Civil Rights Remedies for Battered Women: Axiomatic & Ignored

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** I dedicate this article to the memory and spirit of Mary Joe Frug, whose scholarship and tragic murder forever will inspire my feminist commitment.

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I. Introduction: Civil Rights Remedies For Battered Women - Axiomatic And Ignored

In battering relationships, women are deprived of their personal liberty and dignity through physical constraint, violence, injury or death. Often, they are deprived of their rights to travel, work, speak, associate with others, marry or divorce, have and raise children.

To control these aspects of one's life is essential to the experience of being an independent person, a "subject" engaged in life and society. Violent attacks on women impede this experience and spread the terror of coercive objectification. As targets of rage, battered women endure the dehumanizing violation of their physical, mental and spiritual integrity. When attacks derive from a violent husband, the very possibility of intimacy in a relationship can be severed forever.

"In violent experiences," Susan Schechter writes, "victims have their control and dignity stripped from them. Assault makes people feel helpless, immobilized, and overwhelmed with feelings of vulnerability. The violation of one's body or physical space is enraging and depressing. As victims of violence, we suffer multiple losses."[1]

It is axiomatic that one's bodily, psychological and spiritual integrity are at the essence of one's protected "rights," yet most federal civil rights laws do not make coercive violations of battered women's integrity by private actors legally actionable. Existing and pending civil rights legislation can serve some battered women in their efforts to obtain justice and promote a society in which all women are free from domestic violence.

The pervasiveness of wife abuse requires recognition of the social, economic, legal and political context of male dominance in which "private violence" directed at battered women is just one el-

1. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 18 (1982).

ement. This recognition must lead to the development of strategies to eliminate that violence. Although civil rights strategies against violent husbands largely have been ignored in battered women's political and legal work, some battering behavior constitutes a deprivation of civil rights. Such behavior should be cognizable as a federal civil rights violation pursuant to Title III of the "Violence Against Women Act," hereinafter "VAWA," as introduced in the 103rd Congress.[2] Civil rights remedies should be available for use by some battered women against their abusers.

This article explores civil rights remedies for battered women[3] who suffer physically and emotionally from domestic violence.[4] In this article, the interchangeable terms "wife abuse," "battered wives," and "battered women" describe the repeated use of physical force or threats of physical force[5] by a man against his intimate, cohabiting partner,[6] regardless of actual legal marital status.

Part II of this article begins with a discussion of the severity and pervasiveness of wife abuse and other forms of violence against women. It sets forth a feminist perspective that wife abuse occurs in the context of institutional and social structures of gender and power. It adopts the premise that wife abuse in heterosex-

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2. *See infra* § IV.

3. For a thoughtful analysis of the definitions of "battered women," see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 24-34 (1991) (detailing two definitional approaches — the "incident" focus and the "power and control" focus — and suggesting that the struggle for power and control be brought into the definition of battering itself). The incident approach defines "battered woman" as a woman who "is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse" — namely, a woman who has experienced at least two or more "acute battering incidents." *Id.* at 28 (quoting LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984)). Angela Browne defines "battered women" as those who have experienced two "physically violent incidents" or "those who have been struck repeatedly, often experiencing several different kinds of physically violent actions in one incident, and usually, by the time they are identified, having experienced a series of such incidents, each consisting of a cluster of violent acts." ANGELA BROWNE, WHEN BATTERED WOMEN KILL 13, 14 (1987).

4. "Violence may qualitatively change the nature of intimate relationships, even if they were characterized previously by the presence of severe psychological abuse." Michele Bograd, *Feminist Perspectives on Wife Abuse — An Introduction*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE (Kersti Yllo and Michele Bograd eds., 1988) [hereinafter FEMINIST PERSPECTIVES].

5. It should be noted that the experience of psychological abuse alone is not commonly understood to categorize a woman as "battered." *See supra* note 3. Repeated, physical abuse is required. "Physical abuse" is "any form of a coercive physical act, with or without resultant injury." Mahoney, *supra* note 3, at 29 (quoting WALKER, *supra* note 3, at 202). Such abuse can also be "any physically assaultive act by one person against another, with or without evident resultant physical injury," BROWNE *supra* note 3, at 13.

6. *See* Bograd, *supra* note 4, at 12.

ual relationships is generated by the intersection of two powerful and interconnected social forces: 1) the struggle for power and control that generates all domestic violence; and 2) the societal continuum of violence against women, the domestic manifestation of which is husband-to-wife violence. It is the continuum of violence against women within a gendered-power structure, and the availability of the family as a mediating institution of male dominance within this structure, that supports elevating some battering to a legally cognizable violation of civil rights. Other legal strategies pursued by battered women to stop the violence are not enough. Civil rights remedies uniquely capture the contextual, social aspects of gender-based violence, present a positive, normative prohibition against deprivation of civil rights by violence and provide a remedy for individual harms. Federal and state civil rights statutes should be used by some battered wives to bring civil claims against their abusers.

Part III addresses the existing federal civil rights remedies and demonstrates their limitations in the context of battered women's lives. Part IV analyzes Title III of the VAWA, which would create a new federal civil right to be free from gender-motivated crimes of violence. Part IV also identifies problems with the VAWA statute and proposes revisions.

The application of civil rights analysis to battering requires a shattering of the mistaken, yet prominent, notion of the "private" nature of wife abuse. The civil rights construct illustrates the history of, and societal complicity in, violence against women. As such, the use of civil rights remedies on behalf of battered women promises to serve a transformational role in society by empowering women as a class and as individuals. This civil rights litigation, however, carries the risk that the concept of "gender" will take on an essentialized character in disregard of other aspects of identity such as class, race and sexual orientation. Part V considers the risks of civil rights litigation and concludes that the battered women's movement would benefit from careful advocacy and widespread coalition involvement in the articulation of a civil rights strategy.

II. Battering Deprives Women of Rights That Should Be Protected By Civil Rights Law

A. The Facts: Battering Disproportionately Affects Women and Can Be Motivated By Gender.

Violence against women as a group exists in many institutions of American society. The popular image of women as de-

graded and subordinated to male power is portrayed in the media, films, advertisement and pornography.[7] Women are subject to violence in the home, at work, at school and on the street.

Violent attacks by men now top the list of public health dangers to American women.[8] The Surgeon General indicates that battering is "the single largest cause of injury to women in the United States."[9] Estimates are that between 12%[10] and 50%[11] of American women experience domestic violence in their lifetimes. In 1990, 30% of the 4,399 women identified as murder victims in this country were slain by their boyfriends or husbands.[12]

Statistics and studies of domestic violence demonstrate that battering is a pervasive and serious problem that disproportionately impacts women.[13] The disproportionate impact of battering

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7. *See generally* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); CATHARINE MACKINNON, *Not a Moral Issue*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 146-62 (1987) [hereinafter FEMINISM UNMODIFIED].

8. S. REP. NO. 197, 102nd Cong., 1st Sess. 36 (1991) (Report of the Senate Committee on the Judiciary on the Violence Against Women Act of 1991) [hereinafter VAWA Report 1991].

9. *Id.* at n.10. Statistics help demonstrate the pervasiveness and severity of other violence against women. Violent attacks against young women have increased by fifty percent since 1974, in contrast to violence against young men which has decreased by twelve percent. S. REP. NO. 101-545, 101st Cong., 2d Sess. 30 n.9 (1990) (Report of the Senate Committee on the Judiciary on the Violence Against Women Act of 1990) [hereinafter VAWA Report 1990]. Every six minutes, a woman is forcibly raped. FBI Uniform Crime Rep. 7 (1988). The rate of rape increased over four times as fast as the national crime rate during the last ten years. VAWA Report 1990, *supra*. Recent studies suggest that 12.1 million women have been the victims of forcible rape at least once in their life and that 683,000 adult women were raped in 1990 alone. David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures*, N.Y. TIMES, Apr. 24, 1992, at 14 (report of the National Women's Study demonstrating underreporting of rape and comparing Justice Department statistics of 130,260 rapes in 1990 with Women's Study findings of 683,000 rapes in same year) [hereinafter Survey]. Fifty-three percent of all women have experienced sexual harassment at work. BARBARA A. GUTEK, SEX AND THE WORKPLACE 46 (1985). Because these are only the reported and counted incidents, these figures seriously underestimate the severity of the problem.

10. MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS 36 (1980), *cited in* Mahoney, *supra* note 3, at 10.

11. WALKER, *supra* note 3, at 19.

12. FBI Uniform Crime Reports 13 (1990).

13. Wives or girlfriends were victims in 85% of all reported domestic violence offenses in New Jersey. Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies*, *in* U.S. DEPT. OF JUSTICE REP. (1986), *cited in* Mahoney, *supra* note 3, at 10. In Massachusetts, a study of court records of domestic violence cases found that 91% of the petitioners were women. MASSACHUSETTS GENDER BIAS COMMISSION, REPORT OF THE GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 82 (1989) [hereinafter MASSACHUSETTS GENDER BIAS REPORT].

Some men's rights groups tout contrary studies which indicate that female on male violence also is prevalent. Tamar Lewin, *Battered Men Sounding Equal-Rights Battle Cry*, N.Y. TIMES, Apr. 20, 1992, at 12 [hereinafter *Battle-Cry*] (report

on women, and the targetting of violence at women because they are women, eradicate the notion that wife abuse is based simply on personal animosity.

Many incidents of violence against women target particular, immediate victims — wives or dates — but the hatred that motivates those attacks often is directed at women as a group. Moreover, the impact of particular attacks frequently reverberate beyond the individual victim. Most women change their behaviors, where they work, walk and socialize, as a result of violence against themselves and other women. Thus, violence against women, including wife abuse, serves to intimidate women simply because they are women.

B. Situating Domestic Violence in a System of 'Gendered Power Relations': A Feminist Approach.

A feminist perspective on wife abuse requires more than recognition of a serious problem, it seeks to "understand why men in general use physical force against their partners and what functions this serves for a given society in a specific historic context."[14] The relationship between gender and power in the family institution and the role the family plays in defining and enforcing gender roles in contemporary American society are historically contingent and changeable. Thus, a feminist approach to legal advocacy requires analysis and promotion of legal remedies that validate wo-

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on efforts by Domestic Rights Coalition to open a shelter for "battered men"), *quoting* Murray Straus of the University of New Hampshire's Family Research Laboratory. *See also* STRAUS, et al., *supra* note 10.

Such studies do not determine to what extent women's aggression is in self-defense or a reaction to the men's prior violence or threats of violence, nor do they reflect the greater recurrence, severity and multiplicity of assaults when perpetrated by men against women. *See Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, 101st Cong. 2d Sess. (1990) [hereinafter *Women and Violence*] (testimony of Angela Browne, Ph.D., University of Massachusetts Medical School). *See also* Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings, in* FEMINIST PERSPECTIVES, *supra* note 4, at 90, 103-08 (noting lack of consideration of self-defensive aggression); R. Emerson Dobash & Russell P. Dobash, *Research as Social Action: The Struggle for Battered Women, in* FEMINIST PERSPECTIVES, *supra* note 4, at 51, 60 ("there is no systematic evidence showing a pattern of severe, persistent, and intimidating violence against husbands that would warrant the use of terms such as *beaten* or *battered*") (emphasis in original). Indeed, as indicated by Dr. Angela Browne, "[w]omen abused by male partners tend to sustain multiple injuries to multiple sites of the body, an injury pattern not seen in men assaulted by female partners." *Battle-Cry, supra*. Finally, these studies do not reflect the historical, social, economic and political context in which women have been and continue to be the victims of gender discrimination and violence.

14. Bograd, *supra* note 4, at 13.

men's experiences, provide liberating opportunities for individual litigants and serve to undercut the structures of male dominance and violence that constrain women's enjoyment of their civil rights.[15] It is necessary to adopt an approach designed to achieve what the mainstream legal doctrine of sex discrimination has been "utterly ineffective at getting women" — namely "a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity."[16]

1. Gendered Power

Underlying this analysis of civil rights remedies is the perspective that domestic violence is but one practice of male dominance on a continuum with other social practices of discrimination and violence against women. "Sex," or "gender,"[17] is not just a construct of descriptive biological or socialized differences between males and females, as traditional "difference" feminist theory suggests.[18] Nor is sexism an inaccurate or mistaken categorization of individuals that subverts equality and results in differential treatment, as "equality" feminist theory purports.[19] Gender is a question of power, an ideology of "male supremacy and female subordination."[20] Indeed, our society is structured along gender

15. *Compare id.* at 14.

16. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED, *supra* note 7, at 133.

17. The terms "gender" and "sex" are used interchangeably throughout this paper and in the case law. This terminology conveys the perspective that "sex" is not a biological, but a social construct.

18. "Difference" theorists accept that there are biological sex differences which have resulted in socially constructed gender roles and gender-contoured psychological development. *See, e.g.*, Nancy Chodorow, *Family Structure and Feminine Personality*, *in* WOMAN, CULTURE, AND SOCIETY 43 (Michelle Rosaldo & Louise Zimbalist Lamphere eds., 1974). *See also* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); MAPPING THE MORAL DOMAIN (Carol Gilligan et al. eds., 1988). Gilligan asks that we celebrate and learn from sex differences by incorporating the woman's voice, the "ethic of care," into the traditional psychological discourse and social structure dominated by the justice ethic and its logical, abstract reason.

19. Traditional equality theorists note the existence of a "patriarchal society" where "sex" is an organizational category which advantages men; but the ideals of the theory are primarily assimilationist and hold to an image of a society in which gender would be no different than eye color. *See, e.g.*, Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 587, 604 (1977).

Some equality theorists challenge the "assimilationist" impulse and suggest that we use the full range of feminist critiques to forward the goal of "equality as acceptance" to require "that social institutions react to gender differences, whether arising from biological or cultural sources, in such a way as to create equality between complementary male and female persons, skills, attributes and life patterns." Christine A. Littleton, *Equality and the Legal Theory*, 48 U. PITT. L. REV. 1043, 1052 (1987).

20. MACKINNON, *supra* note 7, at 40.

lines. "Men as a class wield power over women . . . men have differential access to important material and symbolic resources while women are devalued as secondary and inferior."[21]

Traditional strands of feminist theory, the "equality" and "difference" perspectives, have not dealt adequately with issues of violence against women. The "equality" feminists primarily challenge "sexism" as a category mistake, an "irrational prejudice," or as gender oppression that excludes women from some social roles.[22] Violence against women falls outside of this focus. At its best, "difference" feminist theory rejects the model of possessive individualism and develops a more humane social order modeled on an ethic of care.[23] At its worst, "difference" feminist theory merely re-labels as "dignity" the "different voice" of subordinated women[24] without challenging the systemic violence levelled against women that promotes such a voice. As affirmation of a false description of subjugated women, "difference" theory risks perpetuating negative cultural stereotypes about women which are used affirmatively in opposition to women's emancipatory aspirations.[25] What is needed to end domestic violence is an approach that directly addresses the systemic subordination of, and violence against, women.

Popular definitions and stereotypes of battering reflect the negative aspects of "difference" theory. These stereotypes stem largely from oversimplification of Lenore Walker's "learned helplessness" description of battered women,[26] which pathologizes bat-

21. Bograd, *supra* note 4, at 14. *See also* MACKINNON, *supra* note 7, at 42 ("If gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.").

22. As a result of such advocacy, some women gain access to male dominated institutions which enhance their power, but do not alter the institutions or the male norms that guide them. *See* Littleton, *supra* note 19, at 1045-56.

23. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 811 (1989).

24. *See* MACKINNON, *supra* note 7, at 38-39 (noting that women's "different" moral reason and valuation of care stems from men's dominance and valuation of women on the basis of the care women give them; women's voices are in fact silenced and these "differences" should not be reified).

25. *See* Williams, *supra* note 23, at 813.

26. Popular definitions of domestic violence tend to be incident-focused, with an emphasis on notions of male "victimization" of women and the battered women's psychological response. Lenore Walker portrays battered women as victims of "learned helplessness," a result of early-response reinforcement which cultivates battered women's passive behavior and acceptance of responsibility for their own treatment. WALKER, *supra* note 3, at 42-54. The woman's victimization occurs in part due to the abuser's unpredictable violence levelled regardless of the woman's response and her perception that she cannot control this violence; "[r]epeated bat-

tered women as helpless, passive victims of abuse caught in a "cycle of violence"[27] from which they have difficulty escaping. This characterization does not challenge directly the subjugation of women through wife abuse. Further, it reinforces the male gender role of dominance[28] and the negative cultural stereotype of women as submissive to their strong-willed and dominant husbands, an image cultivated by "millennia of violence, and a socialization toward passivity."[29] Although the description of learned helplessness is accurate for many women, it fails to contextualize battering within a larger structure of gendered power relations and thereby loses much of its explanatory value and accuracy.

The "dominance" approach, in contrast, derives legal strategies from the insight that women are targeted for violence because of their sex, that the legal system itself imposes male norms and is complicit in this violence and that women's different capacities and experiences must be heard and taken seriously in order to bring justice to women.[30] The "dominance" approach highlights sex-differentiated violence and abuses of women as a class to demonstrate that sexuality itself is a dynamic of gender inequality.

> [S]exuality [is] a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender. Such an approach centers feminism on the perspective of the subordination of women to men as it identifies sex — that is, the sexuality of dominance and submission — as crucial, as

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terings, like electrical shocks [in animal experiments], diminish the woman's motivation to respond." *Id.* at 49.

27. The "cycle of violence" includes three general phases of variable duration which work together to perpetuate the abusive relationship: 1) the tension-building stage; 2) the acute or explosive battering incident; and, 3) a period of calm, loving respite. *Id.* at 55-70. Although the violence experienced by women across a spectrum of relationships is not constant, and within relationships the level of violence differs depending on the stage in the cycle, the tension of violence exists throughout the first two stages. During these stages, the battered woman seeks signs of danger and guides her behavior by her assessment of whether it might provoke or exacerbate the seriousness of the abuser's attack. The period of respite allows for a build-up of trust after the extremes of violence have exploded. "Battered women are not constantly being abused, nor is their abuse inflicted at totally random times. One of the most striking discoveries in the interviews was of a definite battering cycle that these women experience." *Id.* at 55.

28. "Accustomed to supremacy, acculturated to expect service and deference from women, and integrating these expectations into the ego itself, men [are] understandably disoriented to encounter resistance" to their assertions of entitlement and are "unskilled at negotiating compromises." LINDA GORDON, *"The Powers of the Weak": Wife-Beating and Battered Women's Resistance, in* HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960, 286 (1988).

29. *Id.*

30. "When men's lives, values, and attitudes are taken as the norm, the experiences of women are often defined as inferior, distorted, or are rendered invisible." Bograd, *supra* note 4, at 15.

a fundamental, as on some level definitive, in that process.[31]

Violence is the most overt and effective means of male social control of women,[32] and male violence against women captures the essence of male dominance — female submission. Wife abuse serves to enforce sexualized subordination of women: "[d]ominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity."[33] The practice of "rape, battery, sexual harassment, sexual abuse of children, prostitution and pornography . . . taken together express and actualize the distinctive power of men over women in society; their effective permissibility confirms and extends it."[34] Acts of violence against women indicate a "systematic relegation of an entire group of people to a condition of inferiority and attribute it to their nature,"[35] and those acts must be challenged directly.

2. Intersecting Continua of Violence Against Women and the Struggle for Power and Control

Wife abuse in heterosexual relationships should be understood as a social phenomenon located on two separate, but reinforcing and intersecting planes: 1) the continuum of violence against women; and, 2) the struggle for power and control within relationships.[36] In violent heterosexual relationships, the struggle for power and control in the family institution replicates and is supported by struggles of domination and control on the basis of sex in society at large.[37] Battered women's advocates must link

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31. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989). MacKinnon also writes that "sexuality can no longer be regarded as unimplicated. Nor can the meaning of practices of sexual violence be categorized away as violence not sex. . . . The male sexual role . . . centers on aggressive intrusion on those with less power." *Id.* at 127. *See also* DWORKIN, *supra* note 7.

32. *See* Bograd *supra* note 4, at 14.

33. MACKINNON, *supra* note 31, at 130.

34. *Id.* at 127.

35. *See* MACKINNON, *supra* note 7, at 41.

36. The widespread existence of domestic violence suggests that wife abuse is only one version of a dispute mechanism used in a society acculturated to violence and that wife abuse is not motivated by gender. Such an explanation fails to account for the dominance of male norms in society and the imposition of these norms on all disempowered people: women, the elderly, minorities, children, and the disabled. Studies of battering relations suggest that "[m]en learn these violent techniques, and the appropriate contexts for their use, through a male culture that condones and encourages violence. In the violent events, . . .violence was used by the men [women] lived with to silence them, to 'win' arguments, to express dissatisfaction, to deter future behavior and to merely demonstrate dominance." Dobash & Dobash, *supra* note 13, at 57. Violent dispute resolution is an aspect of gendered power relations.

37. Although the continua of "gender-motivated" violence and that of the struggle for power and control may reinforce one another in heterosexual spousal rela-

"private" discriminatory actions with the social, legal and economic supports required to maintain dominance in relationships.

The institution of the family is a predictable and common site for abuse against women; the family mediates between intimate partners and a society characterized by gender dominance and violence.[38] "The reality of domination at the social level is the most crucial factor contributing to and maintaining wife abuse at the personal level."[39] Batterings teach "a profound lesson about who controls a relationship and how that control will be exercised."[40]

> [A] wealth of historical and contemporary evidence . . . [points] to the significance of male dominance in the etiology of violence. . . .[V]iolence forms an integral aspect of male dominance. . . [S]ystems of power and authority are ultimately based on the use or threat of force. . . .[I]t is through taking on the position of wife that women are mostly likely to become the victims of systematic and severe violence. Although other forms of male violence against women are shaped by patriarchy, it is in the family where men's 'rights' and privileges are given the most free reign.[41]

The economic, social and legal structures in which heterosexual relationships exist provide the context within which battered women have difficulty escaping or ending the abuse and without which the abuser would largely lose his differential of power. For example, some commentators argue that legal rules serve to promote a model of female sexuality characterized by monogamy, heterosexuality and passivity[42] which reinforces wives' dependence on abusive husbands. Economic inequality serves to limit women's options and allows men to use tools of economic control.[43] The sex segregation of poverty[44] threatens women and serves violent men

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tionships, it is possible that these forces do not always act in tandem in other subgroups of the population. In particular, this formulation may not resonate with the experience of lesbian battering or the use of violence in some refugee communities. Civil rights advocates must consider the consequences of elevating the "gender motivation" aspects of domestic violence at the expense of other explanations, as I will do in Section VI. I contend that it is worth pursuing the civil rights remedy for heterosexual battered women even at the risk of pre-legalizing a remedy for a phenomenon that is not yet fully understood in other sub-groups.

38. *See* Bograd, *supra* note 4, at 14.

39. *Id.*

40. SCHECHTER, *supra* note 1, at 17.

41. Dobash & Dobash, *supra* note 13, at 57.

42. *See* Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

43. *Id.* at 1072. *See also*, CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); GUTEK, *supra* note 9.

44. Fifty-three percent of all poor families and seventy-five percent of poor black families are woman-headed. *See* Diana Pearce, *Welfare is not for Women: Why the War on Poverty Cannot Conquer the Feminization of Poverty, in* WOMEN, THE STATE, AND WELFARE 265 (Linda Gordon ed., 1990). Women provide all or

by keeping women dependent on them and the institution of marriage or the state for support.[45] And economic vulnerability is just one element affecting the struggle for power and control in heterosexual battering relationships.[46]

Definitions of battering that address primarily the psychological victimization of battered women fail to capture the context of wife abuse. Definitions must incorporate the batterer's effort to achieve and maintain power and control over his partner[47] and the economic, social and legal barriers that constrain a woman from leaving a violent relationship or stopping the abuse. Descriptions of battering must reveal how violence reverberates beyond the couple and works to mold a broader definition of heterosexual relations. "Wife-beating sends 'messages' to all who know about it or suspect it; it encourages timidity, fatalism, manipulativeness in women. Men's violence against some women . . . reinforces all women's subordination and all men's dominance."[48] Finally, these

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most of the support for children (only 43% of absent fathers are forced to pay support), and foster parents receive four times as much as an AFDC recipient per child; women are disadvantaged in the wage market and make only 66% of men's wages; women with children need more than a job, but child care and health insurance for children are unavailable from the state or employers. *Id.* at 268. Notions of "deserving poor," which correlate with white, unemployed men, and the "undeserving poor," which refer to poor, minority, female heads of household, are really images of gender discrimination at the core of poverty. *Id.* at 269.

45. *See generally* Teresa Amott, *Black Women and AFDC: Making Entitlement Out of Necessity*, *in* WOMEN, THE STATE, AND WELFARE, *supra* note 44. The alternative is dismal. "Woman battering is also associated with being a major risk factor for becoming homeless." *Women and Violence*, *supra* note 13, at 141 (testimony of Susan Kelley-Dreiss, Executive Director of the Pennsylvania Coalition Against Domestic Violence). Available and affordable low income housing is virtually non-existent and between 20% and 40% of the New York homeless population are battered women. Interview with John Bonifaz, Harvard Law Student, author of unpublished manuscript on battered women and homelessness, in Cambridge, Mass. (May 1992).

46. The notion that batterers use multiple tools to achieve control is common in the battered women's advocacy community. The "power and control wheel," a conceptual chart developed by workers at a renowned battered woman's shelter in Duluth, Minn., assists advocates in understanding the techniques batterers use to establish and maintain control over partners. *See Women and Violence*, *supra* note 13, at 98 (testimony of Charlotte Fedders, Domestic Abuse Intervention Project, including the Power and Control Wheel) [hereinafter Power Wheel]. Abusers commonly use the following tools of intimidation: emotional and physical abuse which replicates negative social images of women and objectifies them, reducing them to objects of male sexual desire; sexual abuse and rape as a way to establish sexual dominance over their wives, as celebrated in pornography and other advertising images of women; domination of big decisions about money, work and family, consistent with societal notions of male privilege; social isolation — keeping wives from family and friends, imprisoning them and controlling their movement and car use; and, where the parties are separated, abuse of visitation privileges to gain regular access to their wives and make them feel guilty about breaking connections. *See id.*

47. *See* Mahoney, *supra* note 3.

48. GORDON, *supra* note 28, at 288.

descriptions must demonstrate how battered women are not only victims of individualized abuse, but also victims of a system of gendered power relations and agents of resistance to both.

3. Establishing the Civil Rights Claim Supports a Survivor Theory

Civil rights legal advocacy for battered women provides a single forum to address directly the social and historical context of gendered power relations as implicated in wife abuse and to hold individual abusers accountable for their actions. Civil rights advocates can move beyond the "victim" characterization of battered women to stress the great survival techniques and efforts such women use to overcome violent relationships. This "survivor perspective" stresses the agency of battered wives and the complicity of the broader social forces that render their help-seeking efforts ineffective.[49] It is important to link the single abused wife with the broader social context of male dominance to establish a civil rights violation.

Plaintiffs' lawyers need not revert to the "victim" characterization theories of learned helplessness implicit in efforts to establish damages in wife abuse civil rights cases. The "survivor" theory[50] provides an alternative damages theory. The psychological symptoms women experience in the abusive relationship often are temporary manifestations of traumatic shock, experiences of failure in the "traditional female role of nurturing and domesticity" and an expression of separation anxiety and reasonable fear of reprisal for leaving.[51] There is a practical legal risk that characterizing battered women plaintiffs as "survivors" of a system of male domination and wife abuse will not invoke the same sympathy of jurors that the victim characterization promises. However, exposure of the context of abuse and the struggle to survive may provide greater damage awards because the characterization is realistic and the effects of the husband's abuse are demonstrably

49. "Survivor" theories stress the coping techniques of women within abusive relationships, demonstrate battered women's repeated efforts to leave or to get the violence to stop and address the barriers abuse victims face in a social environment which fails to support them; the "survivor hypothesis . . . suggests that women respond to abuse with help seeking efforts that are largely unmet." EDWARD W. GONDOLF & ELLEN E. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11 (1988).

50. Survivor theories demonstrate women's extraordinary powers of "self-transcendence," inner strength, and yearning for dignity and life. Such characterizations problemmatize the "learned helplessness" description of the "battered woman" as victim to prior conditioning and adverse circumstances. *Id.* at 20.

51. *Id.* at 21-22.

more overwhelming than if the abuse were viewed in terms of the relationship alone.[52]

To demonstrate the existence of a civil rights violation, as opposed to random violence between two people, advocates should explore the theory of gendered power relations, the role of wife abuse in promoting subordination and the way in which violence is used to stifle battered women's assertions of their rights. It is critical that plaintiffs are not portrayed as submissive victims. "Wife-beating arose not just from subordination but also from contesting it. Had women consistently accepted their subordinate status, and had men never felt their superior status challenged, there might have been less marital violence."[53] Civil rights advocates must address the dynamic of power and control in relationships to explain the empirical evidence that battered women face increased danger with their assertion of rights and independence from their male partners.[54]

When battered women seek a divorce, obtain a restraining order or leave the abusive partner, they face increased danger because batterers use violence when their dominance is challenged.[55] The term "separation violence" has been used to mark the abuser's desperate, post-separation assertion of power over the domestic partner who has sought freedom.[56] As such, separation assault is prime evidence of wife abuse as a civil rights violation.

Of all the civil legal remedies, civil rights concepts are best able to capture and marshall the survivor theory and the concept of "separation assault" for the benefit of battered women. In the heterosexual context, domestic violence *qua* control can be seen as

52. Advocates who set forth the history of and social complicity in violence against women may run the risk of obtaining verdicts against the husband for only partial liability. However, this risk does not seem great. In civil rights claims brought by victims of race bias, defendants are held accountable for their behavior. Racism provides the social context and informs the motivation of, and damages arising from, the act. In battered women's civil rights litigation, the husband is the proximate cause of the deprivation of civil rights through violence within the marriage and should be held liable for the damages caused by his actions. The popular conception that the family is a "private" institution actually may be helpful to women in this context.

53. GORDON, *supra* note 28, at 286.

54. It is not surprising, from the perspective of intersecting and reinforcing planes of male dominance and the struggle for power and control, that "rates of [wife] abuse increased in those states in which women's status was highest relative to men's." Kersti Yllo, *Political and Methodological Debates in Wife Abuse Research*, in FEMINIST PERSPECTIVES, *supra* note 4, at 31. These findings indicate that tension increases with women's agency, that "rapid change toward equality may bring a violent backlash by husbands." *Id.*

55. Mahoney, *supra* note 3, at 6-7.

56. *Id.* at 6.

part of the enforcement of gender dominance at home, just as rape serves that function on the streets[57] and sexual harassment serves it in the workplace.

4. Listening and Challenging: Feminist Legal Theory, Subjectivity and Social Change

Feminist legal strategies must not only obtain a remedy for individual women, but should provide a conduit for women to articulate their experiences and challenge degrading stereotypes and the structure of male entitlement. The risk of applying some traditional civil rights models to violations of civil rights through wife abuse is that the articulated intent of the abuser may not reflect gender motivation. That motivation may be implicit, however, and the acts may serve the function of promoting male dominance and female subordination. The VAWA appropriately sets forth a non-intent based scheme for proof of a prima facie case.[58] The VAWA should be augmented by adoption of alternative means of proof to fully capture the experience of battered women and to provide effective avenues to challenge gender-motivated violence. The adoption of "radical subjectivity," a victim perspective approach, and the establishment of per se violations of civil rights, or "radical essentialism," would be alternative mechanisms of proving a prima facie civil rights violation by battering.

To develop the radical subjectivity approach, one must acknowledge that the struggle for power and control is central to the concept of battering. A modified version of Martha Mahoney's definition of battering demonstrates the point: "battering is that pattern of violent and coercive behavior whereby [one partner] seeks to control the thoughts, beliefs or conduct of [his] intimate partner or to punish the intimate for resisting the perpetrator's control over her."[59] This definition focuses on the batterer's motivation to control,[60] not the woman's inability to leave.

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57. *See* Wendy Rae Willis, *The Violence Against Women Act*, 90 GEO. L. J. 2197, 2209 (1992) ("[T]he act of rape is part of a societal pattern of male dominance. It is the exaggeration of the current socialization and power relationship between men and women.").

58. *See infra* § IV.C.

59. Mahoney, *supra* note 3, at 33 (quoting Barbara Hart, *Lesbian Battering: Our Examination*, *in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 173 (Kerry Lobel ed., 1986)). Hart's definition is of lesbian battering.

60. One difficulty with this definition, however, is that it focuses on the question "why did the batterer do it?" instead of "what did the batterer do?" As a practical legal matter, this definition could be understood to require demonstration of actual intent to control the abused partner — a burden of proof far more difficult than the demonstration of the batterer's actions which had the effect of controlling or overpowering the abused partner.

The nexus between an abuser's use of, or threats to use, physical violence and the concept of "battering" as a civil rights violation could be addressed as well from the women's perspective of the violence; this will be called the "radical subjectivity" approach.

> If the assaulted partner becomes fearful of the violator, if she modifies her behavior in response to the assault or to avoid future abuse, or if the victim intentionally maintains a particular consciousness or behavioral repertoire to avoid violence, despite her preference not to do so, she is battered.[61]

As a legal matter, the battered woman's response to abuse could provide prima facie evidence of a civil rights violation within the power and control concept of wife abuse.

This "radical subjectivity" approach should be endorsed with qualifications. The approach could be used against women to focus judicial attention exclusively on women's *response* to violence, using resistance as a measure of coercion as in rape law doctrine,[62] without addressing the batterer's inherently invasive, violent actions. Instead, the battered woman's interest in preserving bodily integrity, her perspective or estimation of the risk of threatened violence and her actions to avoid that perceived risk are the appropriate guideposts to this theory.

In recognition of the risks of this approach, an additional approach of "radical essentialism," which requires establishing per se violations of civil rights by battering, should be recognized. Estab-

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61. Mahoney, *supra* note 3, at 33 (quoting Hart, *supra* note 59, at 173). Again, Hart is discussing lesbian battering.

62. The term "force" has been held to be an essential element of the crime of rape. The prosecution must proffer evidence that the victim resisted the accused and her resistance was overcome by force, or that she was prevented from resisting by threats to her safety. *See, e.g.,* Rusk v. State, 406 A.2d 624 (1979). The interpretations of "force" and "threat" have been narrowed to include only a male definition of the concepts — the school-yard fist fight style of conflict — irrespective of the fact that rape embodies the force of a man against a woman in a sex crime which treads upon the "explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality — areas where differences between a male and a female perspective may be most pronounced." Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986).

In lieu of the *mens rea* requirement, courts interpret the force required in rape law as more than force "incidental" to the act of intercourse, as the force necessary to overcome female non-consent. *Id.* at 1107. The woman's resistance is the determinant of force; if it is not present, courts look to the reasonable woman's will to resist. *Id.* at 1107-08.

> Yet, when some time elapses between the force and intercourse, when the force is more of the variety considered "incidental" to sex, or when the situation is threatening but no explicit threat of harm is communicated, "force" as defined and required by the criminal law may not be present at all. In such cases, the law fails to recognize, let alone protect, a woman's interest in bodily integrity.

Id. at 1106.

lishment of per se violations marks certain behaviors "out of bounds" and focuses judicial attention on the batterer's behavior. These proposals are described more in Section IV(C)(2).

Adoption of alternative ways of proving a prima facie civil rights claim, and definitions of battering that incorporate the struggle for power and control, reflect the reality facing battered women and provide the legal context to further their struggle for freedom. This approach rejects stereotypes of women as weak, passive and victimized creatures of male control; yet it does not abandon the notion of the inherent gender motivation of the assaults or the connection of those assaults with male dominance. In the civil rights context, demonstration of the power and control systems within some heterosexual relationships work in tandem with the demonstration of gendered power relations in society and the gender-role enforcement effect of battering behavior itself. Violence-centered forms of control should be challenged through individual civil rights claims to forward individual women's goals and the social change objectives of women as a class.

C. Federal Remedies Are Appropriate to Protect the Civil Rights of Battered Women

As established, wife abuse is gender-motivated violence supported and perpetuated by social, economic and legal systems of male dominance. There is a firm political and philosophical foundation for passage of civil rights legislation to protect battered women. The historical legal permission to engage in wife abuse and gender discrimination provides additional support for such a remedy. Existing remedies fail to redress fully the damages arising from violations of civil rights and fail to promote women's equality as a class. The civil rights remedy best captures the normative, positive valuation of women and the social commitment to create an environment where women will thrive, free from violence.

1. Political/Philosophical Foundations

American civil rights theory derives in part from the 17th century "social contract" tradition[63] which was translated into

63. *See generally* THOMAS HOBBES, THE LEVIATHAN (Penguin Classics reprinted ed. 1985) (1651); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Hackett Pub. Co. ed. 1980) (1690); JOHN-JACQUES ROUSSEAU, *The Social Contract, in* THE ESSENTIAL ROUSSEAU (New American Library printed ed. 1983) [hereinafter *Social Contract*]; and JEAN-JACQUES ROUSSEAU, *The Discourse On Inequality, in* THE ESSENTIAL ROUSSEAU (New American Library printed ed. 1983) [hereinafter *Discourse*].

English common law by William Blackstone[64] and found expression in the U.S. Constitution.[65] This tradition suggests that, through the social contract, citizens give up their right to self-enforcement of "natural rights" in exchange for protection from the state. In reality, rampant battering exists in the private sphere where government, the enforcing arm of the social contract, effectively does not reach the relations between husbands and wives. Thus, the philosophical tradition of American liberal government supports an argument that civil rights of battered women must be recognized and protected, lest the foundation of democratic government itself, the social contract, lose all legitimacy.

Social contract theories presume all humans enjoy natural rights, the most basic of which is the right and individual enforcement of self-preservation.[66] Battered women, regardless of their legal relationship to their husbands, also possess this right.

Self-preservation is limited and defensive in posture — it does not allow needless harm to others or the self. Thus, there is a collateral right to enforce one's preservation if under attack. Although reason or compassion may limit violence and activities of self-preservation,[67] in families where domestic violence exists, these limits to self interest often fail. If a person attempts to obtain absolute power over others in an offensive manner, as does an abusive husband in the cycle of control, without consent and by compulsion of force, he puts himself in a state of war,[68] "a state of enmity and destruction."[69]

With the advent of the social contract and entry into a civil state, the theory proposes citizens agree to relinquish their natural rights to obtain "civil rights," the rights and obligations of citizens and subjects under government.[70] The motivation to end the state

64. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, FIRST BOOK (Dawsons Of Pall Mall ed. 1966).

65. The United States Constitution, influenced by Madisonian fears that a "tyranny of the majority" might lead to religious sectarian dominance or the masses' efforts to redistribute and equalize wealth, encapsulated the freedom from deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV; THE FEDERALIST NO. 10 (James Madison).

66. *See, e.g.*, HOBBES, *supra* note 63, at 189; ROUSSEAU, Discourse, *supra* note 63, at 140-41.

67. *See* ROUSSEAU, *Discourse*, *supra* note 63, at 140.

68. Without a common power, individuals in the state of nature are "in that condition which is called Warre; and such a warre, as is of every man, against every man." In that condition, there is only continual fear and danger of violent death; the "life of man" is "solitary, poore, nasty, brutish, and short." HOBBES, *supra* note 63, at 185-86.

69. LOCKE, *supra* note 63, at 14.

70. *See, e.g.*, HOBBES, *supra* note 63, at 268; ROUSSEAU, *Social Contract*, *supra* note 63, at 28. The establishment of a body politic, a real contract between the peo-

of nature and form political society, a body politic,[71] arises from individuals' desire to avoid war,[72] defend against one another,[73] and preserve property — including the "mutual preservation of their lives, liberties and estates."[74] But where law does not reach, the natural freedom of individual power remains and with it, the danger.

The social contract requires government to enforce civil and inalienable natural rights — or at least to provide legal avenues through which individuals may enforce their own rights. Agreements and laws join individual rights to duties, direct justice and give movement and will to the social pact.[75] In return for the social subject's recognition of duties, sovereign laws should be backed by public force and supreme power to enforce the rights of the citizens.[76]

Although battered women have developed support systems, shelters and services, they, like any other group of citizens, are entitled to rely on the state's protection when they are in danger. Without intercession and arbitration between individuals engaged in domestic violence, there is no peace.[77] The social compact obliges the government to protect people from deprivation of their civil rights by other members of society. The government's legitimacy could be judged by its success in providing actual protection of women's civil rights when they are deprived. In this context, the government ought to enact enforceable civil rights legislation to codify the implicit rights of women and act to enforce those rights through its executive power.

A similar position can be reached from a functional analysis of social relations. When a person "receives the protection of society," that person "owes a return for the benefit;" living in society requires each to be bound to observe a "certain line of conduct towards the rest" which consists of not doing others harm.[78] Thus,

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ple and the leaders it chooses for itself, where both parties obligate themselves to observe the laws that are stipulated, theoretically does away with arbitrary power. *See* ROUSSEAU, *Discourse*, *supra* note 63, at 192.

71. *See* LOCKE, *supra* note 63, at 52 (where a majority consent to make one community or government, they make a body politic). *See also* ROUSSEAU, *Social Contract*, *supra* note 63, at 17-18.

72. *See* LOCKE, *supra* note 63, at 16.

73. *See* HOBBES, *supra* note 63, at 268 (the end of the institution of sovereignty to which people submit is the "peace of the subjects within themselves, and their Defence against a common Enemy").

74. LOCKE, *supra* note 63, at 66.

75. ROUSSEAU, *Social Contract*, *supra* note 63, at 33.

76. *See id.* at 30.

77. *See* HOBBES, *supra* note 63, at 213.

78. JOHN STUART MILL, ON LIBERTY 70 (W.W. Norton & Co. ed. 1975) (1859).

abusive husbands cannot have it both ways; they should not be allowed the benefits of the public realm of regulation and democratic government and still experience few restrictions on their domination through force in the private realm. At a bare minimum, civil liberty is defined in the negative: individual independence limited by social control.[79] Where there is violence, there must be intervention to protect individual rights. In the absence of state protection, civil law does not extinguish all natural rights: the right of self-preservation is not alienable,[80] and battered women could use force to defend against risk to their lives.

Battered women currently live a dual existence. In the public sphere, battered women live in accordance with the so-called social contract. In the private sphere of the family, they experience a state of nature, replete with the emotional and physical dangers of the husband's restless desire to control. The government that fails to protect women's lives pursuant to the social contract also works against women who protect themselves, notably as a result of gender bias in treatment of self-defense claims.[81] In addition, the psychological, economic and social barriers to a woman's escape from an abusive husband result in stymied efforts to seek help. Thus, the social and legal constructs, combined with lack of state enforcement of the theoretical social compact, reinforce and perpetuate the inequalities in the abusive marriage and fail to allow battered women adequate opportunity to fulfill their human or civil rights to safety of their person, liberty and life itself.

Although social contract theory establishes that the husband has no right to infringe on the person of the wife with violence that might lead to death, the state's historical "privatization" of the family has provided the theoretical rationale of non-intervention and non-enforcement of wives' civil rights when deprived by husbands through domestic violence. In this context, John Stuart Mill asserts that liberty is often granted where it should be withheld. . .[82]

> The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess

79. *Id.* at 6. Mill suggests that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. . .to prevent harm to others." *Id.* at 11.

80. *See* HOBBES, *supra* note 63, at 192.

81. Elizabeth Schneider, *Equal Rights To Trial For Women: Sex Bias In The Law Of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980). *See also infra* note 138.

82. MILL, *supra* note 78, at 96-97.

> over others. This obligation is almost entirely disregarded in the case of the family relations.[83]

Recognition of the state's historical role in legitimating and perpetuating domestic violence by neglecting to enforce battered women's civil rights justifies contemporary efforts to use state mechanisms to correct the history of discrimination and to confront contemporary problems of wife abuse. It is time that notions of "civil rights" be brought into the so-called "private" realm of the family to end the violent state of nature left by non-enforcement of the laws. The state's enforcement structure must work to protect, not reinforce the infringement of, women's civil rights.

2. Historical Legal Discrimination

Historically, the law placed limits on the recognition of women's civil rights — especially within marriage. In the "private" realm of the family, the state's social contract obligation to protect the civil rights of its female citizens effectively has been suspended. In the past, the common law provided for a man's discipline of his wife. Today, the state effectively permits domestic violence where there is inadequate law enforcement and restriction of legal avenues for private relief under law. Recognition of a civil rights cause of action is an appropriate mechanism to address the current patterns of gender-motivated violence and to assist women in achieving full social status.

At British common law, the state's obligation to protect the civil rights of citizens did not reach relations between husband and wife because entry into a marriage contract constructively transferred the wife into the property of her husband.[84] The common law implication of treating wives as within the private domain of the husband's control was legal non-intervention in marital relationships. If abuse remained domestic, the common law permitted a husband to discipline his wife. Since the husband was "to answer for her misbehavior," the common law allowed the husband to "give his wife moderate correction," and intrusted him with the power of restraining her by "domestic chastisement," in order to

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83. *Id.*

84. *See* BLACKSTONE, *supra* note 64, at 430.

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover*, she performs every thing; and is therefore . . . under the protection and influence of her husband, her *baron*, or lord.

Id. (emphasis in original).

correct her behavior.[85]

A husband's use of violence, however, was limited at British common law. Unlike Roman law, where the "marital power of the husband was absolute, and he could chastise his wife even to the point of killing her,"[86] there was a formal limitation on the husband's right to moderately chastise his wife at British common law; only blows with a switch no wider than a man's thumb were allowed.[87] This "rule of thumb" created a distinction between single blows with large sticks and repeated blows with small sticks irrespective of the damage.[88]

Only when domestic violence extended beyond the wife did British common law reach it. For an extreme example, when a pregnant woman was beaten, no crime was committed if she personally was injured. Only "if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child" would there be a charge of a heinous misdemeanor.[89]

The rule of thumb and a husband's right to chastise his wife were recognized in the United States.[90] A "husband may put 'gentle restraints upon her liberty, if her conduct is such to require it' . . . provided he did not 'use a switch larger than her thumb,' or did not 'do serious bodily harm or inflict permanent injury.' "[91] The husband's privilege to chastise his wife stemmed from precedent, the husband's duty to make his wife behave and the belief that drawing "a veil over dealings between man and wife" would "make less noise and scandal than the publicity of a court trial" to deal with her misbehavior.[92]

The first American judicial recognition of this right and discussion of its rationale came in an 1824 Mississippi Supreme Court opinion in support of a husband's defense on charges for assault and battery upon his wife.[93] The court repeated the rationale that the husband "is answerable for her misbehavior" and indicated that the rule of thumb serves to "prevent the deplorable spectacle of the exhibition" of "family broils and dissention" in the courts of

85. *See* BLACKSTONE, *supra* note 64, at 432.

86. Sohm Inst., § 93; 21 Cyc. 1143, *cited in* Article, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241 (1917) [hereinafter *Right to Chastise*].

87. *Right to Chastise*, *supra* note 86, at 241.

88. *Id.*

89. BLACKSTONE, supra note 64, at 433.

90. *See generally*, *Right to Chastise*, *supra* note 86; GORDON, *supra* note 28. *See also*, Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (1984).

91. *Right to Chastise*, *supra* note 86, at 243 (*citing* Fulgham v. State, 46 Ala. 143, 147 (1871)).

92. *Id.* at 243 (*citing* State v. Fulton, 63 S.E. 145 (N.C. 1908) (dissenting opinion)).

93. *Id.* (*citing* Bradley v. State, 1 Miss. (Walk.) 156 (1824)).

justice which would cast "shade over the character of those who are unfortunately engaged in the controversy."[94] The court's Victorian interest in public propriety generated an opinion allowing wife abuse and preventing women's access to the courts except in the most extreme circumstances.

> To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[95]

In an 1864 case in North Carolina, a court similarly repeated the Blackstonian formulation that

> [a] husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain.[96]

The Mississippi holding finally was overturned in 1894 as a "revolting precedent."[97] North Carolina, too, overturned the rule of thumb, noting that "the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances."[98] In contrast to Britain, wife beating was less officially accepted in the United States. It was considered a "disreputable, seemy practice, and was effectively illegal in most states of the United States by 1870."[99]

However, earlier admonitions against the public display of familial strife remained strong. Public discussion of wife beating was rare, and women in the nineteenth and early twentieth centu-

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94. *Id.*

95. *Id.* at 158.

96. State v. Black, 60 N.C. 262, 86 Am. Dec. 436 (1864), *cited in Right to Chastise*, *supra* note 86, at 243-44.

97. Harris v. State, 14 So. 266 (Miss. 1894), *cited in Right to Chastise*, *supra* note 86, at 243-244.

98. State v. Oliver, 70 N.C. 60, *cited in Right to Chastise*, *supra* note 86, at 246.

99. *See* GORDON, *supra* note 28, at 255. In 1917, a commentator confirmed that the

> right of the husband to chastise his wife has generally met with disapproval in the United States and at this late date is entirely obsolete even in those states which formerly acquiesced in the practice . . . it is now as unlawful for a husband to beat his wife as for another to do so, and he is amenable to the criminal law for such offense.

Right to Chastise, *supra* note 86, at 246 (listing 14 states in which wife beating was held to be a criminal violation).

ries "did not seem to believe they had a 'right' to freedom from physical violence" and "spoke of the inevitability of male violence."[100] Indeed, in many states they were forbidden from bringing legal claims as a result of interspousal tort immunity and the marital rape exception to criminal laws.[101] Instead, women resisted by "fighting back, running away, attempting to embarrass the men before others, calling the police."[102] Although nineteenth-century middle-class reformers were motivated by the notion that "wife-beating was entirely intolerable" and proposed "to do away with physical violence in marriage altogether," battered women were caught in the patriarchal system.[103] They had no economic support independent from their husbands, no supportive institutions or defense of absolute rights; thus, battered women used custom and bargaining[104] to defend against violence.

In contrast to the historical state sanction of wife abuse and code of silence about it, women's acts of violence against their husbands, in self defense or otherwise, were legally prohibited and punished in the extreme. At common law, the husband was the lord of his wife and representative of the state in the family. A wife who killed her husband threw "off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king."[105] Although the existence of a marital relation no longer supports elevating the crime of murder to treason, continuing gender bias in law and its application to criminal self-defense theory reveals and perpetuates the gender discrimination at common law.[106]

A state of war continues to exist in thousands of American homes where domestic violence is met with little social or governmental intervention. There is still a "leftover notion" from the English jurisprudential system's treatment of women as chattel.[107] In the context of the family, this liberty granted to husbands stems from the common law history. Such liberty is "altogether misplaced" in part due to the pretext that the affairs of the wife are

100. *See* GORDON, *supra* note 28, at 256.

101. *See infra* §§ II.D.3. and 1.

102. GORDON, *supra* note 28, at 256.

103. *Id.*

104. *Id.* at 257.

105. Schneider, *supra* note 81 at 628-29 (*citing* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 418 n.103 (R. Walsh & Co. ed., 1897)).

106. *Id.*

107. *Women and Violence*, *supra* note 13, at 106 (statement of Senator Joseph Biden).

the affairs of the husband.[108] Husbands' liberty with violence remains strong in part due to legal language and construction which, in its veneer of neutral non-intervention, allows the terror to continue.

Basic political and economic rights, gradually attained through women's struggles, provided the conditions for political and social action to challenge domestic violence directly. In the early 1970s, coalitions of feminist shelter workers, academics, lawyers and participants in consciousness-raising groups declared that "the private and the social were no longer separable categories."[109] They made legal and extralegal resources available to assaulted wives.[110] The silence was broken. "Since 1975, the ongoing struggle of the battered women's movement has been to name the hidden and private violence in women's lives, declare it public, and provide safe havens and support."[111] "Today . . . any notion of a husband's prerogative to physically discipline his wife is an 'increasingly outdated misconception.' "[112] Yet, abuse continues.

Despite success in advocacy efforts to enforce criminal laws against abuse and pass legislation allowing for civil restraining orders and improved police policy toward wife abuse, breaking the silence has not resulted in the universal reversal of the state's treatment of domestic violence as a "private" matter. As a result, battered women have brought Fourteenth Amendment equal protection challenges to police policies and practices that afford less protection to victims of domestic violence than victims of other crimes.[113] What should be considered a police department's "affirmative duty to take reasonable measures to protect the personal safety of [women in domestic relationships or other persons] in the community"[114] often is marginalized as a "private" matter not entailing any affirmative duty. Insofar as the "private" reemerges, the silence returns.

Martha Minow[115] exposes the silence of the private in the context of child abuse and the Supreme Court's opinion in *DeShaney v. Winnebago*.[116] This case held that Joshua DeShaney

108. *See* MILL, *supra* note 78, at 96.

109. *See* SCHECHTER, *supra* note 1, at 30-31.

110. *Women and Violence*, supra note 13 (testimony of Dr. Angela Browne).

111. SCHECHTER, *supra* note 1, at 11.

112. *Thurman*, 595 F. Supp. at 1528 (*citing* Craig v. Boren, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1977)).

113. *See id*; *see also infra* § III(B).

114. *Thurman*, 595 F. Supp. at 1527.

115. Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VANDERBILT L. REV. 1665 (1990).

116. 489 U.S. 189 (1989).

and his mother's Fourteenth Amendment liberty rights were not violated when the Department of Social Services failed to protect the child from the violence of his father, despite the Department's active intervention in his affairs. Minow suggests two assumptions were at work in denying the claim. "The first" she writes, "is that violence is private and that the distinction between public and private action makes violence, on occasions like this one, beyond public control. The second is that the government has to act in order to invade someone's rights; failing to act is not an invasion."[117]

The categorical distinctions expressed through the words "private" and "failure to act," Minow suggests, "act as talismans to ward off the facts of the case."[118] The dissenting Justices noted the violation by the state and judicial system through inaction and compared the conduct to "antebellum judges who denied relief to fugitive slaves" on the basis of formalist legal analysis and "existing legal doctrine."[119] Minow suggests that the dissenting Justices are "on the brink of considering that violence itself is public as well as private — that law is part of the violence and that law itself can be violent."[120]

In the context of domestic violence, the public/private distinction continues to seek a separation of law from violence.[121] Law and legal actors are not only complicit in their "omissions," often they act violently.[122] As a consequence, the silence is not truly broken about wife abuse and often women's experiences are not accepted as authentic or deserving of judicial action. "Redefining as unacceptable that which previously has been acceptable will remain difficult unless society can acquire a different language, a language that reflects the experiences of those abused by domestic violence."[123] The language required to litigate civil rights claims not only incorporates women's experiences, but directly challenges the public/private distinction which continues to silence women's voices.

D. Existing Remedies Are Not Enough

Non-civil rights remedies have been developed to serve many

117. Minow, *supra* note 115, at 1668.

118. *Id.*

119. *Id.* at 1670 (*quoting DeShaney*, 489 U.S. at 212 (Blackmun, J., dissenting)).

120. Minow, *supra* note 115, at 1671.

121. *See id.*

122. Violence occurs when police refuse to respond to domestic violence, clerks harass women appearing for restraining orders, or judges "blame the victim, trivialize the cases or deny the victim's experiences." *Id.* at 1671-72.

123. *Id.* at 1672.

of the needs of battered women. No single piece of legislation can serve all purposes, so developing a multiplicity of tools available to battered women for social and legal redress increases the likelihood that one remedy will be appropriate for a particular woman and that, in combination, litigants will make a political impact by simultaneously chipping away at the pillars of the male dominated power structure. Yet, some remedies may serve to reinforce that power structure if their impact is limited or if they promote stereotypes of women that cut against the emancipatory ideal and fail to translate descriptions of victimization into an account of the agency of women[124] engaged in struggles for equality, freedom and safety. An examination of criminal sanctions, restraining orders and tort remedies further reveals that a civil rights remedy is necessary.

Legal remedies for battered women can be evaluated on the basis of their social change value for liberating women[125] and for their ability to make relationships safer for women.[126] The goal of creating "safe connection" can be accomplished in four ways: 1) "change the batterer" so that he fits within cooperative and nonviolent models of community;[127] 2) decrease the cost of "rupture" to battered women,[128] the total disruption of home, work and community resulting from fleeing a violent spouse; 3) "increase the costs of battering" to the batterer;[129] and 4) "expand the options for community" so that women are not limited to heterosexual relationships alone.[130]

Most existing remedies for battered women focus on increasing the costs of battering to the batterer. Direct efforts to "change the batterer" through therapy are discouragingly limited.[131] Ultimately, battered women's advocacy may succeed in reversing cul-

124. *See generally* Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

125. Mahoney, *supra* note 3, at 93 ("The challenge is to identify legal and social strategies that will allow us to change law and culture simultaneously, by illuminating the context of power and control within which a woman lives and acts.").

126. Christine Littleton suggests that the legal system should aim to make possible real women's desires for "safe connection," for women to be "safer in relationships." Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 89 U CHI. LEGAL F. 23, 52 (1989) ("if battered women seek to maintain connection in the face of enormous danger, perhaps the key to accessing the legal system on their behalf lies in taking seriously *both* the connection they seek and the danger they face in that quest").

127. *Id.* at 52-53.

128. *Id.* at 53-54.

129. *Id.* at 55.

130. *Id.* at 55-56.

131. *Id.* at 53.

tural acceptance of violence against women which, in turn, may serve to "change the batterer." Thus far, however, the prevalence of wife abuse suggests that there has been no such shift in the behavior of individual batterers.

The civil rights remedy promises to serve a direct social change function not currently achieved by other remedies. None of the other approaches establishes directly women's right to be free from violence, characterizes domestic violence as a public harm and simultaneously allows recovery of individual damages. Civil rights remedies increase the cost of battering to the batterer, while promoting a social vision that freedom from gender-motivated violence is a protected civil right for all.

1. State Criminal Law

Since the 1970s, battered women's coalitions have sought to use state criminal law to protect battered women and to increase the costs of battering to batterers. Criminal law, against assault and battery,[132] kidnapping,[133] homicide[134] and rape,[135] among other crimes, technically prohibits many types of behavior associated with wife abuse. Arrest reduces recidivism; it "substantially reduces the number of domestic assaults and murders."[136] As compared to other interventions, such as mediation or the securing of restraining orders, arrest of batterers best serves the goal of "changing the batterer." The social change value of addressing battering through criminal law is also valuable because violations

132. *See, e.g.*, WASH. REV. CODE § 9A.36 (1992). Assault covers three types of acts — attempts to commit battery, intentionally causing fear of battery and actual battery. The degree of assault varies with the intent of the actor, the means used and the harm to the victim.

133. *See, e.g.*, WASH. REV. CODE § 9A.40.020 (1992). Kidnapping in the first degree requires proof of abduction — restraint of a person by secreting her away to a place she is not likely to be found or using or threatening to use deadly force — with intent to inflict bodily injury or inflict extreme mental distress on her or a third person.

134. *See, e.g.*, WASH. REV. CODE § 9A.32.010 (1992).

135. Marital rape was barred or accorded a lower level of criminality in many states. S. Rep. 102-197 § III (C)(2)(b) at 45. The common law definition of rape was the "unlawful carnal knowledge of a woman, *not a spouse*, forcibly and against her will." Commonwealth v. Milnarich, 498 A.2d 395, 397 (Pa. Super. Ct. 1985) (emphasis supplied), *cited in* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS, FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE 37 (1989). By 1987, approximately 60% "of the states had removed that marital exemption" and opened the route for women to prosecute their violent husbands for rape. *See* KARP & KARP, *supra*, at 37 (citing Patricia Searles & Ronald Berger, *The Current Status of Rape Reform Litigation: An Examination of State Statutes*, 10 WOMEN'S RTS L. REP. 25, 33 (1987) (table 5)).

136. Sarah Buel, *Mandatory Arrest For Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215 (1988).

are characterized as crimes against the state, not as isolated private incidents.

However, gender bias in the criminal justice system,[137] for example, the imposition of so-called "objective" legal standards in circumstances particular to battered women,[138] has required battered women's groups to struggle to get state prosecutors and police to tend to the problems of domestic violence.[139] Despite the evidence that domestic violence was widespread,[140] early studies revealed that the police normally did not respond to battered women's calls.[141] Studies of criminal prosecution demonstrated that "battered women's experiences were trivialized as 'non-crime' by

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137. "Study after study commissioned by the highest courts of the states has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." VAWA Report 1991, *supra* note 8, at 43.

138. This gender bias can be seen in battered women's self-defense claims. "Self-defense . . . to an intentional homicide rests on the view that a person may take reasonable steps to defend himself or herself from physical harm." Schneider, *supra* note 81, at 630. Gender bias in self-defense claims arises in part from stereotypes about battered women which "often bind the trier of fact to the reasonableness of a battered woman's use of defensive force." *Id.* at 629. Further, the imposition of the "equal force" and "imminent danger" rules, judged by the so-called "objective" reasonableness standard, are sex-biased, *see* Schneider, *supra* note 124, at 201, and serve to reinforce male norms in the law. The impact of sex bias in self-defense is two-fold:

> First, sex-stereotyped attitudes and the sex bias inherent in the legal rules of self-defense often cause the judge to exclude evidence of an individual woman's circumstances and perceptions. The woman is thus unable to present her case fully and is denied a fair trial. Second, sex-stereotyped attitudes make it more likely that the trier of fact will excuse the woman on the grounds of incapacity rather than declare her act of self-defense justified.

Id.

139. Police failure to respond to complaints of domestic violence has been challenged by battered women as abuse of discretion and as a violation of equal protection guarantees of the Fourteenth Amendment. Women's groups put pressure on police to increase their awareness of domestic violence, created committees, and developed training programs to turn the force of police into allies against domestic violence. The passage of abuse prevention statutes substantially aided these efforts by allowing women to obtain civil orders for protection and by setting forth arrest guidelines, including mandatory arrest policies, to guide police response and to send a clear message that society values women and penalizes violence against them. *See*, Buel, *supra* note 136 at 215; *but see* Coalition For Criminal Justice Reform For Battered Women, Criminal Justice Proposals For Battered Women (July 1989) (New York City advocacy group finds that policy of mandatory arrest procedures in response to misdemeanor family offenses in New York City would not be feasible)[hereinafter Criminal Justice Proposals].

140. In 1982, "forty-one percent of all assault and weapon-related calls to the San Francisco Police Department involved family violence," and in 1984, "forty-five percent of all female homicide victims in California were killed by a boyfriend, spouse, or other family member." Esta Soler, *Improving the Criminal Justice System's Response to Domestic Violence*, 11 NOVA NEWSLETTER NO. 4, Apr. 1987, at 1.

141. WALKER, *supra* note 3.

prosecutors and judges."[142]

After lawsuits challenged discriminatory prosecution,[143] and women's task forces called for major changes in prosecution of domestic violence claims, some District Attorney's offices have adopted concrete strategies to reduce the discretion that works against women[144] and legislatures have passed criminal laws specifically addressing domestic violence.[145] However, despite these new policies promoting vigorous prosecution, some prosecutors' offices have not followed suit, and all have limited resources with which to bring such claims.

In practice, criminal prosecution of batterers also proves to be a mixed blessing. The largest benefit provided by a criminal approach is stopping violence through state interference with the cycle of abuse. Prosecution sends the message that a batterer's controlling and violent behavior is not just an element of his private relationships with his wife, but is a crime against the state. Reinforcement of this message through publicity about the prosecution of men for assault and battery against their domestic partners is vital to confronting the attitude of insularity and private entitlement that perpetuates battering behavior. The advantage of criminal prosecution over civil legal action also may be considerable in particular cases.[146]

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142. *See generally* Elizabeth Stanko, *Would You Believe This Woman? Prosecutorial Screening for "Credible" Witnesses and a Problem of Justice*, *in* JUDGE, LAWYER, VICTIM, THIEF (Nicole Hahn Rafter & Elizabeth Anna Stanko eds., 1982); ELIZABETH STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE (1985).

143. *See, e.g., supra* note 139; Raquz v. Chandler, No. C74-1064 (N.D. Ohio 1974), *cited in* GOVERNOR'S BATTERED WOMEN'S WORKING GROUP, VIOLENT CRIME IN THE FAMILY: ENFORCEMENT OF THE MASSACHUSETTS ABUSE PREVENTION LAW 8 (1985) [hereinafter GOVERNOR'S WORKING GROUP]; Doe v. Bellelle, Civ. Mo. 81-5256 (S.D. Ill. 1981), *cited in* GOVERNORS WORKING GROUP, *supra*, at 8.

144. *See supra* notes 139 and 140. There are many examples of such strategies — for instance, requiring consultation with community groups, adopting written policies and procedures on domestic violence cases, and providing assurance that women who drop their cases may re-contact the District Attorney's office.

145. *See, e.g.*, WASH. REV. CODE § 10.99 (1992) (official response to domestic violence including restriction upon and duties of court).

146. First, there is no risk to the battered woman of attorneys fees or other costs of civil litigation. Second, some civil lawyers may prefer that criminal charges be brought and adjudicated before civil rights or tort claims are filed. This may be a way to develop the evidence and test the available witnesses. Third, the rules of criminal procedure differ dramatically from that of civil procedure — victims will be protected from having to undergo discovery and depositions, tools of civil procedure which can be misused by a batterer to harass and damage the victim. Batterers often continue their controlling behavior through the legal system when they no longer can do it directly. Finally, criminal claims are constitutionally required to be tried with speed, while civil litigants currently face backlogs which can last years in many jurisdictions.

On the other hand, the disadvantages of criminal prosecution of domestic violence cases may, at times, outweigh the benefits. The power and control of the state replaces that of the batterer in a criminal prosecution and may perpetuate battered women's experience of victimization. The psychological trauma and disempowerment experienced by crime victims may be exacerbated by their inability to prevent dismissal of charges, participate in developing a prosecution strategy or even testify against the abuser. The criminal system's remedies and the battered women's needs may not correspond.[147] Further, criminal prosecution alone does not provide recovery for the damages incurred as a result of the abuse even where restitution is a possibility. Although state criminal remedies are an essential aspect of battered women's efforts to find safety in relationship and to label domestic assaults as a crime against the state, because of their disadvantages, individual litigants may choose not to use criminal prosecution as a legal tool to obtain justice or may seek to augment it with civil claims.

2. Abuse Prevention Orders

Abuse prevention legislation, adopted in at least 48 states and the District of Columbia,[148] provides a remedy designed to empower battered women[149] through the courts and to secure their safety by increasing the costs of violent behavior to the batterer. Abuse prevention legislation allows battered women to obtain civil protection orders, or temporary restraining orders (TROs), to enjoin batterers from further violence.[150] Women can obtain temporary orders directly without counsel,[151] on an emergency and ex parte basis.[152] The legal standard to obtain a civil protection order is generally a "preponderance of the evidence," which is more easily demonstrated than a criminal, "beyond-a-reasonable-doubt" standard.[153] As compared to extensive civil litigation, this remedy

147. The successful end of arrest and criminal prosecution is imprisonment. A woman may fear retaliation, require the financial support the batterer provides or seek to maintain the father's relationship with the children of the marriage. *See* Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L. Q. 43, 44 (1989).

148. *Id.* at 43.

149. Victims of attempted abuse can obtain protective orders in 39 states and the District of Columbia. Forty-two states permit protective orders if a woman is threatened with physical violence and is in fear of imminent bodily harm. *Id.* at 48.

150. *Id.* at 46.

151. *Id.* at 49.

152. The husband is entitled to contest the order in a hearing scheduled ten or fourteen days after the issuance of the ex parte order. *Id.* at 52. *See, e.g.*, MASS. GEN. L. ch. 209A (1992).

153. Finn, *supra* note 147, at 49.

is quick, easy and accessible to a great number of women in danger. Protective orders provide "the only remedy for abuse that is not yet criminal (e.g., intimidation or harassment) and for behavior that is misdemeanor crime with insufficient evidence for charging or conviction (e.g., threats or shoving)."[154]

Temporary restraining orders can separate the parties to keep battered women safe from abuse[155] and decrease the costs of rupture to women by removing the batterer, forbidding contact and granting custody and child support.[156] Unlike criminal prosecution, civil restraining orders address the specific dynamics of domestic violence where an "offender is motivated to retaliate against a specific victim" and where cohabitation allows him to continue abuse and draw on sympathy.[157] Local police, in possession of copies of the restraining orders, are on notice if calls of distress come from protected women. A violation of a civil restraining order "constitutes civil contempt in thirty one states, criminal contempt in twenty five states and the District of Columbia, and civil and criminal contempt in eleven states."[158] When there is adequate police enforcement and criminal prosecution, restraining orders substantially increase the costs of abuse to the batterer.

Still, women seeking TROs face serious difficulties[159] and, unlike victims of many other crimes, are often targeted for repeated assaults. Some women are unable to use restraining order provisions at all due to their immigration status or sexual orientation.[160] For those who can obtain orders, the obvious and "most serious limitation of civil protection orders is widespread lack of enforcement."[161] Because police are not usually present when the violation occurs, women in some states must file a complaint to initiate enforcement — issuance of a warrant or a contempt hear-

154. *Id.* at 44.

155. *Id.*

156. *See, e.g.*, MASS. GEN. L. ch. 209A (1992).

157. Finn, *supra* note 147, at 44.

158. *Id.* at 55.

159. Clerks may bar or discourage access to judicial remedies, judges may have incorrect understandings of the law or widely divergent interpretations and bias may block proper functioning of the law. *See* GOVERNOR'S WORKING GROUP, *supra* note 143.

160. Civil restraining order provisions are practically unavailable to immigrants who lack the legal status to remain in the country, are afraid of deportation and whose language skills and lack of court interpretors prevents them from communicating sufficiently to obtain relief. In many states, gays and lesbians are not covered by the statutes because of gender specific language which limits the remedy or a lack of provision for "unrelated household members."

161. Finn, *supra* note 147, at 45. *See also* GOVERNOR'S WORKING GROUP, *supra* note 143, at 2-3.

ing.[162] In other cases, even where police have a mandatory duty to arrest,[163] if the abuser is not present when the police arrive, the police may have no duty to go after him and investigate.[164] Therefore, some women face repeated risks from their abusers.

When TROs are enforced, state interference in systems of violence challenges the relative power of family members and indirectly works to break down the public/private distinction. In tension with that function, abuse-prevention orders also perpetuate the "private harm" characterization of domestic violence. Each TRO focuses on one husband's abuse of his wife and provides an order designed to protect her. Thus, the TRO remedy is not a general panacea for wife abuse, but a necessary element of a broader safety plan for women who seek an exit from abusive relationships.

3. State Tort Law

Battered women who have damages arising from abuse may have options for recovering against their abusers pursuant to state tort law. Although the common law rule of interspousal tort immunity still exists in some states,[165] it has been eroded or abrogated by other jurisdictions.[166] The possible legal causes of action in tort include: assault and battery;[167] wrongful death;[168] intentional infliction of emotional distress, or the tort of outrage;[169]

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162. Finn, *supra* note 147, at 45. To address this problem, 24 states have passed statutes allowing police to "arrest without a warrant when they have probable cause to believe that the respondent has violated an order" and 13 states have initiated mandatory arrest policies for violations. *Id.* at 55.

163. Roy v. Everett, 823 P.2d 1084 (Wash. 1992).

164. Donaldson v. Seattle, 829 P.2d 1125 (Wash. Ct. App. 1992).

165. Where the interspousal tort immunity still exists, the following exceptions to the rule, among others, allow causes of action where there has been: 1) the death of one spouse; 2) a divorce or separation; 3) a willful, wanton or intentional tort; or, 4) premarital torts. *See* KARP & KARP, *supra* note 135, at 36.

166. *Id. See* Freehe v. Freehe, 500 P.2d 771 (Wash. 1972) (interspousal tort immunity totally abandoned in state of Washington).

167. *See* KARP & KARP, *supra* note 135, at 38-41 (citing RESTATEMENT (SECOND) OF TORTS § 13 (1965)). The following elements are required for a civil battery cause of action: 1) a harmful or offensive contact with a person; 2) resulting from an act intended to cause the plaintiff to suffer such a contact; and, 3) apprehension. *Id.* Civil assault to the person requires an act by the defendant creating a reasonable apprehension in plaintiff of immediate harm, intent to cause such apprehension in the plaintiff and causation of that apprehension. *Id.*

168. *Id.* at 42 (wrongful death includes any "wrongful act, neglect, or default that causes death" including "intentional as well as negligent torts").

169. *See, e.g.*, Chambers-Castanes v. King County, 666 P.2d 45 (Wash. 1983) (defendant's act must amount to extreme and outrageous conduct, with intent to cause the plaintiff to suffer severe emotional distress or with recklessness as to such consequences; plaintiff may be the object of defendant's actions or an immediate family member present at the time of the conduct). Conduct is actionable if it "is so outra-

negligent infliction of emotional distress;[170] and false arrest, or false imprisonment.[171] State tort law may also be used by battered women against third parties, such as the police[172] or landlords[173] for damages arising from their negligence in law enforcement or failure to provide reasonable security.

With potential awards for pain and suffering, general and specific damages and punitive damages in some states, tort relief is broader than that available through restraining orders. However, the damages must be significant and the defendant's assets and income must be recoverable to make filing such a claim worthwhile. Such limitations make civil law recovery for tortious misconduct an applicable remedy only in some battering relationships. Where possible, tort claims are an effective way to increase the cost of battering to the batterer. Publicity deriving from the claims may promote a social change agenda as well. If rich batterers are risk-averse, behavior might change as financial risk escalates. This behavior switch is unlikely, however, unless there are significant claims brought and won by battered women.

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geous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965), *cited in* KARP & KARP, *supra* note 135, at 43.

170. *See, e.g.*, Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976); Carney v. Knollwood Cemetery Assn., 514 N.E.2d 430 (Ohio Ct. App. 1986) (hearing that ancestors remains had been disinterred and thrown on refuse heap was sufficient to support action for negligent infliction of emotional distress). *See generally* KARP & KARP, *supra* note 135, at 49 (action where negligence causes mental disturbances as well as physical consequence or illness). Sometimes mental distress alone is enough to be actionable if it is serious or severe and if the distress is foreseeable. *Id.*

171. The tort of false imprisonment "protects the personal interest in freedom from restraint of movement" and requires that the restraint be total, though it may be brief.

172. KARP & KARP, *supra* note 135, at 46. State tort law is statutory, therefore governmental tort immunity accorded to government actors at common law has an exception where a "special relationship" exists between the plaintiff and the third party, the police. The failure of police to act with reasonable care to protect members of the general public has given rise to municipal liability. Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984), *cited in* GOVERNOR'S WORKING GROUP, *supra* note 143, at 9. *Cf.* Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280 (1990) (arguing that the existence of a restraining order is a form of state custody, one of the limited conditions under which the state assumes an affirmative duty to protect). The police are responsible by statute and judicial restraining order to protect the battered woman against her abuser. Where the police have notice of the danger and fail to act, they may be held partially liable for the damages that occur.

173. For example, a landlord who has been given notice of faulty outside locks on the door, in violation of a Housing Code, and who fails to remedy the problem despite her duty of reasonable care may be held contributorily liable for injury to a tenant who has a restraining order against her estranged husband and is harmed when he bashes through the door.

Probably the greatest advantage of a civil claim is that plaintiffs, in cooperation with their lawyers, are able to control the pace and content of their case. Yet, use of state tort law, like civil restraining orders, risks perpetuation of the notion of domestic violence as a "private harm" and fails to recognize the broader societal implications of blows sent by an abusive husband to his wife. In contrast, "a civil rights claim redresses an assault on a commonly shared ideal of equality."[174]

4. State Civil Rights Statutes

Some state statutes or constitutions may provide civil rights avenues for battered women. Many state codes include "hate crime" or malicious harassment provisions that recognize gender bias in their criminal laws.[175] Although some hate crime statutes are constitutionally invalid in light of the Supreme Court's decision in *R.A.V. v. St. Paul*,[176] and others that impose enhanced sentences for gender-motivated crimes are suspect,[177] carefully drafted malicious harassment laws[178] provide an important tool to fully address the bias element that motivates some crimes and the civil rights harm that results from them. Few states, however, have civil law remedies for acts of violence motivated by gender.

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174. VAWA Report 1991, *supra* note 8, at 49.

175. *See* CENTER FOR WOMEN POLICY STUDIES, VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUES (1991) [hereinafter BIAS MOTIVATED HATE CRIME]. Minnesota's intimidation/harassment law creates increased fines and imprisonment for fourth degree assaults motivated by bias, including "[w]hoever assaults another because of the victim's or another's actual or perceived . . . sex." MINN. STAT. § 606.2231 (1989), *cited in* BIAS MOTIVATED HATE CRIME, *supra*, at 16-17; *See also* MICH. COMP. LAWS ANN. § 750.147b (West Supp. 1989); WASH. REV. CODE § 9A.36.080 (1992) *as amended by* Ch. 127 of the laws of 1993. New Hampshire, Vermont and West Virginia also include gender-motivated crimes in their criminal enhancement provision for hate crimes. BIAS MOTIVATED HATE CRIME, *supra*, at 17-18.

176. — U.S. —, 112 S.Ct. 2538 (1992). The Supreme Court held the St. Paul ordinance facially unconstitutional for moving into viewpoint restrictions on speech. *Id.* at 2550. That ordinance created a misdemeanor for placing symbols on private property "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ." *Id.* at 2541.

177. The Wisconsin Supreme Court ruled its state sentencing enhancement provision unconstitutional in light of the *RAV* decision. Wisconsin v. Mitchell, 485 N.W.2d 807 (1992), *cert. granted*, — U.S. —, 113 S.Ct. 810 (1992). Hopefully, the U.S. Supreme Court will clarify the parameters of malicious harassment jurisprudence in this case.

178. Malicious harassment statutes may be constitutional if they proscribe fighting words directed at persons or groups that communicate ideas in a threatening manner and serve to protect individuals from the "fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 120 L.Ed.2d at 321.

This section describes three state statutes that provide civil law causes of action for gender-motivated violence. The California and Vermont civil statutes are based on a hate crime model. The Massachusetts provision is a more general civil rights statute based on existing federal civil rights law. All provide potential remedies for battered women.

California recognizes a right to be free from gender-motivated violence. "All persons . . . have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their . . . sex."[179] A civil cause of action enforces this right: "[w]hoever denies the right provided by § 51.7, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, . . . exemplary damages, . . . a civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right" and attorney fees.[180] Actual damages include general and special damages.[181] Complaints pursuant to this section can be brought by the state attorney general, district or city attorneys or any person aggrieved by the conduct.[182]

In Vermont, a "person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived . . . sex" is subject to enhanced criminal penalties[183] and civil liability. "Independent of any criminal prosecution or the result thereof, any person suffering damage, loss or injury as a result of conduct prohibited by section 1455 . . . of this title may bring an action for injunctive relief, compensatory and punitive damages, costs and reasonable attorneys fees, and other appropriate relief."[184] This statute's criminal enhancement provision may be unconstitutional in light of *RAV v. St. Paul*.[185]

These statutes provide rights and remedies for some battered women. No state action is required and plaintiffs need not demonstrate deprivation of any independent underlying right. Reported decisions do not reflect use of these statutes by battered women to bring claims for deprivation of their civil rights because of sex.

179. CAL. CIV. CODE § 51.7 (1992), *cited in* BIAS MOTIVATED HATE CRIME, *supra* note 175, at 15-16.

180. *Id.* at § 52(b).

181. *Id.* at § 52(h).

182. *Id.* at § 52(c).

183. 13 VT. STAT. ANN. § 1455 (1991), *cited in* BIAS MOTIVATED HATE CRIME, *supra* note 175, at 17.

184. *Id.* at § 1457, *cited in* BIAS MOTIVATED HATE CRIME, *supra* note 175, at 18.

185. *See supra* notes 176-178.

However, the language of the California statute, which declares that people should be free from "violence . . . committed . . . because of . . . sex," has broad applicability in practice. These statutes provide excellent tools that battered women may use to gain justice through the civil court system.

Massachusetts' primary civil rights statute available to battered women is the Massachusetts Civil Rights Act of 1979 [hereinafter Massachusetts Civil Rights Act].[186] Another, the Act Relative to Equal Rights Under Law, passed in 1989 [hereinafter Massachusetts Equal Rights Act],[187] providing substantive protection against discrimination in the areas of contracts and real property, is modelled on the federal civil rights provisions codified at 42 U.S.C. §§ 1981 and 1982 and provides a basic right to sex equality in these areas.

The Massachusetts Civil Rights Act[188] includes a civil cause of action to be brought by the state Attorney General[189] or an aggrieved person[190] for actions committed by a private person, whether or not acting under color of law.[191] The procedure for litigating the Massachusetts Civil Rights Act claims breaks down into two stages: 1) the securing of injunctive relief through the issuance of a temporary restraining order; and, 2) prosecution for violation of that order.[192] The consequences for violation of a civil

186. MASS. GEN. L. ch. 93, § 102 (1992).

187. In 1989, the Massachusetts Legislature passed this broad equal protection law which provides that "all persons within the commonwealth, *regardless of sex*, race, color, creed or national origin, shall have . . . *the same rights enjoyed by white male citizens*, to make and enforce contracts, to inherit, purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." *Id.* at § 102(a) (emphasis supplied).

188. The Massachusetts Civil Rights Act is made up of different parts. MASS. GEN. L. ch. 12, §§ 11H, 11L and MASS. GEN. L. ch. 265, § 37. This legislation was approved in 1979 by St. 1979, c. 801, §§ 1 and 2. Other civil rights statutes in Massachusetts, added subsequent to the initial civil rights laws, are typically known as "hate crime" legislation. They fail to include gender or sex in their classifications thereby precluding utilization for rights seekers complaining of gender bias.

189. *See* MASS. GEN. L. ch. 12, § 11H (1992).

190. *See id.* at § 11I.

191. The legislative intent in adopting General Laws ch. 12, §§ 11H and I, the Massachusetts Civil Rights Act, was to provide a state remedy for deprivation of civil rights, coextensive with federal remedies, which, by not requiring state action, incorporates private action within its clear language and its bounds. *See* Batchelder v. Allied Stores Corp., 473 N.E.2d 1128 (Mass. 1985). *See also* Bell v. Mazza, 474 N.E.2d 1111 (Mass. 1985) (plaintiff need not allege state action to plead cause of action under this section).

192. MASS. GEN. L. ch. 12, § 11J (1992). The party or the attorney general obtains a temporary injunction or restraining order to make the defendant refrain

rights restraining order are more severe and typically are pursued more seriously than violations of abuse prevention orders.[193] Prevailing parties are entitled to receive reasonable costs and attorneys fees, including student lawyer fees,[194] under the Massachusetts Civil Rights Act.[195]

The Massachusetts Civil Rights Act requires proof of interference, or attempts at interference, "by threats, intimidation or coercion, with the exercise or enjoyment by any person or persons" of rights secured by federal or Commonwealth law[196] and its terms are to be construed liberally.[197] Thus, there are three elements of the plaintiff's prima facie case: 1) identification of a right or rights secured by federal or Commonwealth law; 2) the exercise or enjoyment of which has been, or has been attempted to be, interfered with; 3) by defendant's threats, intimidation or coercion.

Specific intent to deprive the individual of her rights is not required for a claim to prevail pursuant to this section.[198] There is

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from certain conduct or activities. Violation of the order is a criminal offense and language to that effect must be contained in the served order. The statute provides law enforcement officers with the authority to arrest the defendant upon probable cause to believe that the defendant has violated the order.

193. Telephone interview with Judy Beals, Public Protection Bureau, Massachusetts Attorney General's Office, Boston (May 1, 1991). The injunctive relief element of the civil rights action duplicates the relief available pursuant to the abuse prevention statute at MASS. GEN. L. ch. 209A and effects the same purpose to protect women from immediate danger. The statutorily required language for the civil restraining order is identical to other abuse prevention orders and requires the same notice to the defendant and law enforcement officers. MASS. GEN. L. ch. 209A (1992). The immediate relief available from stage one of the Mass. Civil Rights Act fundamentally parallels that of any temporary restraining order obtained pursuant to abuse prevention actions. The consequences for violation are much more severe. Violations of civil rights restraining orders are prosecuted in different courts and are taken more seriously — violators go to jail.

Obtaining equitable relief for violation of the civil rights statute is easier than obtaining relief pursuant to a standard TRO which establishes a criminal violation. The Massachusetts Civil Rights Act requires a preponderance of the evidence, not reasonable doubt, to prove violation of an order. *See* Commonwealth v. Guilfoyle, 521 N.E.2d 984 (Mass. 1988). The defendant's violation "shall be punishable" by a maximum fine of five thousand dollars and/or by imprisonment for not more than two and one-half years. MASS. GEN. L. ch. 12, § 11J (1992). If bodily injury results from the violation, "the maximum fine jumps to ten thousand dollars and/or imprisonment for up to ten years. *Id.*

194. *See* Champagne v. Commissioner of Correction, 480 N.E.2d 609 (Mass. 1985) (the value of law student services may be compensable, since fee awards are authorized by statute, provided the students were supervised by an attorney).

195. MASS. GEN. L. ch. 12, § 11I (1992). This provision parallels the cost and fees provision for prevailing parties in federal civil rights actions pursuant to 42 U.S.C. § 1988. For application in Massachusetts, see, e.g., Draper v. Greenfield, 425 N.E.2d 333 (1981), *cert. denied*, 456 U.S. 947 (1982).

196. *See* MASS. GEN. L. ch. 12, § 11H and I (by reference to H) (1992).

197. *Batchelder*, 473 N.E.2d 1128.

198. *See* Elwood v. Pina, 815 F.2d 173 (1st Cir. 1987) (public employees need not

a possibility that negligence, under some circumstances, could amount to coercion.[199] Thus, the characterization of the batterer's motivation is inapposite insofar as the court has "interpreted the statute not to require a showing of hostile, discriminatory animus."[200] An evidentiary showing of direct and circumstantial evidence of actual violations of secured rights by threats, intimidation or coercion is sufficient to state a claim.[201]

In many of the cases tried under this section, the required proof of interference by threat, intimidation or coercion proved difficult to establish.[202] For battered women, however, this particular hurdle does not appear to be similarly problematic. Where witnesses can support the occurrence of physically violent incidents or if the victim is able to document an injury resulting from such incidents, the existence of physical coercion will be hard to dispute. Further, evidence of patterns of battering and expert testimony on the battering cycle could demonstrate that physical abuse, threats and intimidation are cyclical but that coercion is always present in a battering relationship. Battering in a marital relationship also provides an opportunity for the extension of an economic coercion theory.[203] Some battered women will be able to establish, through evidence of injury, testimony about violence and threats and expert testimony on batterers' coercive and intimida-

show specific intent that their discharge arose from not supporting their employer's reelection campaign and from supporting his opponents).

199. *Cf.* Deas v. Dempsey, 530 N.E.2d 1239 (Mass. 1988) (declining to find coercion through negligence).

200. O'Connell v. Chasdi, 511 N.E.2d 349, 354 (Mass. 1987).

201. However, circumstantial evidence supporting an inference of sex discrimination and a discriminatory employment environment is admissible pursuant to this section, as it adds "color" to the employer's decision-making process and the influence behind the particular actions he took regarding the employee. *See* Conway v. Electro Switch Corp. 825 F.2d 593 (1st Cir. 1987), *certified question answered*, 523 N.E.2d 255 (Mass. 1988).

202. *See e.g.,* Bally v. Northeastern University, 532 N.E.2d 49, 51-53 (Mass. 1989) (no threats, intimidation or coercion in urinalysis for athletes, so no violation of the Act); Longval v. Commissioner of Correction, 535 N.E.2d 588, 593 (Mass. 1989) (no coercion within meaning of the statute).

203. Threats by a husband that he will "leave" his wife and children, "commit suicide," or "quit his job" to secure her obedience, or on the other extreme, the aggressive acts of a husband in forcing his wife to work against her will, which may amount to involuntary servitude, may constitute economic coercion actionable pursuant to the Massachusetts Civil Rights Act. Support for the economic coercion theory in the case law can be found in an employment case where a University professor alleged that the denial of her tenure was due to her political expression. The District Court held that the cancellation of future economic relationship was sufficient to constitute coercion within the meaning of "threats, intimidation and coercion" under this section. Karetnikova v. Trustees of Emerson College, 725 F. Supp. 73 (D. Mass. 1989).

tion techniques, that their rights were deprived by threat, intimidation and coercion.

The Massachusetts Civil Rights Act does not create independent substantive rights,[204] so battered women must identify separate rights secured by the federal or Commonwealth law that were deprived by battering. Many rights deprived through wife abuse would provide a basis for a Massachusetts Civil Rights Act claim.[205]

Some federal constitutional rights cannot be used to establish actionable private deprivations by threat, intimidation or coercion. First Amendment protection of speech and Fourteenth and Fifth Amendment rights of due process and equal protection are secured against state action only.[206] However, the Thirteenth Amendment prohibits involuntary servitude and does not require proof of state action.[207] Although this amendment was passed to eradicate slavery of African-Americans, battered women sometimes find themselves in relationships in which they have lost all freedom of movement and integrity of body and mind to the control and coercion of their husbands. Such a system of "private" involuntary servitude today has its cultural origins in "public" laws which treated women as the property of their husbands, allowed husbands to discipline their wives through violence and prevented women from participating in the democratic process. Deprivation of Thirteenth Amendment protection could be alleged as general support for a Massachusetts Civil Rights Act claim.

Rights inherent in national citizenship, such as interstate travel[208] or voting,[209] do not require proof of state action. Where the federal Constitution has been interpreted to require proof of state action, some state constitutions that include rights to due process and equal protection, may not require state action. The Massachusetts Declaration of Rights, article one, as amended by article 106 of the amendments, also may provide a basis for a Mas-

204. *Cf.* Mouradian v. General Electric Co., 503 N.E.2d 1318 (Mass. App. Ct. 1987), *rev. denied*, 507 N.E.2d 1056 (Mass. 1987) (when employee's only claim of age discrimination in employment discharge could have been enforced under statutory procedures, employee could not make a claim under MASS. GEN. L. ch. 12, § 11I).

205. The following section is a preliminary list of protected rights. They are not well developed, but are meant to provoke creative advocacy. Each fact situation will raise its own possibilities.

206. *See, e.g.*, United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 831 (1983).

207. *See* United States v. Kozminski, 487 U.S. 931, 942 (1988); Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

208. *Griffin*, 403 U.S. at 105.

209. *See, e.g.*, Means v. Wilson, 522 F.2d 833, 838-39 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

sachusetts Civil Rights Act claim. Pursuant to that declaration, all people have "the right of enjoying and defending their lives and liberties . . . seeking and obtaining safety and happiness," an equality which shall not be denied "under the law . . . because of sex."[210] Article one of the Massachusetts Declaration of Rights also "provides that all people have the right to be safe and secure and to use their property peacefully."[211]

Case law provides support for the utilization of this amendment where private acts deprive women of their safety. In *O'Connell v. Chasdi*,[212] the plaintiff alleged assault and battery, intentional infliction of emotional distress and violation of her civil rights pursuant to the Massachusetts Civil Rights Act, arising from a co-worker's series of sexual advances throughout a business trip.[213] The Supreme Judicial Court found that "[s]exual harassment by a person not acting under the color of law may violate secured rights within the meaning of the Massachusetts Civil Rights Act . . . Sexual harassment accomplished by threats, intimidation, or coercion constitutes precisely the kind of conduct proscribed by the act, and is similarly directed toward a class explicitly protected by article 1" of the Massachusetts Declaration of Rights, including its Equal Rights Amendment.[214] Thus, acts of violence by a man against a woman in the domestic context may also qualify as coercion on the basis of sex.

Federal and state statutes, as well as recognized common law rights, may serve as the underlying deprivations required to state a claim pursuant to the Massachusetts Civil Rights Act. For instance, women are protected from discrimination in contract and property pursuant to the Massachusetts Equal Rights Act[215] and federal fair housing laws. Deprivation of these rights could be shown in a context where a battered woman is kept out of her house as punishment and to humiliate her. State tort law commonly prohibits intentional infliction of emotional distress and wrongful death. In addition, state criminal laws against assault and battery, and in the extreme, murder or manslaughter, prohibit

210. MASS. DEC. OF RTS., art. 1.

211. *Id.*

212. 511 N.E.2d 349.

213. The plaintiff complained of repeated requests to share a hotel room, physical touching of her (including stroking her thighs while the plaintiff lay ill in her hotel room) and unconsented entry to her room while she slept. Her denial of his advances were met by comments that she was "rigid and Catholic," "very unsophisticated" and that she was inappropriate for the job she was currently holding. *Id.* at 350.

214. *Id.* at 353. *But see id.* at 354-56 (Lynch, J. dissenting).

215. MASS. GEN. L. ch. 93, § 102(a) (1992).

interferences with the physical sanctity of a person. Other crimes, such as kidnapping, may be applicable in some situations where women are trapped in the home or prevented by force from leaving, if even for relatively short periods of time.

State civil law remedies for deprivation of civil rights motivated by gender are valuable tools for battered women. In some instances, litigants may choose state court mechanisms to enforce their federal and state civil rights. Some state constitutions include rights not covered by the U.S. Constitution, such as victim's rights and rights to individual dignity.[216] Furthermore, some state courts enforce a broader notion of rights than the federal judiciary.[217] Yet, a federal civil rights remedy is still needed. Civil rights options are not available in all states. And in some, the lack of enforcement of criminal laws against domestic violence and gender bias in the courts may dissuade battered women from seeking justice altogether.[218]

E. Civil Rights Remedies — Appropriate and Helpful

Civil rights law provides an ideal legal mechanism through which some battered women can generate state intervention in, and recovery for, violations of their civil rights by gender-motivated violence. Where other social and economic support mechanisms fail to provide alternatives to violent marriages, judicial accountability for batterers is particularly important. Civil rights laws may provide this accountability, as well as expand the range of remedies tailored to litigants' needs and the needs of the battered women's movement.

Civil rights remedies, like tort and restraining order remedies, increase the cost of abuse to the batterer. Unlike restraining orders, which potentially promote intervention during marriage, civil rights lawsuits will be filed after separation of the parties. As

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216. *See* Laura S. Harper, *Battered Women Suing Police For Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393 (1990).

217. *See* John Kincaid, *State Court Protections of Individual Rights Under State Constitutions*, 61 J. ST. GOV'T 163, 164 (1988), *cited in* Harper, *supra* note 216, at 1425 ("Since 1970, state high courts have issued more than 100 rulings in which they have either granted broader rights protections under state constitutions than the U.S. Supreme Court has granted under the U.S. Constitution, or based their rights protections decisions entirely on state constitutional grounds.").

218. A critical aspect of the philosophy behind Congressional enactment of early federal civil rights laws to provide a remedy in federal courts was that "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." Monroe v. Pape, 365 U.S. 167, 180 (1961) (regarding 42 U.S.C. § 1983 claims).

such, civil rights lawsuits do not provide a mechanism for increasing a woman's safety within the marriage, nor do they necessarily work to make an abusive husband stop his violence. Instead, they provide an opportunity for a survivor of abuse to demand she be compensated fully for the damages incurred during, and the ramifications of the violent attacks. Successful litigation and publicity may change societal norms of behavior by demonstrating that the violent deprivation of battered women's civil rights is an attack on all and that violators of women's integrity will be held accountable.

The distinct advantage to civil rights causes of actions, like criminal prosecutions, is that violations constitute attacks on socially held norms of human decency, not individual or "private" harms. Civil rights actions against abusers make explicit the linkage between the violation of a single woman's bodily and spiritual integrity and the violation of all women's integrity and sense of self-worth. By drawing the context for power and control into the definition of battering itself, and by challenging the social, economic and legal context in which individual battering relationships are situated, civil rights claims constitute a direct confrontation of gender dominance.

Creation of federal civil rights causes of action for battered women is appropriate. Existing federal civil rights laws were passed to provide judicial mechanisms to intervene and stop pervasive and systematic private discrimination on the basis of race. The history of slavery constituted sufficient legal support of segregation and discrimination to make legal remedial provisions necessary. Likewise, discrimination against women and the tolerance of wife abuse throughout American history is tied to the law and the State's action of supporting male violence. Enactment of effective civil rights legislation is necessary to promote women's equality and freedom from violence and to assist in the elevation of women's agency over victimization.

III. Existing Federal Civil Rights Remedies Fail to Protect the Rights of Battered Women

Existing federal statutes fail to provide battered women with a legal remedy for the deprivation of their civil rights.[219] Some

219. "While this society has announced, and upheld, a national commitment against violent discrimination for 120 years, that commitment has never adequately protected victims of gender-motivated violence. It is the fundamental purpose of title III of the Violence Against Women Act to correct that, on balance, providing these victims with an effective antidiscrimination remedy for violently expressed prejudice." VAWA Report 1991, *supra* note 8, at 42.

provide legal avenues for women who suffer discrimination on the basis of sex in isolated contexts, such as in employment decisions or police protection, but no existing federal civil rights cause of action allows women to bring claims against their abusers. The following sections canvas the existing federal civil rights statutes to demonstrate their value and limitations as applied to battered women.

A. 42 U.S.C. §§ 1981 and 1982

The civil rights statutes at 42 U.S.C. §§ 1981 and 1982 prohibit private acts of race discrimination in making and enforcing contracts[220] and owning and selling property.[221] These provisions were enacted by Congress after ratification of the Thirteenth Amendment[222] in response to pervasive racial discrimination remaining after the abolition of slavery.[223] Private acts of race discrimination, as well as government conduct in deprivation of civil rights on the basis of race, are actionable pursuant to 42 U.S.C. §§ 1981[224] and 1982.[225] Because of their origin and legislative history, these statutes only afford a legal remedy for race discrimination,[226] not gender discrimination.[227] Therefore, battered women

220. The Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, provides a guarantee to "all persons . . . the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." With the Civil Rights Act of 1991, § 1981 protections extend to the performance and modification of contracts.

221. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1992).

222. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982).

223. For a discussion of the history and passage of the Civil Rights Act of 1886, see Case Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus From Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 826-829 (1987) [hereinafter *Beyond Black and White*].

224. *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (congressional source of § 1981 and its constitutional authority derive in part from the Thirteenth Amendment; a § 1981 claim thus may reach purely private acts of discrimination without a requirement of state action). The *Runyon* holding applying § 1981 to private acts of discrimination was upheld unanimously in the Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

225. *See Jones*, 392 U.S. 409. In *Jones*, the Court held that § 1982, derived from the 1886 Civil Rights Act, bars *"all* racial discrimination, private as well as public, in the sale or rental of property and that the statute, thus construed, a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Id.* at 413 (emphasis in original).

226. The Supreme Court has included discrimination on the basis of ancestry or ethnic characteristics in the definition of "racial" discrimination forbidden by § 1982. For a critical assessment of the definition of "race," see *Beyond Black and White*, *supra* note 223.

may not seek relief for gender-motivated deprivations of civil rights pursuant to these statutes.

Nor should battered women seek to replicate the requirements necessary to obtain recovery afforded by these statutes. Race discrimination claims arising under §§ 1981 and 1982 require proof of intent to discriminate,[228] a controversial standard.[229] The intent standard should not be re-created in civil rights claims brought by battered women.[230] The intentionality requirement largely misses the subtle, pervasive and devastating forms of discrimination against women and minorities in contemporary society. Indeed, the intent standard has the practical effect of perpetuating discriminatory behavior[231] and should not be included in new legislation seeking to stem the tide of gender-motivated civil rights deprivations.

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227. The Supreme Court examined the legislative history of § 1981's "white citizens," and held that this section defines the nature of the rights protected, and thereby affords a remedy to white employees who are victims of racially discriminatory treatment in private employment. McDonald v. Santa Fe Transportation, 427 U.S. 273, 291-93 (1976). In so doing, the Court noted that the amendment incorporating this clause was adopted because "it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors." *Id.* at 293 (citations omitted). Executive Orders, set forth in the spirit of § 1982's prohibition against racial discrimination in the exercise of property rights, have been amended to include a prohibition against sex discrimination in the sale, leasing and financing of property. *See* Exec. Order No. 11,063, 27 Fed. Reg. 11,527, *as amended by* Exec. Order No. 12,259 1980, 46 Fed. Reg. 1,253. The Executive Order, originally written to protect racial minorities, was amended in 1980 to include sex discrimination within its provisions. No such amendment has been made to the primary statutes, §§ 1981 and 1982.

228. *General Building Contractors*, 458 U.S. at 391.

229. *See* Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 DUKE L.J. 1267.

230. The proposed federal statute that would provide for such civil rights claims arises a century after the Fourteenth Amendment and, as a consequence, should not be hampered by its judicial construction. Further, recognition of the subtlety and disguise of racial discrimination in modern society has led many commentators to argue for another standard for civil rights claims based on race discrimination and abandonment of the requirement to prove intent. *See* Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (injury of racial inequality exists irrespective of motive, and equal protection scrutiny should be extended to all situations where government action is race-dependent, even where it is unconscious rather than purposeful); *see also* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial And Evasion*, 40 AM. U.L. REV. 1307, 1323 n.73 (1991). Congress already has recognized the subtlety of race and sex discrimination in its Title VII legislation, and the Supreme Court followed suit in upholding disparate impact claims arising from systems of discrimination and not simple discriminatory wrongs. *See, e.g.*, Connecticut v. Teal, 475 U.S. 440, 447 n.8 (1982), *cited in* Lively & Plass, *supra*, at 1323 n.73.

231. *Cf.* Lively & Plass, *supra* note 230, at 1323 (the standard devitalizes traditional equal protection and invalidates remediation of racial discrimination).

Instead, the key principle and spirit embodied in §§ 1981 and 1982 should be applied to the situation of violence against women: remedial action and intervention in private relations sometimes is necessary to correct a history of discrimination. After an era of state action which perpetuated physical abuse of women, legislation is necessary to correct dangerous social, economic and legal inequalities.

B. 42 U.S.C. § 1983

Enacted in 1871,[232] 42 U.S.C. § 1983 is broader in scope than §§ 1981 and 1982. It provides a private civil rights cause of action for individuals deprived, "under color of" law, of "any rights, privileges, or immunities secured by the Constitution and laws." To sustain a claim pursuant to § 1983, a plaintiff must establish that: 1) the conduct complained of was committed by a person acting under color of law;[233] and, 2) this conduct deprived the complainant of a constitutional right[234] or a right under other law. This remedy is available to all people, including women and racial minorities, whose constitutional rights are violated.

The central limitation of the § 1983 remedy for battered women is that only those acting "under color of" law can be held accountable for the deprivation caused to the victim. Pursuant to § 1983, an individual woman cannot sue her husband or spouse for beating her unless this action can be construed as "under color of" law. Some states, however, have broader civil rights statutes modeled after § 1983 which provide a parallel cause of action but do not require state action.[235] A further limitation of § 1983 is that it is only a procedural mechanism to protect independent, underlying rights. Therefore, where the underlying rights are secured by

232. Section 1983 was originally Section 1 of the Ku Klux Klan Act of 1871 and was enacted, in part, to address some state officials' inability or unwillingness to enforce ex-slaves' rights under state and federal law. *See* Monroe v. Pape, 365 U.S. 167.

233. The phrase "under color of" law was defined in United States v. Classic, 313 U.S. 299, 326 (1941), in the context of 18 U.S.C. § 242, as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *See also* Screws v. United States, 325 U.S. 91, 111 (1945) ("acts of police officers in the ambit of their personal pursuits are plainly excluded"); Williams v. United States, 341 U.S. 97 (1951); Monroe v. Pape, 365 U.S. 167.

234. *See* Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327, 330-31 (1986). For deprivation of constitutional rights in the context of a battered woman's claim, *see* Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1424 (9th Cir. 1988), *amended and superseded*, 901 F.2d 696 (9th Cir. 1990).

235. *See, e.g.*, Massachusetts Civil Rights Act, MASS. GEN. L. ch. 12, §§ 11H, 11I, and MASS. GEN. L. ch. 265, § 37 (1992).

the Fourteenth Amendment's Equal Protection Clause, proof of intentional race or gender discrimination is required just as it would be for §§ 1981 and 1982 claims.[236]

When battered women are victims of third parties acting under color of law, 42 U.S.C. § 1983 may be useful. Battered women have invoked this section against municipalities and police departments[237] for failure to protect their constitutional rights in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The recent Supreme Court holding in *DeShaney*,[238] that the department owed no affirmative duty to protect a victim of child abuse pursuant to the Due Process Clause of the Fourteenth Amendment, highlights the difficulty of bringing § 1983 claims to increase state intervention on behalf of battered women.[239] Battered women who have abuse prevention orders, as distinguished from the *DeShaney* situation, arguably are owed a special duty of care because the state has involved itself in the relations between husband and wife, and the police are directed to enforce the order.[240] However, § 1983 cannot be used by most battered women to gain justice for their husbands' abuse.

C. 42 U.S.C. § 1985(3)

Section 1985(3) of chapter 42 of the United States Code provides a cause of action against private individuals who conspire "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[241] This section was passed as part of the

236. *See, e.g.*, Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-54 (1977); Washington v. Davis, 426 U.S. 229 (1976) ("even if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose").

237. *See, e.g.*, *Balistreri*, 855 F.2d 1421 (original opinion); Hynson v. City of Chester, Legal Dep't., 864 F.2d 1026, 1027, 1030 (3d Cir. 1988) (citing Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988)); Dudosh v. City of Allentown, 665 F. Supp. 381 (E.D. Pa. 1987), *reh'g denied sub nom.*, Dudosh v. Warg, 668 F. Supp. 944 (E.D. Pa. 1987), *vacated & rem'd*, Dudosh v. City of Allentown, 853 F.2d 917 (3d Cir.), *cert. denied*, Dudosh v. Warg, 488 U.S. 942 (1988), *reh'g granted in part*, Dudosh v. City of Allentown, 722 F. Supp. 1233 (E.D. Pa. 1989); *Thurman*, 595 F. Supp. 1521.

238. 489 U.S. 189 (1989). *See supra* note 116 and accompanying text.

239. The Equal Protection Clause of the Fourteenth Amendment, not at issue in *DeShaney*, remains a viable avenue for women's challenges. For a detailed discussion of this and other equal protection claims, see Harper, *supra* note 216.

240. *See* Borgmann, *supra* note 172.

241. The "equal protection of the laws" clause was inserted to distinguish the legislation from a criminal version of the bill which, it was feared, would be unconstitutionally broad. The criminal statute would have punished "any [conspiratorial] act in violation of the rights, privileges, or immunities of another person, which . . .

Ku Klux Klan Act of 1871 and makes private harms actionable where "some racial, or perhaps otherwise class-based invidiously discriminatory animus [lay] behind the conspirators' action"[242] and the conspiracy aimed at depriving underlying rights protected against private encroachment.[243]

In *Bray v. Alexandria Women's Health Clinic*,[244] the U.S. Supreme Court narrowed the application of this statute by holding that interference with the claimant's underlying right must be a conscious, intentional objective of the enterprise, and that the conspirators must "act at least, in part, for the purpose of producing" deprivation of it.[245] By finding that abortion protestors did not infringe upon or intend to infringe upon the right of interstate travel, and that the right to abortion is not protected against private infringement, the U.S. Supreme Court largely eradicated this provision because virtually every conspiracy could articulate a purpose that would exclude application of § 1985(3).

Further, the majority of the Supreme Court has not established that gender-based animus is covered by § 1985(3),[246] although gender may be recognized as a protected category. In *United Board of Carpenters & Joiners v. Scott*,[247] the Supreme Court stated that "it is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause."[248]

Many lower courts consider "gender" to be a class covered by

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would . . . constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury. . . ." CONG. GLOBE, 42nd Cong., 1st Sess., App. 68 (1871), *cited in* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88, 88 n.3 (1985) [hereinafter *Limiting Strategy Gone Awry*].

242. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) (because the statute requires demonstration of intent to deprive a person of "equal protection" of the laws, "there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirator's action."). The Court in *Griffin* applied an intent analysis to these claims which resembles that applied to claims pursuant to the Equal Protection Clause of the Fourteenth Amendment.

243. *See* United Bhd. of Carpenters v. Scott, 463 U.S. 825, 831-33 (1983).

244. —U.S.—, 113 S.Ct. 753, 61 U.S.L.W. 4080 (1993).

245. 61 U.S.L.W. at 4083.

246. 61 U.S.L.W. at 4081. *But see* Great Am. Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366 (1979), where Justice White indicated in his dissent that "sex discrimination may be sufficiently invidious to come within the prohibition of Section 1985(3)." 44 U.S. at 389 n.6 (White, J., dissenting).

247. 463 U.S. 825 (1983) (holding that a conspiracy against workers who refused to join a union was not covered by § 1985(3) because Congress did not intend to reach conspiracies motivated by bias towards others on account of their economic views, status or activities).

248. *Id.* at 836.

§ 1983(5).[249] In *Bray*, without recognizing that gender is reached by § 1985(3), the Supreme Court narrowed the potential future application of § 1985(3) claims based on gender animus. The Court rejected the argument that opposition to abortion is a purpose focused on women by reason of their sex,[250] despite the fact that the protesters in that case targeted women "because of their capacity to become pregnant and to have an abortion."[251]

In addition to the difficulties of proving intent to deprive one of specific underlying rights, and gaining recognition of § 1985(3) coverage of gender animus, the plaintiff must demonstrate that the private defendant acted in conspiracy with another[252] — not the common experience of women abused by their domestic partners. It is unlikely, after *Bray*, that many battered women could use the § 1985(3) cause of action to challenge private conspiracies with gender-based animus to deprive them of substantive rights that are protected against private deprivation. The original spirit of § 1985(3), that Congress constitutionally can remedy some private acts of discrimination on the basis of race and other class designations, should be extended in support of new federal civil rights legislation designed to end discrimination and violence against women.[253]

D. Title VII — 42 U.S.C. § 2000e et seq.

Title VII provides a mechanism to eradicate discrimination

249. *See, e.g.*, Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d. Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979), *on remand* 22 Fair Empl. Prac. Cas. (BNA) 440 (W.D. Pa 1980); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (conspiracies discriminating against persons on the basis of sex covered by § 1985(3)); Stathos v. Bowen, 728 F.2d 15 (1st Cir. 1984) (discrimination on the basis of sex is sufficient to bring a § 1985(3) action), *cert. denied*, 459 U.S. 907 (1982); Padway v. Palches, 665 F.2d 965, 969 (9th Cir. 1982) (§ 1985(3) can be used against conspiracies against classes defined by sex).

250. *Bray*, 61 U.S.L.W. at 4082.

251. *Id.* at 4096 (Stevens, J., dissenting).

252. By the explicit terms of the statute, § 1985(3) claims may be brought against conspiracies, "two or more persons," and not individual defendants. Plaintiffs must show injury resulting from an overt act resulting from a conspiratorial agreement, "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." Hampton v. Harahan, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 447 U.S. 754 (1980), *cited in* 2 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY REPORTER 4 (1991)[hereinafter CIVIL RIGHTS REPORTER]. Although proof of a conspiracy is exceedingly difficult, circumstantial evidence can be relied upon to establish the existence of an agreement, a "meeting of the minds," to achieve the conspiracy's objectives. *Id.*

253. *See infra* § IV.

against women and minorities in employment.[254] It prohibits private employment decisions, and their consequences, that discriminate against a person or class of persons "because of . . . sex."[255] Thus, Title VII provides a valuable tool that reaches private actors in their acts of sex discrimination. However, the statutory application of Title VII to employment prohibits most battered women from using it to remedy abusive acts of their domestic partners. Because of the similarities of the contexts, however, Title VII has been designated as the model for the VAWA's proposed cause of action for women to be free from gender-motivated violence.[256]

Title VII's statutory prohibition against employment discrimination because of sex has evolved into discrete jurisprudential theories.[257] "Disparate treatment" addresses employment decisions that, on their face, demonstrate denial of employment opportunities on the basis of gender. "Disparate impact" deals with situations where facially neutral decisions or standards adversely effect women, members of a protected group. Finally, "hostile environment" and sexual harassment claims have evolved in the Title VII jurisprudence.[258]

A meaningful expansion of the original Title VII remedies[259] renders Title VII an effective tool for women seeking broad redress and elimination of sex discrimination in employment. Punitive and compensatory damages are available for Title VII plaintiffs who can prove claims for unlawful, intentionally discriminatory practices.[260] These provisions are accompanied by others

254. Pub. L. No. 88-352, § 701 et seq., 78 Stat. 253 (1964) was codified, as amended, at 42 U.S.C. § 2000e (1992).

255. Title VII, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex, or national origin.

256. VAWA Report 1991, *supra* note 8, at 50.

257. *See* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis On Motive Rather Than Intent*, 60 S. CAL. L. REV. 734, 734 (1987).

258. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

259. The relief afforded victims of private employment discrimination under Title VII was primarily remedial prior to the recent amendments to Title VII in the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-5(g) (1992).

260. Punitive damages are awarded to complaining parties who can demonstrate that the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of

which impose a severe and controversial cap on damages, generous attorneys fees and allowance for jury trials.[261] Title VII relief is designed to "remedy the harm done to the individual plaintiff, and also to deter future acts of discrimination by the defendant and other employers."[262] Similarly, VAWA relief should remedy the harms done to individuals and deter future acts of gender-motivated violence outside of employment.

E. Federal Hate Crime Statistics and Reporting Act

The federal Hate Crime Statistics and Reporting Act[263] provides for the acquisition and publication of data about crimes that manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity.[264] It explicitly does not create a cause of action or a right to bring an action for discrimination.[265] Despite the testimony of women's advocacy groups such as the National Organization of Women Legal Defense and Education Fund, major proponents of the federal Hate Crimes Statistics and Reporting Act chose not to lobby for inclusion of crimes against women in the provisions of the statute. They were concerned that crimes against women would overwhelm the other statistics, bury crimes against Blacks, Jews, homosexuals and other minorities into insignificance, and not serve women with the special attention rape, sexual assault and domestic violence need and deserve.[266] Under an expanded definition which includes crimes of gender bias, more than half of the population theoretically might qualify as victims of hate crimes although the crimes themselves would be charged under more specific laws.

The choice to exclude women, however, may also have been due to a perception that an individual animus truly underlies do-

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an aggrieved individual." 42 U.S.C.S. § 1981a(b)(1) (1993). Punitive and compensatory damages, however, are not available for those who succeed in disparate impact claims. *Id.* at § (a)(1).

261. Pursuant to the new act, a jury trial is now electable by any party if the complaining party seeks compensatory or punitive damages. *Id.* at § (c)(1).

262. Dale Carpenter, *Bumping the Status Quo: Actual Relief for Actual Victims Under Title VII*, 58 U. CHI. L. REV. 703, 703-04 (1991) (*citing* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

263. The Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, codified at 28 U.S.C. § 534 (1992). *See generally Bringing Hate Crimes Into Focus*, 26 HARV. C.R.-C.L. L. REV. 261 (1991).

264. *See* Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534 (1992).

265. *Id.* at § (b)(3).

266. Telephone interview with Steve Freeman, Anti-Defamation League of B'nai B'rith in New York (Apr. 1991). *See* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY, Appendix A (Supp. 1990) (excluding sex or gender-motivated intimidation from their model legislation) [hereinafter ADL RESPONSE].

mestic violence and that sexual assaults do not reflect gender-bias sufficient to constitute hate crime. The VAWA civil rights proposal, in contrast, declares gender-motivated crimes of violence to be bias crimes and provides a federal civil rights remedy for women to bring claims.[267]

IV. Proposed Federal Legislation: Title III of the Violence Against Women Act

No federal legislation has been enacted specifically to address deprivation of civil rights through gender-motivated violence outside of employment. The 101st[268] and 102nd Congresses attempted to do just that through the Violence Against Women Act (VAWA). The 102nd Congress introduced S. 15[269] (1991 Senate VAWA) and H.R. 1502[270] (1991 House VAWA), but failed to enact the law. The 103rd Congress introduced S. 11 on January 26, 1993 (Senate VAWA)[271] and H.R. 1133 on February 24, 1993 (House VAWA).[272] Title III may be cited as the "Civil Rights Remedies for Gender-Motivated Violence Act."[273] Although Congress intended to protect women from violence on the streets and in the home by proposing the VAWA, changes should be made before it is passed by the 103rd Congress to reflect the needs of battered women and to provide a meaningful civil rights cause of action to address violence against women.

A. VAWA: A Federal Substantive Right to be Free From Gender-Motivated Crimes of Violence

Congress introduced the VAWA in recognition that what has been considered private criminal activity between individuals — such as rape or wife abuse — often, in fact, constitutes a pattern of civil rights abuses on the streets and in the homes of America. "[C]rimes motivated by the victim's gender constitute bias crimes

267. *See infra* § IV.

268. See Violence Against Women Act, S. 2754, 101st Cong., 2d Sess. (1990) [hereinafter 1990 Senate VAWA]; H.R. 5468, 101st Cong., 2d. Sess. (1990) [hereinafter 1990 House VAWA].

269. Violence Against Women Act of 1991, S. 15, 102nd Cong., 1st Sess. (1991) [hereinafter 1991 Senate VAWA].

270. Violence Against Women Act of 1991, H.R. 1502, 102nd Cong., 1st Sess. (1991) [hereinafter 1991 House VAWA]. On September 24, 1992, in the last month of the Congress, the House Subcommittee on Crime and Criminal Justice reported out the Subcommittee Amendment in the Nature of a Substitute to H.R. 1502, which failed to include the civil rights section because that committee did not have jurisdiction over it.

271. S. 11, 103rd Cong., 1st Sess. (1993) [Senate VAWA].

272. H.R. 1133, 103rd Cong., 1st Sess. (1993) [House VAWA].

273. Senate VAWA, *supra* note 271, at § 301.

in violation of the victim's right to be free from discrimination on the basis of gender."[274] State and federal criminal laws fail to protect adequately "against the bias element of gender crimes, which separates these crimes from acts of random violence" and fail to "provide victims the opportunity to vindicate their interests."[275] New legislation is necessary since civil rights remedies exist for violent discrimination because of race, religion or political beliefs[276] and for gender-motivated "crimes committed in the workplace, but not for gender crimes committed on the street or in the home."[277] "It is the fundamental purpose of title III of the Violence Against Women Act to correct that imbalance by providing these victims with an effective antidiscrimination remedy for violently expressed prejudice."[278]

Congress' power to enact Title III of the VAWA arises from many sources including the Commerce Clause because the legislation addresses the national costs of violence against women, and the Fourteenth Amendment because it promotes the equality of women.[279] In addition, Title III protects the rights and immunities of national citizenship and promotes the Thirteenth Amendment's moral imperatives of freedom from involuntary servitude.[280] Passage of legislation that creates a federal civil rights remedy may help eradicate gender-motivated violence. Such a goal, however, may not be achieved by the existing legislative proposal.

The analysis in this section depends to a large extent on the experience and scholarship of rape prosecution and Title VII hostile environment sexual harassment claims. The comparison is helpful because language of the VAWA approximates Title VII and because violence against women at work, on the streets and in the home share many characteristics. Lessons should be learned from others who have litigated similar claims.

B. The VAWA Proposed Standards

1. The Federal Right and Cause of Action

The VAWA bills would create a new substantive federal right

274. *Id.* at § 302(a)(1); House VAWA, *supra* note 272, at § 301(a)(1).

275. *See*, Senate VAWA, *supra* note 271, at § 302(a)(3); House VAWA, *supra* note 272, at § 301(a)(3).

276. VAWA Report 1991, *supra* note 8, at 42.

277. Senate VAWA, *supra* note 271, at § 302(a)(2); House VAWA, *supra* note 272, at § 301(a)(2).

278. VAWA Report 1991, *supra* note 8, at 42.

279. Prepared testimony of Professors Cass Sunstein and Burt Neuborne, submitted to the Committee on the Judiciary, United States Senate, Apr. 9, 1991 (on file with the author).

280. *Id.*

to be free from crimes of violence motivated by gender and provide a federal cause of action for plaintiffs who are victims of such crimes. Title III, § 302(b) of the Senate VAWA provides, "All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d))."[281] The distinctive aspect of this right is that by proving a gender-motivated crime of violence was committed against her, a plaintiff establishes that she has been deprived of her civil rights. No further demonstration of a separate deprivation of rights, privileges or immunities is necessary. The proposed legislation expands claimants' actionable rights by creating one.

The Senate VAWA establishes a cause of action to enforce the newly recognized federal right at § 302(c):

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.[282]

The language of § 302(c) clearly provides a cause of action for a plaintiff who can prove that a "crime of violence" was committed and that it was "motivated by gender." The VAWA does not require a prior criminal complaint, prosecution or conviction to establish the elements of a cause of action.[283] The Senate VAWA language suggests that a "crime of violence motivated by gender" is not only a per se violation of the federal right recognized and actionable under this section, but the *only* type of deprivation actionable pursuant to this section. In contrast to prior versions of this section,[284] the 103rd Senate clearly indicates that plaintiffs

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281. Senate VAWA, *supra* note 271. The 1991 version of the Senate bill left open some questions about the need to prove underlying rights. Senate VAWA, *supra* note 271, at § 301(b) provides, "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)." House VAWA, *supra* note 272, at § 301(b) provides, "[A]ll individuals within the United States, and the Special Maritime and territorial jurisdiction of the United States, shall have the right to be free from crimes of violence motivated by the victim's gender."

282. Senate VAWA, *supra* note 271, at § 302(c).

283. *See id.* at § 302(e)(2); House VAWA, *supra* note 272, at § 301(d)(2).

284. 1991 Senate VAWA, *supra* note 269, at § 301(c) provided:

> 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 in-

need not demonstrate an underlying, separate deprivation of rights, privileges or immunities[285] that occurred as a consequence of the crime.

The cause of action section of the House VAWA articulates this more clearly but substantially creates the same cause of action as the Senate VAWA. The House VAWA reads: "Any person . . . who deprives an individual of the right secured by subsection (b) shall be liable to the individual injured. . . ."[286] The House VAWA explicitly enumerates the scope of the VAWA civil rights remedy as congruous with the newly recognized VAWA federal right set forth in subsection (b).[287] Properly construed, the House and Senate VAWA bills establish the same right and cause of action with slightly different language.

The Title III remedy is available to men as well as women whose civil rights are violated on the basis of gender. The language of the statute is gender-neutral. In civil rights cases brought pursuant to 42 U.S.C. § 1981, whites have sought relief from deprivation of their civil rights as a result of association with blacks.[288] This relief is in keeping with the racial character of the rights being protected,[289] and would suggest that men who support the rights of women and are targeted as the victim of a crime of violence because of that support would have an actionable claim under Title III if they plead the civil rights deprivation with particularity.[290]

The relief available for successful Title III claimants includes "compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court may deem appropriate."[291]

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jured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, or such other relief as the court may deem appropriate.

285. *Compare id. with* House VAWA, *supra* note 272, at § 301(c).

286. House VAWA, *supra* note 272, at § 301(c).

287. *Id.*

288. *See* Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989) (§ 1981 claim allowed on the basis of white attorney's allegations of discrimination due to his association with blacks); Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988) (white employee may maintain § 1981 action on the basis of allegations that he was terminated for assisting a black employee).

289. *See Beyond Black and White*, *supra* note 223, at 824 n.11 (citing, *inter alia*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 287 (§ 1981 covers white plaintiffs because of the "racial character of the rights being protected")).

290. *But cf.* Albert v. Carovano, 851 F.2d 561, 572-573 (2d Cir. 1988) (rejecting a § 1981 cause of action the for retaliation for support of political causes favored by minorities).

291. Senate VAWA, *supra* note 271, at § 302(c). *See also* House VAWA, *supra* note 272, at § 301(c).

The Senate VAWA provides for attorneys fees,[292] pursuant to 42 U.S.C. § 1988,[293] to promote use of the Title III remedy. The House appears to have dropped the attorneys fees provision of the VAWA, which seriously impairs the ability of potential litigants to bring claims.[294] The House should amend the VAWA to provide for payment of attorneys fees in order to encourage enforcement of the VAWA right and to insure that Title III claimants have the same protection as claimants who file under other federal civil rights laws. The VAWA does not limit damages for claimants who demonstrate injury arising from crimes of violence motivated by gender.[295]

The special and general damages and civil rights harms arising from gender-motivated violence will reflect the context in which the claims arise. Compensation should include, *inter alia*: past and future medical and non-medical care, treatment and services; temporary and permanent disability and disfigurement, including psychological impairment; damaged property; past and future lost wages and earning capacity; past and future pain and suffering and emotional distress. Claimants could seek general damages for the loss of enjoyment of life, including the stigma of victimization and the shattering of identity, confidence and image. Wife abuse also threatens confidence in intimate relations and trust of others altogether. Some battered women may suffer from post traumatic stress disorder[296] or other psychological injuries. A survivor's ability to engage in work place and community activities may be impeded by injuries, psychological trauma and fear of retaliation for assertions of independence.[297]

Although the terms of the House and Senate VAWA bills pro-

292. Senate VAWA, *supra* note 271, at § 303.

293. The Civil Rights Attorney's Fees Awards Act of 1976 is codified at 42 U.S.C. § 1988.

294. Past versions of the House VAWA included attorneys fees provisions. *See* 1991 House VAWA, *supra* note 270, at § 302.

295. In contrast, Title VII prevents damage awards in the event of a successful "same-decision" defense. *See supra* § IV.B.3.c.i. (Title VII disparate treatment, same-decision defense). *See also* Comment, *Reconstruction, Deconstruction, and Legislative Response: The 1989 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 533-34 (1990) [hereinafter *Reconstruction, Deconstruction*] (citing Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 318 (1982)). Further, the Civil Rights Act of 1991 at § 102(b)(3), drastically caps the damage award for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" — by restricting damages on the basis of the respondent's number of employees.

296. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 250 (3d ed. rev. 1987).

297. *See id.*

vide remedies for many crimes of violence against women, there is a risk that other provisions of the VAWA and its legislative history will restrict the scope of its application to paradigm cases unreflective of the reality of battered women. Such a result may do more harm than good. The language of the VAWA should be tailored to achieve the purpose of eradicating gender-motivated violence in the home as well as in the street and to avoid unnecessary judicial limitations. The judiciary should allow for broad recovery for battered women's civil rights deprivations. Limits to the civil rights remedy, as applied to domestic violence, should arise organically from the context of wife abuse itself.

Two aspects of the VAWA bill deserve particular attention and concern for their potentially limiting effects: the definition of the term "crime of violence" and the interpretation of "gender motivation." These features of the VAWA will require judicial interpretation. Although the terms may be construed broadly, they may work in tandem to provide access for only a subset of the individuals victimized by gender-motivated crime and may send the wrong message to women that their experience of civil rights deprivation is not meaningful or legally cognizable.

2. The Term "Crime of Violence"

a. Definition of "Crime of Violence": 18 U.S.C. § 16 and Its Interpretation

The statutory definition of "crime of violence" can be analyzed by reviewing the legislative history of Title III of the VAWA and by considering how the term has been judicially interpreted in other contexts.

The Senate VAWA defines a "crime of violence" by reference to the definition at 18 U.S.C. § 16.[298] This definition broadly describes offenses that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . *or* any other offense that is a felony and, by its nature, involves a substantial risk that physical force may be used in the course of commiting one offense,"[299] whether or not those acts

298. *See* Senate VAWA, *supra* note 271, at § 302(d)(2). This section provides:

> (2) the term 'crime of violence' means an act or series of acts that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not these acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States.

Id.

299. 18 U.S.C. § 16 (1991) defines "crimes of violence" as follows:

have resulted in actual charges or prosecution.[300]

The plain language of the Senate VAWA, defining crimes of violence as those which include, as an element, the "use, attempted use, or threatened use of physical force," should be construed to cover many types of violence battered women experience. The definition requires evaluation of state or federal statutes to determine whether the particular crime includes an element of force. Because the federal remedy is not limited to any particular crime of violence, the definition would be flexible, although nationally inconsistent, due to state criminal law variations. Crimes of violence are not always categorized as felonies, so misdemeanor crimes involving the use of force against the person also qualify as crimes of violence pursuant to the Senate VAWA. A plain reading of the definition promises relief for crimes commonly associated with domestic violence — assault and battery, rape, kidnapping and homicide.[301]

The House also defined "crime of violence" by reference to section 16 of title 18, U.S.C., but limited the civil cause of action pursuant to Title III to felonies.[302] This may jeopardize some women's use of the remedy, especially in the context of domestic violence, where prosecutors bring misdemeanor charges for most crimes.[303] However, where a lesser offense applies simply because of the relationship between the parties, the civil rights action would be available if the crime of violence would constitute a felony if it were between strangers.[304] This provision, necessary if a

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The term "crime of violence" means -

(a) an offense that has as an element of 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.

300. *See* Senate VAWA, *supra* note 271, at § 302(e)(2).

301. *See supra* § II(D)(1) (criminal remedies).

302. House VAWA, *supra* note 272, at § 301(e)(2)(A):

The term crime of violence means -

(A) a State or Federal offense that -

(i) is of a kind described in section 16 of title 18, United States Code; and

(ii) may be punished by a maximum term of imprisonment exceeding one year; or

(B) any action taken that would constitute such offense but for the relationship between the person who takes such action and the individual against whom such action is taken; whether or not such offense or such action results in criminal charges, prosecution, or conviction . . .

303. *See infra* notes 332-340 and accompanying text.

304. House VAWA, *supra* note 272, at § 301(e)(2)(B).

felony crime provision is included in Title III, addresses the gender bias inherent in some state laws.

Judicial interpretation of the term of art "crime of violence" is complicated, however, by the fact that it has been incorporated and developed in the context of criminal sentencing legislation and case law. The term "crime of violence" and its definition found at 18 U.S.C. § 16 were incorporated in the Career Offender Statute,[305] pursuant to which comprehensive sentencing guidelines and commentary on the "crime of violence" provision were promulgated.[306] The Sentencing Commission subsequently amended its guidelines[307] to eliminate any reference to 18 U.S.C. § 16 and redefined the term in a more inclusive fashion.[308] Thus, the current sentencing guidelines have no binding effect on the interpretation of the VAWA. However, courts may look to this case law in an effort to interpret "crime of violence." This examination demonstrates that a term's interpretation for one purpose may not serve another. Congress should elaborate on the contours of the term and provide more specific guidance to trial courts and potential battered women claimants.

The current United States Sentencing Guidelines permit increased sentences if, *inter alia*, the defendant is convicted of a crime of violence.[309] For purposes of the career offender statute, "crime of violence" is defined by U.S.S.G. § 4B1.2(1) as follows:

> any offense under federal or state law punishable by imprisonment for a term exceeding one year that — (i) has an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[310]

The original 18 U.S.C. § 16 "crime of violence" was interpreted in the career offender context to require demonstration of a crime which actually or potentially involved intentional use of force.[311] Yet, the latter prong of the current Sentencing Commission in-

305. Although the statute, at 28 U.S.C. § 994(h), did not include the definition explicitly, the legislative history confirms this definition was meant to apply throughout the comprehensive Crime Control Act of 1984, of which it was part. United States v. Parson, 955 F.2d 858, 864 (3rd Cir. 1992).

306. *See* United States v. Coble, 756 F. Supp. 470, 471 (E.D. Wash. 1991).

307. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL APPENDIX C 110-11 (Nov. 1991) (text of amendment 268, including revisions from the earlier version of U.S.S.G. § 4B1.2(1)), *cited in Parson*, 955 F.2d at 865. *See also* United States v. Wright, 968 F.2d 1167 (11th Cir. 1992).

308. *See Coble*, 756 F. Supp. at 471.

309. *See* U.S.S.G. § 4B1.2(1).

310. 18 U.S.C. App. § 4B1.2(1) (1992).

311. *Parson*, 955 F.2d at 860.

quiry, which deviates from 18 U.S.C. § 16, asks only for potential risk of physical injury; no specific intent would be required in some cases and reckless endangerment might qualify as a "crime of violence."[312] Pursuant to the VAWA definition as originally interpreted in the career offender context, battered women would still have to prove intent to use force in order to demonstrate commission of a "crime of violence."

The Sentencing Commission's definition of "crime of violence" also represents incorporation of aspects of a 1986 "violent felony" definition found in a sentence enhancement provision at 18 U.S.C. § 924(e)(2)(B).[313] "Violent felony"[314] has a meaning independent of "crimes of violence," however, and should not be applied in VAWA jurisprudence unless it is incorporated explicitly by Congress.

The sentencing guidelines require a determination of whether a defendant has committed past crimes of violence. The Sentencing Commission has suggested a three-tiered approach to proof. Although this suggested approach is not judicially binding,[315] it has been adopted by some circuits and should be considered for the model of proof it offers VAWA civil rights claimants. Clearly, sentencing proceedings do not recognize the same procedural protections accorded defendants during trial. This comparison suggests only that plaintiffs should be allowed alternative ways of setting forth a prima facie case. Defendants still should have all the protections of the judicial process including their right to rebut and challenge the plaintiff's prima facie case.

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312. As the Third Circuit noted in a plea to the Commission to change the guidelines, "crimes such as drunk driving and child neglect present a serious risk of physical harm to a victim and therefore qualify as predicate 'crimes of violence' for purposes of the career offender Guideline." *Id.* at 874. *Compare* 18 U.S.C. § 16 (1991), *supra* note 299.

313. *See id.* at 868-71.

314. *See, e.g.*, United States v. Mathis, 739 F. Supp. 15 (D.D.C. 1990). In *Mathis*, the D.C. court discussed the term violent felony as defined at § 924(e)(2)(B), and affirmed that it means

> any crime punishable by imprisonment for a term exceeding one year . . . that — (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. at 16. In deciding whether an offense is a "violent felony" pursuant to § 924(e)(1), a "court must examine the statute of the offense and determine whether it has 'as an element' the use of force; the court should not examine the actual conduct underlying the offense." *Id.* at 17 (citing United States v. Headspeth, 852 F.2d 753, 756 (4th Cir. 1988); United States v. Sherbondy, 865 F.2d 996, 1005-06 n.2 (9th Cir. 1988)).

315. United States v. Pinto, 875 F.2d 143, 144 (7th Cir. 1989).

First, the Sentencing Guidelines application note sets forth per se "crimes of violence": "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling."[316] The application note explicitly includes an attempt to commit such an offense as a "crime of violence."[317] In addition, the application note defines two other categories of offenses as included in the term of art, "crimes of violence."[318] The first of these definitionally includes an element of force. "[W]here . . . that offense has an element the use, attempted use, or threatened use, of physical force against the person of another,"[319] it is a crime of violence. The last prong differs from the 18 U.S.C. § 16 definition and allows courts to engage in a fact-based analysis of the actual offense to determine whether "the conduct set forth in the count of which the defendant was convicted included use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another."[320] The application note "reveals the Sentencing Commission's intent to establish three independent ways by which the government may prove that a defendant's past conviction was for a 'crime of violence.' "[321]

In practice, the guidelines have been interpreted to include many offenses as crimes of violence. Burglary of private residences has been held to be a "crime of violence" since burglary creates a substantial risk that physical force will be used.[322] Similarly, pointing a firearm at a person has been held to be a crime of violence in South Carolina because it is punishable by imprisonment of more than one year, constitutes a felony and poses a substantial risk that force will be used even if it was not actually used.[323] Threats in letters and over the telephone against the life of the President have been held to be crimes of violence,[324] as has

316. U.S.S.G., 18 U.S.C. App. § 4B1, Application Note 2 (1992), *quoted in Parson*, 955 F.2d at 871 (listing per se crimes of violence).

317. U.S.S.G., 18 U.S.C. App. § 4B1, Application Note 1 (1992).

318. *See Parson*, 955 F.2d at 871 (quoting Sentencing Guideline Application Note 2).

319. U.S.S.G., 18 U.S.C. App. § 4B1, Application Note 2 (1992).

320. *Id.*

321. *Parson*, 955 F.2d at 871 (citing United States v. John, 936 F.2d 764, 767 (3d Cir. 1991)).

322. *See, e.g.*, United States v. Flores, 875 F.2d 1110 (5th Cir. 1989); United States v. Davis, 881 F.2d 973 (11th Cir. 1989).

323. United States v. Thompson, 891 F.2d 507 (4th Cir. 1989), *reh'g and reh'g en banc denied*, (Jan. 30, 1990) *cert. denied*, 495 U.S. 922 (1990).

324. *See* United States v. McCaleb, 908 F.2d 176 (7th Cir. 1990) (violation of 18 U.S.C. § 871 is crime of violence); United States v. Poff, 723 F. Supp. 79 (N.D. Ind. 1989). In *Poff*, a woman was convicted of threatening the President in letters and

the mailing of a threatening letter despite the writer's imprisonment and contemporaneous inability to act on the threat.[325] Offenses categorized as assault and battery also should be included as crimes of violence pursuant to 18 U.S.C. § 16 and the VAWA.

Lesser use of force has been held to constitute a crime of violence for purposes of sentencing. Sandwiching a target of a pickpocket in a crowded public bus has been suggested, in dicta, to constitute "force."[326] The defendant used force where his role was "to bump up against the victim, i.e. to use 'physical force against the person of another' in order to distract her."[327] " 'Force' simply means 'power made operative against resistance; exertion.' "[328] This definition of force should not require a focus on the plaintiff's resistance to define a crime of violence. Instead, it is crucial that the violent behavior itself be the target of the law's prohibition and that a low threshold of force constitute a "crime of violence" for purposes of VAWA claims.

Despite the apparent broad interpretation of "crime of violence" in the Sentencing Guideline context, there is reason to be concerned that judicial construction of the "crimes of violence" element of the VAWA civil rights cause of action may serve to limit the types of crimes that will be actionable. Limitations may arise from the legislative history of the VAWA and gender bias in the courts as experienced by victims of rape who have brought forth similar claims and have faced significant hurdles in the demonstration of "force." In particular, the language of Title 18 resembles language in some state rape statutes that require proof of force beyond nonconsensual sex.[329]

The Senate Judiciary Committee anticipated the risk that VAWA limitations would arise as a result of misunderstandings of the pervasiveness and severity of domestic violence. It acknowledged the immensity of the domestic violence situation in its report to the full Senate to counter assumptions that domestic violence is just a "trivial squabble, a push or a shove."[330] This and other legislative history of the VAWA suggests that the Judiciary

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in telephone threats and was sentenced for "crimes of violence" because each of the pertinent crimes had as an element the "threatened use of physical force against person or property of another" within the meaning of 18 U.S.C. § 16(a).

325. United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990).

326. *See Mathis*, 739 F. Supp. at 17 (citing Hooks v. United States, 373 A.2d 909 (D.C. App. 1977)).

327. *Id.* at 18.

328. *Id.* (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 513 (1981)).

329. See Willis, *supra* note 57, at 2213.

330. VAWA Report 1990, *supra* note 9, at 38.

Committee intends a broad interpretation of the term "crime of violence," which would cover the majority of incidents of domestic violence.

> In fact, one-third of all such (domestic violence) incidents, if reported, 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. Far worse, family violence may account for a significant number of murders in this country; last year, one-third of all women murdered in America were murdered by present or former husbands or boyfriends.[331]

With this characterization, the Senate Judiciary Committee acknowledges that most wife abuse qualifies as crimes of violence actionable in the civil courts pursuant to the VAWA if it is motivated by gender. Contrasting statements indicate, however, that "[t]he cause of action provided under Title III is strictly limited to *violent felonies* 'motivated by gender.'"[332] And the House amended its cause of action to include only violent felony crimes or misdemeanor crimes where the same action between people in different relationship to one another would constitute a felony.[333]

If Title III of the VAWA were to allow civil rights claims only by victims of felonious crimes, much of the pattern domestic violence — assault and battery — that women face might not be covered by the VAWA.[334] Typically, domestic assaults are classified by prosecutors as misdemeanors.[335] The felony requirement would exacerbate a significant problem resulting from linking the existence of a federal civil right remedy to state and federal criminal law: individual federal civil rights will be consistent as to the federal crimes, but will vary depending upon state statutory elements and classifications of crime and discretionary ranking of felonies and misdemeanors. Linkages to state law may replicate the difficulties battered women have had with police and prosecutorial non-enforcement of domestic violence crimes and the fact that the

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331. *Id.*

332. *Id.* at 48 (emphasis added). It should be noted that this language apparently was intended to compare the VAWA claim, which requires proof of discriminatory motivation, from "random assaults and beatings" which, some argue, might be read to create a general federal tort law. *Id.* The "motivated by gender" restriction does prevent this legislation from becoming a federal tort law. Furthermore, preoccupation with placing limits on the remedy should be abandoned for an embrace of the civil rights action as a tool to end wife abuse. Placing restrictions on its use to cover only "felonious" violence does not serve the remedial purpose of the legislation. It should be clear to Senator Biden and the Senate Judiciary Committee that repeated assaults and beatings of wives should be considered as anything but "random."

333. *See supra* notes 302 and 304.

334. *See generally supra* § II.D.1. (criminal remedies).

335. *Women and Violence*, *supra* note 13 (testimony of Sarah M. Buel).

severity of punishment accorded perpetrators of wife abuse has been traditionally less than that accorded to defendants who assault strangers. The House VAWA addresses this issue by theoretically making such gender-motivated crimes actionable,[336] but the practical effect of the extra step — the need to determine what crimes would constitute felonies if between strangers — may add uncertainty where it need not exist. Congress should use the Title III civil rights statute to eradicate violence against women, not limit it unnecessarily to exclude some battered women.

Interpretation that limits the scope of the VAWA to "felonious" crime also runs contrary to the term of art "crime of violence" as it is defined in 18 U.S.C. § 16, although the one year prison term limit that defines the felony has been incorporated in the sentencing guidelines. Further, restriction to felonious crime is not necessary to prevent over use of the remedy. Private lawsuits are not practicable unless the defendant has income or assets with which to pay a judgment. This places a practical limit on the number of claims that will be brought. Further, the Judiciary Committee has placed alternative limits on the application of the cause of action by requiring proof of gender motivation. "In order for a cause of action to arise under title III, the plaintiff must prove that the crime of violence —whether an assault, a kidnapping, or a rape — was motivated by gender."[337] In the preceding quote, "assault," levels of which constitute misdemeanor crime, is clearly listed as an actionable civil rights violation.

Most importantly, imposing a felony crime floor for a civil rights cause of action would dilute the essence of the right to be free from crimes of violence motivated by gender. Violent attacks because of gender cause civil rights injuries that are far deeper, and carry broader significance, than the physical manifestations of those attacks. Indeed, it is the unique civil rights injury to the victim and the reverberations of violence directed by animus beyond that individual to other members of the class that makes this legislation necessary. Limitations on civil rights based on the extent of injury, the intent of the actor to injure and the means used[338] serve to perpetuate violence motivated by gender. Like courts that allowed wife abuse provided the implement of abuse was the size of the man's thumb or less,[339] the felony crime restriction provides

336. *See supra* note 304.

337. VAWA Report 1990, *supra* note 9, at 49.

338. *See supra* note 132 (degree of assault).

339. *See supra* note 87 (Rule of Thumb).

a similar severity limitation to gender-motivated violence without addressing the essence of the problem.

There should be no floor restriction on the level of crimes of violence actionable pursuant to Title III. "The only remedy title III provides is for violent crimes motivated by gender discrimination."[340] Violent crimes should be interpreted synonymously with "crimes of violence" as set forth and defined by the statute through reference to 18 U.S.C. § 16.

b. Unnecessary Limitations: The "Crime of Violence" Requirement

The creation of a federal substantive civil right to be free from crimes of violence motivated by gender promises a powerful remedy to survivors of wife abuse. However, the VAWA's required proof of gender-motivated "*crimes* of violence," regardless of the felony requirement, in and of itself places an unnecessary burden on plaintiffs who bring civil claims for sex-based deprivations of their civil rights. The requirement that all civil rights deprivations motivated by gender should be limited to occasions of "*crimes*" demonstrates congressional refusal to promote equal rights for women more generally. At a minimum, Congress should broaden the scope of the remedy to cover *acts* of violence, regardless of whether all of the required criminal elements are present.

Imposition of the "*crime* of violence" requirement may limit actionable gender-based discrimination claims by battered women. Higher standards of proof, imported from criminal laws, may be applied in civil gender-based discrimination trials using the "crime of violence" designation[341] than would be applied in a civil rights action using an "acts" of violence standard. A Title III claimant will have to prove that a "crime of violence" motivated by gender was committed against her to establish a prima facie civil rights case. Although the Senate Judiciary Committee built a portion of the VAWA, Title II, on the philosophy that "spouse abuse must be treated just as seriously as any other violent crime,"[342] the judicial impulse may be to limit the category of "crimes of violence" actionable by battered women in the civil context. In contrast, California's civil rights law does not limit civil claims to a criminal law standard but recognizes a "right to be free from any violence, or intimidation by threat of violence . . . because of sex."[343] Congress

340. VAWA Report 1990, *supra* note 9, at 49.
341. Willis, *supra* note 57, at 2214.
342. VAWA Report 1990, *supra* note 9, at 39.
343. CAL. CIV. CODE § 51.7 (1992).

should state explicitly that proof of acts of violence motivated by gender, including crimes of violence defined at 18 U.S.C. § 16, sustain a prima facie Title III claim.

3. The Term "Motivated by Gender"

a. The Statutory Definition

The Senate VAWA limits the scope of the civil rights cause of action to those plaintiffs who can prove, by a preponderance of the evidence, that the crime committed against them was "motivated by gender." The Senate VAWA provides the following definition: "(1) the term 'crime of violence motivated by gender' means any crime of violence . . . committed because of gender or on the basis of gender."[344] Thus, a "crime of violence motivated by gender" or a "crime of violence committed because of gender or on the basis of gender" are restatements of the same burden of proof that falls on the complainant.[345]

The burden of proving motivation is included in the Senate VAWA as a mechanism to ensure limitation of the use of the remedy to instances of bias crime. By the Senate VAWA's explicit terms at § 302(e)(1), claimants are not entitled to a "cause of action under subsection (c) 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 as defined in subsection (d)."[346] The proof of motivation is to be determined from the "totality of the circumstances" surrounding the event.[347] The Senate VAWA places no limitations on the context in which plaintiffs can bring suit, but the comments in the legislative history suggest that battered women are not the paradigm case.

In comparison, the definition of "crime of violence motivated by the victim's gender," contained in the House VAWA provides a general approach like the Senate VAWA cause of action and an alternative way of proving a Title III cause of action for sex crimes.[348] "Crimes of violence motivated by the victim's gender" are delineated as "(A) a crime of violence that is rape (excluding conduct that is characterized as rape solely by virtue of the ages of the participants), sexual assault, sexual abuse, or abusive sexual contact; or (B) any other crime of violence committed because of

344. *See* Senate VAWA, *supra* note 271, at § 302(d)(1).

345. *See* VAWA Report 1991, *supra* note 8, at 50-51.

346. Senate VAWA, *supra* note 271, at § 302(e)(1) (emphasis added).

347. VAWA Report 1990, *supra* note 9.

348. House VAWA, *supra* note 272, at § 301(e)(1).

gender, or on the basis of gender, of the victim."[349] The language in the House VAWA ends the ambiguity about some of the types of crimes that would qualify a victim to bring a civil rights cause of action under this section.[350] Furthermore, it eliminates the need to prove the gender motivation of sex crimes. The explicit enumeration of sex crimes, however, represents only one category of gender-motivated crimes and may discourage some battered women from seeking civil rights relief.

The House VAWA does provide a remedy for "any other crime of violence committed because of gender, or on the basis of gender, of the victim."[351] This clause, set off from the first category of crimes in a different section separated by an "or," should be interpreted to avoid redundancy and to delineate another category of crimes not included in the first. This additional set of crimes should include most crimes associated with domestic violence. To make this definition easier to apply to domestic situations where sex crimes are not a component of the violence, however, the House VAWA's Title III explicitly should include a third section that presumes gender motivation where assault and other violent crimes are committed in the context of battering relationships.[352]

b. Legislative History

Despite the neutrality of the Senate VAWA's burden of proof and standard of persuasion, and in contrast to the conscious portrayal of domestic violence as a serious crime in the legislative history of the VAWA, the Senate Judiciary Committee and Senator Biden, its Chair, have issued comments on the Senate VAWA gender motivation clause[353] which call into question the applicability

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349. *Id.*

350. The term "motivated by gender" was defined differently in the original 1990 House VAWA.

> (1) the term "crime of violence motivated by gender" means any crime of violence, as defined in this section, including rape, sexual assault, sexual abuse, abusive sexual contact, or any other crime of violence committed because of gender or on the basis of gender.

1990 House VAWA, *supra* note 268, at § (d). By clearly separating the sections, the House VAWA's delineation of sex crimes as crimes of violence motivated by the victim's gender and others where motivation must be proven serves to expand the practical usefulness of the remedy for victims of sex crimes.

351. *See supra* note 349 and accompanying text.

352. *See infra* notes 483-493.

353. Although a VAWA that establishes alternative burdens of proof of a crime of violence motivated by the victim's gender is preferrable, it is important to analyze the Senate VAWA's definition of "gender-motivated crime" for two reasons. First, the Senate VAWA has been subject to extensive hearings and its Title III has undergone amendment from a version substantially similar to the 1991 House VAWA. *See*

of the remedy to some situations of domestic violence. In statements by the Senate Judiciary Committee, there appears to be a misunderstanding of the systematic nature of domestic violence in which physical abuse characteristically comprises only one element of a cycle of control tied to broader systems of male dominance.[354]

> [O]ne of the most serious misunderstanding of title III has concerned its scope. For example, some have wrongly suggested that it will cover random muggings or beatings in the home or elsewhere. This argument is incorrect and is belied by the text of the proposed statute: this is a discrimination statute, not a felony protection bill.[355]

It is unclear what the committee means by "random . . . beatings in the home" and this statement leads advocates to wonder whether the Senator intends all "beatings in the home" to be excluded from the scope of the application of Title III.

Without resolving the ambiguity of this statement, the Committee legitimately distinguishes Title III from a federal divorce law but acknowledges that married claimants could, in theory, sue under this law[356] for violent crimes motivated by gender. This is a discrimination law, however, and filing a claim should not extend federal pendant jurisdiction over state divorce, alimony or custody claims.[357] Yet, to assure the critics that it will not be an over-used provision or a federal divorce law, the Senate Judiciary Committee overstates the point by indicating that Title III "does not cover random beatings in the home or elsewhere."[358]

Senator Biden personally downplays the extension of Title III to typical wife abuse. To squelch the fear that the VAWA will be used in excess, and to counter the estimate that it will impose a cost of $43.5 million and 450 staff years to the federal courts,[359] Senator Biden responded:

> Title III does not cover everyday domestic violence cases . . . . [It] expressly bars any cause of action for a random crime, including crimes motivated by personal animosity . . . . [T]he judicial impact statement of the Administrative Office of the Courts is based on . . . a reading of the statute that includes

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VAWA Report 1991, *supra* note 8, at § 2 (Legislative History of the VAWA), § 5, Title III (Section by Section Analysis). Second, the latter independent clause of the House VAWA is the same as the main clause of the Senate's version.

354. *See supra* § II.B.

355. VAWA Report 1991, *supra* note 8, at 48.

356. *Id.*

357. House VAWA, *supra* note 272, at § 301(d)(3). *See also* VAWA Report 1991, *supra* note 8, at 48.

358. VAWA Report 1991, *supra* note 8, at 48.

359. *See id.* at 69.

> random crimes and domestic violence cases. Since those cases cannot be brought under title III, the judicial impact statement is obviously inaccurate.[360]

Despite Senator Biden's statement, some battered women still could demonstrate the gender motivation of the domestic abuse levelled against them to distinguish it from "random violence" not covered by Title III.

These statements of the Senate Committee and its chair are shocking reminders that "everyday domestic violence" still can be viewed as something other than discrimination against women and an inherent building block of women's subordination. Despite the testimony submitted before it, these statements add to the difficulty of battered women by somehow distinguishing violence they face from a domestic partner, someone with whom they have intimate relations, from violence inflicted by those whom they may encounter outside of the family. Such distinctions do not belong in legislation that purports to address violence against women by providing a civil rights remedy.

In contrast, the VAWA legislative history includes statements that support the concept that no one should have the privilege, especially by marriage, to infringe upon the civil rights of another. The literal terms of the VAWA cause of action have a broad scope, not in any way limited by marriage. Marriage does not translate violence against women, an "assault on a commonly shared ideal of equality,"[361] into personal animosity. As is clear from the patterns of violence against women, marriage is an institution which mediates between violent social enforcement of male domination and family relations.[362]

Most importantly, in the context of committee testimony and discussion of wife abuse, Chairman Biden agreed with the statement of Dr. Browne that the legislation is important because it makes a louder statement that wife abuse "is criminal, that in this country this is not accepted, nor will it be tolerated, in fact."[363] Mr. Biden said, "[t]hat is why, . . . I made it a civil rights offense, in addition . . . . The ultimate sanction, beyond a prison term, that can be applied in this society is to say that you violated the civil rights of someone else."[364]

The 103rd Congress explicitly should expand upon support for Title III claims brought by battered women. Indeed, based on

360. *Id.* at 69-70.
361. *Id.* at 49.
362. *See supra* § II.B.2.
363. *Women and Violence*, *supra* note 13 (testimony of Dr. Browne).
364. *Id.*

the gender-role enforcing aspects of wife abuse and its effect in systematically controlling and degrading women as a group, repeated wife abuse[365] should be presumed to be a gender-motivated act of violence. Review of similar civil rights laws should assure Congress and the Executive Branch that Title III's burden of proof and standards of persuasion, in addition to the financial limitations inherent in bringing private law suits, practically will restrict access and not swamp the federal courts with new claims.

c. Title VII: Guidance to Proof

The VAWA's gender motivation standard, because of gender or on the basis of gender, will be interpreted like similar motivation standards set forth in Title VII and other federal discrimination law. "Proof of 'gender-motivation' under Title III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws."[366] Discriminatory motive is concerned with the question of whether the defendant's action or choice of victim was affected by the victim's membership in a protected group. Some federal discrimination causes of action require proof of actual discriminatory intent;[367] other federal discrimination provisions, such as Title VII disparate impact and hostile environment claims, allow for demonstration of discriminatory motivation without proof of the defendant's actual intent to discriminate. Because VAWA Title III is linked to Title VII for interpretation, proof of gender-motivation is required but proof of the defendant's discriminatory intent should not be.

Legislative history of the VAWA bill requires proof of "gender-motivation" like that required in Title VII claims because the "definition of gender-motivated crime is based on Title VII."[368] The Senate Judiciary Committee's report of the VAWA provides that the

> definition of gender motivated crime is based on title VII, which prohibits discrimination in employment 'because . . . of sex.' 42 U.S.C. 2000e-2. Hence, title III defines crime motivated by gender to be crimes committed 'because . . . of gender.' The

365. For definitions of battering, see *supra* note 3.

366. VAWA Report 1991, *supra* note 8, at 50.

367. *See, e.g.*, 42 U.S.C. § 1981 (1992).

368. VAWA Report 1991, *supra* note 8, at 50. A hostile 1990 amendment to the VAWA would have required proof that the defendant's conduct was "overwhelmingly" motivated by gender. The "term 'overwhelmingly' was eliminated in the version of the bill introduced in the 102nd Congress because there is no counterpart to such language in any other civil rights remedy" and it "would pose an unnecessary and harmful burden on women, creating a 'special disability that nobody else has' and 'feed[ing] into precisely the sorts of biases that the law is trying to eliminate.'" *Id.* at 51 (citing testimony of Professors Cass Sunstein and Burt Neuborne).

> phraseology 'motivated by,' 'because of,' 'on the basis of' or 'based on' sex or gender is used interchangeably in case law discussions of title VII. This body of case law will provide substantial guidance to the trier of fact in assessing whether the requisite discrimination was present.[369]

The VAWA also draws a direct parallel to Title VII by acknowledging the existence of a civil rights remedy for gender crimes committed in the workplace and lack of a remedy for crimes committed on the street or in the home.[370] However, Title VII has evolved into multiple causes of action, each of which entails different burdens of proof. Thus, the proof of motivation pursuant to the VAWA still requires significant judicial interpretation.

Evaluation of the successes and limitations of Title VII of the Civil Rights Act of 1964, as amended, provides a valuable lens through which to inform the content of the civil rights portion of the proposed VAWA. The VAWA creates a federal cause of action for discrimination "on the basis of . . . sex" for endemically widespread incidents of sexualized domination in the home much as Title VII does in the workplace.[371] In addition, both Title VII and the VAWA purport to regulate gender relations, discrimination and violence in what were once considered "private realms": employment, where freedom of contract reigns subject to common law exceptions and specific wage and hour, labor and discrimination legislation; and the family.

A review of the content of Title VII, the judicial interpretation of the burdens of proof and the alternative jurisprudence of civil rights remedies that take account of victim perspective in the presentation of a prima facie case should inform the 103rd Congress' consideration of Title III of the VAWA and the way courts should interpret the civil rights section once it has passed.

Title VII jurisprudence is multifaceted, and interpretation of "on the basis of . . . sex" depends largely on the type of Title VII claim that one finds most comparable to battered women's claims. An analysis of disparate treatment, disparate impact and hostile environment/sexual harassment jurisprudence demonstrates that all three theories add some support and precedent for the conceptualization of battered women's civil rights claims. The hostile environment/sexual harassment case law provides the analogy best suited for comparison with the battering context. The practical difficulties women face in enforcing their Title VII claims, espe-

369. *Id.*

370. Senate VAWA, *supra* note 271, at § 302(a)(2).

371. For an excellent survey of the prevalence and experience of sexual harassment, see GUTEK, *supra* note 9.

cially those of sexual harassment, should inform the Title III civil rights cause of action to facilitate the accomplishment of the law's underlying objective to provide an effective antidiscrimination remedy for "gender-motivated crime."[372]

i. Disparate Treatment Claims

When an employer treats an employee less favorably than others because of her sex, she can bring a claim for disparate treatment pursuant to Title VII. To uphold a Title VII disparate treatment claim, the plaintiff must prove discriminatory motive or discriminatory intent.[373] Liability is predicated not on the actions of the defendant, but on the underlying discriminatory intent which must often be inferred from those actions.[374]

To prove disparate treatment, a Title VII plaintiff has the burden of establishing, by a preponderance of the evidence, that her employer intentionally engaged in an action, or a pattern and practice of discrimination, because of sex.[375] Unlike systemic disparate impact discrimination cases where violations may be supported by statistical evidence demonstrative of discrimination within the appropriate employee pool,[376] individual disparate treatment claims often must rely on particularized evidence because there is no evidence of a pattern or practice of discrimination against other employees to support their claims.

The burden of demonstrating a discriminatory motive may be difficult for battered women, but it is less of a burden than proving discriminatory intent. Pursuant to Title III, a claimant must show by a "preponderance of the evidence"[377] that she is a victim of a "gender motivated" crime of violence. This should not require proof of intent.

If one were to apply a disparate treatment analysis to Title III claims, and impose the intent burden, the abuser's treatment of the victim of domestic violence, often the *only* target of the

372. VAWA Report 1991, *supra* note 8, at 42.

373. One commentator suggests that "discriminatory treatment" and "intentional discrimination" have been linked in Title VII jurisprudence due to sloppy application of the "intent" concept which arises from the failure to distinguish the concept of "motive" from "intent." In fact, the language of Title VII, its legislative history, judicial analysis and policy rationale all suggest that discriminatory motive should be the controlling theory for disparate treatment cases. *See* Welch, *supra* note 257.

374. *See* Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOKLYN L. REV. 1107, 1114 (1991).

375. 42 U.S.C. § 2000-3 (1992). *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981), *cited in* Sullivan, *supra* note 374, at 1116.

376. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

377. VAWA Report 1991, *supra* note 8, at 51.

abuser's violence, compared to his treatment of all other individuals in society, might demonstrate disparate treatment of her and intent to discriminate on the basis of gender. In some cases, the defendant may have abused previous domestic partners or may have been convicted for violent crimes against other women. This might provide evidence of a pattern and practice of targeting women domestic partners, or women in general, as victims of violence.

Where there is no pattern and practice, or relevant group with which to compare treatment, the proffering of circumstantial evidence to prove discriminatory intent becomes of paramount importance in disparate treatment cases. Similarly, when considering a Title III claim, a court shall consider the "totality of the circumstances' surrounding the event"[378] to make the determination of gender motivation.

In the Title VII hiring context, plaintiffs can draw an inference of discriminatory intent from the employer's conduct. A plaintiff can make a prima facie case of disparate treatment because of sex by demonstrating that she: 1) belongs to a protected class; 2) applied for and was qualified for a job for which the employer was seeking applications; 3) was rejected; and, 4) the employer hired someone less qualified or continued to seek applications from individuals with the complainant's qualifications.[379] As these factors must be altered in other employment contexts,[380] so could such a prima facie case be adapted to the particular situations involving wife abuse claims brought pursuant to Title III if proof of discriminatory intent were required.

The pervasiveness of violence against women,[381] and the history[382] and function of wife abuse in maintaining gendered power relations,[383] should provide evidence of gender motivation or intent in Title III actions brought by battered women. Acts of violence and psychological abuse that enforce traditional gender roles of female subordination and male dominance or an abuser's preference of gender roles should be further evidence. Finally, claimants could demonstrate absence of other motives or provocation, as well as special characteristics of the crime,[384] to show gender motiva-

378. *Id.* at 50.

379. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

380. *See id.* at n.13.

381. *See supra* § II.A.

382. *See supra* § II.C.2.

383. *See supra* § II.B.

384. VAWA Report 1991, *supra* note 8, at 50 n.72 (citing BIAS MOTIVATED HATE CRIME, *supra* note 175).

tion. Examples of such characteristics may include: targeting of the survivor's sexual organs or effects, use of gender-specific words during the violent act, or attacking to reassert control at a point where the woman has attempted a separation to reassert control.[385]

Since plaintiffs are entitled, by Title III, to prove "bias" from "circumstantial evidence,"[386] if courts impose a burden of proving intent to discriminate, they also should create a burden shifting scheme. A battered woman plaintiff would prove a prima facie Title III claim if she demonstrates that: 1) she was a member of a protected class in a battering relationship;[387] 2) she was a victim or survivor of an act or "crime of violence;" 3) and the act or "crime of violence" did or was likely to:[388] a) control her thoughts, beliefs or actions or punish her for resisting the perpetrator's control; or, b) cause her to modify her behaviors, duties, attitudes or roles to avoid further violence. The rationale that underlies the acceptance of inferential proof of discriminatory intent in disparate treatment claims should also apply in situations of domestic violence. Meeting the prima facie burden established by *McDonnell Douglas Corp. v. Green*[389] establishes an inference of discriminatory intent from an employer's actions. It

> raises an inference of discrimination only because we presume these acts, if not otherwise explained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons . . . . Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[390]

Although the presumption that actions are based on reason in the domestic context is less developed than the presumption that business decisions are based upon "rational" or "profit maximizing" purposes, discriminatory considerations and purposes are no less present, and perhaps are more pervasive, in the domestic con-

385. *See supra* notes 55-56.

386. VAWA Report 1991, *supra* note 8, at 50.

387. Again, for definitions of battering, see *supra* note 3.

388. This construction is designed to allow for two conceptions of targets of domestic violence — those who conceive of themselves as "victims" detrimentally affected and debilitated by the abuse — and those who consider themselves "survivors" of abuse designed to place them in servility.

389. 411 U.S. 792 (1973). *See supra* notes 379-80 and accompanying text.

390. Funco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978), *cited in* Sullivan, *supra* note 374, at 1115.

text than they are at work.[391] Therefore, if a discriminatory intent must be demonstrated, meeting a prima facie case should be sufficient to shift the burden of proof of intent to discriminate in the Title III context.

Once a Title VII disparate treatment plaintiff has raised an inference and presumption of discrimination, the defendant may place into evidence a nondiscriminatory reason for the employment action to avoid a directed verdict.[392] The risk of non-persuasion remains on the plaintiff, who can prevail by the strength of the inference of her prima facie case[393] or by demonstration that the defendant's "legitimate reasons" are merely pretextual.[394]

As applied to the domestic violence context, explanation often accompanies a defendant's use of force against the plaintiff. Abusers punish women because they "burned the toast" or failed to prepare rice properly. Perhaps a battered woman was held accountable for a young child's incessant crying. Perhaps she totalled the car.[395] A defendant could argue that he did not hit the plaintiff for any discriminatory purpose and has no interest in her subordination, he hit her because she burnt the toast. This argument demonstrates the difficulty of proving discriminatory intent in the absence of intent derived from a prima facie case. Because

391. First, the notion of "reason," broadly construed, implicates not just an individual's conscious process of rational analysis or ratiocination, it includes the societal norms, political and legal rewards and sanctions, systemic prejudice and gender-based expectations that frame and provide context for those decisions. Discriminatory actions that reinforce the subordination of women are far from "arbitrary," they fulfill a systemic and historical structure of dominance and power which cuts along gender lines. Thus, "unexplainable actions" that reinforce the subordination of women could be legally presumed motivated "by sex" because they serve that purpose.

Second, the same individuals play dominant and controlling roles in both work and family contexts. For "rational" actors, it is appropriate to presume that mental capacities and considerations are not largely altered by environment. However, one's sense of entitlement, moral obligations, social expectations and risks of punishment in different contexts may alter behavior. Although some men may be indiscriminately abusive to employees, their wives and strangers on the street, it is more likely that the sophisticate might perceive the entitlement to control only regarding domestic relations or might act selectively in the workplace toward targeted employees. In either context, the victim of the violence should have access to justice for deprivation of her civil rights. In both contexts, the violent acts may be obscured from the underlying purpose to discriminate or control.

392. *See Texas Dept. of Community Affairs*, 450 U.S. 248 (1981).

393. *See* Sullivan, *supra* note 374, at 1159-60.

394. *See Reconstruction, Deconstruction*, *supra* note 295, at 528 n.318. *See also* Duffy v. Whelling Pittsburgh Steel Co., 738 F.2d 1393, 1396 (3d Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984) ("[A] showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated."), *cited in* Sullivan, *supra* note 374, at 1117.

395. *See*, BROWNE, *supra* note 3, at 54-62 (1987) (discussion of the inception of typical wife abuse).

abusers are known intimately by their victims and the violence appears particularized, Title III plaintiffs will have to overcome the impulse to presume violence toward them is personal animosity and not gender-motivated action. This can best be done by setting forth a broad prima facie expectation of proof.

In the absence of a recognized scheme to infer gender discrimination, and where there is another articulable motive for abuse, proof of the repeated use of violence against a battered woman should be sufficient to show that the defendant's "reasons" are really "excuses" for his violence and, as such, are pretextual. With the exception of self defense, there are no legitimate reasons for a person to use force against another.[396]

In *Price Waterhouse v. Hopkins*,[397] the U.S. Supreme Court addressed mixed-motive cases "in which an employer's decision seems to have been motivated by both lawful and unlawful considerations."[398] The plurality held that the plaintiff only "retains the burden of persuasion on the issue whether gender played a part in the employment decision."[399]

In the Civil Rights Act of 1991, Congress clarified Title VII to read that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."[400] Congress provided a guide to interpreting the causation requirement of Title VII. Decisions made "because of . . . sex" need not be shown to be the sole, or "but for," cause of the final employment decision.[401] Such a construction of "mixed motive" should also be applied in the domestic violence context where the intimacy of the partners will lead to many so-called "causes" for actions between them.

In Title VII, the employer is then afforded an affirmative "same decision" defense. The Title VII disparate treatment plaintiff is entitled to "declaratory relief, injunctive relief . . . and attorney's fees and costs"[402] but is not entitled to damages or orders "requiring any admission, reinstatement, hiring, promotion, or

396. *See Women and Violence*, *supra* note 13, at 106 (statement of Senator Biden).

397. 490 U.S. 228 (1989).

398. *Reconstruction, Deconstruction*, *supra* note 295, at 527.

399. *Price Waterhouse*, 490 U.S. at 246, *quoted in* Sullivan, *supra* note 374, at 1126.

400. Section 703 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (as amended by the Civil Rights Act of 1991, at § 107).

401. 137 CONG. REC. S 15,472, S 15,476 (1991).

402. 42 U.S.C. § 2000e-5 (1992) (as amended by Civil Rights Act of 1991, at § 107(B)).

payment"[403] if the defendant can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor."[404]

In domestic violence situations, a defendant could argue that he would have taken the "same action" without considering the gender of the plaintiff. For example, a defendant could demonstrate that he engaged in the same acts and is indiscriminately violent towards anyone who crosses his path — male or female. Rampant, indiscriminate violence is not motivated by gender. Where courts apply the Title VII standard to Title III claims, a plaintiff could rebut this defense by demonstrating, within the totality of the circumstances, all actions that raise the defendant's violence towards her to a discriminatory level or show that the defendant's so-called "indiscriminate violence" was accompanied by sexist language, took place to sanction her deviation from his control or traditional gender roles or was sexual in nature. However persuasive the "indiscriminate violence defense" might be, often there will be gender discrimination that is demonstrably "a motivating factor" for the act.

Fundamentally, repeated wife abuse is motivated by gender when considered in the context of the economic, social and legal history of its use. The disparate treatment model, which focuses only on an individual action and its immediate target, largely misses the relevant gender role enforcement that battering performs. Thus, the hostile environment Title VII model may better capture the inherent gender motivation of wife abuse by viewing actions in their context.

ii. Disparate Impact Claims

Disparate impact claims can be used to challenge facially neutral decisions that have a disparate impact on a protected group. Title VII's "disparate impact" concept generally informs Title III of the VAWA insofar as most domestic violence disparately impacts women, it is crime targeted on the basis of gender and a federal civil rights action is necessary to eliminate the disparity.

Disparate impact claims have a distinct advantage to disparate treatment claims in that they have been free from the requirement of proof of intentional discrimination since the 1971

403. *Id.* The Title VII remedial scheme fails to value certain non-financial discrimination harms in some cases and dramatically caps others. See *supra* notes 259 and 260.

404. Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (as amended by the Civil Rights Act of 1991, at § 107 (A)).

U.S. Supreme Court decision in *Griggs v. Duke Power Co.*[405] In enacting Title VII of the 1964 Civil Rights Act, Congress recognized that "overt or covert, discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with built-in administrative processes through which non-white applicants are automatically excluded from job opportunities."[406] Requiring proof of discriminatory intent would not serve to eradicate the discrimination so prevalent in private employment. By eliminating the intent requirement, Title VII's procedural rules were designed to ease presentation of a plaintiff's prima facie case through the use of quantitative data regarding the impact to the relevant pool of applicants or employees and testimony depicting the discriminatory effects of policies.[407]

The Civil Rights Act of 1991 expressly adopts the disparate impact analysis and burden of proof enunciated by the Supreme Court in *Griggs*,[408] and overturns the Supreme Court's 1989 holding in *Wards Cove Packing Co. v. Atonio*.[409] A complainant demonstrates disparate impact if she shows that the respondent "uses a particular employment practice that causes a disparate impact on the basis of . . . sex . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . ,"[410] or if she demonstrates the existence of an "alternative employment practice and the respondent refuses to adopt such alternative employment practice."[411] Compensatory or punitive damages are not available to victims of Title VII disparate impact discrimination, so plaintiffs who experience race discrimination will alternatively plead under

405. 401 U.S. 424, 429-30 (1971). *See also International Bhd. of Teamsters*, 431 U.S. at 335 n.15 (since *Griggs*, employer's intent has been irrelevant in disparate impact cases.)

406. S. REP. NO. 867, 88th Cong., 2d Sess. 24 (1964) (statement of Sen. Clark), *cited in* Lively & Plass, *supra* note 230, at 1323.

407. *See McDonnell Douglas*, 411 U.S. at 802-06 (discussing allocation of burdens of proof in racial discrimination cases), *cited in* Susan Estrich, *Sex at Work*, 43 STANFORD L. REV. 813, 817 (1991).

408. 42 U.S.C. § 2000e-2 (1992) (as amended by Civil Rights Act of 1991, at § 105(a)).

409. 490 U.S. 642 (1989).

410. Civil Rights Act of 1991, at § 105 (a).

411. *Id.* at § 105 (a) and (c). The "alternative employment practice standard" of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), is to apply. Plaintiffs can prevail if they "persuade the fact finder that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interests; by so demonstrating, [plaintiffs] would prove the defendants were using their tests merely as a 'pretext' for discrimination." 137 CONG. REC. S 15,472, 15,476 (analysis of Civil Rights Act of 1991 introduced by Sen. Dole).

Title VII and 42 U.S.C. § 1981.[412] Victims of disparate gender impact have no such alternative.

Courts could allow admission of statistical evidence of domestic violence in the Title III plaintiff's case to demonstrate the systemic nature of domestic violence targeted against women as evidence that such violence is motivated "because of sex."[413] It is unclear, however, how the Title VII "disparate impact" approach would be used to evaluate the defendant's actual behavior. In keeping with Title VII law, if courts hold that statistics are relevant only if limited to the immediate pool of the abuser's prior contacts and not the population at large, rarely will there be a case that could generate statistically meaningful evidence. Although there may be occasional serial abusers, plaintiffs generally could demonstrate only a string of abused partners to demonstrate a policy of disparate, violent treatment toward women over time. Often, in the domestic violence context, there is no demonstrable "policy" or practice by which the defendant operates, there is *no* "other," no pool of women and no male domestic partner with whom a battered woman could compare herself to demonstrate the detrimental effects of the defendant's behavior toward her because of her sex. Thus, the other avenues of Title VII proof of gender motivation hold more promise for Title III litigants than disparate impact theory.

iii. Hostile Environment Claims and Sexual Harassment

Catharine MacKinnon first argued that sexual harassment, "the unwanted imposition of sexual requirements in the context of a relationship of unequal power," should be actionable as sex discrimination under Title VII.[414] The Equal Employment Opportunity Commission ("EEOC") issued guidelines preventing, in three circumstances, harassment on the basis of sex or "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[415]

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412. Nothing in the terms of the Civil Rights Act of 1991 is to be construed to limit the scope of, or the relief available under, § 1977 of the Revised Statutes (42 U.S.C. § 1981) (1992).

413. *See supra* § II.A.

414. MACKINNON, *supra* note 43, at 1, *cited in* Estrich, *supra* note 407, at 818.

415. 29 C.F.R. § 1604.11(a) (1990)

> The circumstances under which this definition constitute sexual harassment are those in which: 1.) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, 2.) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or, 3.) such conduct has the purpose or effect of unreasona-

In *Meritor Savings Bank v. Vinson*,[416] the U.S. Supreme Court recognized lower courts'[417] extension of Title VII to include a cause of action for "hostile environment" claims of sexual harassment. The Court directed lower courts to look to the EEOC for guidance when interpreting hostile environment claims of sexual harassment.[418] Hostile environment harassment has been defined by the EEOC as "sexual misconduct" "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance *or* creating an intimidating, hostile, or offensive working environment.' "[419] Although "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,"[420] for a plaintiff to sustain a claim, the harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[421]

Although some courts have considered the actual intent of the employer or co-worker alongside a "reasonable person" or "reasonable woman" standard to evaluate the pervasiveness of harassment,[422] the strength of Title VII hostile environment jurisprudence has been the abandonment of the proof of intent requirement. Title VII unambiguously

> classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment . . . because Title VII is not a fault-based tort scheme. 'Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation' of co-workers or employers.[423]

In situations where there is sexualized institutional dominance, such as within violent families, courts and Congress should recognize that intent-based standards are inadequate to address

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bly interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id., *cited in* Estrich, *supra* note 407, at 818.

416. 477 U.S. 57 (1986).

417. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (quoting 29 C.F.R. § 1604.11(a) (1981)); Budy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), *cited in* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1198 (1989).

418. *See Meritor*, 477 U.S. at 65; Ellison v. Brady, 924 F.2d. 872 (9th Cir. 1991).

419. 29 C.F.R. § 1604.11(a)(3), *quoted in Meritor*, 477 U.S. at 65.

420. *Meritor*, 477 U.S. at 65.

421. *Id.* at 67.

422. Abrams, *supra* note 417, at 1202.

423. *Ellison*, 924 F.2d 872 (consciously adopting a "reasonable woman" standard) (*quoting* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)); *Griggs*, 401 U.S. at 432 (the absence of discriminatory intent does not redeem an otherwise unlawful employment practice).

the more pervasive, subtle forms of discrimination and subordination that prevent women's full participation in society. As in employment, where "[r]eliance on the intent of the employer misses the crucial point that even an employer who regards such exchanges as harmless 'business as usual' can create an environment that is nightmarishly oppressive to his female employees,"[424] so should the courts treat the concept of "motivation" embodied in the Title III cause of action as not requiring proof of intent to discriminate but proof of the discriminatory act. As with hostile work environment claims, courts should hold that violence motivated by sex can constitute a hostile domestic environment in violation of Title III. Courts should impose a standard that violent conduct by a domestic partner that has the purpose or effect of unreasonably interfering with an individual's work, family or social performance *or* creates an intimidating, hostile, or offensive domestic environment constitutes a crime of violence motivated by gender.

A woman suffering from sexual harassment or a hostile work environment may make a claim of employment discrimination "because . . . of sex" by demonstrating her subordination and vulnerability through sexual objectification in the workplace evidenced by abusive language, unwanted touching, pressures to engage in sexual activity, rape and economic coercion through sanctions imposed for her failure to cooperate with the employer or coworker's demands. A woman in an abusive relationship could similarly demonstrate the perpetrator's efforts to control her thoughts, beliefs and actions and deprive her of her civil rights as evidenced by abusive language, physical violence, rape and economic deprivation. Hostile environment Title VII claims raise issues closely related to the situation in which battered women find themselves.

The Supreme Court's recognition in *Meritor* that a workplace can be systemically hostile marked a significant step in women's efforts to address the coercive aspects of social, economic and legal structures. Since such a move can be made by Congress to end violence against women at home, the lessons of Title VII should be applied to the Title III effort to eradicate violence against women so that the same problems are not recreated in a new setting.

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424. Abrams, *supra* note 417, at 1202.

C. *VAWA: Anticipated Problems and Proposed Changes to Remedy the Deprivation of Women's Civil Rights by Battering.*

1. Anticipating the Problems

Doctrinal judicial restrictions on women's sexual harassment claims, including the "unwelcomeness," "on the basis of sex," and severity requirements, greatly limit Title VII relief.[425] Similarly, it is not enough to examine the statutory terms of the VAWA; it is important to anticipate how courts may use such terms to limit women's access to justice in order to prevent such incursions on women's rights in the Title III context.

a. The Term "Motivated by Gender"

In Susan Estrich's work on sexual harassment,[426] she found that the gender motivation requirement in Title VII, the "on the basis of sex" requirement, has been interpreted in two general ways. Courts first took an "equality" perspective in which the sexual aspects of harassment were ignored. The relevant question was whether coercion or pressure was disparately targeted toward women. Then, the reverse was true and the sexual aspect of harassment became virtually all important; the relevant question became whether the coercion involved sex itself. Battered women would be at a disadvantage if either approach were adopted in Title III because neither captures the common experience and full dimension of gender-motivated violence.

In the first approach to Title VII, courts ignored the sexual core of violent workplace behavior and treated the violations as they would treat different wage and conditions claims, as "differential treatment" on the basis of gender.[427] Courts identified gender discrimination through a comparison of employers' treatment of women and men. "When conditions are imposed on a person that would not be imposed but for her being a woman, that is sex discrimination regardless of the nature of the offensive conditions."[428] The differential treatment analysis relegates the issues of sexuality to the sidelines and "[t]he sole issue becomes whether the coercion, whatever form it takes, would have been imposed on

425. *See generally* Estrich, *supra* note 407, at 827, 845; Abrams, *supra* note 417, at 1202. This section draws from these works on sexual harassment and rape law doctrine in anticipation of similar issues arising under Title III.

426. *See* Estrich, *supra* note 407.

427. *See id.* at 819-20. *See also supra* § IV.B.3.c.i.

428. Estrich, *supra* note 407, at 819.

a man."[429] In the context of a battering relationship, there is usually no "other" with whom a battered woman can compare her treatment.[430] Yet the context of wife abuse, at the intersecting planes of the struggle for power and control and violence against women, renders battering very much about subordination on the basis of sex.[431]

The apparently "neutral" differential treatment framework also ignores the underlying inequality of women in society and the use of violence to enforce that structure. Sexual harassment in the workplace and violence in the home involve both gender and sex,[432] yet the "equality/difference" disparate treatment approach does not provide a meaningful analysis of either dynamic.

If applied to violence in the context of a domestic relationship, the disparate treatment analysis would treat "sex" as secondary to a "but for" comparison of the way the defendant batters his wife versus other women or men. Such an inquiry would eviscerate the very power of this remedy to draw broader social connections between battering behavior and the social, legal and economic structures that support it.

Further, by ignoring the power objectives served by male violence against women, the disparate treatment approach suggests that all people victimized by violence share a comparable experience. Although there may be similarities, a woman's experience of abuse and subordination results at least in part from the different social meanings that adhere to physical and sexual violence directed toward women as compared to men. Male violence against women reinforces women's experience of fear, objectification, subordination and perpetual vulnerability to violation; it fulfills dominant male role expectations. Where a woman has been assaulted or abused in the past, she may have a psychological response to the abuse and the message of insubordination it sends to her. In comparison, violence towards heterosexual men by male strangers usu-

429. *Id.* at 820.

430. *See supra* § IV.B.3.c.i.

431. *See supra* § II.B.2.

432. What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women. . . . [T]hese cases are such a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality.

Estrich, *supra* note 407, at 820.

ally is irrelevant to sexual considerations.[433] Situations in which violence occurs must be analyzed by their particular factual circumstances[434] and subcultural meanings.[435]

If applied to Title III, disparate treatment analysis also would ignore the centrality of the use of violence in the struggle for power and control in battering relationships. A disparate treatment comparison of an abuser's treatment of his wife and other men may lead to an "indiscriminate violence" defense at best[436] and, at worst, may result in a claimant's failure to set forth her claim because there is often no "other" target with whom to compare the defendant's actions. Instead of focusing on a "but for sex" comparison, the gender motivation inquiry should address the particularized way in which an abuser coerces and controls his wife and the social function of gender role enforcement that violence performs.

The second trend in Title VII sexual harassment case law demonstrates a conflation of "because of sex" with sex itself and a minimization of other types of harassment.[437] A focus on sex acts alone misses the more pervasive gender-motivated acts of violence against women. Such a pattern should be guarded against in the VAWA Title III domestic violence context.

Although an employer's workplace propositions to have sex with a worker of the opposite sex have generally been treated as gender-based, "some courts have held that worksite conditions — foul language, obscene cartoons, and aphysical gestures short of sex or their demand for it — are not always based on sex."[438] Indeed, "[w]hile the test is often stated, in legal terms, as whether the harassment is 'equally offensive' to both sexes, it is often applied in practice as a question of whether the action is itself sexual."[439] This narrow "based-on-sex" formulation presumes that

433. It should be noted that gay men are frequently the targets of "gay-bashing" which, too, is a violent tool to punish deviation from expected gender roles.

434. For instance, violence by female partners towards men most often takes place during separation where women are most at risk and must protect their lives with extraordinary means, including killing in self defense. Some female/male battering may represent an effort by a woman to break such gender models. *See* Mahoney, *supra* note 3.

435. Some lesbian battering may fulfill gender-role enforcement within the subculture of the lesbian community. The particular circumstances and pressures of that community would determine the way in which to interpret the use of violence to control another and whether such violence is motivated by gender.

436. *See supra* § IV.B.3.c.i.

437. *See* Estrich, *supra* note 407, at 841.

438. *Id.*

439. *Id.* Estrich cites the examples of Wendorf v. Metropolitan Life Insurance Co., 47 Empl. Prac. Dec. (CCH) 38,316, at 53,795 (E.D.N.Y. 1988) (boss's behavior, perhaps "unpleasant to the plaintiff," failed to constitute sexual harassment be-

non-sexual acts are directed at all persons and are, by definition, non-offensive and that sexual acts are directed only at women and are offensive.[440] Such a narrow formulation disregards the more insidious forms of harassment of women and the gendered elements of power in the workplace that stigmatize women and result in their subordination.

In addition, the definition of "sexual" tends to be narrow, "based on a man's view of a man's acts,"[441] without consideration of the perspective of the female employee who may be dependant upon her male boss for economic security and may interpret physical contact and sexually explicit language as more threatening and demeaning than would a male in her position.[442]

In the context of VAWA Title III claims, conflation of "based on sex" with sex itself would diminish the significance of techniques of control, including violence, that are used to maintain gendered power differentials in some heterosexual relationships. Some battered women face sexual pressures and rape as part of the pattern of control and violence; others are spared violent sex acts for different tools of domination and control.[443] Although all the violence acted out toward a domestic partner may not have the same obvious sexual characteristics as rape, many of these acts are violent assertions of power over women because they are women.[444]

Where a defendant manifests violence in sexual conduct, that conduct alone should satisfy the Title III element of gender-based animus, but it should not be considered the only evidence of gender motivation. Indeed, to construe "rape" or other sex crimes as the only crimes committed because of gender is to confuse the means with the motivation or effect of violently expressed discrimination. It is the gender motivation, effect and civil rights injury resulting from epidemic violence against women that prompts the need for the VAWA Title III civil rights remedy.

The risk that gender-motivated crimes of violence will be collapsed into the category of sex crimes is significant for three reasons. First, the category of "sex crimes" is but a subset of the universe of potentially gender-motivated crimes. To equate sex

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cause "this behavior . . . was directed at both male and female workers and was clearly not sexual in nature"); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441-42 (S.D.W.Va. 1985) (sexual harassment must be directed at a female and play "upon the stereotypical role of the female as a sexual object" to be actionable).

440. *See* Estrich, *supra* note 407, at 841.

441. *Id.*

442. *Id.* at 842.

443. *See supra* § II.B.

444. *See supra* §§ II.A. and B.

crimes with gender-motivated crimes is to misunderstand the continuum of violence against women.

Second, women's experience of prosecuting sex crimes demonstrates that those who know their sexual assailants face severe difficulties in the criminal justice system. In the context of domestic violence, proof of sexual violence will likely raise the same difficulties women face in rape prosecutions.

In rape law, stranger rape routinely has been contrasted with "date rape" — a false dichotomy the 1991 Senate VAWA recognized and attempted to remedy.[445] "Real rape" cases, such as when a "woman (is) raped by a stranger, or better yet, by two strangers jumping from the bushes and brandishing weapons," are considered serious criminal offenses and are likely to result in prosecution and significant jail sentences.[446] For "real rapes," courts notably excuse substantive requirements of proof of resistance and relax procedural requirements of prompt complaint or expectations that the victim procure evidence corroborating her testimony.[447] Although acquaintance rape meets the legal definition of rape — "sexual intercourse, by force or threat of force, against the will and without consent of the victim"[448] — some courts' treatment of the victims is very different.

> [W]hen the man is a friend, neighbor, or co-worker; or when the force consists of words and hands instead of guns and knives . . . few of these cases follow the legal route of "real rape" cases . . . . [M]ost such cases are never reported by their victims, most that are reported do not lead to prosecution and conviction, and those that do result in successful prosecutions are disproportionately likely to result in either reversal on appeal or suspension of sentence.[449]

Third, there are indications in the legislative history of VAWA that the conflation of gender motivation and sex itself already has begun. The Judiciary Committee's report of the VAWA bill includes a comparison of a racially motivated attack and a gender-motivated crime to demonstrate the mechanics of inference of motivation from circumstantial evidence, the "totality of the circum-

445. 1991 Senate VAWA, *supra* note 269, at § 402 (acquaintance sexual assault on campuses is widespread; one in seven college women have been raped and over half of the victims know their attackers) and § 403 (providing grants for campus rape education and prevention).

446. Estrich, *supra* note 407, at 813.

447. *Id.*

448. *Id.* at 814 (citing Leigh Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980)).

449. Estrich, *supra* note 407, at 814 (summarizing her findings and conclusions previously published in SUSAN ESTRICH, REAL RAPE 15-26 (1987)).

stances" surrounding the event.[450] In this discussion, the prima facie case the Committee sets forth provides an "extreme" example of a bias crime, yet the very inclusion of it provides insight into the imagination of those who are drafting the legislation. The paragraph bears quoting in full:

> Consider the case of a serial rapist who violates his victims as he hurls misogynist slurs. The victim's lawyers would prove exactly the same type of 'circumstances' that the lawyer in the 'race' case proved: that the victim was of one sex (female) and the attacker a different sex (male); that the attacker did not kidnap and rape men, but had a long history of attacking women; and that the attacker shouted anti-woman epithets during the assault. Again, the jury might not be convinced by any one of these circumstances individually — but all together show gender bias.[451]

Although this example addresses a set of facts that would clearly give rise to a Title III cause of action, the challenge is to address situations where the gender motivation is more subtle.

To avoid the pitfalls of the differential treatment interpretation of gender motivation, and the conflation of the "based-on-sex" standard with sex itself, Congress should reconsider the mechanics of proof in Title III as it applies to battered women, much as the House VAWA drafters have done for sex crimes.[452]

b. Battering Cycles and the "Crime of Violence"

Congress and courts should acknowledge that a wide variety of force and threats of force directed toward battered women constitute deprivation of civil rights. Violence in the context of battering relationships is particularized and draws little from case law established in other contexts. Indeed, the pattern and cycle of violence[453] documented in situations of wife abuse is one of repeated targeting of, and retaliation against, a single victim. Separation assault is similarly characteristic of gender-motivated violence in the context of battering relationships.[454] This contrasts with the paradigm criminal model of one-time, stranger-on-stranger violence.

Physical violence is commonly understood as a single technique within an abuser's broader effort to effectuate control over his domestic partner.[455] Where there is sporadic use of physical violence to maintain control in a relationship, every threat may not

450. *See* VAWA Report 1991, *supra* note 8, at 50.
451. *Id.*
452. *See supra* notes 348-52 and accompanying text.
453. *See supra* note 27 and accompanying text.
454. See *supra* notes 55-56 and accompanying text.
455. Power Wheel, *supra* note 46.

carry the punch, but the punch is implicit in every threat. Assault is within the definition of crimes of violence contemplated by the VAWA.

To prove a "crime of violence" in the career-offender context, courts require demonstration of intent to use force.[456] If this requirement were imposed on Title III claims, battered women claimants who sustained a pattern of abuse from their husbands might have difficulty if the recent incidents of violence include threats alone. Abusers may purport that they did not actually intend to follow through with their threats, that "I'm going to kill you" is a figure of speech, that "choking slightly is like caressing strongly," or that they temporarily "lost control." Where violence has occurred before and the tendons of power are strong, threats are sufficient weapons to maintain an ominous aura of control. Yet the actual use of force or attempted use of force may have preceded these threats by a significant time period. Therefore, Congress should explicitly find that demonstration of intent to use force is not required, only proof of acts or threats of violence are necessary.

By focusing on gender-motivated "crimes," applications of Title III may underestimate the complexity of domestic violence and the subtle techniques which result in civil rights deprivations in abusive relationships. The full battering cycle includes periods during which there is no act of violence, only veiled threats — subtle to the extent that the battered woman understands the signals but neighbors, and a jury, may have difficulty understanding the coded communications that have evolved to mean "obey."[457] Congress and the courts should recognize the relevance of evidence of power and control in a violent relationship to enable a battered woman to substantiate her civil rights claim and prove the full extent of her damages.

c. Evidentiary Issues

Although there is no prerequisite that a claimant bring prior

456. *See Parson*, 955 F.2d at 866 ("Use of physical force is an intentional act, and therefore . . . requires specific intent to use force.") (dicta).

457. The domestic context promotes different types of violence because it is intimate and the parties know the others' capabilities toward violence. A man may threaten to kill his mother-in-law as part of a pattern of coercion against his wife. This threat of violence toward a third party in some circumstances could provide a basis for a civil rights cause of action. If he threatens to commit suicide and leave the partner and kids with no economic support, this could provide evidence of a pattern of coercion. What to a stranger may seem a threat, may in some situations be a certain and coercive promise.

criminal charges,[458] proof of the "crime of violence" element of a Title III civil rights case where no criminal prosecution preceded it may be complicated. Where proof of a crime of violence is not difficult, broad admissibility of evidence of past violence by an abuser may be important in establishing damages.

A claimant should be allowed to introduce evidence of underlying circumstances and patterns of violent behavior to demonstrate the existence of "an offense that has as an element, the use, attempted use, or threatened use of physical force."[459] Due to the cyclical nature of domestic violence, it is important that battered women claimants be allowed to introduce evidence that traces back in time in order to establish the extent of damages and the existence of a threat of violence. The "totality of the circumstances" test adopted by the VAWA should include such evidence.

In the context of a battered woman's claim, it is crucial that the situation itself and the case as presented determine the temporal and substantive boundaries of relevant and admissible evidence. For justice to be served, courts should err on the side of admission of evidence that implicates the defendant in prior violent behaviors or similar patterns of violence to that alleged by the plaintiff regardless of the time that has passed between the violence and the court action. The defendant's proclivity to act with violence toward others is relevant to proof of his capacity to act violently towards the plaintiff.

The domestic violence context also should inform the admissibility of evidence regarding victim credibility. Congressional and judicial recognition of the possibility of retribution and increased victimization of battered women who seek separation from situations of domestic violence[460] should prevent adoption of requirements of "prompt complaint" and "corroboration" which arise in rape law and are present in Title VII actions. In practice, the opposite has been the case. Studies indicate that greater corroboration of physical injuries is required by judges in domestic violence cases than in other serious crimes.[461] More generally, the issue of credibility emerges in the "tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament" which hampers the court's ability to protect the victims and has a "chilling effect on victims' willingness to seek relief."[462]

Title VII courts presume the relevance of "factors such as the

458. *See* House VAWA, *supra* note 272 at § 301(d)(2).
459. *See supra* note 299.
460. *See supra* notes 55-56 and accompanying text.
461. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 13, at 89.
462. *Id.* at 80.

presence of corroboration and the freshness of the woman's complaint" in evaluating the credibility of victims' claims and treat them as "neutral indicia of credibility rather than as cards categorically stacked against women."[463] In fact, these so-called neutral Title VII standards of credibility belie the experiences of women who often are humiliated and fearful when faced with sexual harassment. One study demonstrated that while 53% of women report having experienced sexual harassment, only 21% actually complained about it to another person.[464] Similarly, battered women frequently do not show anyone their bruises,[465] battering usually occurs in private where there are no corroborating witnesses and few women report the abuse.[466]

> The fact that the corroboration rule continues to be embraced unembarrassedly in sexual harassment cases, long after it has at least been formally rejected in rape cases, raises the question of whether it serves, here as there, its more traditional and deservingly vilified purpose: not as a neutral guide to truth, but as a mechanism reflecting the disfavored status of sexual complaints and complainants.[467]

Informed by the sexual harassment experience, Congress should institute a one-way evidentiary rule in Title III law to allow evidence of corroboration — witnesses, pictures of bruises, doctors' reports, sperm — as persuasive when present, but irrelevant when such extraordinary evidence is not available.[468]

In addition to relevancy, a second evidentiary concern arising under Title III is the extent to which opinion and reputation evidence, which focuses on the victim's "provocation" and past sexual behavior rather than the defendant's alleged violent action and its gender motivation, will be admissible. In the development of Title VII, some courts "have structured the relevancy rules in sexual harassment cases to frame the credibility question as a one-way ratchet against women."[469] Such a phenomenon should be anticipated and avoided in Title III. But even imposition of symmetry in evidentiary rules affecting the parties would obfuscate the central nature of the victims' claims against their aggressors — the acts of violence or threats of violence — and mix it with the claimant's proclivities, personal behaviors and effects.

Just as Title VII evidence of the boss' past sexual relations

463. Estrich, *supra* note 407, at 848.
464. *Id.* at 851 (citing GUTEK, *supra* note 9, at 46, 54.)
465. *See* DEL MARTIN, BATTERED WIVES 2 (1983).
466. *See* SCHECHTER, *supra* note 1, at 26.
467. Estrich, *supra* note 407, at 851.
468. *See id.* (recommending this for sexual harassment cases).
469. *Id.* at 848.

with other employees is admissible even if the incidents are alleged to be "voluntary" because they set a tone in the workplace that sexual acquiescence has consequences,[470] so should an abuser's past violence against other partners or rapes of other women be admissible because they demonstrate a tendency to use violence in similar contexts. So-called "symmetrical" admission of evidence of a wife's relations with other men will not provide information relevant to the inquiry of the existence of wife abuse. Admission of such evidence may, instead, reinforce women's experience of powerlessness to confront violence because they may fear a court proceeding in which their lives will be unfairly scrutinized and evidence of male and female sexual activity will be received in vastly different ways by the jury.[471]

To avoid the problem of opinion and reputation evidence cutting unfairly against woman claimants, Title I, Subtitle E of the VAWA provides new evidentiary rules in some civil cases. The section amends the Federal Rules of Evidence by adding a new section: "[I]n a civil case in which a defendant is accused of actionable sexual misconduct, reputation or opinion evidence of the plaintiff's past sexual behavior is not admissible."[472] Cases involving "actionable sexual misconduct" include "sex harassment or sex discrimination claims brought pursuant to title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)) and gender bias claims brought pursuant to title III of the Violence Against Women Act of 1993."[473]

Pursuant to the VAWA, however, all evidence of a plaintiff's past sexual behavior is not excluded. "[E]vidence of a plaintiff's past sexual behavior other than reputation or opinion evidence may be admissible if — (1) it is admitted in accordance with procedures" requiring the defendant to make a specific, timely written motion to offer evidence accompanied by a written offer of proof upon which a court will hold a hearing to determine whether the evidence is relevant, that it is not excluded by other evidentiary rules,[474] and that "(2) the probative value of such evidence outweighs the danger of unfair prejudice."[475] To procedurally protect plaintiffs, this section requires the court to consider, in its order admitting the evidence; "the chain of reasoning leading to its finding of relevance; and . . . why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the

470. *Id.* at 849.
471. *Id.*
472. Senate VAWA, *supra* note 271, at § 152(a).
473. *Id.* at § 152(d).
474. *Id.* at §§ 152(b)(1), (c)(1) and (2).
475. *Id.* at §§ 152(b)(2) and (c)(3).

evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences."[476]

This provision is necessary to protect women who bring civil rights claims for domestic violence, but it may not go far enough. Many judges who preside over rape trials devalue similar provisions of rape shield laws, weigh the probative value of admission of evidence against the prejudicial effect of it, and admit evidence of the victim's sexual activities with other men.[477] Generally, such evidence is irrelevant to the alleged act of rape by the defendant. To improve this rape-shield system, Susan Estrich suggests a limited symmetry to

> draw lines between sex and aggression which make evidence of the latter admissible, even if the line between the two is an artificial one. [She wants] to know if the man has been prosecuted or sued for rape elsewhere, or arrested for domestic assault, and [wants] to know even if the cost of knowing is also asking whether the woman has ever complained of rape.[478]

Such a rule should hold in the civil rights action for gender-motivated acts or crimes of violence. Evidence of a battered woman's prior legal actions to address violence sustained by other men and the outcome of those claims may be relevant to ensure that claimants do not engage in false accusations.

Finally, the question of expert witnesses must be addressed by courts in the Title III context. In criminal prosecutions, battered women's self defense claims have been supported by expert testimony to provide a background on battering and its effects, the so-called "battered woman syndrome." In this way, courts and juries learn about the context and effect of the abuse, torture and shock that battered women experience.[479] Such testimony is also needed in civil rights actions in which prejudice and innocent preconceptions may serve to distort the evidence before the jury. Title VII courts often judge the motivations of women on the basis of stereotypes "which punish real women for both their strengths and their weaknesses, and leave unchallenged the most traditional 'scorned woman' explanations for why women complain of harass-

476. *Id.* at § 152(c)(3).

477. *See* Estrich, *supra* note 407, at 849 (citing State v. Colbath, 540 A.2d 1212, 1216 (1988) (Souter, J.) ("evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances")); Kathleen Winters, *United States v. Shaw: What Constitutes an "Injury" Under the Federal Rape-Shield Statute?*, 43 U. MIAMI L. REV. 947 (1989); Andrew Z. Soshnick, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644 (1987)).

478. Estrich, *supra* note 407, at 850.

479. *See generally* Schneider, *supra* note 124.

ment."[480] As Estrich notes,

> women who are considered by courts or co-workers to be 'outspoken' or 'assertive' are expected to be outspoken or assertive about the sexual wrongs of their bosses. The fact that such assertiveness might bring embarrassment, or even dismissal, is routinely ignored, as is the fact that women in these cases are always relatively powerless.[481]

In Title III actions, as in battered women's self defense claims, expert testimony on the phenomenon of domestic violence, the patterns and tools of power and control, the typicality of separation assault, and the psychological effects of battering should be available to prove the existence of threats of use of force and demonstrate the impact of domestic violence in assessing damages. Such testimony may counter the prejudice that arises against women who challenge violence and harassment in other contexts.

2. Alternatives: Radical Essentialization and Radical Subjectivity

To eliminate violence against women in the home, and in light of the uncertainties of proof of a battered woman's Title III claim, Congress and the courts should augment the VAWA with alternative approaches to proof of a prima facie case. Ideally, Title III would allow for three alternative ways of proving a prima facie case, electable by the plaintiff and arguable in the alternative, to enforce the substantive right to be free from gender-motivated acts or crimes of violence. The first, the radical essentialization approach, would set forth "per se violations" of Title III in an effort to preclude violence in the home,[482] much like the House VAWA

480. Estrich, *supra* note 407, at 848.

481. *Id.* at 851.

482. Legislative establishment of per se violations of Title III provides normative bounds of prohibited gender-motivated behavior and allows a plaintiff to make a prima facie case by demonstrating that the prohibited acts occurred. In the context of a battering relationship, the knowledge that hitting, punching, restraining, or threatening another constitutes behavior actionable pursuant to the VAWA would send a clear message that abusers should refrain from using violence.

The risk of establishing per se violations of a civil rights law, of course, is that static categories might not represent the true dimension of domestic violence and may thwart women's use of the remedy if the behavior they complain of is different than that codified. In addition, the understanding of battering and the women's movement's social change needs may change over time, change which would not be reflected in static categories. However, given the educational function of federal civil rights laws, there is value in marking certain behavior as legally out of bounds. Such per se violations will support judicial enforcement of Title III of the VAWA and can be amended to reflect the changes in battering behavior, new understandings of wife abuse and the changing needs of the battered women's community that may develop as a result of the adoption of the VAWA. Furthermore, the negative

does for sex crimes.[483] The second should be a more traditional civil rights approach such as that already proposed by the Senate[484] and House VAWA.[485] The third, the radical subjectivity approach, would incorporate an individualized, victim-perspective standard.[486] The House VAWA and the Sentencing Commission's three-tiered approach of proving past crimes of violence for sentencing purposes should serve as models for amendments to the Title III civil rights cause of action.

Violence against women is severe and warrants a section of the VAWA that sets forth per se crimes of violence motivated by gender. This approach categorizes violent battering behavior as unlawful and outside the norms of society. To prove a prima facie Title III case with this approach, a battered woman claimant should have to demonstrate that per se "acts of violence" had been committed against her within the context of an abusive relationship,[487] or as separation assault for leaving such a relationship.[488]

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aspects of static categories are easily overcome by providing alternative ways of proving a Title III violation.

483. *See* House VAWA, *supra* note 272, at § 301(d)(1)(A).

484. Senate VAWA, *supra* note 271, at § 302(c).

485. House VAWA, *supra* note 272, at § 301(d)(1)(B).

486. An individualized approach permits the trier of fact to consider "particular circumstances and perceptions under which a battered woman operates." Schneider, *supra* note 81, at 647. Individualization requires "a full consideration of individual differences and capacities." *Id.* at 639. This approach could be used to determine whether a woman was the victim of a threat of use of force motivated by sex and whether, on that basis, the defendant should be held liable for a civil rights violation.

With an individualized approach, proof of the existence of a threat and the reasonableness of that perception must be judged from the individual's own perspective with consideration of the full circumstances. *See id.* at 640. The victim-oriented standard of proof may limit the gender bias that often exists in the application of "objective" standards. *See supra* note 138. *See also* Schneider, *supra* note 124, at 201, 219; Estrich, *supra* note 407, at 830-31. Generalized stereotypes can be overcome and the law can equalize the position of male and female actors by recognizing their differences. Schneider, *supra* note 81, at 640.

The language of "reasonableness" muffles the voice of the individual claimant by suggesting that an imaginary position of neutrality best explains her particular circumstances and perspective. "In their concern to avoid the social and moral irresponsibility of the first voice, legal thinkers have veered in the opposite direction, toward the safety of the second voice, which speaks from the position of 'objectivity' rather than 'subjectivity,' 'neutrality' rather than 'bias.'" Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 583 (1990). By so doing, the language obscures the power of the law, the reality that "legal interpretive acts signal and occasion the imposition of violence upon others." *Id.* (quoting Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986)).

To successfully accomplish individuation in practice, evidence revealing a woman's perceptions and perspectives arising from past contacts must be admissible in lay testimony, augmented by expert testimony. *Schneider, supra* note 81, at 644-46.

487. *See supra* note 3.

488. *See supra* notes 55-56 and accompanying text.

The acts of violence should cover the broad spectrum of battering behavior — hitting, punching, slapping, kicking, pulling hair, biting, and burning another, or threatening such behavior, use or threat of use of weapons, coercive sex and sexual acts, forced restriction of movement and intentional deprivation of basic needs such as food, water and medical care. Because battering behavior enforces power and control in heterosexual relationships consistent with the batterer's gender role expectations and in concert with the dominant social structure,[489] a battered woman who demonstrates these acts of violence should also have established a prima facie case of gender motivation. The gender motivation of battering has as strong a foundation, based on the history and context of the violence,[490] as the presumption of gender motivation for rape, based on the sex inherent in the crime itself.

The second means of proof in this amended VAWA would be that established by the existing VAWA: proof of commission of a gender-motivated crime which has, as an element, the actual, attempted, or threatened use of physical force against a person.[491] In this general category, there should be a rebuttable presumption of gender motivation where a woman can establish that the violent crime took place in the context of a battering relationship, or in leaving an abusive relationship. The defendant could then rebut proof of the acts or motivation. In response, the plaintiff could introduce specific evidence of gender motivation. Finally, the radical subjectivity approach would allow a battered claimant to proffer evidence of the batterer's conduct and/or her response to determine whether that conduct "presented a serious potential risk of physical injury"[492] to the claimant. If the immediate conduct did not amount to an act of violence enumerated as a per se violation, the claimant should be permitted to admit evidence and expert witness testimony to demonstrate that the gender-motivated conduct created, in the totality of the circumstances judged from her perspective, a threat of physical injury which would elevate the action to a violation of the VAWA civil rights statute. This is a victim-oriented, highly individualized approach.[493] The claimant

489. *See supra* note 57.

490. *See supra* § II.B.

491. *See supra* § IV.B.2.

492. *See supra* notes 319-20, and accompanying text (U.S.S.G., 18 U.S.C. App. § 4B1, Application Note 2 (1992)). This proposal is based on the amended sentencing guidelines and not on 18 U.S.C. § 16.

493. Kathy Abrams suggests a useful three-staged, victim-oriented approach toward sexual harassment adjudication which could be adopted in the VAWA context. The prima facie "victim perspective" case in Title III, like that suggested for Title VII, would focus on the subjective response of the plaintiff to the behavior of the

could show that she had become fearful of the violator and had modified her behavior to avoid further abuse. She could demonstrate the serious potential risk by proof of cycles of violence, past injury and threats. If she could demonstrate that she was battered in this way, gender motivation should be a rebuttable presumption. If not, the claimant also would have to prove gender motivation.

Congressional approval of these alternative mechanisms of proof would clarify the application of the VAWA civil rights remedy as applied to wife abuse and allow battered women to articulate their experiences while seeking justice for deprivation of their civil rights. Regardless of Congressional approval of the specific amendments, some battered women will be able to establish that they have been targets of crimes of violence motivated by gender as set forth in the existing Title III proposal.

V. Implications of a Civil Rights Remedy for the Battered Women's Movement

The use of civil rights remedies by battered women raises many theoretical and strategic issues for the battered women's movement. The first concerns "rights" theory and the fear that a reified "rights" discourse will constrain the battered women's

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abuser. The plaintiff's description of the defendant's violent behavior and threats of use of force, the feelings of coercion or devaluation it produced and the gender roles it enforced would establish the plaintiff's prima facie case. *See* Abrams, *supra* note 417, at 1209. The burden would then shift to the defendant who would bear the burden of non-persuasion. The defendant would be allowed an opportunity to answer the claim that he committed a crime of violence motivated by gender by threatening the use of force. He could demonstrate that he didn't do it, that the plaintiff's reactions were idiosyncratic or pretextual, or that the alleged behavior was not likely to enforce gender roles or his dominance nor violate his wife's integrity. *See id.* at 1210-11. To evaluate the defendant's rebuttal, the court could apply the "totality of the circumstances" test, as required by the VAWA, and consider factors probative of gender motivation, including: the nature of the conduct; the frequency of violent conduct; the extent to which that behavior reinforces the defendant's view of plaintiff's appropriate gender roles; the language or terms used during the violent act that indicate gender motivation; sex crimes or the targeting of sexual organs or effects; whether the defendant has a history of violence targeted at women; and, the cycle of abuse.

If the defendant sustains his burden of non-persuasion, the plaintiff would have an opportunity to make a rebuttal showing that her "idiosyncrasy" was knowingly exploited on the basis of her special sensitivity. *See* Abrams, *supra* note 417, at 1214. For example, if a woman is atypically sensitive to violence or threats of use of force because of prior history of abuse and is exposed to such conduct by a domestic partner aware of her history, she can argue that such treatment is coercive, intended to place her in a subordinate position and evidence of gender motivation. The advantage of the victim-perspective proposal, the "radical subjectivity" approach, is that it does not require women to meet an imaginary "reasonable person" or "reasonable woman" standard; rather, this approach confronts directly an indvidual's particularized experiences.

movement instead of fulfilling the potential that the "dynamic interrelationship of rights and politics"[494] will advance the political development of the movement.

The second critique of the civil rights remedy as applied to domestic relations centers on the practical limitation of the remedy to heterosexual victims of battery. Such a focus may perpetuate popular images of battered women that reflect heterosexual norms at the expense of lesbian experience and insight. The practical application of the civil rights remedy by battered women litigants and its relative value as a legal tool also may be questioned, as well as the implications of what some may claim is a paternalistic remedy. Finally, those who agree that the battered women's movement should affirm the power of survivors of wife abuse may fear the articulation of "victim" language at a civil rights trial. Despite these concerns, introduction of the civil rights remedy is likely to play an important educative function in the articulation of women's experiences, promote liberating and powerful images of battered women and serve individual women in their search for justice. On balance, civil rights remedies should be embraced and used by battered women.

A. Rights and Politics — Struggles for Dignity

Articulation of rights concepts is a familiar and powerful element of American political and legal discourse.[495] "Rights" evoke powerful images of entitlement and worthiness of individual and group claims. Rights demands often serve as critical interventions against aspects of inequality, exclusion, discrimination and violence perpetuated by the dominant power structure. Rights theory in the women's movement has played a part in political efforts to gain women's suffrage, legalized abortion, access to universities and employment, protection against discriminatory treatment and remedies against sexual harassment and domestic violence. Each of these efforts has had transformative effects on the social structure, but none have fully reached their emancipatory and transformative potential. The structure of gendered power and violence against women remains.

Some commentators condemn the notion of the "rights" concept itself. Individual rights often are treated as naturalized, re-

494. Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 590 (1986).

495. The "civil," "women's," "welfare," "animal," "consumer," "human," "environmental," and "voting" rights movements all suggest the broad evocative power of the concept of rights.

ified concepts that form the neutral categories of a liberal state; this treatment obscures and distorts "the reality of the social construction of rights and duties."[496] Use of reified rights theory serves to validate the concepts and structures of the liberal state without challenging the core.[497] The "excessive preoccupation with 'rights consciousness' tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves."[498]

This critique highlights, as well, the practical danger of the unknown outcome of rights theory. Reliance on the state to protect individuals appears to result in the forfeiture of alternative mechanisms of articulating values and commitments arrived at through collective discourse and enforced by community means. Further, it may be seen as paternalistic for women to seek help of the state in a struggle for emancipation. Rights theory can work for emancipatory purposes, but often it serves to reinforce the status quo.

> For most of American constitutional history, rights theories have been associated with protection of property against a more just distribution of wealth and privilege. Even as an emancipatory conception of rights has emerged during the past half century, theories of rights have continued to represent a double-edged sword because of their lack of grounding in any substantive theory of social justice or the 'good society.'[499]

The "individual" orientation of rights theory, the assertion that citizens have rights and duties toward one another and liberties against the state, also reaffirms the dichotomy between the public and the private. Like other classical legal concepts, this distinction is a dilemma for women. The right to privacy has been at the core of the emancipatory recognition of important constitutional rights for women, including a woman's right to control her own reproduction[500] and family rights.[501] Yet, the public/private

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496. Morton J. Horwitz, *Rights*, 23 HAR. C.R.-C.L. L. REV. 393, 403-04 (1988).

497. *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

498. Schneider, *supra* note 494, at 611.

499. *See* Horwitz, *supra* note 496, at 393.

500. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). Family and parental rights are closely linked to rights of privacy. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right "to acquire useful knowledge, to marry, establish a home and bring up children").

501. *See* Runyon v. McCrary, 427 U.S. 160 (1976). "The *Meyer-Pierce-Yoder* 'parental' right and the privacy right, while dealt with separately in this opinion, may be no more than verbal variations of a single constitutional right." *Id.* at 178 n.15.

distinction also traditionally has worked to hinder the claims of women and has been one cornerstone of women's vulnerability to wife abuse.

In contrast to the state's "hands-off" posture against intervention in the family to protect the disempowered, the U.S. Supreme Court has allowed intrusion into the most private experience of lovers, their sexual activity, by enforcing state laws against sodomy.[502] Furthermore, the Reagan/Bush appointed judiciary makes civil rights litigation at the federal level predictably difficult and possibly damaging to women. There is legitimate fear among feminists that initiating rights claims within the family may result in intrusion upon valued aspects of privacy, and ultimately, may place women at further risk of private and public subordination.

Despite the risks of civil rights litigation, rights advocacy within the context of the women's movement should not be abandoned — especially where women's lives are at risk. Establishing civil rights protection against violence motivated by gender is not paternalistic, but an essential aspect of securing equality and a tool for strong challenges to a structure of male dominance. Debate over the choice of which rights to articulate and how to inform and enforce those rights is the more important political question than whether rights concepts should be articulated at all.[503] Where there is fear of lack of success of federal civil rights claims, there should be strategic enforcement of the remedy in some state courts until the federal judiciary demonstrates a greater openness to civil rights seekers.

In recognition of the dynamic interrelationship between theory and practice and the vast options available for strategic use of the civil rights law, a dialectical perspective of "rights"[504] should be adopted to evaluate the benefits of civil rights remedies for battered women. From this perspective, "rights" notions should not be thought of or treated as static, positive law concepts, but as tools informed by struggles for social change. The value of rights articulation extends beyond the dimension of Supreme Court recognition of federal constitutional protection. Indeed, rights advocacy broadly conceived encompasses all political efforts for social

502. *See* Bowers v. Hardwick, 748 U.S. 186 (1986).

503. For instance, the public/private distinction, which works against women by perpetuating wife abuse, should be deconstructed. An alternative grounding for abortion rights could be sought in legislation and theories other than privacy, such as equal protection. *See* Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989).

504. *See* Schneider, *supra* note 494, at 589.

change at the grassroots, state or federal level — it is the communal articulation and debate about normative moral values and social goals that should be embodied in the laws of the state.

Articulation of battered women's "civil rights," whether those rights stem from Congressional enactment or state constitution, is a passionate expression of the integrity of individual persons and the value of women as a group. It is not a perpetuation of victimization, but an embrace of empowerment. The notion of "rights," as Elizabeth Schneider notes, should be contextualized within the social movement that articulates it.

> Various kinds of legal rights and entitlements may be used in a manner that helps to develop social movement, which in turn leads to expanded opportunities for a more humane society, or they may be used to help frustrate social movement by legitimizing existing relationships. The meaning of a right or entitlement depends upon the way in which it intertwines with social movement.[505]

Schneider further contends that "[t]he women's movement's experience with rights shows how rights emerge from political struggle. The legal formulation of the rights grew out of, and reflected, feminist experience and vision which culminated in a political demand for power."[506] Like the women's movement generally, battered women's coalitions have developed the underlying power and resources to make a real difference for many survivors of wife abuse. This experience provides a context for furtherance of the goal of ending violence against women. The political and legal articulation of civil rights demands is an effective tool to promote this advancement which lies in the hands of increasingly empowered women.

Late 19th- and early 20th-Century battering resisters recognized that "the language of absolute 'rights' is only one legitimate approach to self-defense; in a patriarchal system there were neither institutions nor concepts defending absolute rights, but rather custom and bargaining."[507] Women's construction of the notion of a right or entitlement to protection evolved when women "had some reasonable expectation that they could win — otherwise strategies other than head-on confrontation with a husband's prerogatives were more effective."[508]

> Women's invention of a right not to be beaten came from a dialectic between changing social possibilities and aspirations. When women's best hope was husbands' kindness, because

505. *Id.* at 612 n.102.
506. *Id.* at 648.
507. GORDON, *supra* note 28, at 256.
508. *Id.* at 258.

> they were economically dependent on marriage, they did not protect violations of their individual rights but rested their case on their importance as mothers. As women's possibilities expanded to include wage-earning, remarriage after divorce, birth limitation, and aid to single mothers, their best hopes escalated to include escape from marital violence altogether.[509]

As previously discussed, since the mid-1970s, feminists have developed support groups, newsletters, legal resource centers, shelters, and personal safety mechanisms to assist directly survivors of wife abuse and to challenge violence against women.[510] In addition, battered women's growing political clout in legislatures across the nation has resulted in abuse prevention legislation which allows women to obtain civil orders of protection.[511] Domestic relations laws have been modified to recognize the special status of battered mothers and create presumptions on their behalf during temporary custody proceedings.[512] These efforts articulate the battered women's needs for safety and legal protection. They imply a "right" to be free from violence, but they do not articulate that right directly or provide a civil cause of action whereby women can obtain damages for batterers' violations of their integrity.

The power of the battered women's movement is still relatively weak, however, and exists largely in opposition to the dominant male power structure. Shelters are notoriously underfunded; women are battered and raped in increasing numbers. Despite legislative "victories" in the struggle to erode male dominance, each has had a backlash. For example, upon a woman's complaint for a protective order, mutual restraining orders are commonly issued which put women in greater danger.[513] "Learned helplessness" has been turned against women in custody battles[514] and women have been blamed for failure to protect their children[515] against

509. *Id.*

510. *See generally* SCHECHTER, *supra* note 1.

511. *See* § II.D.2.

512. *See, e.g.*, MASS. GEN. L. ch. 31 (1992).

513. *See* Finn, *supra* note 147, at 51. Mutual restraining orders fail to identify the abuser as the individual to be restrained from abusing the wife but order both parties to refrain from interfering with the liberty of the other or harming the other. Therefore, if a woman who was issued a "mutual" restraining order calls the police for protection, the police are likely to be confused when they arrive about who is dangerous and may choose to mediate the dispute or arrest both parties. Neither resolution serves to protect the battered woman.

514. For a comprehensive and practice-oriented treatment of this subject, see Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

515. "Wife beaters abused children in 70% of the families in which children were present" and women's use of help-sources is higher where child abuse is present than where it is absent which "constitutes strong evidence of the wife's efforts to

the ravages of their fathers.[516] The structure of power and dominance is not changed by individual, isolated victories. The battered women's movement must, by now, be conditioned to the need for continual advocacy and struggle to prevent the appropriation of emancipatory tools by those who would further women's oppression.

A realistic assessment of judicial, legislative and social treatment of women's rights claims, while sobering, does not require abandonment of civil rights efforts or any other kind of legal strategy. Instead, women's legal claims and strategies, and the timing with which they are deployed, should be informed by the needs of the movement and predictions of the way the dominant framework will treat such claims.[517] If positive lessons can be learned from feminists' efforts to pass anti-pornography ordinances,[518] state and federal civil rights legislation prohibiting violence against women and well-publicized litigation of battered women's civil rights claims is likely to provoke controversy and serve many positive educational functions. Considering the dynamic interrelationship of rights and politics, civil rights discourse is an appropriate mechanism to advance the political development of the battered women's movement. There are at least seven positive effects battered women's civil rights theory will have in forwarding the goals of the women's movement.

First, civil rights discourse directly links violence against battered women to the historical and legal context of that violence. The battered women's movement successfully has positioned the building blocks of individual protection for many. To continue to make societal and structural changes, we must directly focus on the invidiousness of violence against women and transform the dominant law, culture, economic structure and individual behavior that perpetuate the harm. In the big picture, a civil rights remedy promotes safety.

Current cultural understandings of "civil rights" have been

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protect her children." Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES, *supra* note 4, at 162, 164.

516. *See* State v. Wiliquette, 385 N.W.2d 145 (Wis. 1986) (finding woman's failure to act in allowing abusive father to remain in custody of child a causal factor in exposing children to maltreatment for purposes of child abuse statute).

517. The VAWA and other civil rights legislation should be considered in terms of existing jurisprudence. Battered women's advocates should lobby Congress to amend the VAWA's standards of proof so that real women can articulate their real experience, pain and injury.

518. *See* Paul Brest & Ann Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987); Frug, *supra* note 42, at 1067 (characterizing the ordinance campaign as a "dazzling success and an appalling disaster").

shaped by legal definitions and the history of the civil rights movement. The notion of protected class status for women evokes a history of harm, domination and exclusion of women as a group from the white, male power structure. The battered women's movement would gain by continued articulation of the history of discrimination. Civil rights claims would link the dominant social structure to the struggle for power and control in heterosexual relationships, the "private violence" of wife abuse, and show how abuse is one cornerstone of women's subordination. These linkages are essential to challenging the misconception that "random" wife abuse exists.

Second, civil rights claims would project positive images of survivors of wife abuse as powerful agents and valuable members of the community who deserve, like all people, to be free from violence. A battered woman who directly exposes and challenges her treatment, sexualized subordination and the history and social structures which promote violence against women works also to challenge the stereotype of battered women as victims.[519] Although victim identification may resonate with many people's life experiences as well as the core of the western Judeo-Christian moral tradition, civil rights deprivations also conjure up normative impulses promoting the integrity of human life and the inviability of spirit. These impulses counteract debilitating stereotypes of victimization and promote an image of battered women engaged in a collective struggle for empowerment. This is important because an interactive relationship exists between general cultural assumptions about battered women and the substantive law, methods of litigation and legal images of the same. "Serious harm to women results from the ways in which law and culture distort our experience."[520]

Third, civil rights litigation of battered women's claims would expose, as context for each case, the pervasiveness and commonality of battering. Popular images of battered women currently are sensationalized, individualized and essentialized so that the vast majority of women who are abused do not feel they fit the popular stereotype. As such, society denies the pervasiveness of wife abuse. Despite the commonality of domestic violence,[521] the popular image of domestic violence is that it is rare and aberrant.[522]

This radical discrepancy between the "mysterious" character

519. The civil rights remedy will serve to enhance battered women's voices and images as survivors and advocates for justice. *See supra* § II.B.

520. Mahoney, *supra* note 3, at 2.

521. *See supra* § II.A.

522. Mahoney, *supra* note 3, at 11.

> of domestic violence and repeatedly gathered statistics reflects massive denial throughout society and the legal system . . . . Societal denial amounts to an ideology that protects the institution of marriage by perpetuating the focus on individual violent actors, concealing both the commonality of violence in marriage and the ways in which state and society participate in the subordination of women.[523]

Civil rights claims would shift the legal imagery to presume that violence is a societal problem and that individual batterers gain from systemic violence against women. This would counteract, although it is unlikely to eliminate, the tendency of batterers and the judicial system to "blame women for their abuse and deny or trivialize the violence involved."[524]

Fourth, debate over legislation and litigation of civil rights violations would work to reformulate the characterization of what is socially appropriate behavior. The legal remedy embodies a socially transformative, normative potential. Civil rights legislation and litigation[525] would provide opportunities for community interactions over norms of human relations and the development of collective mechanisms to ensure mutual respect and dignity. This collective action expands women's options for community.[526]

Fifth, legislative and legal advocacy efforts that focus on the civil rights violations of battering may result in an increased and widespread commitment to prevent violence against women at its origin and to fund programs for helpseekers. Positive publicity, with or without increased funding, also encourages women to speak out and demand freedom from violence.

Sixth, contextualizing battered women's collective struggle as a civil rights movement taps a pervasively moral chord, strikes at the very legitimacy of our democratic government and demands remedial action.[527] Fundamental rights, guaranteed by the laws of this great land of opportunity, systematically are denied to battered women. Articulation of the deprivation experienced by an entire class of citizens requires reformulation of laws and policies to eradicate the regular experiences of violence directed at women because of their sex.

Finally, battered women's civil rights remedies serve as a vehicle for individual women to obtain damages and compensation

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523. *Id.* at 12.

524. *Id.* at 13.

525. Although litigation has less of an inherent communitarian component, I aspire to notions of lawyering whereby community strategy, support and press work (where appropriate) forms an integral component of the litigation itself.

526. *See supra* § II.D.

527. *See supra* § II.C.1.

for the deprivation of their civil rights. If the elements of proof and procedure are crafted with a survivor's perspective in mind, one litigants' expression would serve an empowering function as she speaks for an entire community by demanding treatment with dignity.

B. Essentialism and Legal Norms

The civil rights characterization of wife abuse — as an act on a continuum of male violence against women, rooted in sex — risks creation of images that essentialize gender categories and fail to give weight to differences of race, class, sexual orientation and different preferences for sexual pleasures.[528] Promotion of theories which highlight male dominance may be wrong,[529] may blur the complexities of particular women's situations, promote the image of women as victim[530] and risk recreating norms which actually harm individual litigants.

The civil rights strategy benefits the heterosexual women's community most if it exposes wife abuse as on a continuum of male dominance and violence against women and demonstrates that the continuum of the struggle for power and control works to enhance that dominance through the family institution. Such an explanation risks excluding the possibly different experiences of minority women and the lesbian experience of battering. It risks describing women's voices in a unitary fashion and may perpetuate patriarchy[531] by not articulating the lesbian alternative.[532] The

528. *Cf.* Carole Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, *in* PLEASURE AND DANGER (Carole Vance ed., 1983) [hereinafter PLEASURE AND DANGER]. Vance believes that the proponents of the anti-porn initiatives, in their essentialized opposition to subordinated sex, eliminated the complexity of sexuality — that along with pleasure there is danger. Women have been forced to conform to social norms in restriction of their sexuality. New heterosexist norms fail to acknowledge other views and perpetuate the dishonesty of the "transmutation of sexuality into unmitigated danger and unremitting victimization." *Id.*

529. *See* ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 114-32 (1988). Dominance feminism, Spelman argues, fails to understand the phenomenology of gender discrimination by failing to include the perspectives of so many Black and poor women. The approach requires Black women to divide their racial selves from their gendered selves and treats gender discrimination of Black women like white women "only more so" without recognizing the special confluence of race and gender relations.

530. *See* Vance, *supra* note 528; *but see supra* note 519.

531. The dominance approach may marginalize lesbians and "erase" the experience of lesbians from the feminist map. It falls into the essentialist trap by promoting a notion that all women are different from men and essential in this same way. In this sense, heterosexual women are not challenged in their complicity in the institution of heterosexuality which perpetuates patriarchy and punishes, in particular, lesbians who step outside the gender boundaries. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191

concept may thereby fail to challenge not only the law's content, but its tendency to privilege the abstract and unitary voice. The normative standards in the law may, in turn, serve to thwart all battered women who choose to undertake civil rights litigation.

These concerns should be taken seriously at a theoretical and practical level: legal and political advocates should work to adopt substantive and procedural rights which counteract the negative tendencies of essentialization and increase the odds of positive outcomes for all women. In this vein, the alternative methods of proof of a VAWA civil rights claim should be adopted so that women's voices are amplified by engagement in civil rights litigation and so that the law itself embodies normative requirements for real changes in the practice of violence against women.

1. Heterosexual Norms

Where women are targeted for gender-motivated violence by persons other than their husbands or spouses, the perceived sexual orientation of the women may be an element of the gender motivation in some cases. "[N]egative attitudes toward lesbian and gay people correlate strongly with traditional sexist concepts about the appropriate roles of men and women."[533] In this context, civil rights remedies will benefit women in the heterosexual and lesbian communities by providing a unique remedy for the civil rights harm that is suffered because of heterosexual gender norms.

Promotion of a civil rights remedy for battered women, however, risks the essentialization of heterosexual norms. The existence of lesbian battering challenges the gender-motivation explanation of male on female violence. On the surface, lesbian battering appears to reflect the struggle for power and control in relationships, but does not appear to be explained by the continuum of male violence against women. Use of the civil rights remedy by battered lesbians would require articulation of deprivations at least in part because of gender.

Martha Mahoney articulates definitions of lesbian battering based on the struggle for power and control.[534] Lydia Walker

(1988). The social meaning of homosexuality is a denial of the "traditional belief . . . that stable relations require the hierarchy and reciprocity of male/female polarity." Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218.

532. Although exposure of lesbian violence may, in fact, lead some women to think that this alternative is no safer than heterosexual relationships, it may be that violence is significantly less common in the lesbian community, which would suggest an alternative with a higher likelihood of safety.

533. Law, *supra* note 531, at 221.

534. Mahoney, *supra* note 3.

states that, from her experience working with battered women in shelters, "the only difference in the interpersonal dynamics and perpetration of violence in battering in lesbian couples is that lesbian women report physically fighting back more often than women who are battered by men."[535] If this characterization is correct, there is no lesbian contradiction to the struggle for power and control explanation of battering but an indication that physical resistance to abuse may be more prevalent where size and strength differentials are less extreme.

It is not clear, however, whether lesbian battering can be situated on the continuum of male dominance through violence against women. Although men's battering of women serves to enforce gender-norms, there is no evidence that the "butch"/"fem" stereotype, which heterosexist society erroneously might consider a re-creation of "male"/"female" roles within lesbian relationships,[536] correlates with the identity of the abusive (male) and abused (female) partners in heterosexual relationships. The essentialized characterization of gender-motivated civil rights deprivations may be successful in the lesbian community only by imposition of heterosexist norms and promotion of false images of lesbians. The heterosexual community must be careful not to impose its own imperialist norms.[537]

Thus, it is clear that not all battered women will have similar immediate interests in, or direct benefits from, the use of the civil rights remedies.[538] There is, however, a connection between male dominance in society and the use of violence in the struggle for power and control in all relationships.[539] Violent attacks on lesbians because of their gender and rejection of traditional gender roles might be actionable pursuant to the VAWA. Furthermore, the dominant culture's pressures and stereotypes influence lesbian intimate relationships, even if the results do not replicate heterosexual practice. Lesbians acknowledge the influence of the male dominated society on them. The lesbian community has

> internalized many societal messages about women's roles. We need to be alert, questioning and helping each other to learn

535. Lydia Walker, *Battered Women's Shelters and Work with Battered Lesbians*, *in* NAMING THE VIOLENCE, *supra* note 59, at 76.

536. *See* Joan Nestle, *The Fem Question*, *in* PLEASURE AND DANGER, *supra* note 528, at 237 (discussing the fem phenomenon and heterosexual misperceptions).

537. *Id.* at 235.

538. The "women's movement" notoriously has set forth the white, middle-class, heterosexual woman as the normative standard of the category "women;" in this context, the individuals who are likely to benefit most directly from civil rights remedies are heterosexual women.

539. *See supra* § II.B.2.

> which of these roles to accept and cherish, and which to let go. The attention we devote as a lesbian feminist culture to sensitivity, to processing problems, and to mutual emotional support, emphasizes our recognition of the value of many of the traditional areas of women's skill.[540]

The values of solidarity and support, relative isolation from the heterosexist culture, reluctance to being "out" in that culture, lack of particularized community resources and the discrimination many lesbians face when they are open about their sexual orientation perpetuates the isolation experienced by lesbian survivors of battering. Such isolation prevents battered lesbians from seeking assistance. American culture "teaches women to be nonassertive, dependent on others for validation, and nurturers of their relationships;" the culture supports battered lesbians in accepting blame for the abuse, sustaining hope that it will stop and seeing no alternative in the greater community.[541]

Promotion of civil rights remedies for gender-motivated violence would serve lesbians targeted because of their sex. By not articulating the experience of battered lesbians, use of the civil rights remedies by battered women may risk battered lesbians' further isolation and danger in this area. But by challenging gender-motivated violence in heterosexual relationships, battered women challenge the construct of gendered power relations which would have positive ramifications in the lesbian community.

2. Race Bias

Like lesbian battering, issues of race may complicate the characterization of the battering experience as gender-motivated violence. Different stereotypes attributed to racial groups may lead to variance in the practical application of civil rights laws. Finally, not enough may be known about the intersection of race and domestic violence to impose the legal standards of the mainstream battered women's movement which has been critiqued as predominantly white.

As is clear from Jacqueline Dowd Hall's study of race, rape and lynching in the slave and post-Reconstruction south, gender and race relations are inherently intertwined.[542] Patriarchal con-

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540. Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse*, *in* NAMING THE VIOLENCE, *supra* note 57, at 193.

541. *Id.* at 191.

542. "The violence directed at black women illustrates the double jeopardy of race and sex. . . . Black women . . . routinely . . . served as targets of sexual assault. . . . [T]he sexual access of white men to black women was a cornerstone of patriarchal power in the south." Jacquelyn Dowd Hall, *The Mind That Burns In Each Body*, *in* POWER OF DESIRE 328, 332 (Ann Snitow, et al., eds., 1983).

trol was asserted by white men over Black women, upon whom notions of promiscuity and sexual agency, "the fear and fascination of female sexuality was projected" and communicated white men's power over Black men through lynching.[543] White women also were constrained by the so-called "protection" against Black men's sexual advances.[544] "For this privilege (of protection) . . . she might pay with suffering in the extreme. In any case, she would pay with a lifetime of subjugation to the men gathered in her behalf"[545] whose own acts of rape were met as "moral lapse(s) . . . better ignored and forgotten."[546]

Just as Black men continue to draw disproportionate punishment for sexual assault,[547] popular stereotypes and images work against black women in a courtroom where demonstration of deprivation of rights is necessary. Left-over stereotypes of the Black woman as a strong, powerful, sexual provocateur, and as the "object" of property, may work against her in civil rights cases. The Massachusetts Gender Bias Commission found such racial bias.

> [R]esearch literature and media reports indicate that ethnic and racial minorities encounter stereotypical views of the role of violence in relationships among minority group members. In a recent proceeding in which a male defendant was being sentenced for assaulting a woman with whom he was residing, the judge cited general levels of violence in the black community as a mitigating factor in the sentencing determination. The defendant's attorney in the case spoke about the more violent nature of relationships among blacks. Such stereotypes serve to minimize and condone violence that would not be tolerated among strangers or acquaintances who are white. Stereotypes relating to economic class tend to have the same effect, even though battering is a phenomenon in all classes.[548]

Other racial and ethnic minorities might find different stereotypes at work. For instance, Asian-American women, culturally mislabelled as passive and weak, may be perceived as victims of domestic violence but may not be understood as independent, strong agents who desire to be compensated for deprivation of their civil rights. Further, there may be a double standard in the

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543. *Id.* at 333. "The 'protection of white womanhood' was a pervasive fixture of racist ideology" and "an accepted rationale for lynching" Black men. *Id.* at 334.

544. White women were the forbidden fruit, the untouchable property, the ultimate symbol of white male power. As the vulnerable, virginal Victorian image of white women was projected in the popular culture, rape of a white woman by a Black man was met with lynching — a gallant retribution for the violation, pollution and humiliation of the pure Fair Maiden victim. *Id.* at 334-35.

545. *Id.* at 335.

546. *Id.* at 339.

547. *Id.* at 343.

548. MASSACHUSETTS GENDER BIAS REPORT, *supra* note 13, at 90.

evidentiary burden depending upon the operable stereotypes. When information presented by litigants confirms sex and race stereotypes, no independent proof may be necessary to satisfy the judge, but when information cuts against the stereotype, judges may demand empirical quantification or a production of evidence.[549]

Without recognition of the particular reality of every group of minority women, racial stereotypes may work to hurt those who litigate civil rights violations under the gender motivation rubric. Those who truly are victimized may not be perceived as such because they deviate from the white woman norm.

Battered women who actively seek recognition of their civil rights will generate positive social influences, but they must work as well to overcome historical prejudice and racial bias.

3. The "Perfect Case"

Reliance on legal remedies to bring justice to battered women requires appeal to male legal norms and predominantly male judges. As always, legal action risks results that ultimately may do more harm than good for individual litigants and for the women's movement of which they are part. Nevertheless, civil rights remedies are an important addition to the collection of tools women can utilize to escape the "private violence" that enforces a gendered power structure.

Imposition of unitary descriptions, such as "gender motivation," together with the failure to articulate the reality of different women, can translate into essentialized, prescriptive normative standards which tend to work against women who bring claims that differ from the judge's estimation of the norm. Battered women's civil rights strategies may run this risk, unless remedies are crafted to ensure that individual litigants' experiences can be articulated within the legal process.

Judicial establishment of difficult burdens and standards to prove violations of civil rights might reduce the positive transformative value of the civil rights remedy and serve to disempower individual women who seek to enforce their rights. Failure of individual rights seekers may translate into disempowerment of the community. Denial of battered women's civil rights claims in the courts risks creating a situation in which battered women are put in worse danger. If courts do not endorse battered women's

549. *See* Williams, *supra* note 23 (in EEOC v. Sears, 625 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*., 839 F.2d 302 (7th Cir. 1988), the court "opinion establishes a legal presumption that all women fit traditional gender stereotypes").

civil rights claims, other battered women may deny the severity of the violence levelled against them[550] or reject the possibility of life without violence.

Possible claims may be rejected as a result of judicial recognition of only the most extreme cases in denial of the severity and pervasiveness of battering.[551] Capturing the extreme cases as the norm of the type of situation appropriate for a civil rights action might marginalize the successful cases and ill serve women who experience more common and regular deprivation of their civil rights. In one act of systemic denial, Senator Biden suggested that "random" domestic beatings would not be actionable because the requisite "gender motivation" would be absent.[552] In a similar vein, prosecutors who have contemplated litigating gender-motivated civil rights claims have avoided the common violations which demonstrate widespread male dominance and sexualized subordination of women, and sought instead a fact scenario which appears to be an aberration.[553] To avoid losing the first gender-motivated civil rights claim, these prosecutors risked seeking a fact scenario which may never occur, and if it did, might solidify applications so different from the common experience of battered women that the remedy would never serve them.

Evidence of the "perfect case" phenomenon exists in the VAWA legislative history and in the early experience of the Massachusetts Attorney General's Office. The Attorney General's Office considered bringing state civil rights claims on behalf of battered women but sought the "perfect case" to initiate the use of these remedies in the context of gender-motivated violence.[554] The

550. *See supra* § IV.C.1.

551. *See* Mahoney, *supra* note 3, at 16-18.

552. One of the central difficulties in bringing battered women's civil rights claims is the commonality of the battering experience and the resulting individual and social denial of the severity of the problem in American society. The cases which are litigated will face an unstated higher burden to overcome popular assumptions and profound tendencies toward denial. Those who sit in judgment might require demonstration that the case at bar is qualitatively and quantitatively different, more egregious, than the common violence that haunts their own experience or the experience of others they know. If jurors or judges already have determined for themselves that they must not act to stop violence of which they may be aware, the denial of that harm will likely cloud their willingness to acknowledge another's. That commonly experienced domestic assaults and rapes would be actionable as civil rights violations calls into question long-held notions of appropriate roles within the family and the very structure of American society. Such pervasiveness may result in judicial resistance and heightened, limiting standards.

553. *See supra* note 348 and accompanying text.

554. Until 1991, the Massachusetts Attorney General's Office had contemplated, but not filed, gender-motivated civil rights claims. Telephone interviews with George Fisher, Civil Rights Division, Massachusetts Attorney General's Office, in Boston (Apr. 1991).

"perfect case" would involve a woman victim, a male defendant who did not know her and had no prior relation with her, who picked her out as a target of violence — preferably rape — and said something derogatory toward all women as he sexually assaulted her.[555]

An example propounded in the legislative history of the VAWA suggests that while domestic violence is common, the extreme case of an actionable claim touted by the Senate Judiciary Committee involves a stranger jumping out of the bushes, hurling misogynist slurs at his victim and raping her.[556]

The great risk of the civil rights remedy is that it may work to prevent women from telling their own stories and impose a rigid formula for success which requires objectification of the woman as a "symbol" of all women. If this transpires, the very nature of a civil rights remedy may work against women's interests in the long term.

C. Civil Rights Remedies Should Be Used

Despite the foregoing concerns, articulation of a civil rights remedy serves the agenda of the entire battered women's movement precisely because it reveals battering as a societal problem of male on female violence and subordination. This perspective legitimately ties individual violence to a cultural and historical context, it links individual battered women to a collective movement. Such an endorsement, however, is not meant to detract from serious concerns about the development of the feminist coalition or the proposed language of the VAWA.

Undercutting the dominant male power structure through successful litigation of battered women's civil rights claims would help to erode a system that negatively impacts lesbians as well as heterosexual women, minority women as well as whites. The existence of lesbian violence does not require abandonment of social reform efforts to create a nonviolent culture; nor should it require abandonment of heterosexual battered women's zealous advocacy of civil rights claims against their abusers. The situation may require recognition that

> [w]e have all grown up in a sexist and homophobic culture. The seeds of both victimization and violence are dormant in all of us . . . . we need to recognize those seeds for what they are, to expose them, and gently tug them from the roots of our

555. Telephone interview with Judy Beals, Public Protection Bureau, Massachusetts Attorney General's Office, in Boston, (May 1, 1991).

556. *See supra* note 451.

psyches, as they begin to sprout, take hold, and grow.[557]

Indeed, lesbians may choose not to litigate claims against their partners pursuant to civil rights statutes requiring "gender motivation," but white and minority women who do will indirectly benefit the lesbian community's efforts to cultivate an environment in which heterosexuality is not compulsory[558] and in which male dominance through violence has no place.

The civil rights approach will help to re-cast the mold of male dominance which oppresses women as a whole. It is an important and necessary tool which should be used, together with other strategies, to deconstruct the neutral and natural appearances of the existing structures of power which conceal a many-faced oppression. Yet, all civil rights strategists must be sobered by recognition that use of the remedy requires reliance upon one of the most entrenched of all institutions of male power — the law.

The public nature of the battered women's civil rights remedy, compared to other legal strategies, may best serve feminist emancipatory goals by revealing the lack of foundation for the public/private distinction and other constructions of classical legal thought. Repeated, direct exposure may accelerate erosion of the underpinnings of an exclusionary and violent system that has withstood less direct forces of history; it may create the space within which to develop new structures of tolerance.

As such, broad coalition goals should be adopted which are inclusive of many voices and strategies joined together to achieve the liberation of all subordinated people. The civil rights strategy for battered women must embrace a broad challenge to male violence and gender norm enforcement that is sensitive to differences between women. Battered women's experiences, as articulated by each claimant, will assist in revealing the effects of gendered power relations and gaining recognition of the authenticity of each woman's struggle.

The shared commitment to removing the mask of domination is likely to have a liberating and self-definitional effect on individual claimants.[559] Articulation of the right to human integrity, once counteracted and muffled by carefully metered abuse, can be cele-

557. Hammond, *supra* note 540, at 196-97.

558. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence, in* BLOOD, BREAD & POETRY: SELECTED PROSE 1979-85 (1986) ("compulsory heterosexuality" is the enforcement of heterosexuality for women as a means for ensuring male right of physical, emotional and economic access). Rich's perspective appears to support a civil rights remedy in that she sees all women as united by a lesbian continuum and, at one level, in solidarity.

559. *See* Schneider, *supra* note 494, at 616, for discussion of Carol Gilligan's theory of moral development in relation to legal rights notions.

brated with the exposure of and resistance to widespread and systemic violence. Women are more likely to tap into this web of potentially supportive relationships if popular images link their experience to others. One practice goal, therefore, must be to bring forth a broad range of early civil rights cases to demonstrate that all women, regardless of their double and different oppression, can gain judicial relief for gender-motivated deprivations of their civil rights.

As social actors, we should recognize a dialectic in the categories we embrace to advance our social change objectives. Although in an ideal world all social categories would be explicitly tentative, the political targets of particular campaigns often suggest categories and norms which, if articulated, can powerfully promote that movement's definitive goals. The widespread violence against women in all spheres of society cries out for an intervening civil rights strategy. In turn, the practice of articulating and litigating civil rights claims may stem violence against women and will inform and change our notions of gender motivation and the category of gender altogether.

This praxis, if tied to the collective action of a broad coalition seeking an evolving set of emancipatory goals, should aim to make the category of gender itself irrelevant. The world should not be polarized by gender, and divisions among feminists now serve as bold reminders that oppression is more complex than the single concept "gender" could ever capture. As Mary Joe Frug noted, "exploring, pursuing, and accepting differences among women and differences among sexual practices is necessary to challenge the oppression of women by sex. Only when sex means more than male or female, only when the word 'woman' cannot be coherently understood, will oppression by sex be fatally undermined."[560]

At this stage, it is premature and dangerous to ignore the explanatory power of gender discrimination and sexualized subordination as concepts for exposing and eradicating systemic violence against women. Direct civil rights challenges need not harden into binary gender opposition. Instead, if successfully integrated with other strategies, civil rights victories promise to create new spaces, systems and structures of respect for all people and to promote an environment in which all can thrive. Free from violence.

560. *See* Frug, *supra* note 42, at 1075.