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# Engaging with the State about Domestic Violence: Continuing Dilemmas and Gender Equality

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# ENGAGING WITH THE STATE ABOUT DOMESTIC VIOLENCE: CONTINUING DILEMMAS AND GENDER EQUALITY

ELIZABETH M. SCHNEIDER\*

## INTRODUCTION

Recent legal reform efforts focused on intimate violence,<sup>1</sup> such as state mandatory arrest policies and the federal Violence against Women Act of 1994 (“VAWA I”),<sup>2</sup> underscore the complex issues presented when feminists “engage with the state”<sup>3</sup> on issues of violence. Feminist efforts to use state or federal governmental mechanisms for law reform on intimate violence present serious theoretical and practical contradictions. In this essay I briefly explore these contradictions. I place the issue of the role of the state respecting domestic violence in a theoretical,<sup>4</sup> historical, and social movement context and identify continuing dilemmas presented by recent legal reforms. I suggest that an explicit gender equality framework is a necessary first step for meaningful state engage-

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\* Professor of Law, Brooklyn Law School. This essay, which is based on my presentation at *The Georgetown Journal of Gender and the Law* First Annual Gender, Sexuality, and the Law Symposium, *Hate Crimes, Domestic Violence, and State Accountability*, on February 20-21, 1998, is part of a larger project on feminist lawmaking and feminist legal advocacy on domestic violence. Thanks to the Brooklyn Law School Faculty Research Fund for generous support, to Susan N. Herman and Minna Kotkin for thoughtful comments on earlier drafts, to Alexandra Derian, Pamela Garas, and Tracy Peterson for excellent research assistance, and to Charles Krause for putting it all together.

1. I use the phrases “domestic violence” and “intimate violence” throughout to signify heterosexual intimate violence. Although some of what I say in this essay also applies to same-sex intimate violence, my focus is on heterosexual intimate violence.

2. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in 42 U.S.C. § 8, § 18 (1994)) [hereinafter VAWA I].

3. Nickie Charles, *Feminist Politics, Domestic Violence and the State*, 43 SOC. REV. 617 (1995) (exploring the question of how feminists ought to engage with the state on the issue of domestic violence); Claire Reinelt, *Moving onto the Terrain of the State: The Battered Women’s Movement and the Politics of Engagement*, in FEMINIST ORGANIZATIONS, HARVEST OF THE NEW WOMEN’S MOVEMENT 84 (Myra Marx Ferree and Patricia Yancey Martin eds., 1995) (describing a “politics of engagement” that involves autonomous feminist institutions working with mainstream institutions). As Deborah Rhode has observed, there are many dimensions to the term “the state.” See Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1182 (1994). She notes that “[m]ost feminist work refers to ‘the state’ without defining it” and uses the term synonymously with central government. However, some theorists view the state more broadly as all of the “administrative, legal, bureaucratic and coercive systems that structure social relations.” *Id.* at 1182. Here, I use the term in the conventional sense of federal and state government.

4. For other works on feminism and the role of the state, see Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN’S L.J. 47, 53-54 (1997) (exploring the problem posed to feminist political theory by “public women”); Judith Allen, *Does Feminism Need a Theory of ‘The State’?*, in PLAYING THE STATE: AUSTRALIAN FEMINIST INTERVENTIONS 21-22 (Sophie Watson ed., 1990) (arguing that feminism does not need to develop a theory of “the state” in order to end the oppression of women); Charles, *supra* note 3, at 619-20, 623 (examining how first and second-wave feminists used the liberal rhetoric developed by the liberal democratic state to women’s advantage by successfully raising equal rights claims for women, while simultaneously granting legitimacy to the traditionally patriarchal state).

ment, and then examine early judicial interpretation of the civil rights remedy of VAWA I as an example of the potential and limits of such a framework.

## I

Recent public and legal attention to domestic violence grew from the work of an activist battered women's movement in this country, which began roughly thirty years ago. The role of the state was one of the most vexing issues that this movement faced.<sup>5</sup> The battered women's movement was an outsider movement, a grass-roots movement that developed from the civil rights and feminist movements in the 1960s.<sup>6</sup> Many feminists saw battering as the product of patriarchy, as male control over women. Many in this movement were skeptical of an affirmative role for the state; they saw the state as maintaining, enforcing, and legitimizing male violence against women, not remedying it; they rejected the idea that battered women activists ought to trust the state, expect much from the state, or engage with the state in any way.<sup>7</sup> The movement developed shelters, safe houses, and alternative institutions. Groups rejected governmental funding for battered women's services and programs. The legal remedies supported by the movement also reflected a fundamental ambivalence about engagement with the state: many feminist activists initially rejected criminalization as an appropriate remedy or strategy to redress domestic violence because battered women "did not necessarily want their partners jailed, they wanted the violence condemned and stopped."<sup>8</sup>

Yet, as the movement developed, engagement with the state became more inevitable. Susan Schechter, an activist in and historian of the movement, has detailed the contradictions of state involvement in the movement. Schechter describes the resistance of some grass-roots organizations in the battered women's movement to accept Law Enforcement Assistance Agency funding in the late 1970s. Some groups feared that acceptance of governmental aid would result in the relinquishment of control and principles surrounding feminist ideological views of the movement as a separate and independent force in combating violence against women. She observes that funding from the government operated as a mixed blessing for the shelter movement.<sup>9</sup> Although it helped to

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5. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 94, 201 (1982). Schechter identifies the role of the state as an important issue for the battered women's movement and examines the movement's ambivalence toward the state in a number of different ways. See *infra* notes 7-10 and accompanying text.

6. See also REINELT, *supra* note 3, at 91; SCHECHTER, *supra* note 5, at 53-81.

7. SCHECHTER, *supra* note 5, at 29-79.

8. SCHECHTER, *supra* note 5, at 26. In this section, I am simplifying a far more complex story of different approaches within the battered women's movement that Susan Schechter describes in great detail.

9. SCHECHTER, *supra* note 5, at 185-89. See also Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 *LAW & INEQ. J.* 185, 277 (1991) (arguing that government funding ensures existing male control over women and "results in autonomy

legitimize the movement, government funding also served to undermine shelter philosophy and organizational structure, requiring the employment of credentialed shelter staff and transforming grassroots shelters into social service agencies serving clients instead of empowering battered women. Schecter also discusses the way in which government support of the battered women's movement redefined feminist political analysis of violence. Government-produced pamphlets and educational material on "spouse abuse" and other generic categorizations of domestic violence obscured the feminist grassroots history and politics of the movement.<sup>10</sup>

Over the last 25 years, this critical view of engagement with the state has changed. First, on the theoretical front, the notion of the state has been modified. Catharine MacKinnon's early notion of the state as "male in the feminist sense," and a tool for further subordination of women, coincided with and reflected the activist and anti-statist stance of the movement at that time.<sup>11</sup> Feminists have continued to explore the way in which the gendered nature of the state is masked by the purportedly gender-neutral rhetoric of liberty, equality, and citizen's rights.<sup>12</sup> More recently, these accounts of the state have been criticized by feminists influenced by postmodern approaches, particularly Foucault.<sup>13</sup> For Foucault, power is discursively constituted, is both more diffuse and dynamic, and can be challenged anywhere and everywhere. Power does not reside only in government and governmental institutions, but rather is reflected in many more sites and loci within the culture.<sup>14</sup> Each of these perspectives is important and deepens our analysis—for there is both a "male state" tilt to the state *and* power is not exclusively lodged in the state. Though the state may not be the only "power" player, it is an important one.

From an historical, social movement perspective, there has also been change. We have witnessed a cyclical development of state engagement. Because advocates are currently actively involved in legislative reform efforts, the issue of intimate violence is now on the legislative agenda of every state and the federal

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loss, permits a band-aid approach by the government to violence against women . . . undercut[ing] the movement's revolutionary potential"). *Id.* at 187.

10. SCHECHTER, *supra* note 5, at 201.

11. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y. 635, 644 (1983). MacKinnon continues:

The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender, through its legitimizing norms, relation to society, and substantive policies. . . . Substantively, the way the male point of view frames an experience is the way it is framed by state policy.

*Id.*

12. See, e.g., CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988).

13. Rosemary Pringle & S. Watson, *Women's Interests" and the Post-Structuralist State*, in *DESTABILIZING THEORY: CONTEMPORARY FEMINIST DEBATES* 53-73 (Michelle Barrett and Ann Philips eds., 1992). See generally Baldwin, *supra* note 4, at 143-61; Michel Foucault, *Two Lectures*, in *MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, 78, 97 (Colin Gordon ed., 1980), quoted in Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 797-98 (1996).

14. See Foucault, *supra* note 13.

government. As this issue has moved from one raised on the margins to one that has now been appropriated by government, feminist liberatory discourse challenging patriarchy and female dependency, which shaped this work, has been replaced by discourse emphasizing crime control.<sup>15</sup> Many battered women's activists have moved from a view that rejected state engagement to one that supports state and federal legislative reform, including the pro-criminalization stance of VAWA I and mandatory arrest policies.<sup>16</sup> This, in turn, has led to considerable debate and critique within the battered women's movement and among legal advocates, particularly among communities of color, who do not see the state as benevolent.<sup>17</sup> The impact of state and federal involvement continues to be complex, as money provided by states and by VAWA I grants now supports many important and innovative battered women's organizations, as well as educational and legal projects around the country.<sup>18</sup>

## II

What are the implications of these developments for both theory and practice? First, we must understand the roles of the state, together with other institutions, law, and culture, in encouraging, legitimizing, and perpetuating violence. Government is an important source of power, although not the exclusive source of power. Martha Minow's observation captures this idea.

When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the

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15. See Kathleen J. Ferraro, *The Dance of Dependency: A Genealogy of Domestic Violence Discourse*, 11 *HYPATIA* 77, 89 (Fall 1996).

16. Ferraro, *supra* note 15. See Forum, *Mandating Prosecution in Domestic Violence*, 7 *UCLA L.J.* 169 (1997). Several provisions of VAWA I reflect its pro-criminalization stance. See, e.g., 18 U.S.C. § 2247 (1994) (amended 1998) (providing increased criminal penalties for repeat offenders of any provision of the Act and amending sentencing guidelines); 18 U.S.C. § 2262(a)(1)-(2) (1994) (amended 1996) (creating criminal penalty for violation of interstate protection orders); 18 U.S.C. § 2261(a)(1) (1994) (creating criminal penalty for travel across state lines to commit acts of domestic violence); 42 U.S.C. § 13992 (1994) (allowing grants to the states to provide sensitivity training to better equip prosecutors and law enforcement officers to respond to domestic violence). For a discussion of how VAWA I has criminalized violence against women through the creation of new crimes, longer prison sentences, mandatory arrests, and mandatory restitution, see George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 *WILLAMETTE L. REV.* 847, 851-52, 857-58 (1997). Stevenson notes that the 1984 study of The Minneapolis Domestic Violence Experiment detailed how mandatory arrest policies contributed to a decrease in domestic violence recidivism rates which catapulted the women's political movement during the 1980s. He contends that the focus of the battered women's movement shifted and acquired a pro-criminalization stance, advocating for an aggressive legislative and criminal justice response with regard to domestic violence. For example, under VAWA I, judges must sentence all first-time domestic violence offenders who do not receive prison sentences to a term of probation. *Id.* at 860. Before VAWA I, however, first-time domestic violence offenders received deferred or diverted prosecution. *Id.*

17. See Sheila James Keuhl, *Introduction to Forum: Mandatory Prosecution in Domestic Violence Cases*, 7 *UCLA WOMEN'S L.J.* 169 (1997).

18. For the range of available VAWA grants, see U.S. Dep't of Justice, Violence Against Women Grants Office, <<http://www.ojp.usdoj.gov/vawgo/htm>> (visited July 11, 1999).

violence. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. Increased unemployment correlates with increased family violence. Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond.<sup>19</sup>

Recognition of the breadth of cultural support and range of institutions that are complicitous in violence is an important dimension of a more nuanced approach to the role of the state concerning intimate violence.

Second, we need to carefully and critically examine the murky middle ground between total rejection and total endorsement of working with the state. As Claire Reinelt has argued:

the state itself is a contradictory and uneven set of structures and processes that are the product of particular struggles. The state is neither a neutral arbiter of gender nor simply a reproducer of existing gender inequalities. It is a site of active contestation over the construction of gender inequalities and power. Legislative decisions and institutional practices are made in historically specific social, political, and economic contexts that shape, by either perpetuating or altering, particular social formulations of gender.<sup>20</sup>

Mandatory arrest policies and VAWA I are examples of recent shifts in ascription of state responsibility, on both the state and federal level. The move towards mandatory arrest, criminal prosecution, and prosecutorial “no-drop” policies has been widespread around the country.<sup>21</sup> Yet, as we know, for many battered women, criminal prosecution is deeply problematic.<sup>22</sup> Many activists and legal

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19. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671 (1990). Minow adds:

Public, rather than private, patterns of conduct and morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses. It is a societal decision to permit such police practices. Some clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private, actions.

*Id.* (footnote omitted).

20. Reinelt, *supra* note 3.

21. See *supra*, note 16, and accompanying text. A “no-drop” policy denies the victim of domestic violence the option of withdrawing a complaint at her discretion once formal charges have been filed. The policy likewise limits prosecutors’ discretion to drop a case based only on the fact that the victim is unwilling to cooperate or participate. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

22. See, e.g., Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman’s Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN’S L.J. 183 (1997). Linda Mills advocates for a flexible and individualized prosecutorial response to each battered woman who is a victim of domestic violence with the main focus being to deter future violence against women. She explains how poor economic status and differing cultural views on domestic violence may compound a battered

reformers continue to raise important questions concerning criminalization, reflecting tensions around issues of maximizing women's autonomy, concerns for poor women and women of color who are less likely to see state intervention as helpful to them and their communities, and problems of "dual arrests," where both women and men are arrested.<sup>23</sup> Criminalization may be an appropriate strategy in some contexts, but it is only one of many that we ought to be considering.

Far more important and more challenging is the provision of resources to deal with the real problems that battered women face—child care, shelters, welfare, work, and workplace violence—which make it possible for women to have the economic and social independence which is a prerequisite to women's freedom from abuse. Indeed, the coalition of activist organizations that organized VAWA I have recognized this in the organizing work they have done for VAWA II. The proposed VAWA II,<sup>24</sup> now pending in Congress, focuses on the interrelationship among violence, employment,<sup>25</sup> insurance,<sup>26</sup> and economic and social service resources, placing domestic violence within a broader framework of gender discrimination. For example, the Domestic Violence and Sexual Assault Victims' Housing Act<sup>27</sup> amends the McKinney Homeless Assistance Act to provide available funding for housing services for domestic violence victims, including rental assistance. The Workplace Violence Against Women Prevention Tax Credit Act<sup>28</sup> implements tax credits to businesses providing workplace safety programs to combat violence against women. These provisions are an important antidote to the criminalization emphasis in VAWA I, and represent a different form of state involvement and assistance.

This leads to the third and most significant facet of state involvement in domestic violence: the need for an explicit gender equality framework for state and federal law reform efforts respecting intimate violence. The civil rights remedy of VAWA I, which explicitly identifies "gender-motivated" violence<sup>29</sup> as a harm and requires proof of gender animus,<sup>30</sup> is an example of this important

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woman's situation and decision to prosecute her batterer. For example, African-American, Latina, and Asian-Pacific women often fear that after reporting their abuse they will be shunned by their respective communities. *Id.* at 183.

23. See *supra* note 19, and accompanying text.

24. HR 357, 106th Cong. (1999).

25. The Battered Women's Employment Protection Act provides unemployment insurance for victims of domestic violence who are forced to leave their jobs as a result of domestic violence, and entitles employed victims of domestic violence to take reasonable leave under the Family and Medical Leave Act of 1993 to seek medical help, legal assistance, counseling, and safety planning and assistance without penalty from their employers. H.R. 357, 106th Cong. § 743 (1999).

26. The Victims of Abuse Insurance Protection Act provides that victims of domestic violence are protected against insurance discrimination. H.R. 357, 106th Cong. § 423 (1999).

27. H.R. 357, 106th Cong. § 404 (1999).

28. H.R. 357, 106th Cong. § 732 (1999).

29. 42 U.S.C. § 13981(a)(1994).

30. See 42 U.S.C. § 13981(d)(1) (1994) (requiring that the crime be "due at least in part to an animus based on the victim's gender").

approach. The identification of intimate violence, sexual abuse, and rape as gendered, impacting on women's freedom, citizenship and autonomy and fundamental to women's equality, revives the core precept of the battered women's movement that generated the last thirty years of important legal work around battering.<sup>31</sup>

However, this context of gender equality has been lost in both public and legal discourse around domestic violence. While our highest governmental officials, like President Clinton and Attorney General Janet Reno, talk about domestic violence and legitimate it as an important topic of public discourse, this discourse does not link violence to larger issues of gender.<sup>32</sup> Several years ago, I was at the White House for the first program commemorating October as Domestic Violence Awareness Month, at the same time that welfare "reform" legislation was being debated in Congress.<sup>33</sup> The White House domestic violence program emphasized criminalization, but failed to even mention a link between violence and welfare.<sup>34</sup> Indeed, the fact that President Clinton could simultaneously

31. See SCHECTER, *supra* note 5, and accompanying text.

32. The focus, instead, has been on criminalization. In an October 1995 proclamation declaring that month "National Domestic Violence Awareness Month," President Clinton remarked that "Americans are fortunate that knowledge about domestic violence has increased and that public interest in deterrence is stronger than ever." See U.S. DEP'T OF JUSTICE, *National Domestic Violence Awareness Month 1995*, (visited July 12, 1999) <<http://www.usdog.gov/vawo/procla.htm>>. However, this "knowledge" and "interest in deterrence" was devoid of any recognition of the link between domestic violence and welfare. Instead, the focus was on "the tough new sanctions" in the Violent Crime Control and Law Enforcement Act of 1994. *Id.* In a radio address to the nation during this first annual National Domestic Violence Awareness Month, President Clinton related the story of a woman who was "battered and terrorized" by her husband for more than 20 years before "she got up the courage to leave the marriage and seek help," but he failed to recognize and address the economic restraints preventing many women from leaving their batterers. Instead, he touted laws "bann[ing] assault weapons from our streets and our schools," "impos[ing] tougher penalties for repeat offenders," and putting more police out on the streets. *Id.* In 1996, the President recognized the need to "encourage all Americans to increase public awareness and understanding of domestic abuse as well as the needs of its victims," but the focus remained on criminal measures "with which to prosecute and punish criminals who intentionally prey on women and children." See U.S. DEP'T OF JUSTICE, *National Domestic Violence Awareness Month 1996*, (visited July 12, 1999) <<http://www.usdoj.gov/vawo/procla96.htm>>.

In 1999, Attorney General Janet Reno's testimony before the Senate Judiciary Committee about reducing domestic violence also focused on criminal measures. She noted six priorities identified by the Department of Justice in fighting domestic violence, including "the vigorous federal prosecution of domestic violence . . . offenders under VAWA," and touted "new specialized prosecution and law enforcement units" that have sprung up around the country during the previous two years. U.S. DEP'T OF JUSTICE, *Excerpts from Attorney General Janet Reno's Testimony Before the Senate Judiciary Committee May 15, 1996*, (visited July 12, 1999) <<http://www.usdo.gov/vawo/ag796.htm>>.

33. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (eliminating the open-ended federal entitlement program of Aid to Families with Dependent Children (AFDC) and providing time-limited cash assistance for needy families through the creation of block grants to states).

34. Research has established the link between domestic violence and welfare dependency. See JODY RAPHAEL, TAYLOR INSTITUTE, *DOMESTIC VIOLENCE: TELLING THE UNTOLD WELFARE-TO-WORK STORY* (1995) (finding that domestic violence was one of the greatest obstacles in assisting program participants to move off welfare and into the labor market); Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201, 208 (1996); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 GEO. L.J. 1961, 2000



eliminate welfare payments to battered women at the same time that he was proclaiming an end to domestic violence reflects the powerful contradictions of feminist engagement with the State. Fortunately, domestic violence and welfare advocates responded by forging important connections that have had significant legislative consequences and made some difference in the lives of battered women on welfare.<sup>35</sup>

The identification of a concept of gender violence in VAWA I is a critical theoretical move; the important work of building connections between welfare and violence documents the crucial relationship between gender equality and the economic impact of violence on women's lives.<sup>36</sup> However, the work that needs to be done to build more explicit connections between violence and gender equality is just beginning. If feminists are to engage with the State, it must be to ensure that the interrelationship among violence and gender, work and violence, economic resources, homelessness, and the material constraints of gender is central to both theory and practice in domestic violence legal reform efforts.

### III

When the state does adopt a gender equality framework for law reform respecting intimate violence, will it make a difference? An examination of early judicial interpretation of the civil rights remedy of VAWA provides an opportunity to begin to consider this question.

Congressional identification of a harm of gender violence in VAWA I is important theoretically; but it remains unclear whether the promise of this legislation will be fulfilled. Even when a gender framework for intimate violence is explicit in legislation, as in VAWA I's civil rights remedy,<sup>37</sup> engaging with the state is tricky. The "male" tilt to state power means that there will be resistance to the notion that intimate violence is an aspect of gender inequality. As Reva Siegel has argued, "status" reforms concerning battering, such as VAWA I, are likely to continue to replicate the cabined understanding of intimate violence that preceded them.<sup>38</sup> Since many VAWA civil rights remedy cases have been mired in

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(1993); Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 *FORDHAM URB. L.J.* 1141 (1995) (discussing the role of violence in creating and prolonging poverty).

35. As a result of the coordinated efforts of violence and welfare advocates, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allows states to adopt the "Family Violence Option," which allows the state to exempt a family suffering from domestic violence from the Act's sixty-month cap on state benefits. 42 U.S.C. § 608(a)(7)(C)(i)(1996). Implementation of the Family Violence Option also allows states to waive time limits when a member of a family has been a victim of domestic violence or is at risk of domestic violence. See § 602(a)(7)(A)(iii). See also Jody Raphael, *The Family Violence Option*, 5 *VIOLENCE AGAINST WOMEN* 449, 455-56, 465 (1999) (concluding that although the Family Violence Option is implemented in most states, it is unclear whether its main objective of providing battered women with extra time and services in obtaining employment is truly effective in assisting these women in making the transition from welfare to work).

36. See White, *supra* note 34.

37. 42 U.S.C. § 13981 (1994).

38. See Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," 105 *YALE L.J.* 2117 (1996). See also Sally F. Goldfarb, " 'Private' Wrongs: Sexual Harassment and The Violence

threshold constitutional challenges,<sup>39</sup> few cases have interpreted gender-motivation on the merits.<sup>40</sup> The legislative history of the civil rights remedy sets out a "totality of the circumstances" standard. However, the few cases that have been decided suggest the difficulty that many judges have in seeing domestic violence within a framework of equality.

There have been only a handful of published opinions involving allegations of domestic abuse under VAWA I. In one case, *Dolin v. West*,<sup>41</sup> the district court granted a summary judgment motion by the defense, concluding that the plaintiff's allegations of physical abuse were insufficient to prove that her ex-husband's physical abuse amounted to felonious conduct and was motivated by gender.<sup>42</sup> Only two cases have thus far addressed the sufficiency of the plaintiffs' claims.<sup>43</sup> In *Kuhn v. Kuhn*,<sup>44</sup> the plaintiff alleged that during their marriage, her ex-husband had restrained and battered her, attempted to strangle her, raped her, and threatened to murder her.<sup>45</sup> In *Ziegler v. Ziegler*,<sup>46</sup> the plaintiff alleged that during their ten-year marriage, her ex-husband voiced gender-specific epithets, acted in ways to perpetuate the stereotype of the submissive female, severely attacked her physically (especially during pregnancy), raped her, and became violent without provocation (in particular when the plaintiff asserted her independence).<sup>47</sup> Although the allegations in the two cases were similar, the outcomes of the cases differed. In *Kuhn*, the court found evidence of gender animus in the plaintiff's allegation of marital rape, and defined sexual assault as a crime motivated by gender animosity,<sup>48</sup> but held that the plaintiff's other allegations of battering did not meet the requirement of "gender animus."<sup>49</sup>

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*Against Women Act*," in *SEXUAL HARASSMENT* (Catharine MacKinnon and Reva Siegel eds., forthcoming 2000) (manuscript on file with author).

39. A petition for writ of certiorari before the United States Supreme Court has been filed in one important case dealing with these constitutional issues. *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820 (4<sup>th</sup> Cir. 1999), *petition for cert. filed*, No. 99-5 (June 30, 1999).

40. *See, e.g.*, *Dolin v. West*, 22 F. Supp.2d 1343 (M.D. Fla. 1998); *Kuhn v. Kuhn*, No. 98 C2395, WL 673629 (N.D. Ill., Sept. 16, 1998); *Ziegler v. Ziegler*, 28 F. Supp.2d 601 (E.D. Wash. 1998); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

41. 22 F. Supp.2d 1343 (M.D. Fla. 1998).

42. *See id.* at 1351.

43. *Kuhn v. Kuhn*, No. 98 C2395, WL 673629 (N.D. Ill., Sept. 16, 1998); *Ziegler v. Ziegler*, 28 F. Supp.2d 601 (E.D. Wash. 1998). In the other two cases, the District Courts have ruled that VAWA I is constitutional, but neither court has yet addressed the sufficiency of the plaintiffs' allegations. *See Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997) (denying defendant's alternative motions to dismiss and for summary judgment on the grounds that VAWA I is a constitutional exercise of Congress' power under the Commerce Clause); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996) (denying defendant's motion to dismiss on the grounds that VAWA I is a constitutional exercise of Congress' power under the Commerce Clause).

44. No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998).

45. *See id.* at \*1-\*2.

46. 28 F. Supp.2d 601 (E.D. Wash. 1998).

47. *See id.* at 606-607.

48. *Kuhn*, 1998 WL 673629 at \*6.

49. *Id.*

In *Ziegler*, the court found gender animus based on the totality of the plaintiff's allegations.<sup>50</sup>

Cases brought under the VAWA civil rights remedy for sexual assault/ rape, and for "inappropriate sexual behavior" have fared somewhat differently. I have elsewhere suggested that judges may be more likely to see rape than battering as gender-motivated under VAWA I.<sup>51</sup> As in *Kuhn*, district courts appear to have been able to equate heterosexual rape and sexual assault<sup>52</sup> with gender-motivated crimes.<sup>53</sup> Thus, although the data is preliminary because of the small number of cases, cases in which there are clear allegations of rape may fare better under VAWA I than will cases involving clear allegations of domestic violence.<sup>54</sup>

However, the VAWA I cases on domestic violence do exhibit some hopeful signs. The opinion by Fourth Circuit Judge Diana Motz's opinion in *Brzonkala v. Virginia Polytechnic Institute and State University*,<sup>55</sup> which has since been reversed, is one. The plaintiff, Christy Brzonkala, alleged a gang rape committed by two fellow college students.<sup>56</sup> In concluding that there was a legally sufficient claim under VAWA I, Judge Motz emphasized not just the physical fact of the rape, but a number of gender-based epithets.<sup>57</sup> Brzonkala alleged that when Morrison, one of the rapists, had finished raping her for the second time, he told her, "You better not have any fucking diseases."<sup>58</sup> She also claimed that Morrison had announced in the college dining room, "I like to get girls drunk and fuck the shit out of them."<sup>59</sup> Judge Motz concluded:

[a]s the district court noted, Morrison's statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent. And that this statement indicated disrespect for

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50. *Kuhn*, 1998 WL 673629 at \*6 -\*7.

51. See Elizabeth M. Schneider, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, A Panel Discussion Sponsored by the Association of the Bar of the City of New York, 4 J.L. & POL'Y 427, 431 (1996).

52. Cf. *Wilson v. Diocese of New York of the Episcopal Church*, No. 96 Civ. 2400 (JGK), 1998 WL 82921 (S.D.N.Y. Feb. 26, 1998) (alleging sexual assault of a male church musician by a priest).

53. See, e.g., *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir.1999). See also *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997) (alleging sexual assault, including rape by employer); *Mattison v. Click Corp. of America, Inc.*, Civ. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998) (alleging sexual assault—including rape—sexual harassment and battering by an employer).

54. See *Braden v. Piggly Wiggly*, 4 F. Supp.2d 1357 (M.D. Ala. 1998) (the court declined to infer gender animus in a case in which the plaintiff alleged sexual assault by her supervisor at work that resulted in hospitalization and severe emotional distress and trauma). *But see Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997) (holding that the plaintiff sufficiently pleaded gender animus under VAWA by averring that defendant employer fondled her, grabbed her breasts, assaulted and attempted to rape her).

55. 132 F.3d 949 (4th Cir. 1997), *rev'd Brzonkala v. Virginia Polytechnic and State University*, 935 F. Supp. 1997 (W.D. Va. 1996), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999).

56. *Brzonkala*, 132 F.3d at 953

57. *Id.* at 963-64.

58. *Id.* at 964.

59. *Id.*

women in general and connects this gender disrespect to sexual intercourse.<sup>60</sup>

Judge Motz also noted that Brzonkala was “brutally raped . . . three times within minutes after first meeting [her assailants],”<sup>61</sup> and that “the severe and unprovoked nature of the crime triggered by no other motive, is an indication that the crime was motivated by gender bias.”<sup>62</sup> In her dissenting opinion in the *en banc* Circuit Court decision, she goes even further: “Brzonkala has alleged virtually all of the earmarks of a violent, felonious ‘hate crime;’ an unprovoked, severe attack, triggered by no motive other than gender-based animus and accompanied by language clearly reflecting such animus.”<sup>63</sup> Judge Motz’s link between an attitude of disrespect and verbal abuse with other aspects of battering is pathbreaking. Although Judge Motz’s decision was vacated *en banc* by the historically conservative Fourth Circuit, the Supreme Court is now considering review.<sup>64</sup>

In *Ziegler*, District Judge William Nielsen also recognized the continuum upon which intimate violence occurs.<sup>65</sup> He ruled that gender motivation must be determined “from the totality of the circumstances,”<sup>66</sup> rather than discerning gender animus from discrete instances. “Totality of the circumstances” in this case included rape and other sexual violence, gender-specific epithets directed at the plaintiff, acts perpetuating the stereotype of the submissive female such as control of the family’s finances and plaintiff’s personal documents, and severe and excessive unprovoked violent attacks, particularly when the plaintiff asserted her independence.<sup>67</sup> Judge Nielsen deemed these allegations to be more than conclusory in nature.<sup>68</sup> Looking at them together, he held, “could reasonably result in an inference of gender-motivated violence.”<sup>69</sup> This reading of the gender animus requirement of the civil rights provision of VAWA I is promising.<sup>70</sup>

## CONCLUSION

In conclusion, in legal work on domestic violence, we have moved beyond a

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60. *Id.*

61. *Id.* at 64.

62. *Id.* at 63.

63. *Brzonkala*, 169 F.3d 820, 910 (1999).

64. *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir.), *petition for cert. filed*, No. 99-5 (June 30, 1999).

65. *See Ziegler*, 28 F. Supp.2d 601.

66. *Ziegler*, 28 F. Supp. 2d at 606 (citing S. Rep. No. 102-197, at 50 (1991)).

67. *Id.* at 607.

68. *Id.*

69. *Id.*

70. For a more detailed analysis of the “gender animus” requirement under VAWA, see Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN’S L.J. 123 (1999).

simple rejection of the state or a simple assumption that the state can solve the problem. So too should we move beyond uncritical engagement with the state, particularly in the criminal context, and towards a more critical theoretical and practical analysis. An explicit gender equality framework, linking battering with power and control, attitudes of disrespect, verbal abuse, the workplace, housing, welfare, and childcare, is necessary for any possibility of meaningful reform. At the same time, as early case law on VAWA suggests, a gender equality framework is not sufficient to ensure that the state will be genuinely accountable to battered women. The contradictions of engaging with the state on domestic violence continue.