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The Violence Against Women Act: Civil Rights for Sexual Assault Victims

W. H. HALLOCK*

The attempt to split bias from violence has been this society’s most enduring and fatal rationalization.

Patricia Williams1

INTRODUCTION

In December, 1989, a gunman entered the University of Montreal engineering school, systematically separated out all of the women from a group of people gathered there, and shot them with a high-powered rifle at close range, killing fourteen women and wounding thirteen.2 The suicide note he left stated that women were to blame for his problems, especially the “feminists.”3 The similarity between this crime and the two million rapes4 and four million beatings5 that women suffer each year at the hands of men is far greater than most people would like to admit. The parallel between violence against women generally and the Montreal murders is that, in both, women are targeted for violence mainly “because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.”6 The fact

* J.D., 1992, Indiana University School of Law at Bloomington; B.A., 1986, Middlebury College, Middlebury, Vermont. Many thanks to Lauren Robel and Rita Noonan for their help with this Note.
3. Id.
4. This figure takes into account underreporting. Violence Against Women: Victims of the System: Hearing on S. 15 Before the Committee on the Judiciary, 102d Cong., 1st Sess. 215 (1991) [hereinafter Hearings Part III]. The Department of Justice Bureau of Justice Statistics (BJS) estimated that there were 127,000 rapes in 1989. Id. Both the federal government and the BJS acknowledge that methodological flaws result in severe undercounting of rapes. Id. The number of reported rapes exceeded 100,000 for the first time in 1990. Id. at 184; see also Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Committee on the Judiciary (Part 2), 101st Cong., 2d Sess. 79 (1990) [hereinafter Hearings Part II].
5. Hearings Part II, supra note 4, at 111.
that ninety-seven percent of all sex crime victims are women clearly illustrates that gender-targeted violence exists.\(^7\)

The confirmation of Supreme Court Justice Clarence Thomas, the William Kennedy Smith and Mike Tyson rape trials, and the Navy's Tailhook Association sex scandal have all helped bring the issues of sexual harassment and sexual assault to the forefront of national attention. Such exposure, however, does not necessarily correlate with a more enlightened general public or with any reduction in violence against women.\(^8\) A problem as pervasive as the epidemic of gender-based\(^9\) violence in this country should be addressed in a comprehensive manner. A solution should bring some measure of relief to the victims of sex-based crimes while simultaneously raising public awareness and changing the national attitude which exists toward these types of crimes and their victims.\(^10\)


\(^8\) The precise effect of exposure on the amount of violence is impossible to determine. What is clear, however, is that exposure helps to empower some victims. For example, since the confirmation of Justice Clarence Thomas, sexual harassment complaints to the Equal Employment Opportunity Commission have increased 45%. Claudia MacLachlan, Harassment Charges Up One Year After Hill, NAT'L L.J., Oct. 26, 1992, at 7. Others fear that the harsh treatment of Anita Hill will discourage other victims from coming forward. An Issue Ensnares Appointee, N.Y. TIMES, Oct. 26, 1992, at A13 ("Compared with a year ago, it is easier to understand why a woman who has been harassed would not file a formal complaint."). See generally Nina Burleigh, Now That It's Over, A.B.A. J., Jan. 1992, at 50 (providing an overview of the Thomas confirmation hearings). The suggestion by Pennsylvania Senator Arlen Specter that Anita Hill "fantasized" the alleged encounters with Clarence Thomas is a fine example of one of the most widely held myths about the victims of sex crimes. For a discussion of commonly held rape myths, see Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013 (1991). There is debate surrounding the acquittal of William Kennedy Smith and its likely effect on future rape trials. See generally Mark Hansen, Experts Expected Smith Verdict, A.B.A. J., Feb. 1992, at 18.

\(^9\) "Sex" typically refers to a person's biological structure as male or female, while "gender" is a social construct which refers to socially created expectations of male and female attitudes and behaviors. CYNTHIA F. EPSTEIN, DECEPTIVE DISTINCTIONS 5-6 (1988); see also WINNIE HAZOU, THE SOCIAL AND LEGAL STATUS OF WOMEN 15 (1990). However, because one's sex and gender are so closely linked in our society, the words "sex" and "gender" are used interchangeably in this Note.

\(^10\) Hearings Part I, supra note 7, at 2-3. It is ironic that our national anti-crime attitude could lead to legislation making "carjacking" a federal offense punishable by life in prison or death, see Car Theft Measure Advances, N.Y. TIMES, Sept. 28, 1992, at A8; Gwen Ifill, Pushing Anti-Crime Issues, Bush Cites Arkansas Crime, N.Y. TIMES, Sept. 29, 1992, at A19, yet there is considerable opposition to making gender-based violence a federal civil rights crime. For a discussion of opposition to the Violence Against Women Act, see infra notes 224-43.
The Violence Against Women Act (VAWA)\textsuperscript{11} is a legislative attempt to deal with the national problem of gender-motivated violence. This Note examines the problem of violence against women and suggests that the VAWA, if applied as intended, could help prevent violent sex discrimination.\textsuperscript{12} Drawing upon an analogy to violent racial discrimination,\textsuperscript{13} this Note argues that sexual assault and domestic violence are crimes predominantly motivated by the victim's gender. Thousands of women are discriminated against and deprived of their civil rights on a daily basis. A national solution like the VAWA is a vital first step in addressing the problem of gender-motivated violence.

Part I of this Note discusses the prevalence and the nature of violence against women. Part II presents a brief overview of the various provisions of the VAWA. Title III of the VAWA, the most controversial portion of the Act, creates a federal civil rights cause of action for victims of gender-motivated violence.\textsuperscript{14} Part III summarizes the specific provisions of Title III and discusses the need for, and the advantages of, making gender-motivated violence a federal civil rights violation. Part IV examines the scope of the Title III civil rights provision and analyzes the likely outcomes of several possible claims that could be brought under Title III. Part V of this Note discusses the likely effect of Title III on the rising tide of violence against women in this country and concludes that the Act would have significant practical and symbolic effects.

\textsuperscript{11} S. 15, 102d Cong., 1st Sess. (1991); H.R. 1502, 102d Cong., 1st Sess. (1991). The current version of the VAWA is substantially similar to the original bill, S. 2754, introduced by Senator Joseph Biden on June 19, 1990 in the 101st Congress. See CONG. REC., June 19, 1990, at S8263. The Senate Judiciary Committee held three hearings on the original bill, and it was reported favorably to the floor of the Senate, but no action was taken on the bill before the end of the 101st Congress. S. REP. No. 197, 102d Cong., 1st Sess. 35 (1991). The current version of the bill, S. 15, was reintroduced in the 102d Congress in January, 1991. See CONG. REC., Jan. 14, 1991, at S597. The Senate Judiciary Committee held one more hearing on S. 15. S. REP. No. 197, supra, at 35. Although the bill was reported favorably out of committee, it was not acted on by the full Senate and will therefore have to be reintroduced in the next session.

\textsuperscript{12} The VAWA is premised on the fact that many forms of violence against women are gender-motivated and are therefore a form of violent sex discrimination. S. REP. No. 197, supra note 11, at 42-43; see also infra notes 57-59 and accompanying text.

\textsuperscript{13} I realize there are limitations to analogizing the plight of African-Americans to that of women. Some believe, for example, that comparing the situation of women to that of African-Americans trivializes the economic deprivation and violent racism faced by African-Americans in this country. See Christine A. Littleton, Restructuring Sexual Equality, 75 CAL. L. REV. 1279, 1288 (1987). Also, there is little doubt that sexism exists within racial classes and that racism exists within gender classes. Id. However, with these limitations in mind, an analogy between the experiences of women and African-Americans can be useful. To the extent that race analogies are used in this Note, it is solely for the purpose of illuminating a particular idea by reference to a concept—race discrimination—with which some readers will be more familiar.

\textsuperscript{14} Hearings Part I, supra note 7, at 18.
I. THE NATURE OF THE PROBLEM

A. Historical and Social Context: A Brief Overview

The current problem of violence against women can be better understood if viewed in historical context. Other authors have written extensively on the historical subordination of women in this country.\(^{15}\) A fine example of women’s historical subordination lingers with us today in the form of a common idiomatic expression. The phrase "rule of thumb" originated when early American courts expressly recognized a man’s right to beat his wife provided he used a stick no larger in diameter than his thumb.\(^{16}\)

In addition to a historical understanding, an awareness of the inequalities and discrimination that still exist today makes it easier to understand gender-based violence as an extension of such inequality. Many of the most blatant forms of discrimination against women have disappeared with time,\(^{17}\) and women have undoubtedly made significant strides toward equality over the past thirty years. However, contrary to the beliefs of most Americans,\(^{18}\) "[w]omen are dramatically underrepresented in the highest positions of social, economic, and political power, and [are] dramatically overrepresented in the lowest positions."\(^{19}\) Even though more women now hold elective office than ever before, they still account for only 6% of the U.S. Senate and 10.8% of the U.S. House of Representatives.\(^{20}\)

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15. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.") (Bradley, J., concurring); DEL MARTIN, BATTERED WIVES 26-44 (1983); SUSAN M. OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979); DEBORAH L. RHODE, JUSTICE AND GENDER 9 (1989); DIANA E.H. RUSSELL, RAPE IN MARRIAGE 2-5 (1990).

16. MARTIN, supra note 15, at 32. Much violence against women, including the "rule of thumb" and marital rape, rests upon the traditional idea that women, and wives in particular, are little more than the property of men. RUSSELL, supra note 15, at 3.

17. Not all state-sanctioned forms of subordination have disappeared. For example, some states still have a marital rape exception, and some states still provide civil immunity to parents (i.e., men) who rape their children. S. Rep. No. 197, supra note 11, at 45.


19. Id. at 1733.

Despite measures to address sex discrimination in the workplace, such as the Equal Pay Act and the Pregnancy Discrimination Act, inequality in employment is still the norm, with women earning seventy cents for each dollar men earn. The working world continues to be both highly gender segregated and gender stratified, with women at the bottom. Poverty is beginning to have such a disproportionate effect on women that scholars have termed the problem the “feminization of poverty.” Some analysts have concluded that if current trends continue, the “poverty population will consist entirely of women and their children before the year 2000.”

The family is perhaps the realm where gender inequality and discrimination is most pronounced, yet most ignored. For example, the burden of housework and childcare remains predominantly upon women. Despite a rapid increase in married women’s participation in the full-time workforce, men’s participation in household work has remained astonishingly low. Further, some women are arguably safer in the streets than in their own homes. Violence in the family, directed mainly towards women, occurs with frightening frequency and severity.

23. Sylvia Nasar, Women’s Progress Stalled? Just Not So, N.Y. TIMES, Oct. 18, 1992, § 3 (Business), at 1. Women reached their record high seventy-two cents for every dollar men earn in 1990. Id. Up until 1980 women earned sixty cents for every dollar men earned. Id. During the economic expansion of the 1980s women’s median annual salary increased while men’s decreased after inflation thus accounting for some of women’s gains. Id.
24. See Rhode, supra note 18, at 1733. Over 40% of working women are concentrated in just ten jobs. MYRA M. FERREE & BETH B. HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT 143 (1985). The “big ten” jobs predominantly occupied by women are: nurse, elementary school teacher, secretary, bookkeeper, typist, sales clerk, waitress, cashier, sewer/stitcher, and domestic worker. Id. Women represent 99% of typists, secretaries, and telephone operators, 97% of domestic service workers, and 80% of clerical workers. HARRIET BRADLEY, MEN’S WORK, WOMEN’S WORK 17 (1989) (using statistics from a study done in the early 1980s).
26. FRASER, supra note 25, at 145.
27. FERREE & HESS, supra note 24, at 157.
28. Id.; EPSTEIN, supra note 9, at 210; Littleton, supra note 13, at 1334.
29. Hearings Part II, supra note 4, at 119 (“[W]omen in the United States are more likely to be assaulted and injured, raped, or killed by a male partner than by any other type of assailant.”) (testimony of Angela Browne, Ph.D., Dep’t of Psychiatry, Univ. Mass. Med. School [hereinafter Browne testimony]); see infra note 39 and accompanying text. For a detailed look at the study by Angela Browne, see Angela Browne & Kirk R. Williams, Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetuated Homicides, 23 LAW & SOC’Y REV. 75 (1989).
30. Hearings Part II, supra note 4, at 119.
B. Women and Violence

The historical and social context briefly described above provides a backdrop against which the problem of violence against women can be seen and judged more clearly. The background is one of substantive inequality in every major institution of our society—work, family, and government. With this in mind, it is easier to understand that the sexual violence suffered almost exclusively by women at the hands of men is more than isolated instances of crime by sex-crazed maniacs. Rather it is a systemic, society-wide problem that demands an equally expansive solution. The fear of violence based on one's sex has created a climate of terror that helps maintain the inequality and disadvantaged status of all women.

In a society with as much crime as ours, it is understandable that people might worry about the possibility of becoming a victim of crime. Statistics show that men are more likely to be the victims of violent crimes than women. However, while violence against men has dropped significantly, the rate of crime against women has risen. More significantly, unlike men, women are often targeted for violent crime precisely because of their status as women. Moreover, violence against

31. See, e.g., supra note 7 and accompanying text.
32. Contrary to popular belief, most rapists are very similar to the "boy next door"; the personality profile of the average rapist is surprisingly normal. See Torrey, supra note 8, at 1022-23; see also SUSAN GRIFFIN, RAPE 9 (3d ed. 1986) ("If the professional rapist is to be separated from the average dominant heterosexual, it may be mainly a quantitative difference."); CATHY ROBERTS, WOMEN AND RAPE 22 (1989) ("There is a close similarity between accepted and valued masculinity and the attributes necessary to commit rape."); see also infra note 251.
34. See NOW LEGAL DEFENSE AND EDUCATION FUND, THE VIOLENCE AGAINST WOMEN ACT OF 1991, at 1 (1991) [hereinafter NOW LDEF] (on file with author) ("Much like racial attacks, attacks on individual women create a climate of terror that makes all women afraid to step 'out of line.'"); see also infra text accompanying note 45.
36. Hearings Part I, supra note 7, at 2 ("Over the last 15 years, violence against young men in America has dropped by 12 percent, while violence against young women in America has increased 50 percent.") (statement of Sen. Biden).
37. The U.S. Code defines violent crime as any offense "that has as an element the use, attempted use, or threatened use of physical force" against another, or any 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" to commit the crime. 18 U.S.C. § 16 (1988). The VAWA uses this same definition. S. 15, supra note 11, § 301(d)(2).
38. See Torrey, supra note 8, at 1059 ("Rape is a sex-based crime, the only crime in which men are the offenders and women the victims."). Prison rape is an exception where men are both the offenders and the victims. For a discussion of prison rape, see SUSAN BROWN MILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 285-97 (1975).
women is six times more likely to be committed by intimates.\(^3\) Thus, while both men and women worry about crime in general, women have the additional concern of becoming a victim of crime simply because they are women.

Violent crimes motivated by the victim’s status as a member of a particular group are known as bias or hate crimes.\(^4\) Accordingly, whenever a woman is victimized simply because of her sex, she is the victim of a hate crime. Hate crimes differ from ordinary crimes. Hate crime victimization leaves far more than physical damage; psychological and emotional damage are inflicted on the victim and the victim’s community.\(^4\) Because they cannot change their race, sex, or ethnicity, “targeted people understandably feel helpless and vulnerable to further attacks.”\(^4\)2 The VAWA recognizes that some of the most common forms of violence women suffer, such as rape and domestic violence, are essentially hate crimes—a form of violent sexism\(^4\)3—which warrant federal civil rights protection.

\(^3\) Lewin, supra note 35, at A20. Twenty-five percent of violent crimes against women are committed by family members or by men the women have dated, while the comparable figure for men is only 4%. Id. at A20; see also supra note 29.

\(^4\) The California Attorney General’s Commission on Racial, Ethnic, Religious, and Minority Violence provides one of the best definitions of “hate crimes”:
any act of intimidation, harassment, physical force or threat of physical force directed against any person, or family, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise, or enjoyment of any rights or privileges secured by the Constitution or laws of the United States or the State of California whether or not performed under the color of law. (Cal. Dept. of Justice, 1986).


1. The Problem of Rape

[R]ape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time—in essence, by behaving as though they were free. The fear of rape is a part of almost every woman’s life. Women must plan and schedule certain daily activities with the underlying fear of sexual assault in mind. In contrast, most men do not think about, talk about, or fear rape. Given the staggering statistics, the fears of women about sexual assault (and the lack of fear in men) are clearly understandable.

44. The scope of this Note precludes a comprehensive discussion of the problem of rape. Scholarship on the subject of rape is extensive and the following list of sources is not meant to be exhaustive. LINDA B. BOURQUE, DEFINING RAPE (1989); BROWNMILLER, supra note 38; SUSAN ESTRICH, REAL RAPE (1987); GRIFFIN, supra note 32; ROBERTS, supra note 32; DIANE E.H. RUSSELL, SEXUAL EXPLOITATION (1984) [hereinafter RUSSELL, EXPLOITATION]; RUSSELL, supra note 15; JULIA R. SCHWENDINGER & HERMAN SCHWENDINGER, RAPE AND INEQUALITY (1983).

45. GRIFFIN, supra note 32, at 23.

46. Id. at 4; see ESTRICH, supra note 44, at 3 (“I don’t think I know a single woman who does not live with some fear of being raped.”); Hearings Part I, supra note 7, at 19 (statement of Sen. Strom Thurmond) (discussing the “simple fact that our daughters and wives fear walking down city streets alone or entering their homes at night . . . .”); cf. MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 21 (1989) (stating that recent studies estimate that one-third of women fear rape daily).

47. See supra note 46; see, e.g., Hearings Part III, supra note 4, at 2 (statement of Sen. Biden) (“A recent study showed that 75% . . . of the women surveyed never go out alone at night to see a movie because they fear rape and other violent crimes.”).

In much of the literature on violence against women, terms referring to acts of sexual violence, such as “sexual assault” and “rape,” are often used interchangeably and not necessarily in accordance with their precise legal definition. Because this Note is interested in the larger nature of the problem of violence against women, the terms “sexual assault,” “rape,” and “sexual violence” are used interchangeably unless specifically stated otherwise, or unless the context makes the definition of the term explicit. Many states have enacted rape reform statutes that redefine rape as “criminal sexual conduct” or “sexual assault.” Susan Estrich, Rape, 95 YALE L.J. 1087, 1148 (1985); see MACKINNON, supra note 33, at 174. The purpose of redefining or relabelling the crime is to distinguish between sex and violence. Id. “Rape” encompasses both in one word. Redefinition also helps to “rid the crime of its common law baggage.” Estrich, supra, at 1148. For a detailed discussion of rape reform laws and the implications of their changes in language, see id. at 1133-61.

48. See Lynne N. Henderson, What Makes Rape a Crime, 3 BERKELEY WOMEN'S L.J. 193, 225 (1987-88) (reviewing ESTRICH, supra note 44). Incarcerated men are the exception; many prison inmates have reason to fear rape on a daily basis. See BROWNMILLER, supra note 38, at 285-97.
In 1990, both the number of reported rapes and the total percentage of women raped reached record highs.\(^4\) A 1990 study shows that one of every five women will be raped at some point in her life.\(^5\) Increased numbers of rapes are not simply the result of more reportings. Reports from independent sources, such as rape crisis centers, confirm that rape rates are rising even faster than the official FBI estimates suggest.\(^6\) Furthermore, rape still remains the most underreported of all crimes, with only seven percent of victims reporting their assaults.\(^7\) Although certain women are more at risk than others,\(^8\) no particular class of women is exempt from the threat of sexual assault. Students,\(^9\) married women,\(^10\) and minorities\(^11\) all face significant risk.

These statistics help illustrate two points. First, they show the magnitude and severity of the problem. Second, and perhaps more importantly, they help show that rape is a crime of "violence that is directed against women for the sole reason that they are women."\(^12\)

Women, and almost exclusively women, of every race, economic class,
and ethnic group are the targets of such crime. Since women, because of their very status as women, remain the primary target for sexual assault by men, sex crimes can be considered a form of sex discrimination.

2. The Problem of Domestic Violence

American women are more likely to be "assaulted and injured, raped, or killed by a male partner than by any other type of assailant." Of all the women who seek medical treatment in hospital emergency rooms, one-third are there to receive treatment for injuries suffered because of beatings by their husbands. Even the U.S. Surgeon General has reported that women are injured more because of battering than any other cause. An estimated four million women will be battered by their male partners on the level of aggravated assault in any given year.

As with rape, there are various theories offered to explain the cause and prevalence of battery, but there is no definitive explanation. Like sexual assault, however, it is very clear that women are usually the victims, and men are usually the perpetrators. Accordingly, like sexual

58. Obviously men are not physically incapable of being raped; incarcerated men often face rape and sexual assault. See Brownmiller, supra note 38, at 285-97. This Note also recognizes the tragedy of sexual abuse of children. See generally Russell, Exploitation, supra note 44, at 285-90. However, this Note focuses exclusively on violence against women because 97% of all victims of sex crimes are women. See supra note 7 and accompanying text.

59. As one author stated, rape can be classified as "overwhelmingly a crime of one gender against the other." Henderson, supra note 48, at 225. There are various theories about why men rape women. See, e.g., Hazou, supra note 9, at 108 ("[Rape] is an expression of power over a situation and control over a woman."); Mackinnon, supra note 33, at 172 ("[R]ape is . . . an act of terrorism and torture within a systematic context of group subjection, like lynching."); Rhode, supra note 15, at 252 ("The crime of rape must be reconceptualized as the product of power . . . ").; Roberts, supra note 32, at 29 ("In committing rape, the individual rapist can be expressing feelings of ownership, hatred, power, and revenge."); Torrey, supra note 8, at 1071 ("Rape is a form of social control of women."). See generally Larry Baron & Murray A. Strauss, Four Theories of Rape in American Society (1989). If women are chosen as victims of rape because of their sex, the exact reason why men commit rape becomes less important in understanding the need for anti-discrimination legislation.

60. Hearings Part II, supra note 4, at 119 (Browne testimony, supra note 29). Of all the women murdered in this country, more than half are killed by their male partner. Id. at 114.

61. Id. at 84 (statement of Sen. Biden).

62. S. REP. NO. 197, supra note 11, at 36 n.10; cf. Hearings Part II, supra note 4, at 93 (testimony of Charlotte Fedders, author of Shattered Dreams, 1987) ("Battering is the single [largest] cause of injury to women—exceeding rape, mugging and auto accidents combined.").

63. Hearings Part II, supra note 4, at 111 (Browne testimony, supra note 29).

64. See Martin, supra note 15, at 45-72.

65. Studies show that women also perpetrate acts of "abuse" in the home. Hearings Part II, supra note 4, at 117 (Browne testimony, supra note 29). Those studies do not show, however, whether any of the women who commit abuse are acting in self-defense. Id. Moreover, the outcomes, frequency, and types of aggression perpetrated by men and women are very different. Men perpetrate more acts of
assault, many incidents of domestic violence can be viewed as a form of violent sex discrimination within the home. The VAWA would attempt to change society's continued tolerance of domestic violence and its often tragic results.

II. PROVISIONS OF THE VAWA

The VAWA is a desperately needed legislative attempt to address the "violent sexism" that exists in our society. The Act is divided into five separate titles. Title III is the civil rights provision detailed in Part III below. The other provisions are far less controversial because they deal primarily with increased funding for domestic violence prevention programs and education on gender-based violence, and will therefore be mentioned only briefly in this Part.

A. Title I

Title I, the Safe Streets for Women Act, seeks to improve safety outside the home by increasing the penalties for federal cases of rape and aggravated rape. It creates new penalties for repeat offenders and provides grants for law enforcement and prosecution efforts directed specifically at reducing violent crimes against women. Title I also

violence, more often, and with more severity (due to strength and use of weapons), and male aggression is usually a pattern in the relationship. Id.

66. It is interesting to note that the word "family" comes from "familia," a Latin word "signifying the totality of slaves belonging to a man." Del Martin, The Historical Roots of Domestic Violence, in DOMESTIC VIOLENCE ON TRIAL 5 (Daniel J. Sonkin ed., 1987).

67. For example, there are almost three times as many animal shelters in this country as there are battered women's shelters. Hearings Part II, supra note 4, at 79 (citing data from Koss study, supra note 50). In Washington, D.C., "an abusive spouse is arrested in less than 15% of the cases where the victim is bleeding from an open wound." Id. at 85 (statement of Sen. Biden). See also, e.g., SUSAN SCHECRER, WOMEN AND MALE VIOLENCE 157-69 (1982).

68. See, e.g., Hearings Part II, supra note 4, at 101-03 (testimony of Tracy Motuzick). Tracy Motuzick (formerly Tracy Thurman) was the victim of a brutal assault by her husband in Torrington, Connecticut, in 1985. While police were on the scene, her husband attacked her, stabbed her 13 times, and broke her neck. Id. Although permanently paralyzed, she survived and eventually brought a successful suit against the city of Torrington for denying her equal protection of the laws. Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

70. S. 15, supra note 11.
71. Id. §§ 121-133, 161-163, 231, 243-249, 251-252, 261, 403, 511, 514.
72. Id. §§ 111-112.
73. Id. § 111.
74. Id. § 121.
creates three new Federal Rules of Evidence, based on the existing Federal Rape Shield Law,\footnote{75} governing the use of a victim’s past sexual history in criminal and civil cases.\footnote{76}

**B. Title II**

Title II, entitled the Safe Homes for Women Act, remedies some existing defects in state protective orders by requiring that a protective order issued in one state be given “full faith and credit” in all other states.\footnote{77} By providing funding, Title II encourages states to take domestic abuse seriously and to institute mandatory arrest policies in domestic dispute cases.\footnote{78} Increased funding for battered women shelters and family violence prevention programs is also included in Title II.\footnote{79}

**C. Title IV**

Title IV addresses the increasing problem of sexual assaults on college and university campuses across the country.\footnote{80} It increases funding for rape education programs and requires schools to report the incidence of sexual assaults on their campuses.\footnote{81} Such a measure is needed because educational institutions are reluctant to respond to the problem of campus sexual assaults in a firm manner because of fear about creating negative publicity.\footnote{82} In 1989, the three largest college campuses in the United States reported only three rapes.\footnote{83} Campus studies suggest the actual number was closer to 1,275.\footnote{84}

**D. Title V**

Title V provides funding to implement educational programs to train state court judges and court personnel on issues related to violent crimes

\footnote{75}{FED. R. EVID. 412.}
\footnote{76}{S. 15, supra note 11, §§ 151-154. These new rules would extend the coverage of current Rule 412 to all criminal cases and slightly alter its procedures. S. REP. NO. 197, supra note 11, at 57-58.}
\footnote{77}{S. 15, supra note 11, § 211.}
\footnote{78}{Id.}
\footnote{79}{Id. §§ 231, 241.}
\footnote{80}{See infra notes 83-84 and accompanying text.}
\footnote{81}{S. 15, supra note 11, §§ 401-403.}
\footnote{82}{Hearings Part II, supra note 4, at 62 (testimony of Erica Strohl, Co-Founder, Univ. of Minnesota’s Students Together Against Acquaintance Rape).}
\footnote{83}{Id. at 76 (citing Koss study, supra note 50).}
\footnote{84}{Id.}
against women. Title V also focuses on federal courts, encouraging the judicial council of each circuit to undertake gender bias studies to gain a better understanding "of the nature and extent of gender bias in the Federal courts."

III. TITLE III: THE CIVIL RIGHTS PROVISION OF THE VAWA

Title III of the VAWA recognizes the bias element inherent in many types of violence against women, including rape and domestic violence. The Act recognizes that women are the primary victims of sexual violence and that they are targeted for violence because of their sex. Women, who comprise over one-half of our population, are thus "reduced to symbols of group hatred they have no individual power to change or escape. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated."

Accordingly, the VAWA acknowledges gender-motivated violence as a form of sex discrimination worthy of federal civil rights protection. Title III of the VAWA creates a federal civil rights cause of action for victims of gender-motivated violence. This country has a long history of creating federal civil rights laws to prevent various forms of discrimination. Soon after the Civil War ended in 1865, Congress passed the Civil Rights Act of 1866 to enforce the provisions of the Thirteenth Amendment abolishing slavery. Similarly, in 1871 Congress passed the Ku Klux Klan Act to enforce the Fourteenth Amendment and protect

85. S. 15, supra note 11, §§ 511-514.
86. Id. §§ 521-522. Currently 16 states have published findings based on studies of gender bias in their court systems. Update: Gender Bias in the Courts, TRIAL, July 1991, at 112 (interview with Lynn Schafran). The results of all the studies are similar: the court systems show the presence of "gender bias ranging from the subtle to the direct." Id. Thirty-three other states, as well as several federal circuits, are in the process of conducting studies. Id. Only the Ninth Circuit has any preliminary results. See infra note 164 and accompanying text.
87. S. 15, supra note 11, § 301.
88. S. REP. NO. 197, supra note 11, at 43.
89. The idea of sexual violence as actionable sex discrimination is not a new one. See MacKinnon, supra note 6; see also Amy Eppler, Battered Women and the Equal Protection Clause, 95 YALE L.J. 788 (1986); Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 FLA. L. REV. 45 (1990).
90. S. 15, supra note 11, § 301(c).
newly-freed slaves from hatred and violence in the former Confederate States.\textsuperscript{94}

Unfortunately, it was not until the 1960s that discrimination against women entered the realm of civil rights violations.\textsuperscript{95} Ironically, "sex" was included in the 1964 Civil Rights Act as a last ditch effort by the Act's opponents to defeat the legislation which sought to prohibit racial discrimination in employment.\textsuperscript{96} Despite the inclusion of "sex," the legislation passed and sex discrimination in employment is now unlawful.\textsuperscript{97} Since 1964 Congress has enacted other legislation aimed at protecting women from various types of gender discrimination.\textsuperscript{98} Adoption of the VAWA would continue our national progress toward eliminating discrimination of all forms by seeking to protect women from the sex discrimination inherent in gender-based violence.

\textit{A. Title III's Language}

Since the VAWA views gender-motivated violence as a form of sex discrimination and therefore as a deprivation of the victim's civil rights, Title III tracks the language of, and builds upon, existing civil rights legislation. Title III reads in relevant part:

\textbf{SEC. 301. CIVIL RIGHTS}

(a) FINDINGS.—The Congress finds that—

(1) crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender;

\ldots

(7) a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects of gender-motivated violence on interstate commerce;

\ldots


\textsuperscript{96} See MacKinnon, supra note 6, at 1283. To the opponents of the bill, the idea of making sex discrimination a violation of federal civil rights law was so preposterous that they naturally assumed its insertion would lead to the defeat of the entire act. \textit{Id}.

\textsuperscript{97} See supra note 95.

(b) RIGHTS, PRIVILEGES AND IMMUNITIES.—All persons within the United States shall have the same rights, privileges and immunities in every State as is enjoyed by all other persons to be free from crimes of violence motivated by the victim’s gender, as defined in subsection (d).

(c) CAUSE OF ACTION.—Any 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 rights, privileges or immunities secured by the Constitution or laws as enumerated 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 the court may deem appropriate.

(d) DEFINITIONS.—For purposes of this section—

(1) the term "crime of violence motivated by gender" means any crime of violence, as defined in [18 U.S.C. § 16], committed because of gender or on the basis of gender . . . .

The drafters of Title III clearly borrowed language from the modern day codifications of the Reconstruction Era Civil Rights Acts. The definition of “motivated by gender” given in section 301(d)(1) comes directly from Title VII, which uses the terms “because of sex” and “on the basis of sex.”

Title III is not as broad as the civil rights legislation after which it is modeled. Prior civil rights laws not only protected against violence, but also encompassed a far broader range of rights, including protection against the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” On the other hand, section 301(c) of Title III only protects victims of gender-motivated crimes of violence. The definition of “crimes of violence” in section 301(d) covers, for the most part, only crimes which qualify as an assault.

99. S. 15, supra note 11, § 301.
102. Id. §§ 2000e-2, 2000e(k).
103. Id. § 1983.
104. The term “crime of violence” is defined as:
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other 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.
Other parts of section 301 list congressional findings. Among these findings are that federal and state criminal laws do not provide adequate remedies for victims of gender-motivated attacks, that sex discrimination in the criminal justice system denies victims equal protection of the law, and that gender-motivated violence has significant adverse effects on interstate commerce. Jurisdiction for a Title III cause of action exists under federal question and civil rights jurisdictional statutes.

B. Why Title III Is Needed

1. Current Civil Rights Legislation Does Not Work for Victims of Gender-Based Violence

The civil rights legislation currently in force in the United States is inadequate for addressing the problem of violent gender-based discrimination for two reasons. First, legislation protecting women only applies to sex discrimination in the workplace. Second, legislation originally enacted to protect racial minorities does not translate well when applied to situations involving gender-based violence against women.

a. Sex Discrimination Protection in the Workplace

Title VII of the Civil Rights Act of 1964 is designed to prevent sex discrimination in employment. It "provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes

105. S. 15, supra note 11, § 301(a)(3). This section reads: "State and Federal criminal laws do not adequately protect against the bias element of gender-motivated crimes, which separates these crimes from acts of random violence, nor do those laws adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests . . . ." Id.

106. Section 301(a)(4) states: "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 . . . ." Id. § 301(a)(4).

107. Id. § 301(a)(5)-(6). This section reads:
(5) gender-motivated violence has a substantial adverse effect on interstate commerce, by deterring potential victims from travelling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce;
(6) 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 . . . .

committed on the street or in the home." In 1986, the Supreme Court explicitly recognized in *Meritor Savings Bank v. Vinson* that sex discrimination which creates a hostile work environment is actionable under Title VII. Using an analogy to race to make its point, the Court said:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

In the workplace, the Court equates sex discrimination with racial discrimination. Apart from being “demeaning and disconcerting,” sex discrimination is also an arbitrary barrier to equality. Unfortunately, the barriers to equality caused by sex discrimination do not disappear once the woman leaves work. If eliminating sex discrimination is truly as important as the Court suggests, the protection of women should extend beyond the workplace. It would be both illogical and unfair to prohibit sex discrimination at work, while allowing violent sex discrimination in other spheres of life to continue without federal civil rights protection. Current civil rights laws help protect racial minorities from race discrimination in nonwork environments. Similarly, adoption of the VAWA would help to fill the gap in current legislation which only protects women from sex discrimination at work.

b. Race Protection Statutes Do Not Fit Gender

Shortly after the Civil War, the United States adopted legislation designed to protect blacks from violent race discrimination by both state officials and private parties such as the Ku Klux Klan. However, because the civil rights laws were designed to fit the particular circumstances of blacks, not those of women, these laws are an inappropriate remedy for victims of violent sex discrimination.

Due to the Supreme Court’s narrow interpretations of post-Civil War protective legislation, most of the early civil rights acts were useless until

109. S. 15, supra note 11, § 301(a)(2).
111. Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).
112. See supra notes 91-94 and accompanying text.
the Court started taking corrective action in the 1960s and 1970s. In *Monroe v. Pape*, the Court revitalized the Ku Klux Klan Act of 1871, holding that unauthorized misconduct by state officials is action taken "under color of law" and is therefore actionable under section 1983.

Ten years after *Monroe*, the Court decided *Griffin v. Breckinridge*, which dealt with private misconduct. In *Griffin*, the Court reinvigorated the long-dormant section 1985(3) of the Ku Klux Klan Act of 1871, holding it applicable to victims of "private conspiracies" without the victims needing to show state action. For a valid cause of action under section 1985(3), the Court required that there "be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Lower courts have since held that section 1985(3) extends to other classes and groups besides racial minorities, including political, religious, and ethnic groups and women.

Sections 1983 and 1985(3) of the Ku Klux Klan Act were designed to combat racially motivated violence. Because of the nature of gender-based violence, these laws are not adequate for vindicating the interests of victims of gender-motivated violence. For example, section 1985(3) requires plaintiffs to prove a conspiracy, meaning more than one wrongdoer. However, most rapes and acts of violence against women are committed by individuals acting alone. Thus, a victim of a single rapist is unable to assert section 1985(3). Similarly, section 1983 is designed to redress unauthorized state misconduct. Most violence against women, however, is not the product of state action. Rather, women

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113. During the "Dreadful Decade" from 1873 to 1883, the Supreme Court turned much of the post-Civil War legislation into "decorative irrelevancies." Gormley, *supra* note 94, at 541.
116. *Monroe*, 365 U.S. at 172, 187. Prior to *Monroe*, a suit under § 1983 could only be brought where the alleged violations were affirmatively authorized by statute or ordinance and hence occurred "under color of law." See generally id.
118. *Id.* To have a cause of action under § 1985(3), plaintiffs must allege (1) a conspiracy, (2) "for the purpose of depriving . . . any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws," (3) "an act in furtherance of the conspiracy," and (4) injury to person or property or deprivation of any right or privilege of U.S. citizenship. *Id.* at 102-03.
119. *Id.* at 102.
120. See New York State NOW v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989); see also Gormley, *supra* note 94, at 550-51.
121. See *supra* notes 117-19 and accompanying text.
122. S. REP. No. 197, *supra* note 11, at 42 n.35.
123. See *supra* notes 114-16 and accompanying text.
are most likely to suffer violence at the hands of someone they know. Therefore, section 1983 is of little value to most victims of gender-based violence.

Title III fills the holes in existing anti-discrimination legislation by providing a cause of action specifically designed to address the types of violence most often suffered by women. Title III does not require a conspiracy, as does section 1985(3), and it is drafted to deal with the problem of individual misconduct, not state misconduct as in section 1983. Under section 301 of the VAWA, women would be able to assert a civil rights claim against any person who commits a gender-motivated crime of violence.

2. State Remedies Are Inadequate: The Problem of the Unequal Treatment of Women in the Criminal Justice System

Survivors of sexual assault and domestic violence not only face the horror of being attacked, but also the fear of an unresponsive and biased criminal justice system. From the initial contact with police to the final decision of the judge, "[w]omen uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility." Although recent state legislative reforms have helped, the problem remains essentially the same. Women still face both formal and informal biases in state legal systems. Title III of the VAWA would address these biases by providing women with an alternative forum and method for vindicating their interests.

a. Formal Barriers

Biased state laws dealing with sexual assault and domestic violence are one example of formal barriers to gender equality in state legal systems.

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124. See supra notes 39, 60-61 and accompanying text.
125. Section 301(c) of the VAWA creates the federal cause of action and reads as follows:
   (c) CAUSE OF ACTION.—Any 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 rights, privileges or immunities secured by the Constitution or laws as enumerated 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 the court may deem appropriate.
S. 15, supra note 11, § 301(c).
126. Hearings Part I, supra note 7, at 65 (statement of NOW Legal Defense and Education Fund) (quoting a "typical" finding of the New State Task Force on gender bias in the courts).
127. See ESTRICH, supra note 44, at 80-91; Torrey, supra note 8, at 1014.
For instance, until 1990 it was legal in seven states for a husband to rape his wife. Among the states that have outlawed spousal rape, twenty-six of them accord it a lesser degree of criminality, permitting prosecution only under narrow circumstances. Some states have even extended the protection of such limited prosecution to former husbands and cohabitants.

Jury instructions in rape cases are another example of formal barriers to equality for women in state criminal systems. Lord Hale’s infamous jury instruction reads: “Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.” In an effort to be more neutral, many states have abolished Hale’s instruction. However, over half the states still permit a modern version of Lord Hale’s instruction, and the Model Penal Code still suggests a cautionary instruction for sexual offenses. Legal reform of the law of rape in recent years has helped improve the situation, but serious problems remain.


129. Martha R. Burt, Rape Myths and Acquaintance Rape, in AQUAINTANCE RAPE 29 (Andrea Parrot & Laurie Bechhofer eds., 1991); West, supra note 89, at 46, 48.

130. West, supra note 89, at 48 n.11.

131. BROWNMILLER, supra note 38, at 413 (quoting MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (Emlyn ed. 1847) (1680)).

132. A. Thomas Morris, Note, The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform, 1988 DUKE L.J. 154, 156. The modern version of Lord Hale’s instruction reads as follows: “A charge such as that made against the defendant in this case is one which is easily made, and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female . . . with caution.” Torrey, supra note 8, at 1045-46.

133. The Model Penal Code suggests that the jury “be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth [of the allegation].” MODEL PENAL CODE § 213.6 (Proposed Official Draft 1962), quoted in Torrey, supra note 8, at 1046.

134. Thanks to legal reforms in rape law, formal requirements of corroboration have been abolished, the crime of rape has been redefined, and a rape shield law that partially protects women from the exposure of their past sexual history has been enacted. ESTRICH, supra note 44, at 57.

Yet, “sexism in the law of rape . . . endures . . . [and] supposedly dead horses continue to run.” Estrich, supra note 47, at 1091. For example, most jurisdictions, following the suggestion of the Model Penal Code, adhere in substance to the common law “fresh complaint rule.” Id. at 53-54; Torrey, supra note 8, at 1041. The rule exists today as a rebuttable presumption against the veracity of rape victims who do not report their assaults immediately after the incident occurs. Id. The rule continues to thrive despite strong empirical evidence showing that because of the traumatic, personal nature of rape, immediate reporting is not the natural reaction for rape victims. Id. at 1042. Furthermore, the purpose of the rule is to prevent false reports, yet “[e]stimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for all other crimes.” Id. at 1025. In fact, most victims never even report the crime. Id. at 1029.
b. Informal Barriers

Even where formal barriers to gender equality have been lifted, traditional myths and stereotypes about the victims of sexual violence still remain. Stereotypes center on blaming the victim and questioning the victim’s credibility. Typical myths include “she asked for it”; “she deserved it”; women mean “yes” when they say “no”; women often “cry rape” to be vindictive; and women fantasize about rape. All of these myths have been thoroughly debunked by researchers, including those researchers most intent on questioning feminist contentions about rape. But the stereotypes still exist, and their negative effects taint the judicial system.

Recent gender bias studies of various state court systems have confirmed what many women were saying all along—bias against women exists at almost every stage of the judicial process. In a typical report, the New York State Task Force on Women in the Courts concluded that gender bias “is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity. Cultural stereotypes of women’s role in marriage and in society daily distort courts’ application of substantive law.”

Another problem with current rape statutes is that the criminal element of “force,” which replaced corroboration or nonconsent in the older rape laws, is now being judged in terms of women’s resistance. ESTRICH, supra note 44, at 60. Thus, a woman who gives in to fear or threats and does not fight to defend herself is more likely to have an unsuccessful prosecution. See BROWNMILLER, supra note 38, at 403 (“[R]ape is the only crime of violence in which a victim is expected or required to resist . . .”).

Similar to rape law, formal legal barriers still exist in the domestic violence arena. One example is the intrafamily immunity doctrine, a common law rule which many states adopted by statute, that prohibits tort actions between family members. BLACK’S LAW DICTIONARY 742 (6th ed. 1990) (under “husband-wife tort doctrine” heading). Although many states have abolished the doctrine, domestic violence victims are still unable to collect civil damages from abusive husbands in ten states. HEARINGS Part I, supra note 7, at 64.

The false rape myth has been debunked, and, in fact, the truth is totally the opposite—most rape victims never even report the crime. See Torrey, supra note 8, at 1015.

BURT, supra note 129, at 26-37; Torrey, supra note 8, at 1025-26.

Torrey, supra note 8, at 1015.

See supra note 86.

Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 11, 17 (1986). For a general discussion of the prejudicial treatment women receive in the courtroom, see generally Update: Gender Bias in the Courts, supra note 86. In domestic abuse cases, for instance, it is not unusual for judges (or opposing attorneys) to ask the abused what she did to provoke the attack. HEARINGS Part I, supra note 7, at 65. Trivialization of the harm and demeaning comments are not uncommon. In one case, a judge told a domestic abuse victim who was seeking protection in his court: “Let’s kiss and make up and get out of my court.” Id.
Discrimination against women is not limited to the courts. The historic reluctance of police to respond seriously to private domestic "squabbles" is well documented. Some recent reforms, such as mandatory arrest policies and the possibility of obtaining civil protection orders in all fifty states, have helped improve the situation for some victims.

For rape victims who decide to report the crime, police response is often poor. After going through an "unfounding process," often without consulting a prosecutor, many times the police decide that actual rapes never occurred. In Oakland, California, for example, 228 rape cases were reopened for investigation when it was disclosed that one of every four rapes and attempted rapes in 1989 were classified by police as "unfounded."

Exposing both the formal and informal biases that exist in state judicial systems illustrates that state criminal and civil remedies are inadequate for dealing with some of the most serious crimes suffered by women. In addition, the barriers women face, "barriers of law, of practice, and of prejudice[, are] not shared by other crime victims." Title III of the

140. Most domestic violence incidents are not simply "squabbles." The National Institute of Justice estimates that if domestic violence were fully reported, one-third of the incidents "would be classified as felony rape, robbery, or aggravated assault; the remaining two-thirds involve bodily injury at least as serious as the injury inflicted in 90 percent of all robberies and aggravated assaults." S. REP. NO. 197, supra note 11, at 38 (relying on PETER FINN, NATIONAL INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT, at 4 (1990)). Many victims of domestic violence are murdered—one-third of all women murdered in the U.S. die at the hands of present or former husbands or boyfriends. Id.

141. See MARTIN, supra note 15, at 91-100; NOW KIT, supra note 55, at 25; RHODE, supra note 15, at 239; Delbert S. Elliot, Criminal Justice Process in Family Violence Crimes, in FAMILY VIOLENCE 427, 428 (Lloyd Ohlin & Michael Tonry eds., 1989); Martin, supra note 66, at 6; see, e.g., Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (involving a woman who was stabbed 13 times by her husband while police were on the scene).

142. Of all major crimes, including burglary, robbery, and assault, rape is the most underreported; it is estimated that only seven percent of all rapes are reported to police. See supra note 52 and accompanying text.

143. The "unfounding process" occurs when police independently evaluate the evidence, including the perceived credibility of the accuser, and decide whether or not to pursue charges. ESTRICH, supra note 44, at 15-16; RUSSELL, EXPLOITATION, supra note 44, at 29-30; Torrey, supra note 8, at 1028-29. A classification of "unfounded" basically means the police determine that the crime never occurred. Prosecution Seen As Unlikely in 228 Rape Cases in Oakland, N.Y. TIMES, Nov. 13, 1990, at B10.

144. ESTRICH, supra note 44, at 15-16; RUSSELL, EXPLOITATION, supra note 44, at 29-30; Torrey, supra note 8, at 1028.

145. Prosecution Seen As Unlikely in 228 Rape Cases in Oakland, supra note 143, at B10. The Oakland incident is particularly disturbing because some of the victims were never even interviewed after the initial rape report; yet, subsequent investigations found that 79 of the 112 reported cases reviewed thus far did in fact occur. Id.

146. S. REP. NO. 197, supra note 11, at 43.
VAWA, which would create a federal civil rights cause of action, is needed to remedy state law deficiencies and to provide women with the opportunity for protection from gender-based assaults.

C. Advantages of a Civil Rights Claim

Adoption of Title III of the VAWA would help address the inequalities faced by women in state court systems by providing a civil rights action with federal court jurisdiction. This would help the women who are targeted for violence on the basis of sex in two ways. First, a federal civil rights action is different from, and superior to, a state criminal (or civil) action. Second, the federal court system, while not perfect, is a better forum for the adjudication of federal rights.

1. Federal Civil Rights Remedy

Like other civil rights legislation, a Title III "civil rights claim redresses an assault on a commonly shared ideal of equality."\(^{147}\) State criminal proceedings, on the other hand, are not concerned with equality, but with individual criminal acts.\(^{148}\) Criminal sexual assault trials far too often blame the victim by centering on her manner of dress or amount of resistance,\(^{149}\) instead of focusing attention on the wrongfulness of the assailant's actions.\(^{150}\) More importantly, the plaintiff-victim in a civil rights action would be in charge of the litigation, not the police or a state prosecutor. The ability of the victim to decide when to pursue a claim, when to settle, and how to run the litigation would return to the victim some of the feelings of control and power that are commonly lost in gender-motivated attacks and in any subsequent criminal proceedings.\(^{151}\) Finally, in a criminal prosecution, the burden of proof is "beyond a reasonable doubt." A victim suing civilly under Title III, on the other hand, would face the same burden of proof as other civil litigants—she

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147. Id. at 49.
148. Id.; see also Hearings Part I, supra note 7, at 69 (statement of NOW Legal Defense and Education Fund) ("[V]iolence motivated by gender is not merely an individual crime or a personal injury, but is a form of discrimination, an assault on a publicly-shared ideal of equality.").
149. See ESTRICH, supra note 44, at 57, 60.
150. NOW LDEF, supra note 34, at 2.
151. Fernandez, supra note 41, at 287 (asserting that attacks based on immutable characteristics "result, many times, in a feeling on the part of the victim of 'no control' over his or her life").
would only have to prove her case by a "preponderance of the evidence."\footnote{152} The use of civil remedies by sexual assault victims has received increased attention in recent years.\footnote{153} "[T]he tendency of police to discourage rape complaints, the frequency of negotiated pleas to lesser offenses, and the token sentences meted out to rapists combine to make the sexual assault victim highly dissatisfied with [the] criminal justice system."\footnote{154} By turning to the civil suit, the victim seeks self-confirmation of the seriousness of the offense, and simultaneously hopes that substantial compensatory and punitive damages will educate the assailant as to the gravity of his offense.\footnote{155}

A federal civil rights claim would also improve on traditional state civil tort claims. The very act of making gender-based assaults a "federal offense" communicates, to assailant and victim alike, the seriousness of the crime. Victims bringing a civil rights action would no longer face the barriers presented by outdated state laws or common law doctrines, such as the intrafamily immunity doctrine.\footnote{156} For example, under Title III, a victim of gender-motivated domestic violence could not only receive a civil protection order, but she could also sue a spouse or other assailant for compensatory and punitive damages.\footnote{157}

2. Federal Forum

During the Reconstruction, Congress passed the original post-war civil rights legislation "in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others."\footnote{158} The situation of women in the courts today, particularly in cases dealing with violence, is analogous; the barriers to equality, the biases, and other "defect[s] in the administration of the laws

\footnote{152}{S. REP. No. 197, supra note 11, at 28.}
\footnote{154}{LeGrand & Leonard, supra note 153, at 480.}
\footnote{155}{Id.}
\footnote{156}{See supra note 134.}
\footnote{157}{S. REP. No. 197, supra note 11, at 28 (noting that section 301(c) of Title III allows "for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court may deem appropriate").}
\footnote{158}{D.C. v. Carter, 409 U.S. 418, 426 (1973) (footnote omitted).}
Women are uniquely and disproportionately disadvantaged. Providing a civil rights claim that would be litigated in federal court, under federal law, helps to alleviate some of the inequalities women face.

In the past, when Congress has created new federal rights, it has relied on the federal courts because:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, . . . their sympathies are not so nearly identified with those of the vicinage; . . . they will be able to rise above prejudices or bad passions . . . . We believe that we can trust our United States courts, and we propose to do so.

For similar reasons, women bringing suit under Title III would have the opportunity to bring suit in federal court, thereby avoiding the "prejudices or bad passions" of state systems.

Federal judges obviously are not infallible or completely immune to the cultural forces and gender stereotypes that cause gender bias in state legal systems. However, as with civil rights legislation aimed at protecting racial minorities, it is fair to assume that the federal system would provide litigants a better opportunity to assert their rights than would state courts.

In fact, the recently released sex bias survey of the Ninth Circuit Court of Appeals shows that many of the women surveyed found "the federal courts are relatively free of the kind of blatant sexism they have encountered in some state courts."

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159. Id. at 426 (quoting Indiana Senator Pratt's comments during congressional debate on the Ku Klux Klan Act of 1871).
160. S. REP. NO. 197, supra note 11, at 44.
161. Carter, 409 U.S. at 428 (quoting legislative history which contained the comments of Congressman Coburn explaining the need for federal court jurisdiction over actions under the 1871 Civil Rights Act).
162. For example, Judge Posner of the Seventh Circuit has written that "rape appears to be primarily a substitute for consensual intercourse rather than a manifestation of male hostility . . . ." RICHARD A. POSNER, SEX AND REASON 384 (1992). For a critique of Posner's views, see Lynne Henderson, Authoritarianism and the Rule of Law, 66 IND. L.J. 379, 427-28 (1991). Of all the federal judicial circuits, only the Ninth Circuit has any results from its sex-bias survey. Court that Attacks Sex Bias Is Reported Often Guilty of It, N.Y. TIMES, Aug. 7, 1992, at A17. Although the Ninth Circuit study shows that 60% of women reported some type of unwanted sexual attention in the last five years, only 6% attributed the harassment to a judge. 9th Circuit Studies Gender Bias, A.B.A. J., Nov. 1992, at 30. In fact, "most lawyers in the circuit, male and female, believe they have been treated fairly by judges in the courtroom." Id.
163. Hearings Part I, supra note 7, at 68 (noting a "higher rate of success in cases of racial violence . . . tried under federal civil rights laws rather than in state court").
164. 9th Circuit Studies Gender Bias, supra note 162, at 30; see also supra note 162.
There are several specific reasons why the federal courts are a better forum for plaintiffs seeking redress for civil rights violations. First, a federal forum makes “antiquated State procedural rules . . . irrelevant and local immunities inapplicable.”  

The “fresh complaint rule,” for example, would no longer be a barrier to victims suffering from rape trauma syndrome who fail to report their claim immediately. Second, the small number of positions available on the federal bench permits the selection of highly competent judges—judges who, at least in theory, should be better suited to administer the laws in a neutral, nondiscriminatory manner. Third, federal judges are aware of the special tradition surrounding their posts; this awareness “instill[s] elan and a sense of mission . . . and exert[s] a palpable influence on the quality of the judicial product.” Finally, federal judges with life tenure are insulated from local political pressures, biases, and other majoritarian concerns faced by elected or appointed state judges. This may allow them to perform their duties with less bias than that found in state court judges. Any one of these reasons taken alone may not be conclusive. However, when taken in the aggregate, one could reasonably conclude that a federal forum would provide civil rights plaintiffs a better opportunity to vindicate their interests than is currently available in state judicial systems. In fact, it seems that Congress itself has reached that conclusion by enacting statutes that provide federal jurisdiction for civil rights claims.

IV. TITLE III COVERAGE

Since the introduction of the VAWA in 1990, there has been considerable controversy over the scope of its civil rights provision. Would random muggings, all domestic abuse cases, and other assaults on

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165. S. REP. NO. 197, supra note 11, at 48.
166. See supra note 134.
167. See supra note 134. Waiting a long period of time before reporting a gender-motivated assault may present the same evidentiary problems in the civil setting as it does in the criminal setting. However, the presumption against the victim would not be as strong in civil cases where the burden of proof is only a “preponderance of the evidence.”
168. Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1121 (1977). For example, the State of California has almost two times as many judges as the entire federal judiciary. Id. at 1124.
169. Id. at 1124.
172. See supra note 11 for a history of the Violence Against Women Act.
173. See infra part IV.B for a discussion of opposition to the VAWA.
women be actionable in federal court? The language and legislative history of section 301 directly address these concerns; Title III "is a discrimination statute, not a felony protection bill." To have a successful claim under section 301, a plaintiff would need to allege and prove by a preponderance of the evidence that (1) any person (2) committed a crime of violence (3) motivated by gender.

Title III is designed primarily to address violence committed by individuals, the most common type of violence faced by women. The "under color of law" reference in the statute is meant to allow suits against governmental entities or state actors only when such suits are allowed under current civil rights law.

The second element, "crime of violence," is perhaps the broadest element of the entire offense. The statute defines crime of violence by reference to the definition in 18 U.S.C. § 16, which includes felonies involving a substantial risk of the use of force and any other "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ." The conclusion of some groups that Title III would cover a wide array of violent conduct is correct, but only to the extent that such crimes are motivated by gender.

The third element, "motivated by gender," is based on Title VII of the Civil Rights Act of 1964. Proof of motivation for a particular act of violence would proceed as it currently does under Title VII and other civil rights legislation—by looking at the "totality of the circumstances." For several decades, the courts have successfully used circumstantial evidence to determine racial bias under existing civil rights laws, and they should be able to use the same methods to show gender bias.

The recent growth of violence motivated by group prejudice has led to the development of federal legislation mandating record keeping on "hate

174. S. Rep. No. 197, supra note 11, at 48. Title III has a specific limitation prohibiting a 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' . . . ." Id. at 28.

175. See supra note 122 and accompanying text.


179. See supra note 101 and accompanying text.

180. S. Rep. No. 197, supra note 11, at 50.

181. Id.
The Hate Crime Statistics Act of 1990 (Hate Crime Act) mandates the collection of data on "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity . . . ." Neither gender nor sex is included as a category under the Hate Crime Act. The stated reason why Congress excluded gender as a category under the new law is its belief that inclusion would not improve current data collection on crimes of violence against women. Since 1990, the FBI has established draft guidelines to implement the Hate Crime Act. The guidelines list thirteen representative "facts" that would typically be used as circumstantial evidence to prove a crime is motivated by racial bias or other group prejudice. The same factual circumstances that may show racial bias are easily adaptable to prove a crime is motivated by gender as required under the VAWA. The FBI guidelines include the following illustrative facts:

(a) The offender and the victim were of different racial, religious, ethnic/national origin, or sexual orientation groups. For example, the victim was black and the offenders were white.
(b) Bias-related oral comments, written statements, or gestures were made by the offender which indicates his/her bias. For example, the offender called the victim a "kike."
(c) Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.
(d) Certain objects, items, or things which indicate bias were used (e.g., the offenders wore white sheets with hoods covering their faces) or left behind by the offender(s) (e.g., a burning cross was left in front of the victim’s residence).
(g) Several incidents have occurred in the same locality, at or about the same time, and the victims are all of the same racial, religious, ethnic/national origin, or sexual orientation group.

182. See Fernandez, supra note 41, at 282.
184. Id.
185. Fernandez, supra note 41, at 275. How Congress could believe this in light of acknowledged evidence of severe underreporting of sex crimes is not explained. See supra note 52 and accompanying text. Congress also felt more hearings were needed to examine the deficiencies in current data collection methods for gender-based crimes. Fernandez, supra note 41, at 275.
187. Fernandez, supra note 41, at 285 n.129.
(i) The victim was engaged in activities promoting his/her racial, religious, ethnic/national origin, or sexual orientation group. For example, the victim is a member of the NAACP, participated in gay rights demonstrations, etc.

(k) The offender was previously involved in a similar hate crime or is a member of a hate group.
(l) There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.
(m) A historically established animosity exists between the victim group and the offender group. 188

Three additional items that are not on the FBI list, but that are useful in evaluating racial or other group bias include: (1) lack of provocation, 189 (2) absence of apparent motive, and (3) severity of

188. Id. The four items listed below are excluded from the textual list because they do not easily translate to situations involving gender-motivated crimes:

(e) The victim is the member of a racial, religious, ethnic/national origin, or sexual orientation group which is overwhelmingly outnumbered by members of another group in the neighborhood where the victim lives and the incident took place.
(f) The victim was visiting a neighborhood where previous hate crimes had been committed against other members of his/her racial, ethnic/national origin, or sexual orientation group and where tensions remain high against his or her group.

(h) A substantial portion of the community where the crime occurred perceives that the incident was motivated by bias.
(j) The incident coincided with a holiday relating to, or a date of particular significance to, a racial, religious, ethnic/national origin group (e.g., Martin Luther King Day, Rosh Hashanah, etc.).

Id.

The nontranslation of these four “fact circumstances” from racial bias to gender bias is partly explainable due to the fact that women are not a discrete, insular minority in the United States. However, experience has shown that discrete, insular minority status is not a prerequisite to gender bias. See e.g., Reed v. Reed, 404 U.S. 71 (1971).

189. While I find this factor is very useful, its use in domestic violence and rape scenarios may present problems for people whose definition of what constitutes sufficient “provocation” differs from mine. For example, as a society we have determined that walking through a white neighborhood is insufficient provocation for beating a black person. The crime would be generally denounced as racially motivated. Perhaps 50 years ago the same crime would have been viewed differently by whites because the victim violated what many considered well-established societal rules.

The situation with women today is similar to the situation of blacks about 50 years ago. For example, some people might consider a woman going out to a bar alone wearing a short skirt and a scanty top as sufficient “provocation” to engage in rape or acquaintance rape if the man is invited back to her apartment. Similarly, in domestic violence situations, there are a wide variety of “reasons” why men are “provoked” to beat their wives and girlfriends. See MARTIN, supra note 15, at 29-32.
I will refer to these three items and the nine FBI items collectively as “bias indicators.”

Many of the acts of violence women face today contain a number of the bias indicators listed above. It is important to realize that any one of these indicators taken alone will probably not be sufficient to show gender bias, or in the case of Title III, to prove by a preponderance of the evidence that a given attack was motivated by gender. However, if the evidence shows the existence of several of these indicators in a single incident, a court or jury could reasonably conclude, as currently occurs in many discrimination cases, that the totality of the circumstances shows that the attack was motivated by gender. An analysis of several possible scenarios using the bias indicators listed above suggests that Title III would not cover random muggings, but that it would cover many instances of rape and some cases of domestic violence.

A. Potential Scenarios

1. Muggings

A woman is mugged by a male attacker while walking home from work one evening. The woman is hit and shoved to the ground, called a “stupid bitch,” and has her purse stolen. Using the bias indicators under this set of facts, it would be difficult or impossible to show by a preponderance of the evidence that the attack was motivated by gender.

First, there is a clear motive for the attack (indicator 2)—robbery, not gender bias. This fact alone is extremely persuasive even though several of the bias indicators are present (i.e., different sexes (indicator a) and bias-related language (indicator b)). Second, although the attacker might have a history of such offenses (indicator k), his prior victims most likely include both men and women. Thus, this hypothetical mugging cannot be considered an incident motivated by gender. Finally, although the woman was hit and shoved to the ground, the mugging was not performed

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190. See Copeland & Wolfe, supra note 40, at 9 (citing Peter Finn, Bias Crime: A Special Target for Prosecutors, THE PROSECUTOR 14 (Spring 1988)); NOW LDEF, supra note 34, at 2; see, e.g., S. REP. NO. 197, supra note 11, at 50.

191. To facilitate discussion in the text, this Note refers to the FBI items by their letters (i.e., bias indicator m), and refers to the additional three items by their numbers (i.e., bias indicator 3).

192. S. REP. NO. 197, supra note 11, at 50.

193. Even if this mugger has a prior history of robbing only women because they are easier targets, the apparent motive (indicator 2) is still robbery, not gender bias.
with the type of severity (indicator 3) that might indicate gender bias.\textsuperscript{194} In conclusion, most random muggings do not show enough evidence of gender bias to be covered under Title III.\textsuperscript{195}

2. Aggravated Rape

Aggravated rape, also known as "stranger rape" or "real rape," usually involves an unknown assailant and includes the use of weapons and beatings.\textsuperscript{196} This situation is a relatively easy one to classify as falling under the specifications of Title III. Take a scenario similar to the one used above. The same woman walking home from work is attacked and dragged into some nearby woods where she is raped and severely beaten by a serial rapist who hurls sexist epithets at her.\textsuperscript{197} If the attacker is caught, the victim would likely be able to show that the violence was motivated by gender.

First, the victim is a woman and the attacker a man (indicator a). Second, the sexist epithets and slurs are clearly bias related (indicator b). The use of bias language, such as whore, slut, bitch, or something more offensive, is obviously not, by itself, dispositive and readily indicates nothing more than a foul mouth. In context, however, the use of sexist language lends coherence to a characterization of the overall nature of the attack. Third, the motive for the attack (indicator 2) is clearly not robbery, but rape, a definitive act of gender bias.\textsuperscript{198} Fourth, the victim may be able to show the prior rape history of the assailant (indicator k). Showing that the perpetrator has a prior history of attacking and raping only

\textsuperscript{194} See COPELAND & WOLFE, supra note 40, at 10. Mutilation and torture often characterize bias-related violence. \textit{Id.}

\textsuperscript{195} The drafters of the VAWA have made it very clear that they did not intend for random muggings to be covered by Title III. S. REP. No. 197, supra note 11, at 48.

\textsuperscript{196} See ESTRICH, supra note 44, at 3-4.

\textsuperscript{197} This is a close approximation of the hypothetical used in the Senate Report to illustrate an "obvious" Title III case. See S. REP. No. 197, supra note 11, at 50.

\textsuperscript{198} Even if the rapist also stole something from the victim, the totality of the circumstances would probably show that the rape was motivated by gender. See \textit{infra} note 202.

The drafters of the VAWA have been careful to suggest that Title III would not create a "Federal tort law" for all rapes. See S. REP. NO. 197, supra note 11, at 49 (referring to Griffin v. Breckinridge, 403 U.S. 88, 102 (1971)). Rather, Title III would only cover those rapes that victims can prove by a preponderance of the evidence were motivated by gender. \textit{Id.} However, most rapes would apparently be per se violations of Title III since Congress broadly defined "motivated by gender" as "because of" or "on the basis of" gender. \textit{Id.} at 28; see \textit{infra} note 204. If the assailant has a habit of raping both men and women, it might be more difficult to show the rape was motivated by gender. See \textit{supra} text accompanying note 188 (listing bias indicators a, g, k, and m).
women is additional evidence of gender bias. In conclusion, any one of these indicators alone may not show that a particular act was motivated by gender. However, the combination of all these factors strongly suggests violence motivated by nothing other than the victim's gender. Accordingly, Title III would cover such an act of violence.

3. Acquaintance Rape

The analysis of a scenario of acquaintance or date rape is similar to that of stranger rape. Take, for example, the situation of a female college student who accepts an offer from a male "friend" at a party to walk her to her dorm room. Once there, he grabs the woman, rips off her clothes, and forcibly rapes her. The shocked student does not report the rape to police. It is later discovered that the perpetrator has since raped at least three other women in a similar manner.

Proving gender bias in this case may initially appear more difficult than in the case of stranger rape. A thorough analysis suggests, however, that Title III would probably cover this case. Proving gender bias in this situation should be no more difficult than proving racial bias in an analogous case. For example, if a white student had attacked and beaten four different black students on four separate occasions with no provocation and without monetary motive, would anyone question the

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199. Bias indicator k is likely to be present in many rape situations because of the high rate of recidivism among rapists. Susan Rasky, Bill on Sex Crime Assessed in Senate, N.Y. TIMES, June 21, 1990, at A19 (relying on Linda Fairstein, chief of the Sex Crimes Prosecution Unit in the New York District Attorney's Office) ("[C]onvicted rapists [have] the highest recidivism rate of any criminals."); Elsa Walsh, Health Professionals Discuss Sexual Abuse, WASH. POST, June 5, 1980, at 10 ("[R]apists demonstrate one of the highest recidivism rates of all criminal offenders—35 percent.").

In many rape situations, the victim may be able to present evidence of numerous other bias indicators. For example, she may be able to show that several other incidents of rape have occurred at the same time (i.e., night), around the same place (i.e., a local park), and that all the other victims are women (indicator g).

Indicator d involves bias-related objects. Many feminists argue that pornography is a violation of women's civil rights. See, e.g., Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV. C.R.-C.L. L. REV. 1 (1985). Under this theory, if pornography is linked with an attack, it would be evidence of gender bias under indicator d. This appears plausible since some sex offenders are avid consumers of pornography. See BROWNMILLER, supra note 38, at 442-45.

Finally, indicator 3 suggests that the severity of the attack and excessive violence may show something about the motive of the attacker. See COPELAND & WOLFE, supra note 40, at 10. This indicator may be useful in rapes where the attacker violates his victim with bottles, sticks, or other foreign objects. BROWNMILLER, supra note 38, at 212-14. Such behavior is not uncommon in sexual assaults. Id. Senseless victim mutilation would also suggest bias. See COPELAND & WOLFE, supra note 40, at 10.

200. This scenario is based on the testimony of a student who appeared at hearings before the Senate Judiciary Committee. See Hearings Part II, supra note 4, at 5-6.
reasons for the attacks? Racial prejudice would be assumed instantly. A similar assumption of gender bias should occur when women are attacked and raped without provocation and for no apparent motive.\[201\]

In a typical date-rape scenario, gender bias is fairly evident. The perpetrator, a man, has a history of attacking and raping women, and only women (indicators a, g, and k). As in the case of racial attacks, the history of the attacker and the fact that he picks victims from one group should carry heavy weight. Second, there was no apparent motive for the attack other than gender bias (indicator 2). The attacker did not steal anything from the victim, for example.\[202\] Finally, there was no provocation for the attack (indicator 1). Visiting someone’s dorm room after a date, wearing “sexy” clothing, going out to a bar alone, or even initiating sexual contact and then saying “no” should not be considered “offenses” which justify rape. The typical male response—“she asked for it by inviting me to her room”—is no longer acceptable.\[203\] Indeed, one of the main purposes of the VAWA is to overcome the traditional stereotypes that have for so long legitimized violence against women in these circumstances.\[204\] It must be made clear that women have the same civil rights as men to “behave[e] as though they [are] free.”\[205\]

Rape is the epitome of misogyny. The development of case law under the VAWA should eventually, if not immediately, lead to the conclusion

\[201\] Rape is to women what lynching is to blacks, a form of violent discrimination. See infra note 207. Accordingly, a rapist claiming he was provoked by a woman’s attire or motivated by sexual desire is as ridiculous as a white person claiming he was provoked or motivated to lynch a black man not because of racial bias, but because the victim looked at him the wrong way or because the offender had a particularly frustrating day and needed to vent his frustrations. See also infra notes 202-08 and accompanying text.

\[202\] Even if a theft did occur, this fact alone does not end the inquiry. The question is not simply what happened, but what was the attacker’s motive for acting as he did. Raping a person is not the normal way of accomplishing a robbery. The rape itself carries significance apart from any theft that may occur as an afterthought of the attack. Even if the main objective of an attack is robbery, the victim could still presumably show that the motive for the act of rape was gender bias. See supra note 198.

\[203\] S. REP. No. 197, supra note 11, at 39. Under Title III, a victim would still have to show that she was in fact the victim of a violent attack or rape. To the extent that the victim’s actions, such as inviting a date to her apartment, impinge upon her credibility when she claims that she was raped, traditional stereotypes about victim-blaming would probably continue to exist. However, once a victim shows that she was in fact raped, it should be relatively easy to show that the rape was motivated by gender bias. See supra note 198; infra text accompanying notes 206-07.

\[204\] See S. REP. No. 197, supra note 11, at 47-48; see, e.g., id. at 39 (discussing the need to change pervasive victim-blaming attitudes like “she asked for it.”). If courts used a male proclamation of sexual provocation (e.g., “She asked for it by wearing that short skirt.”) as anything other than evidence of gender bias, the main purpose of the Act would be defeated. Section 301(d)(1) of the VAWA and its legislative history make very clear that violence committed “because of sex” is considered gender-biased violence and is thus actionable under the Act. See supra note 198.

\[205\] GRIFiN, supra note 32, at 23. For full quote, see supra text accompanying note 45.
that rape is a per se act of gender bias. If a woman proves rape, a rebuttable presumption of gender bias should arise, shifting the burden of proof to the defendant. This is more a question of common sense than judicial innovation. If a cross is burned in the front lawn of a black family, does anyone question the motive of the perpetrator? Perhaps a better analogy is lynching. The history of race relations in this country and the historical significance of lynching leave little doubt as to the racist motives of the perpetrators. Similarly, this country has a history of sexual inequality and violence against women, which provides ample evidence to conclude that rape is a continuing legacy of historical sexism and gender bias.

4. Domestic Violence

The final category to be explored is domestic violence. Assume a man with a prior history of abusing his girlfriends gets married. The man regularly beats his wife over the course of several years. Numerous times the beatings result in injuries requiring hospital visits. The police respond to calls on several occasions, but no arrests are ever made. The husband beats his wife for various reasons, ranging from the grand ("You are a rotten wife/mother") to the trivial (breaking an egg yolk while cooking breakfast). Finally, the woman leaves her husband permanently after a particularly severe beating, and she seeks to recover damages under Title III.

It should be possible for the woman to prove that the violence was motivated by gender in this scenario because many of the bias indicators are present. First, at the societal level, there is a well-documented historical "animosity" between the victim group, abused wives, and the

206. See supra note 198.

207. This analogy has been used by others. See, e.g., MacKinnon, supra note 6, at 1303 ("[S]exual assault in the United States today resembles lynching prior to its recognition as a civil rights violation. It is a violent humiliation ritual . . .").

208. This analogy to race is not meant to trivialize the racism faced by blacks in this country. Rather, the purpose is to illuminate the problem of sexism by making an analogy to racism, a problem with which many readers may be more familiar. See also supra note 13.

209. See supra notes 16-30 and accompanying text.

210. Section 301(e)(2) of the VAWA specifically notes that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the necessary elements of a cause of action." S. 15, supra note 11, § 301(e)(2).

211. See, e.g., MARTIN, supra note 15, at 50 ("One woman . . . was beaten unmercifully for breaking the egg yolk while cooking her husband's breakfast.").

212. See supra notes 188-91 and accompanying text (discussing the bias indicators).
offender group, abusive husbands (indicators a and m). "Animosity" may not be the most applicable word, but domination, subjugation, and oppression are fitting. Second, bias-related language and verbal abuse are both integral parts of the cycle of domestic violence (indicator b). Third, the attacker here has a history of prior incidents of a similar nature (indicator k), both with his wife and other women (indicator g). Fourth, the attacks generally occur in the same locality (the home), around the same time (when the husband returns from work), with unnecessary severity and absent any apparent motive or provocation (indicators g, 1, 2, and 3). Finally, many women are beaten when they take jobs outside the home, when they express a desire to visit friends or family, or when they simply leave the house (indicator f). Visiting friends or family, or simply leaving one's home does not exactly fit indicator i because the victim is not engaging in activities promoting her self-interest. However, such actions could certainly be classified as acts of independence and self-assertion—acts that express a woman's right to freedom and to responsibilities outside the home. From the abuser's point of view, the woman is abrogating her duties in the household, and this is sufficient cause for abuse.

Putting all these indicators together, a court could clearly find from the totality of the circumstances that some cases of domestic violence are motivated by gender. When a cycle of beatings occurs over the course of several months or years, it seems clear that the actions of the victimized spouse are not the true cause of the violence. Rather, the spouse, usually the wife, is beaten because she is a woman and is therefore seen as an acceptable outlet for male violence and aggression.

Domestic violence cases would probably create more difficulty under Title III than rape cases. It would be harder for the victim to prove that the violence was motivated by gender because the issue of provocation (indicator 1) is harder to assess. For example, in the domestic violence scenario above, hopefully most people would agree that breaking

213. See supra notes 15-23 and accompanying text.
214. See MARTIN, supra note 15, at 78.
215. Id. at 85.
216. See supra text accompanying note 188.
217. See MARTIN, supra note 15, at 78.
218. See supra notes 60-63 and accompanying text.
219. See, e.g., S. REP. No. 197, supra note 11, at 45 (discussing legalized violence against married women).
220. For a discussion of provocation in rape cases, see supra note 189 (discussing the theoretical problems involved with the "provocation" indicator).
the yolk of an egg is insufficient provocation for violent behavior. Given all the other bias indicators present in this case, a court could logically conclude that the victim proved by a preponderance of the evidence that the beating was motivated by gender. It is unclear, however, when a court or jury would decide that a given beating was "justified" by something other than gender bias.\footnote{221}

Courts should examine evidence of provocation in light of the purposes of the Act. The VAWA seeks to provide women the opportunity to assert their right to be free, like all other citizens, from violence.\footnote{222} The Act seeks to undo the numbness that has resulted from the immensity and ubiquity of violence against women.\footnote{223} With knowledge of this legislative intent, evidence that a man beats his wife for trivial matters should be considered strong evidence of gender bias. Evidence of more "serious" provocation must be carefully evaluated in conjunction with other bias indicators. The exact parameters of what constitutes domestic violence actionable under Title III would be developed in the case law.

\section*{B. Opposition to the VAWA}

The idea of creating a federal civil rights claim for the potential use of victims of domestic violence and other gender-motivated crimes has sparked the attention and opposition of many, including the Chief Justice of the Supreme Court, William H. Rehnquist.\footnote{224} Opposition to the VAWA stems mainly from the fear of (1) overwhelming an already heavily burdened federal court system,\footnote{225} and (2) involving federal

\footnote{221. For example, take the case of a man who severely beats his wife after she accidentally breaks his new camera. Though many of us would find a beating under any circumstances deplorable, the defendant in a Title III claim might argue that he beat his wife not because of her gender, but because of the accident. Depending on the presence of other bias indicators, the plaintiff may or may not succeed in showing that the beating was motivated by gender.}

\footnote{222. See S. REP. NO. 197, supra note 11, at 33-35.}

\footnote{223. Id. at 38.}

\footnote{224. See Richard Carelli, Rehnquist Sees Harm in Making a Federal Case of It, INDIANAPOLIS STAR, Jan. 1, 1992, at A11; Ann Pelham, Domestic Relations in Federal Court, LEGAL TIMES, Oct. 21, 1991, at 7; Rosie Sherman, Fears Expressed on Proposed Bill to Aid Women, NAT'L L.J., June 3, 1991, at 3, 16; News Release, supra note 178, at 1; see also S. REP. NO. 197, supra note 11, at 48.}

\footnote{225. News Release, supra note 178, at 2. Echoing traditional police reluctance to become involved in domestic squabbles, the Judicial Conference expressed its fear that the VAWA would involve federal courts in "domestic relations disputes." Id. The proponents of the VAWA, however, including Senator Biden, realize that "battering is a crime of force, not of domestic discord." Women's Concerns, Senators' Promises, BOSTON GLOBE, Oct. 31, 1991, at 18 (quoting Sen. Biden); see also supra text accompanying notes 60-69; supra note 140.}
courts in areas traditionally covered by state law. Neither of these reasons is sufficient to refuse victims of discriminatory violence an opportunity to vindicate their interests in federal court.

1. Overburdening Federal Courts

Congress recognized the problem of overburdened federal court civil dockets in the recently enacted Civil Justice Reform Act. However, by adopting the VAWA, Congress would also be recognizing and attempting to solve a very serious problem by creating a federal civil rights claim for certain victims of violent sex discrimination. The fact that federal courts would potentially face more civil rights actions should not be sufficient to undermine the legislation. If the passage of new civil rights laws hinged on the potential increased burden on federal courts, we would have no new legislation. Therefore, despite increased administrative burdens on federal courts, Congress should continue to enact legislation like the VAWA, which is necessary to redress discriminatory violations made against half of our population's civil rights.

2. Cases Traditionally Covered by State Law

Many opponents of the VAWA fear that the federal courts will become involved in areas traditionally covered by state law, namely "domestic relations disputes." This argument reveals in part the opponents' general lack of understanding of gender-motivated violence; they underestimate both the nature and brutality of domestic violence. Most cases rise to a level far above what opponents have called "domestic relations disputes." They are serious acts of violence often

226. See News Release, supra note 178, at 1; S. REP. No. 197, supra note 11, at 49.
229. See News Release, supra note 178, at 2; Judicial Conference of the United States, supra note 178.
230. See supra text accompanying notes 60-69; supra note 140.
231. See supra note 225. Referring to domestic violence as "domestic relations disputes" underscores opponents' lack of knowledge about the problem of violence against women. A cynic might even view the use of such terminology as an attempt to trivialize the problem and undermine support for the VAWA. Either way, it is a fine illustration of the historical reluctance of society to recognize as serious a class of violence simply because it occurs against women and within the confines of the home.
232. See supra text accompanying notes 60-63; supra notes 69, 140.
committed under circumstances indicating gender bias. The failure of traditional state remedies to solve the problem has already been discussed above.\textsuperscript{233} Besides, the existence of state remedies, even if they were adequate, should not be sufficient to preclude civil rights legislation. Most civil rights laws on the books today covers some area traditionally covered by state law.\textsuperscript{234}

Another important issue underestimated by those opposed to the Act is that the VAWA is limited to combatting violence motivated by gender. It does not provide a remedy for every assault or act of domestic violence.\textsuperscript{235} Nor does the Act override state tort law or create a "general federal tort law."\textsuperscript{236} It simply treats gender-motivated violence in much the same way as racially motivated violence is treated under other civil rights laws.\textsuperscript{237} If a particular case (or class of cases) involving domestic violence falls under the heading "gender-motivated violence," then it would be covered by the Act. If passed, the VAWA would certainly increase the number of civil rights cases that federal courts would be required to hear. However, when violations of civil rights are involved, "caseload considerations are necessarily secondary to the vindication of those rights."\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{233}See supra notes 126-46 and accompanying text.
\item \textsuperscript{234}S. Rep. No. 197, supra note 11, at 49.
\item \textsuperscript{235}Opponents point out that the definition of "crime of violence motivated by gender" in § 301(d)(1) is broad and may encompass a wide variety of violent acts. News Release, supra note 178, at 2; Judicial Conference of the United States, supra note 178. This is true since women are subject to a variety of violent acts motivated by gender. However, the fact that the VAWA is complete (in that it would cover a wide variety of discriminatory acts) does not make the Act any less valid or necessary. Surely the legitimacy of a civil rights action should not depend on the amount of force employed, or on the classification of the crime in any narrow sense. Rather, the motivation of the perpetrator of the crime should be the focus of consideration. A misdemeanor assault is no less worthy of federal civil rights protection than a rape if both are motivated by the same immutable characteristic of the victim, namely her gender. The protection guaranteed to racial minorities under section 1985(3) of the Ku Klux Klan Act of 1871 is not limited to violent crimes that rise to the level of a felony; rather, that statute broadly encompasses "any deprivation of rights, privileges, and immunities secured by the Constitution and laws." 42 U.S.C. § 1985(3) (1988). Similarly, Title III should not be limited to only "serious" crimes of violence, but it should encompass any crime of violence motivated by the victim's gender.
\item \textsuperscript{236}Cf. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (discussing application of 42 U.S.C. § 1985(3), which is the codified, current version of the Ku Klux Klan Act of 1871); S. Rep. No. 197, supra note 11, at 49.
\item \textsuperscript{237}See generally Griffin, 403 U.S. 88.
\item \textsuperscript{238}Christina Whitman, \textit{Constitutional Torts}, 79 Mich. L. Rev. 5, 28 (1981). If the desire to limit federal caseload were the sole factor in making decisions about the legitimacy of civil rights laws, most current civil rights legislation would never have been enacted. The point of the VAWA is that since women, like other minorities, are often the victims of group-motivated violence, they should receive federal civil rights protection. "The simple desire to reduce the federal caseload provides no guidelines to help us determine the most important uses of limited federal court resources." \textit{Id.} at 29.
\end{itemize}
Finally, the U.S. Judicial Conference opposes the VAWA because it fears that the rights created under Title III would be "invoked as a bargaining tool within the context of divorce negotiations." 239 Unfortunately, this argument relies on some of the same stereotypes which the VAWA seeks to abolish—that women are likely to file frivolous lawsuits for ulterior motives. 240 In fact, "there is no reason to assume that women-any more than any other group-will file false and vindictive civil rights claims for ulterior purposes." 241 As with other civil cases, Federal Rule of Civil Procedure 11 242 can be used to combat frivolous lawsuits under Title III. 243 Accordingly, the right of women to be free from discriminatory violence should not be withheld because of unwarranted assumptions about the likelihood of frivolous lawsuits.

CONCLUSION

Women have suffered a long and continuing history of discrimination and inequality in the United States. 244 Civil rights legislation to protect women from workplace discrimination is a positive step forward. However, gender-motivated violence and discrimination in other areas of life continue to be serious problems. Title III of the VAWA, relying on pre-existing civil rights statutes, attempts to address this problem by defining gender-motivated violence as a bias crime, and by allowing the victims of such violence to sue their attackers in federal court for compensatory and punitive damages, injunctive relief, and any other relief the court deems appropriate.

No one presumes that passage of the VAWA would instantly eliminate the national problem of gender-based violence. 245 It would, however, address "a serious flaw in our national psyche." 246 The effects of passing a civil rights bill for victims of gender-based violence, while difficult to determine beforehand, can be generally classified as both symbolic and practical.

240. See supra note 135 (discussing stereotypical belief that women file false rape suits to be vindictive).
241. S. REP. No. 197, supra note 11, at 48.
242. FED. R. CIV. P. 11.
243. See S. REP. No. 197, supra note 11, at 48.
244. See generally Part I.
245. See Hearings Part I, supra note 7, at 3 (statement of Sen. Biden) ("I am not suggesting the solution I have put forward is the totality of the solution."); S. REP. No. 197, supra note 11, at 35.
Symbolically, the passage of civil rights legislation acknowledges the existence of a very serious problem.\textsuperscript{247} It would raise public awareness of the problem\textsuperscript{248} and convey the message "that violence motivated by gender is not merely an individual crime or a personal injury, but is a form of discrimination, an assault on a publicly-shared ideal of equality."\textsuperscript{249} Advocates of the VAWA hope that the legislation, like prior civil rights legislation, will "change the Nation's attitude"\textsuperscript{250} toward discriminatory violence against women.\textsuperscript{251}

Practically, the VAWA would provide women a superior forum for the adjudication of their rights: an alternative to inadequate and biased state judicial systems, both civil and criminal. Women would "be able to get into the best court system in the world, with the most educated judges in the world and with a set of rules and regulations and a degree of sensitivity that is uniform."\textsuperscript{252}

Unfortunately, civil remedies of any kind do have drawbacks. Though the use of state civil suits as remedies for sexual assault has received increased attention in recent years,\textsuperscript{253} the actual number of suits brought has been very limited.\textsuperscript{254} In cases of rape, there remains the problem of catching the attacker, who, even if caught,\textsuperscript{255} may be judgment proof.\textsuperscript{256} The same problem could exist in domestic violence cases.

\textsuperscript{247} Id.
\textsuperscript{248} Id. at 3.
\textsuperscript{249} Id. at 69 (statement of NOW Legal Defense and Education Fund).
\textsuperscript{250} Id. at 2 (statement of Sen. Biden).
\textsuperscript{251} Several studies show that attitudes about rape, for example, are in serious need of change. In one study, over half of the male participants suggested they would consider committing a rape if they could be sure they would not be caught. Torrey, supra note 8, at 1023-24. In another study of junior high students, 25% of the boys and 20% of the girls stated that it was a man's right to force sex on a woman if he "spent $10 on her." Hearings Part II, supra note 4, at 3. Research on high school males and males in the general population reveals that 50% think it is acceptable for a man to rape a woman if she gets him sexually excited, or if she says "yes" to sex and then changes her mind. Torrey, supra note 8, at 1024.

\textsuperscript{252} Hearings Part I, supra note 7, at 2.
\textsuperscript{253} See supra note 153 and accompanying text.
\textsuperscript{254} Less than one percent of all rape victims have received damages by judgment in a civil jury trial. S. Rep. No. 197, supra note 11, at 44. Over the past 10 years, only 255 civil suits in sexual assault cases have reached a jury; this figure excludes any suits that were dismissed, settled, or tried before a judge. Id. Of course, there is no indication that this trend will continue if the VAWA is passed. The VAWA would hopefully solve some of the very problems that have kept women from pursuing civil remedies in larger numbers.

\textsuperscript{255} See, e.g., S. Rep. No. 197, supra note 11, at 44 n.42 ("[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.").
\textsuperscript{256} The U.S. Department of Justice gathers a variety of information on criminal offenders, including age, race, sex, and relation to the victim. See generally U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES (1989). However, there is little data on the economic status of offenders, apparently because many offenders are never caught.
Thus, Title III would present the most practical benefits in cases where the perpetrator of violence is not immune from civil suit because of indigency. The extent of these drawbacks and the subsequent practical efficacy of Title III would be hard to determine until the courts give substance to the language of the Act. By using the analogy to racially motivated crimes and by following the Act's legislative intent, courts could interpret the Act broadly enough to encompass most, if not all, rapes and many cases of domestic violence. Heavy emphasis should be placed on factors such as a prior history of abusing or attacking women. This would serve the purposes of the Act and would provide the victims of discrimination the opportunity to vindicate their interests in federal court. If a narrow, restrictive interpretation were developed by the courts, legislative intent would be frustrated, and Title III would do little to solve the problem it is meant to address.

When half of our population is being deprived of its most basic civil rights and is being relegated to second-class citizenship because it is female, some action must be taken. The VAWA is a vital first step in eliminating the problem. As one witness testified before the Senate Judiciary Committee: "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 should feel humiliated and ashamed."  

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Our society has more reason to be ashamed than many others; "the United States has the highest rape rate of any industrialized country . . . ." Torrey, *supra* note 8, at 1018.
Editor’s Note

The Editors and Associates of the Indiana Law Journal are delighted to dedicate this issue of the Journal to commemorate the 150th anniversary of the Indiana University School of Law–Bloomington. This issue represents a collaboration among the most integral parts of the Law School community—the faculty, students, and alumni.

About one year ago, the Journal’s Board of Editors invited the faculty to submit essays, articles, and commentaries on the future of the law. We put few limitations on the types of submissions faculty could make. The approaches the faculty took are as diverse as the subjects they teach and write about. While exploring the influences of the past on our present, some have chosen to predict the impact of legislative and judicial trends. Others identify and critically examine weaknesses in our legal institutions, and suggest approaches to improve these institutions in the future. Still others have taken this opportunity to think about old issues in new ways. The result is a thoughtful and dynamic issue that reflects the creative scholarship of our faculty.

Included in this issue is a slightly revised and annotated version of a lecture delivered in December, 1992, by one of the Law School’s distinguished alumni, Wisconsin Supreme Court Justice Shirley S. Abrahamson. Her lecture commemorated the inaugural lecture of the Indiana University Law Department, which was presented in December, 1842, by Judge David McDonald, the first professor of law at Indiana University. The addition of Justice Abrahamson’s piece to this issue is a small yet inspiring representation of the vitality of the alumni of this great Law School.

I hope you enjoy this survey on the future of the law.

Patrick S. Cross
Editor-in-Chief