, despite the fact that it is no longer enshrined in the United States Code. Before and after the *Morrison* decision, VAWA's civil rights provision inspired legislative activity on the federal, state, and local levels to extend legal protections against gender-discriminatory violence and its effects.³⁹ Some of this legislation reflected the fact that congressional deliberations over VAWA had brought unprecedented public attention to the links between violence and other aspects of women's disempowerment. For example, after the enactment of VAWA in 1994, bills were introduced in Congress to enhance battered women's access to housing,

36. See generally Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2119, 2174-2207 (1996) (describing a process of "preservation through transformation" whereby legal elites, confronted with pressure for social reform, abandon existing justifications for social privilege only to reestablish the same or a similar system of privilege based on new rationales).

37. See AUSTIN SARAT & THOMAS R. KEARNS, IDENTITIES, POLITICS AND RIGHTS 8 (1995) (stating that legal rights "revolutionize and yet they conserve"); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 86, 95 (1980) (stating that feminists' reliance on claims of legal rights "reflects the belief in law as a source of social change, while ignoring the ideological power of law to mask social reality and block social change" and arguing that sex equality will not be achieved until law itself is challenged and transformed); Römken, *supra* note 35, at 283-89 (stating that law operates within the existing political framework and therefore legal rights tend to be implemented in ways that constrain rather than liberate battered women).

38. See generally MacKinnon, *Disputing Male Sovereignty*, *supra* note 15 (critiquing the *Morrison* decision and describing it as a triumph for male supremacy).

39. See, e.g., Violence Against Women Civil Rights Restoration Act, H.R. 5021, 106th Cong. (2000). Several states and localities have passed or proposed legislation modeled on VAWA's civil rights remedy. See Goldfarb, *Use and Abuse of Federalism*, *supra* note 12, at 93-94 (citing state and local legislation); see also ANTI-DEFAMATION LEAGUE, 1999 HATE CRIMES LAWS 2-3 (1998) (describing the Anti-Defamation League's decision to amend its influential model state bias crime bill to include crimes motivated by gender bias, due in part to the example set by VAWA).

employment, and insurance.⁴⁰

Clearly, VAWA's civil rights remedy was only one part of a multifaceted national and international campaign aimed at eliminating violence against women.⁴¹ That campaign existed long before VAWA's civil rights remedy was introduced and will continue long after the civil rights remedy was invalidated. The concept that violence against women operates as a denial of gender equality was not original to VAWA.⁴² Still, VAWA's civil rights provision infused that concept with a level of legal and social influence that has not been equalled before or since.⁴³ Thus, VAWA showed that although the effort to secure legal protection from discrimination is not and should not be the sole focus of the movement to secure women's freedom from violence, it has a valuable and distinctive role to play in that movement.⁴⁴

B. *Civil Rights Relief for Violence Against Women: Strengths and Weaknesses of the Cause of Action*

Just as treating violence against women as a form of discrimination has both strengths and weaknesses in theory, so too, it proved to have strengths and weaknesses in practice.

VAWA's civil rights provision gave battered and raped women access to a cause of action that was in many respects superior to other sources of legal redress. For example, VAWA permitted women to

40. See SCHNEIDER, *supra* note 1, at 197; see also Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000).

41. For discussion of the effort to recognize violence against women as an international human rights violation, see SCHNEIDER, *supra* note 1, at 53-57; Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence As a Human Rights Issue*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 323 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994).

42. See, e.g., SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 14-15 (1975) (describing rape as a process of sexist oppression); LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 250-88 (1988) (documenting women's resistance to domestic violence during the late nineteenth and early twentieth centuries); MACKINNON, SEXUAL HARASSMENT, *supra* note 13 (arguing that sexual harassment is sex discrimination); Brenneke, *supra* note 26, at 36-43 (discussing state statutes antedating VAWA that potentially treat violence against women as a civil rights violation); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (documenting opposition to marital rape by the woman's rights movement during the second half of the nineteenth century).

43. See MacKinnon, *Disputing Male Sovereignty*, *supra* note 15, at 138 (describing VAWA's civil rights remedy as "a new departure" and a "historic" step toward equality for women).

44. See generally Schneider, *Dialectic*, *supra* note 33 (describing the dialectical and mutually reinforcing relationship of rights claims and political activism in the feminist movement).

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sidestep the obstacles of spousal immunity in state tort law and marital rape exemptions under state criminal law.⁴⁵ It provided a longer statute of limitations than most state civil actions.⁴⁶ Unlike a criminal statute,⁴⁷ it permitted awards of money damages, placed the individual plaintiff in control of the litigation, and employed a “preponderance of the evidence” standard, rather than the more demanding standard of “proof beyond a reasonable doubt.”⁴⁸ The opportunity to litigate in federal court was an advantage for many plaintiffs.⁴⁹ Finally, VAWA’s civil rights remedy offered legal redress for types of violence that are not covered by any other federal civil rights law.⁵⁰

However, the definition of gender-motivated violence in the statute

45. The doctrine of spousal tort immunity forbids one spouse to sue the other. It is still in force for cases of intentional torts in six states. See 6 FAMILY LAW & PRACTICE 67A-1 to 67A-5 (Arnold H. Rutkin ed., 2001). Marital rape exemptions eliminate or restrict criminal penalties for a husband who rapes his wife. Traditionally, men were completely immune from prosecution for raping their wives, and despite recent reforms, the marital rape exemption continues to exist in some form in the majority of states. See Hasday, *supra* note 42, at 1375, 1392.

46. See 28 U.S.C. § 1658 (1994) (establishing a statute of limitations of four years).

47. The strengths and weaknesses of criminal law as a remedy for domestic violence remain a subject of debate among feminists. While some advocates for battered women support aggressive arrest and prosecution policies, others express concern that these policies deprive women of autonomy, have a disproportionate impact on communities of color, endanger women by triggering retaliatory violence by the batterer, and increase the likelihood that battered women themselves will be arrested and prosecuted. See, e.g., SCHNEIDER, *supra* note 1, at 184-88 (describing the controversy over mandatory arrest and no-drop prosecution policies); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (analyzing the dangers that aggressive criminal responses to domestic violence pose to women); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (advocating mandatory participation by victims in domestic violence prosecutions); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 611-13 (1999) (arguing that the legal system should focus on helping battered women to heal from trauma and that arrest and prosecution of batterers should take place only when the victim wants them to occur or is incapable of deciding what is in her best interest); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL’Y 463, 504-06 (1996) (expressing concerns about the impact of mandatory arrest policies on women of color); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN’S L.J. 173 (1997) (arguing in favor of aggressive prosecution policies).

48. See 42 U.S.C. § 13981(e)(1) (establishing the preponderance of the evidence standard).

49. See Goldfarb, *No Civilized System of Justice*, *supra* note 5, at 539; Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 521 (1995).

50. See Goldfarb, *Persistence of Privacy*, *supra* note 2, at 56 (comparing the scope of VAWA’s civil rights provision to 42 U.S.C. § 1983, 42 U.S.C. § 1985(3), and Title VII of the Civil Rights Act of 1964).

was a focus of dispute and a source of possible problems. A version of VAWA introduced in the House of Representatives included a presumption that rape and sexual assault are per se motivated by gender.⁵¹ The Senate bill introduced in 1991 appeared to create a similar presumption,⁵² but it was later amended to require a showing in each case that the crime of violence was committed “because of gender or on the basis of gender.”⁵³ Ultimately, the bill became even more restrictive. In its final form, it required the plaintiff to prove both that the crime of violence was committed “because of gender or on the basis of gender” and that the crime of violence was “due, at least in part, to an animus based on the victim’s gender.”⁵⁴

Thus, the definition of gender-motivated violence was repeatedly tightened, in an all too familiar process of political compromise that was necessary in order to neutralize the official opposition of the federal judiciary and to ensure bipartisan support for the legislation in Congress.⁵⁵ As befits a product of compromise, VAWA’s definition of “crime of violence motivated by gender” was criticized as both too broad and too narrow.⁵⁶

51. H.R. 1133, 103d Cong. § 301(e)(1) (1993).

52. S. 15, 102d Cong. § 301(d)(1) (1991), reprinted in *Violence Against Women: Victims of the System, Hearing Before the Senate Judiciary Comm.*, 102d Cong. 399 (1991).

53. S. 15, 102d Cong. § 301(d)(1) (1991), reprinted in S. REP. NO. 102-197, at 28 (1991). The language “because of gender or on the basis of gender” was based on Title VII of the Civil Rights Act of 1964. S. REP. NO. 103-138, at 52-53 (1993).

54. 42 U.S.C. § 13981(d)(1) (1994). The term “animus” was borrowed from Supreme Court case law interpreting 42 U.S.C. § 1985(3) (1994). See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). By requiring a showing that the defendant had a discriminatory purpose or intent, the addition of the “animus” clause to the statute foreclosed the possibility that a plaintiff could prevail on a disparate impact theory. See S. REP. NO. 103-138, at 64 (1993); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 29-32 (1996).

55. See Goldfarb, *No Civilized System of Justice*, supra note 5, at 512-13 (describing the political compromises that produced the final version of VAWA’s civil rights provision); Nourse, supra note 54 (chronicling VAWA’s journey through Congress from introduction to enactment).

56. See, e.g., Brenneke, supra note 26, at 94-97 (arguing that VAWA should designate domestic violence as a per se violation of the statute); Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN’S L.J. 1, 9-26 (1995) (arguing that VAWA’s coverage of domestic violence is too narrow); David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163, 242-43 (1993) (arguing that VAWA should enumerate per se violations, including rape, sexual assault, and domestic violence); Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL’Y 247 (1997) (urging Congress to amend VAWA’s civil rights provision to create a rebuttable presumption of gender animus in all rape cases); Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2216-22 (1992) (arguing that VAWA should create a rebuttable presumption that all nonconsensual sexual contact is

The end result was a civil rights law that created one category of domestic violence, rape, and other violent crimes that *are* motivated by gender, and, at least in principle, a second category of the same types of crimes that *are not* motivated by gender.⁵⁷ This formulation posed risks to the statute's effectiveness for at least two reasons. First, for individual plaintiffs, the burden of proving gender motivation in each case could become an impediment to bringing a successful suit. Second, by suggesting that not all instances of domestic violence and rape are a product of gender discrimination, the legislation threatened to undercut the important message that VAWA's civil rights remedy was designed to convey: that violence against women is an expression of gender inequality.

In fact, however, these difficulties turned out to be less significant than might have been expected. When plaintiffs began to file lawsuits under VAWA's civil rights provision, judges proved to be surprisingly receptive to recognizing the gender-discriminatory component in individual acts of violence. In a number of VAWA cases involving domestic violence, rape, and other crimes, lower courts found that the plaintiff had made a satisfactory threshold showing of gender motivation by alleging factors such as the defendant's use of sexist epithets, the fact that the crime involved unwanted sexual contact, the presence of multiple female victims, and the use of violence to force women into a stereotypical submissive role.⁵⁸ Even the United States Court of Appeals for the

gender-motivated); John Leo, *Radical Feminism in the Senate*, U.S. NEWS & WORLD REP., July 19, 1993, at 19 (attacking VAWA's civil rights remedy as "group libel implicating all men . . . in the crimes of individual rapists"); Cathy Young, *Gender Poisoning: In the Bobbitt Era, Facing the Real Truth about Male Violence*, WASH. POST, Jan. 16, 1994, at C5 (arguing that VAWA's civil rights remedy exaggerates the extent to which violence against women is gender-motivated).

57. This distinction was underscored by statements in the legislative history that the bill would not cover "random" or "everyday" domestic violence. *See, e.g.*, S. REP. NO. 102-197, at 48 (1991) (stating that the bill is a "discrimination statute" that would not cover "random muggings or beatings in the home or elsewhere"); *id.* at 69-70 (Chairman Biden stating that the bill would not cover "everyday domestic violence cases" but only "discriminatory violence"). These statements did not exclude domestic violence from the bill's coverage, but rather emphasized that all VAWA plaintiffs – including those alleging domestic violence – were required to prove by a preponderance of the evidence that the violence they experienced was motivated by gender. *See* 42 U.S.C. § 13981(e)(1) (1994) (stating that VAWA's civil rights provision provides no cause of action "for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender"); *see also* Nourse, *supra* note 54, at 29 n.154.

58. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that a male-to-female transsexual prison inmate who alleged attempted rape by a male prison guard stated a claim of gender-motivated violence under VAWA); *Jugmohan v. Zola*, No. 98 Civ. 1509, 2000 U.S. Dist. LEXIS 1910 (S.D.N.Y. Feb. 24, 2000) (holding that plaintiff's allegation of sexual assault by defendant, who had allegedly committed similar acts against other women, was sufficient to withstand a motion to

Fourth Circuit, when it struck down the civil rights provision in an opinion that was later affirmed by the Supreme Court in *Morrison*, held that the plaintiff had stated a valid claim under the statute against a man who she alleged had raped her.⁵⁹ Indeed, a decision by the Ninth Circuit stated that an allegation of rape or sexual assault “is sufficient in and of itself to support the existence of gender-based animus”;⁶⁰ this interpretation returned full circle to the expansive language in earlier versions of VAWA that created a per se rule that rape and sexual assault are always gender-motivated.⁶¹

How can we explain these favorable developments, particularly in light of the prominent judicial opposition to the civil rights provision when it was pending in Congress?⁶² Perhaps the enactment of the civil rights remedy and the legislative history accompanying it, together with other developments in the battered women’s movement, served to educate the judiciary about the interconnections between violence against women and gender discrimination. Another possibility is that judicial hostility toward the

dismiss); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 606-07 (E.D. Wash. 1998) (holding that plaintiff’s allegations of abuse by her husband, which included rape, gender-specific epithets, acts that perpetuated a wife’s stereotypically submissive role, severe attacks during pregnancy, and unprovoked violence at times when plaintiff asserted her independence, were sufficient to state a claim under VAWA); *Crisonino v. N.Y. City Hous. Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997) (denying defendants’ motion for summary judgment on a VAWA claim alleging that plaintiff’s employment supervisor called her a “dumb bitch” and shoved her to the ground); see also Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes: Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 273-82 (2001) (analyzing court decisions concerning gender motivation in cases alleging domestic violence and sexual assault).

59. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 830 (4th Cir. 1999) (en banc), *aff’d sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

60. *Schwenk*, 204 F.3d at 1203.

61. See *supra* notes 51-52 and accompanying text. A number of other VAWA decisions also evinced a willingness to recognize the presence of gender motivation in cases alleging rape and sexual assault. See *Santiago v. Alonso*, 66 F. Supp. 2d 269, 271 n.2 (D.P.R. 1999) (stating that “plaintiff’s allegation that defendant raped her is sufficient to meet the VAWA’s animus requirement” and citing cases in support); *Kuhn v. Kuhn*, No. 98-C2395, 1998 U.S. Dist. LEXIS 15315, at *15 (N.D. Ill. Sept. 16, 1998) (stating that “cases in which a criminal sexual assault is not motivated by gender are few and far between”); Goldscheid & Kaufman, *supra* note 58, at 276-82 (citing and analyzing cases).

62. Chief Justice Rehnquist, the Judicial Conference of the United States, and the Conference of Chief Justices were among the most outspoken opponents of VAWA’s civil rights provision when it was under consideration in Congress. See Goldfarb, *Persistence of Privacy*, *supra* note 2, at 51-54. The United States Judicial Conference withdrew its opposition after the bill was amended to narrow its scope. See *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 103d Cong. 70-73 (1993). Unlike the United States Judicial Conference and the Conference of Chief Justices, the National Association of Women Judges supported VAWA, including the civil rights provision. *Id.* at 30-32.

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civil rights provision remained strong but was channeled into the battle over its constitutionality, a battle that ultimately ended with the provision's defeat.⁶³

The distinction created by the statute between acts of rape and domestic violence that are and are not motivated by gender, which initially seemed so problematic, appears in retrospect to have been a blessing in disguise. The process of having plaintiffs prove the element of gender discrimination in each case provided an opportunity to continue educating judges, juries, and the public about the impact of violence on women's equality.⁶⁴

Moreover, as Elizabeth Schneider has pointed out, not every act of violence among intimates is dictated exclusively by gender, or even dictated by gender at all.⁶⁵ A crucial question confronting feminists is how to reconcile the analysis of male battering of women as sexism with the reality that issues of power and control exist in many types of relationships.⁶⁶ Elder abuse, child abuse, and abuse within gay and lesbian relationships may or may not fit the model devised to explain women's experiences of abuse within heterosexual relationships.⁶⁷ In order to comprehend fully the role played by gender in interpersonal violence, it is necessary to explore the role of factors other than gender.⁶⁸

In addition, broadening our perspective on violence to include motivations other than gender is necessary to enrich our understanding of the many different ways in which violence affects women in all their diversity.⁶⁹ For instance, the intersection of racial

63. See *United States v. Morrison*, 529 U.S. 598 (2000) (declaring VAWA's civil rights provision unconstitutional). In contrast to the Supreme Court's decision, the overwhelming majority of lower courts that considered the constitutionality of the civil rights provision upheld the statute. See Goldfarb, *Use and Abuse of Federalism*, *supra* note 12, at 74 n.106, 75 n.108 (citing lower court decisions).

64. See *Violence Against Women: Victims of the System, Hearing Before the Senate Judiciary Comm.*, 102d Cong. 126-27 (1991) (statement of Burt Neuborne); SCHNEIDER, *supra* note 1, at 94-95. Of course, there was also the danger that case-by-case adjudication of the issue of gender motivation would permit judges and juries to perpetuate unenlightened attitudes about rape, domestic violence, and women's place in society. See, e.g., J. Rebekka S. Bonner, *Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation*, 111 YALE L.J. 1417, 1447-48 (2002).

65. See SCHNEIDER, *supra* note 1, at 67-68 (acknowledging the existence of variables other than gender that affect violence within relationships).

66. *Id.* at 71-72.

67. *Id.* at 67-71.

68. *Id.* at 72 ("Expanding our vision will allow us to understand what is distinctive about battered women's experiences and also to see these experiences in the larger and more general context of violence between intimates.")

69. See *id.* at 68 ("A theoretical framework that recognizes the primacy of gender need not exclude other factors [including] [s]exual orientation, race, class, and

bias and gender bias has been at the root of the long and tragic history of sexual violence committed by white men against African-American women.⁷⁰ The fact-specific inquiry required by the definition of gender motivation under VAWA's civil rights provision was useful in the quest to understand the complex dynamics of abuse, including the ways in which abuse operates differently among different groups of women.⁷¹

Despite these encouraging signs, it is important to remember that all was not well with the interpretation of the anti-discrimination standard in the Violence Against Women Act. For example, the trial court in the case that later became *United States v. Morrison*⁷² stated that gender motivation is more relevant to cases of stranger rape than to acquaintance rape, because an acquaintance rape is more likely to be a product of interpersonal dynamics than of group prejudice.⁷³ This flawed reasoning illustrates the greatest danger in applying the discrimination model to violence against women: the tendency of courts to assume that discrimination and relationship are mutually exclusive phenomena.⁷⁴

age. . . ."); Coker, *supra* note 4, at 11 ("While battering is a phenomenon of gender subordination, it may also be a function of racism, poverty, and conquest.").

70. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1270-71 (1991); Goldfarb, *No Civilized System of Justice*, *supra* note 5, at 527-37.

71. The extent of diversity among women who availed themselves of VAWA's civil rights remedy is impossible to determine. Professor Jenny Rivera predicted that the usefulness of the civil rights remedy to women of color would be limited for a number of reasons: women of color are subjected to a combination of gender and racial bias in the courts and therefore lack faith in the legal system; the abusers of many women of color are impoverished, making it unlikely that the private bar will be willing to bring cases since they are unlikely to recover damages; few battered women of color can afford the financial and emotional costs of litigation; and Latinas in particular face linguistic and cultural barriers obstructing access to the courts. Rivera, *supra* note 47, at 498-501. Because the race and ethnicity of the plaintiff are not indicated in most of the cases brought under VAWA, it is impossible to test this hypothesis empirically. *But see, e.g.,* Santiago v. Alonso, 66 F. Supp. 2d 269 (D.P.R. 1999) (implying that the plaintiff is Puerto Rican); Liu v. Striuli, 36 F. Supp. 2d 452, 458 (D.R.I. 1999) (identifying the plaintiff as an immigrant from Taiwan); Bell v. Cuyahoga Cmty. Coll., 717 N.E.2d 1189 (Ohio App. 1998) (affirming grant of defendants' motion for summary judgment in case alleging racial harassment as well as violation of VAWA's civil rights provision).

72. 529 U.S. 598 (2000).

73. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 784-85 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *vacated & reh'g en banc granted* (Feb. 5, 1998), *aff'd en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

74. Several courts expressed reluctance to apply VAWA's civil rights remedy to violence within the family, based on the traditional view that federal courts should not hear domestic relations matters. See, e.g., *Brzonkala*, 169 F.3d at 841-43; *Bergeron v. Bergeron*, 48 F. Supp. 2d 628, 638 (M.D. La. 1999); *Seaton v. Seaton*, 971 F. Supp. 1188, 1190-94 (E.D. Tenn. 1997). By assuming that violence within the family is

Supporters of VAWA's civil rights remedy argued that gender-motivated violence belongs to the familiar legal category of bias crimes.⁷⁵ But the conventional paradigm for bias crimes⁷⁶ involves a victim who is chosen at random because of his or her membership in a disfavored racial, ethnic or religious group – in short, the victim is interchangeable with other members of the group to which he or she belongs.⁷⁷ This model is inaccurate with respect to racial, ethnic and religious bias crimes, many of which are directed at a specific individual, and it is especially inaccurate with respect to gender-based crimes.⁷⁸ Most often, a woman is targeted for violence both because she is female and because she stands in a particular relationship to the aggressor, such as present or former wife or girlfriend, daughter, or stepdaughter.⁷⁹ The fact that most violence by men against women arises within relationships creates a risk that judges and juries, relying

automatically a domestic relations matter rather than a civil rights violation, these courts revealed an inability to recognize that discrimination can exist between family members. See Goldfarb, *Persistence of Privacy*, *supra* note 2, at 51-54 (describing judicial opposition to VAWA's civil rights provision when it was pending in Congress).

75. See, e.g., S. REP. NO. 103-138, at 48-49 (1993).

76. Bias crimes are sometimes known by the less accurate term "hate crimes." See Lu-in Wang, *The Complexities of Hate*, 60 OHIO ST. L.J. 799, 801 (1999) (describing the term "hate crime" as a misnomer that "reflects and reinforces an oversimplification of the phenomenon it seeks to describe"). In fact, discrimination, but not hatred, is a prerequisite for a bias crime. See, e.g., ANTI-DEFAMATION LEAGUE, *supra* note 39, at 4 (setting forth a model statute creating criminal and civil penalties for crimes committed "by reason of . . . actual or perceived race, color, religion, national origin, sexual orientation or gender"); Steven Bennet Weisburd & Brian Levin, "On the Basis of Sex": *Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 35-36 (1994) (emphasizing that hatred is not a necessary component of bias crimes, but discrimination is). The term "hate crime" is particularly confusing when applied to domestic violence, which some observers might consider to be a "love crime." See SCHNEIDER, *supra* note 1, at 192.

77. See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIMES DATA COLLECTION GUIDELINES 4-8 (Oct. 1999) (establishing criteria for identifying bias motivation and providing examples of hate crimes, all of which involve victims selected at random because of their actual or perceived group membership), available at <http://www.fbi.gov/ucr/hatecrime.pdf>; see also Wang, *supra* note 76, at 802-05 (identifying the "paradigmatic" bias crime model and criticizing it as misleading and unduly narrow).

78. See Serena Mayeri, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1083-84 (2001); see also Weisburd & Levin, *supra* note 76, at 36-38 (pointing out that although victim interchangeability and the absence of a prior relationship between the victim and perpetrator are elements of the classic bias crime scenario, they are not always present in race-based crimes and should not be regarded as a *sine qua non*).

79. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (1998) (presenting data showing that 76% of women who have been raped and/or physically assaulted were attacked by a current or former husband or intimate partner, 9% were attacked by a family member other than a husband, and only 14% were attacked by a stranger).

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on the traditional bias paradigm, will overlook the possibility that such violence is discriminatory.⁸⁰

In reality, domestic violence by men against women typically operates at least in part as an expression of an ideology of male supremacy and a means of enforcing male dominance over women.⁸¹ The presence of additional motivations, including circumstances arising from the couple's relationship, does not negate this fact.⁸² Violent crimes motivated by the victim's gender, including those that occur within ongoing relationships, impose the same kinds of harm that have been recognized as justifying special legal penalties for violence motivated by the victim's race, ethnicity, or religion.⁸³ First, victims of discriminatory violence suffer not only the physical and emotional injury of the crime itself but also the added psychological burden of knowing that they were victimized because of their group membership.⁸⁴ Second, group-based violence—whether based on gender or on other types of discrimination—terrorizes not only the individual who has been attacked but also other members of the same group who fear that they could be next.⁸⁵ Finally, group-based

80. For an example of the traditional refusal to recognize violence within relationships as discriminatory, see John Leo, *Rape Is Not an Act of Bias*, U.S. NEWS & WORLD REP., Oct. 8, 1990, at 25 (attacking VAWA's civil rights provision). According to Leo:

husbands beat wives because they are locked into self-defeating emotional relationships and try, stupidly, to settle matters or gain dominance with their fists. We are a long way here from the original model of civil-rights legislation: The long oppression of blacks by whites, based clearly on discrimination and nothing else.

Id.

81. See *supra* notes 1-4 and accompanying text; see also Brenneke, *supra* note 26, at 7-16 (analyzing domestic violence in terms of "gendered power relations"); Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 145-48 (1999) (describing evidence of gender bias in domestic violence cases); Nourse, *supra* note 54, at 31 n.168 (giving examples of indicia of gender bias in domestic violence cases).

82. See Weisburd & Levin, *supra* note 76, at 38 (arguing that even if part of the motivation for spousal abuse arises from the couple's personal interactions, "that should not preclude bias crime classification when there is also a significant group [bias] component" and stating that "[b]ias crime statutes do not require group bias to be the sole motivation").

83. See *generally id.* at 23-27, 35; see also S. REP. NO. 103-138, at 49 (1993) (stating that bias crimes motivated by gender impose the same deleterious effects as those motivated by race or ethnicity).

84. See Weisburd & Levin, *supra* note 76, at 25-26, 35.

85. See *generally* MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* (1989) (documenting the extent to which women's lives are pervaded by fear of rape); see also MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 7 ("Women must spend an incredible amount of time, life, and energy cowed, fearful, and colonized, trying to figure out how not to be next on the list."); WEST, *supra* note 14, at 116 ("The fear of the potential for sexual violence from husbands, partners, potential partners, acquaintances, or strangers leaves all women, not just

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violence proclaims and reinforces the subordination of the targeted group.⁸⁶ Thus, discriminatory violence—including discriminatory violence against women—is an instrument of social control.⁸⁷ Although gender-motivated violence differs from other bias crimes because it takes place predominantly within intimate relationships, this makes the effects of such violence more, rather than less, damaging.⁸⁸

One of the most important goals of VAWA's civil rights provision was to demonstrate that forms of violence heretofore considered private are actually an expression of group-based discrimination that deserves public recognition and public redress.⁸⁹ Our society tends to view relationships as private, individual, unique, and not subject to legal intervention.⁹⁰ The statute's definition of gender motivation was capable of counteracting this tendency. Despite some ambiguity in the statutory text,⁹¹ the legislative history stated that "animus" meant

abused wives and rape victims, considerably more vulnerable, more dependent, and more constrained than our brothers, fathers, sons, and husbands.")

86. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1302 (1991) ("Sexual violation symbolizes and actualizes women's subordinate social status to men. . . . Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status. . . .").

87. See Goldfarb, *Persistence of Privacy*, *supra* note 2, at 16.

88. For example, there is evidence that marital rape is more psychologically harmful to the victim than rape by a stranger. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1020-21 (1993).

89. See Goldfarb, *Persistence of Privacy*, *supra* note 2, at 16-18, 57; Nourse, *supra* note 54, at 1-5.

90. See generally Goldfarb, *Persistence of Privacy*, *supra* note 2; Siegel, *supra* note 36.

91. Some observers criticized VAWA's definition of gender motivation as unworkably vague. See, e.g., *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 17-25 (1993) (statement of Elizabeth Symonds, Legislative Counsel, American Civil Liberties Union); Bonner, *supra* note 64. However, these critics largely ignored the statute's extensive legislative history delineating the methods of proving gender motivation. See *infra* notes 92-95 and accompanying text (discussing legislative history). Although Justice Antonin Scalia and others have inveighed against using legislative history to determine the meaning of legislation, that view does not command a majority on the Supreme Court, and most judges continue to rely on legislative history to assist in the process of statutory interpretation, especially when the text of the statute is ambiguous. See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279-83 (1996) (Scalia, J., concurring in part and concurring in the judgment) (advocating reliance on statutory text rather than legislative history); ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-37 (1997) (critiquing judicial reliance on legislative history); Stephen Breyer, *On the Use of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history to interpret statutes); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (analyzing attacks on legislative history mounted by Scalia and others); see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 605-10 (2002) (pointing out that the production of legislative history continues to play a central role in

simply a purpose or intent related to gender, did not necessarily entail hatred or animosity, and could be inferred from the totality of the circumstances.⁹² The statute's scope was not limited to cases in which the defendant was consciously aware of his discriminatory motivation.⁹³ Cases of mixed motives – such as violence motivated by gender as well as by race, personal antipathy, or other factors – were included.⁹⁴ VAWA plaintiffs were permitted to use expert testimony to explain the defendant's motivation.⁹⁵ Still, the deep-seated assumptions about relationships, violence, and privacy that VAWA's civil rights provision was designed to challenge have not been eliminated and pose a risk to the enactment and enforcement of any law framing violence against women as a form of discrimination.

III. CONCLUSION

Elizabeth Schneider has observed that legal change on behalf of women's rights often takes the form of one step forward and two steps back.⁹⁶ In the case of VAWA's civil rights remedy, the process was actually more like two steps forward and one step back. First, the civil rights remedy was enacted, despite resistance and controversy; then, the Supreme Court struck it down; and more recently, federal, state and local legislation modeled on it has been introduced and in some cases has passed. The final chapter has not yet been written, since it is not yet clear whether a federal civil right to be free from gender-motivated violence will be restored, and, if so, what form that right will take and how it will be interpreted.

congressional lawmaking, despite Scalia's critique).

92. See S. REP. NO. 103-138, at 50-54, 64 (1993) (describing methods of proving gender motivation); Nourse, *supra* note 54, at 29-33 (citing legislative history).

93. See S. REP. NO. 103-138, at 50-52 (1993). See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing, based on social cognition theory, that much discriminatory behavior is the product of unconscious cognitive bias); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) (arguing that discriminatory behavior often results from culturally transmitted beliefs and attitudes that operate on an unconscious level).

94. See 42 U.S.C. § 13981(d)(1) (1994) (defining "crime of violence motivated by gender" as 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") (emphasis added); see also S. REP. NO. 103-138, at 53 (1993) (stating that VAWA's definition of gender motivation was based on Title VII and that courts should look to Title VII case law to assess whether the requisite discrimination was present); Goldscheid, *supra* note 81, at 157 (explaining that the mixed-motive paradigm used in employment discrimination cases provides a useful analogy for VAWA cases in which the defendant has more than one motivation for his conduct).

95. See S. REP. NO. 103-138, at 52 n.61 (1993).

96. See SCHNEIDER, *supra* note 1, at 8.

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The history of VAWA's civil rights provision offers a number of lessons about the advantages and disadvantages of the discrimination model as a source of legal protection from domestic violence, rape, and other types of violence against women. Despite its weaknesses, VAWA's civil rights remedy demonstrated the value of a legal declaration that gender-motivated violence deprives women of a fundamental right to equality. In the future, the movement to eliminate violence against women should continue to strive for the recognition and prohibition of such violence as a form of discrimination. Although the *Morrison* decision will make it difficult to obtain at the federal level,⁹⁷ effective civil rights protection against gender-motivated violence remains a worthy goal.

97. See Goldfarb, *No Civilized System of Justice*, *supra* note 5, at 543-45 (discussing the prospects for civil rights relief for gender-motivated violence in the aftermath of *Morrison*); see also C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence As Sex Discrimination*, 9 VA. J. SOC. POL'Y & L. 411, 447-48 (2001) (advocating enactment of a federal civil rights remedy for gender-motivated violence on the basis of Congress's powers under the Spending Clause).