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Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases

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AMENDING THE VIOLENCE AGAINST WOMEN ACT: CREATING A REBUTTABLE PRESUMPTION OF GENDER ANIMUS IN RAPE CASES

Jennifer Gaffney[*]

Rape is a man's right. If a woman doesn't want to give it, a man should take it. Women have no right to say no. Women are made to have sex. It's all they are good for. Some women would rather take a beating, but they always give in . . . .[1]

INTRODUCTION

The Violence Against Women Act ("VAWA"),[2] enacted in 1994, is a measure taken by Congress to address the growing problem of violence against women in the United States.[3] Title III of VAWA provides a civil rights remedy for victims of "gender-motivated violence."[4] A person who wishes to make a civil rights

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[1] Interview with a rapist reported in DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE: A STUDY OF CONVICTED RAPISTS 166 (1990).

[2] Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C. (1994)).

[3] S. REP. NO. 138, 103d Cong., 1st Sess. 37 (1993).

[4] 42 U.S.C. § 13981 (1994). The relevant text of the Title III, Civil Rights Remedy is as follows:

> (a) Purpose . . . . [I]t is the purpose of this subtitle to protect the civil rights of victims of gender-motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes motivated by gender.

claim under VAWA must prove that an act was committed against her (or him) which rises to the level of a felony, was committed based on gender and contains some display of "gender animus."[5]

(b) Right to be free from crimes of violence. 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)).
(c) Cause of action. A person . . . 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 . . . .
(d) Definitions. For purposes of this section—
(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
(2) the term "crime of violence" means—
(A) an act or series of acts that would constitute a felony . . . if the conduct presents a serious risk of physical injury to another, that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . . and
(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.
(e) Limitations and procedures.
(1) Limitation. Nothing in this section entitles a person 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 (within the meaning of subsection (d)).

Id. § 13981.

[5] *Id.* § 13981(c), (d).

For purposes of this Note, "animus" is defined as a "disposition" tending toward "hatred of or condescension toward . . . women as a class." BLACK'S LAW DICTIONARY 87 (6th ed. 1990). *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993). "Condescension toward" women includes disrespect for and/or dislike of women, which falls short of "hatred," based on a view of women as inferior. According to Supreme Court authority, a finding of "invidiously discriminatory animus" does not require a finding of hatred, but merely a finding of discrimination which is "arbitrary, irrational and not reasonably related to a legitimate purpose." BLACK'S LAW DICTIONARY, *supra*,

This Note argues that Congress should amend VAWA such that the requirement that a plaintiff prove gender animus be replaced with a rebuttable presumption of gender animus in all cases of rape.[6] Part I provides a general background of the problem of violence against women and the history of VAWA. Part II identifies the problem of using models for determining "animus" from civil rights laws and hate-crime statutes in an effort to prove gender animus in rape cases brought under VAWA. Part III discusses current interpretations of gender animus under VAWA, as defined by members of Congress and the federal judiciary, and the difficulties with these constructions. Part IV argues that because all rape is motivated by gender animus, Congress should amend VAWA to do away with the gender animus requirement in rape cases. Part V discusses rebuttable presumptions generally, and proposes a legislative amendment applying a rebuttable presumption to the gender animus requirement of VAWA. This Note concludes that because all rape is motivated, at least in part, by gender animus, Congress should adopt a rebuttable presumption under VAWA's Title III Civil Rights Remedy which recognizes this fact.

I. HISTORY AND BACKGROUND OF VAWA

The statistics surrounding violence against women are alarming. A woman is raped every five minutes in the United States, according to statistics gathered by the FBI.[7] Estimates show that between thirteen and twenty-five percent of women will be raped

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at 826.

[6] For purposes of this Note, "rape" is defined as "unwanted sexual contact obtained without consent through the use of coercion or force or misrepresentation. Sexual contact can be intercourse, oral sex, anal sex, or vaginal and/or anal penetration with objects." Brande Stellings, Note, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 185 n.1 (1993).

[7] *Id.* at 197 (citing Staff of Comm. on the Judiciary, 102d Cong., 1st Sess., Report on Violence Against Women: The Increase of Rape in America iii (1990)).

in their lifetimes.[8] Congress found that up to four million women are victimized by domestic violence each year.[9] Even more disturbing than these bare statistics is Congress's finding that "women are six times more likely than men to be the victim of a violent crime committed by an intimate."[10] Women are not only being victimized in extraordinary numbers, but this abuse is being inflicted upon them by those to whom they are the closest: their husbands, boyfriends, family members and friends. Such instances of violence against women, combined with the historic failure of states to properly address such violence,[11] and a desire for national uniformity in addressing violence against women,[12] prompted Congress to introduce, and eventually pass, VAWA.[13]

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[8] NANCY A. CROWELL & ANN W. BURGESS, UNDERSTANDING VIOLENCE AGAINST WOMEN 1 (1996). *See also Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, Part I, 101st Cong., 2d Sess. (1990) (reporting that one of five women will be raped in their lifetimes).

[9] S. REP. NO. 138, 103d Cong., 1st Sess. 37, 38 (1993).

[10] *Id.*

[11] *Id.* at 41-42. The Senate report recognized that the historic acceptance of family violence embodied in the common law "rule of thumb" leaves a legacy which "endures even today," as evidenced by studies demonstrating police failures to arrest abusers even where a wife is found bleeding. *Id.* The report also recognized police and prosecutorial deficiencies in the arrest and prosecution of rape cases where, for example:

> over 60 percent of rape reports [did] not result in arrests; and a rape case [was] more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case. [In addition, l]ess than half of the individuals arrested for rape [were] convicted of rape.

Id. (footnotes omitted). *See* 140 CONG. REC. S6098-02, S6102 (daily ed. May 19, 1994) (statement of Sen. Biden) (stating that one reason for the Civil Rights Remedy is that "State remedies have too often proved inadequate").

[12] S. REP. NO. 138, at 41 (asserting that "[VAWA] represents an essential step in forging a *national consensus* that our society will not tolerate violence against women") (emphasis added). *See* 140 CONG. REC. at S6102 (stating that a second reason for the Civil Rights Remedy is that "the Federal courts have traditionally been charged with enforcing national principles of equality").

[13] In 1990, Senator Biden (D-Del) first introduced VAWA "in response to the escalating problem of violence against women." S. REP. NO. 138, at 37. The act was reintroduced and reworked in each succeeding Congress until its eventual

The Civil Rights Remedy of VAWA recognizes that gender-based violence is a form of sexual discrimination which violates women's civil rights, thus creating a federal interest in remedying this violence.[14] Congress has no authority, however, to legislate in the general areas of criminal or tort law, as these areas are reserved to the states to regulate.[15] In enacting the Civil Rights Remedy, Congress found its authority grounded in both the Commerce Clause[16] and the Fourteenth Amendment[17] of the United States Constitution.[18] Thus, Congress recognized that in order to create a remedy for gender-motivated violence under federal law, this violence must be shown to violate more than state criminal or tort law.[19]

The requirement of "gender animus" was created to enable federal law to remedy those acts of gender-motivated violence which are viewed as moving beyond basic criminal or tort law violations, where the underlying discriminatory "animus" consti-

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passage in 1994. *Id.* at 39-40 (discussing legislative history of VAWA through the 102d and 103d Congress, including numerous hearings before the Judiciary Committee, and the eventual bi-partisan bill introduced by Senators Biden and Hatch (R-Utah) which served to refine Senate Bill 11, the VAWA of 1993).

[14] S. REP. NO. 138, at 48.

[15] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that "States historically have been sovereign" in the areas of criminal law and education); Ginsberg v. New York, 390 U.S. 629, 636 (1968) (recognizing state "power to protect the health, safety, welfare and morals of its community"); Buchanan v. Warley, 245 U.S. 60, 74 (1917) (recognizing "[t]he authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare . . .").

[16] U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, ...").

[17] U.S. CONST. amend XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[18] S. REP. NO. 138, at 54-55 (defining Congress' power to enact VAWA under the Commerce Clause and section 5 of the Fourteenth Amendment).

[19] *Id.* at 51 (noting that the Civil Rights Remedy requires proof of a gender-discriminatory motive and because of this requirement "Title III does not expand Federal jurisdiction to all attacks against women, nor does it supplant all State tort law"). *See* 140 CONG. REC. at S6102 (distinguishing VAWA Civil Rights Remedy from "other litigation traditionally reserved to the State courts" and making an analogy to post-Civil War civil rights legislation).

tutes a civil rights violation.[20] Unfortunately, in creating the requirement that a plaintiff prove "gender animus," Congress has failed to recognize that certain acts of gender-motivated violence, including rape, are almost always motivated by gender animus and generally constitute civil rights violations.

II. THE PROBLEM OF PROVING GENDER ANIMUS

Early commentaries following the enactment of VAWA recognized that there might be some difficulty in determining what constitutes "gender animus" under the Civil Rights Remedy.[21] Other observers believed that the difficulty might not be too great.[22] Arguably, two areas of law could provide guidance in

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[20] S. REP. 138, at 50-51. Congress considered the gender animus provision of the Civil Rights Remedy to be a special limitation section.

> [This] special limitation section specifically provides that "random" crimes not motivated by gender are not covered by the statute and do not give rise to a cause of action. A cause of action cannot be established by saying "I am a woman; I have an injury; ergo, I have a civil rights claim." . . . Title III does not expand Federal jurisdiction to all attacks against women, nor does it supplant all State tort law. . . . For a cause of action to arise under title III, a plaintiff must prove that the crime of violence—whether an assault, a kidnapping, or rape—was motivated by gender.

Id.

[21] *See, e.g.*, Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 15 (1995) (noting that the gender animus requirement might bar many domestic violence victims from using the Civil Rights Remedy as it would be difficult to prove gender animus in cases where the abuser and the victim have an intimate relationship because the abuser can claim that the violence was not gender-motivated but rather was directed toward the individual person for some other reason); Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2074 (1994) (questioning how courts will determine whether crimes are motivated by gender when intent is difficult to determine in the most obvious criminal cases).

[22] *See, e.g.*, Sally Goldfarb, *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, September 14, 1995*, 4 J.L. & POL'Y 391, 398 (1996) (remarking that proving gender animus "is not as onerous as some have argued").

interpreting "animus" under VAWA. First, one might look at the definition of "animus" under Title 42, United States Code, Section 1985(3), the modern equivalent of section 2 of the Civil Rights Act of 1871.[23] Second, at least one commentator has suggested that "gender animus" might be determined by a "totality of the circumstances" test similar to the analysis used for other hate crimes.[24] Unfortunately, as will be shown,[25] neither area of law is sufficient to define "animus" so as to be consistent with the purpose of VAWA.

The Supreme Court has interpreted section 1985(3) as requiring "some racial, or perhaps otherwise class-based, invidiously discriminatory animus"[26] before the statute can be invoked to punish a conspiracy to deprive a person of "equal enjoyment of rights secured by the law to all."[27] In *Griffin v. Breckenridge*, the

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[23] 42 U.S.C. § 1985(3) (1996) provides:

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

Id.

[24] *See* W.H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 603-10 (1993) (arguing that gender animus under VAWA may be proved by the totality of the circumstances test used under Title VII and other civil rights legislation and, in addition, outlining FBI guidelines for determining whether a crime was motivated by hate, and applying this totality of the circumstances model to potential scenarios under VAWA).

[25] *See infra* notes 40-48 and accompanying text (discussing totality of circumstances test and possible application to rape cases under VAWA).

[26] Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

[27] *Id.*

Court distinguished between "invidiously discriminatory animus"[28] and the "specific intent to deprive a person of a federal right."[29] This distinction may be used to exclude crimes against a woman, such as rape and battery, from the definition of "animus" under section 1985(3) because these crimes are often viewed as private acts rather than acts affecting women as a class.[30]

An example of this distinction is found in *Bray v. Alexandria Women's Health Clinic*.[31] In *Bray*, the Supreme Court held that acts opposing abortion did not reflect an "invidiously discriminatory animus" directed at women as a class.[32] Justice Scalia wrote that "opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women."[33] Because there are alternative explanations for opposition to abortion, the Court refused to acknowledge that there might be an additional (and perhaps unstated) reason for this opposition, that is, an underlying "discriminatory animus" directed at women.[34] In making this judgment, Justice Scalia ignores arguments showing that opposition to abortion affects not only individual women seeking the procedure, but affects women as a class.[35] Following the logic set forth in *Bray*, rape cannot be

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[28] *Id.*

[29] *Id.* at 102 n.10 (citing Screws v. United States, 325 U.S. 91 (1945), a plurality opinion involving prosecutions under 18 U.S.C. § 242).

[30] *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (discussing how the notion of family privacy has historically precluded law enforcement officials from protecting the victims of domestic violence against their husbands). *See also* Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape*, 5 COLUM. J. GENDER & L. 182, 201 (1996) (noting that the classification of marital sex as "private" was the historical basis for the exemption of marital rape from criminal prosecution).

[31] 506 U.S. 263 (1993).

[32] *Id.* at 269, 274.

[33] *Id.* at 270.

[34] *Id.* at 271.

[35] *Id.* (noting that the respondent in *Bray* argued that since only women can have an abortion, to oppose abortion is "ipso facto to discriminate invidiously against women as a class"). *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1318-20, 1323 (1991). MacKinnon explains that the criminalizing of abortion and the denial of funds for abortion

viewed as displaying gender animus so long as alternative explanations for an individual rape exist.

In effect, the Supreme Court in *Bray* has revealed that it is looking for obvious animus in section 1985(3) cases. An example of obvious animus, given by the Court, would be to impose "[a] tax on wearing yarmulkes"[36] which would clearly be "a tax on Jews."[37] As the gender-discriminatory motivation behind rape is not always this obvious, using a narrow section 1985(3) interpretation of animus for rape cases brought under VAWA would be inconsistent with the purposes of the Act.[38] That VAWA is intended to look beyond the obvious is evidenced in Title 42, United States Code, section 13981(d)(1) which requires that a gender-motivated crime be due "at least *in part*, to an animus based on the victim's gender."[39] This recognizes that crimes often have more than one motivating factor, and that courts may find gender animus even where another obvious intent first comes to mind. Under this construction, one possible motive does not rule out all others, as occurred in *Bray*.

An alternative to the narrow definition of animus under section 1985(3) is the "totality of the circumstances" test. This test has been adopted by Title VII and other civil rights legislation in order to determine whether a discriminatory motive was present in a

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violate equal protection. She cites these acts as examples of "sex inequality" as "only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion." *Id.* at 1319-20. In addition, MacKinnon notes that abortions are often necessary because of "social conditions of sex inequality." *Id.* at 1319. For example, domestic violence or poverty in a woman's life, which are ultimately caused by sex inequality, may force a woman to choose abortion. Finally, MacKinnon asserts that equality in areas such as reproductive control, control over "sexual access to [a woman's] bod[y]" before pregnancy, and day care, as well as the "economic parity between women and men" "would overwhelmingly reduce the numbers of abortions sought"). *Id.* at 1323.

[36] *Bray*, 506 U.S. at 271.

[37] *Id.*

[38] *See supra* notes 11-13 and accompanying text (discussing purposes of VAWA).

[39] 42 U.S.C. § 13981(d)(1) (emphasis added).

given crime.[40] Common criteria used to identify hate crimes include:

*Common sense (use of a swastika or burning of a cross on the victim's lawn).
*Statements by the perpetrator showing bias.
*Display of offensive symbols or pictures.
*The absence of any other apparent motive (such as an assault without robbery).
*Crime occurs during or near holiday or event significant to the target group (e.g. Hanukkah, Martin Luther King Day, Chinese New Year, Gay and Lesbian Parade).
*Perception of the victim that the crime was bias-motivated.
*Lack of provocation.
*Severity of the attack (e.g. mutilation of the victim).
*History of similar crimes by the same perpetrator or in the same area.[41]

Under the "totality of the circumstances" test, certain acts of rape will be identifiable as gender-based bias crimes. For example, the paradigmatic "stranger rape" does not suggest any motive other than gender bias (that is, the perpetrator raped the victim, but he did not rob her purse); the attack may be severe (perhaps even including mutilation or slashing of the victim); there is a clear lack of provocation (that is, the victim does not even know the perpetrator); the perpetrator may use language suggesting gender-

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[40] *See* Hallock, *supra* note 24, at 603. *See, e.g.,* 42 U.S.C. § 1973(b) (1994) (a denial or abridgement of voting rights based upon race or color is established if a "totality of the circumstances" shows "that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens"); 29 C.F.R. § 1604.11(b) (1997) (mandating that the Equal Employment Opportunity Commission, "in determining whether alleged conduct constitutes sexual harassment, . . . [shall look at] the totality of the circumstances"). *See also* F.B.I., U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING SUMMARY REPORTING SYSTEM AND NATIONAL INCIDENT-BASED REPORTING SYSTEM: DRAFT HATE CRIME DATA COLLECTION GUIDELINES (1990) (enumerating thirteen items which might be used as circumstantial evidence to prove that a crime is motivated by racial or other bias).

[41] AMY STEPHSON, NORTHWEST WOMEN'S LAW CENTER, GENDER BIAS CRIMES: A LEGISLATIVE RESOURCE MANUAL 2 (1994).

bias (that is, calling the victim a "bitch" or a "whore"); and the perpetrator may have a history of raping or sexually assaulting women.[42] However, the nature of many gender-based bias crimes is such that numerous individual instances of rape will not fall within the scope of factors generally used to detect bias motivation. For example, marital rape may be inaccurately viewed as having a motive other than gender bias (that is, a personal desire to have intercourse with one's wife); the attack might not appear severe (as a wife might not physically resist her husband's force); provocation may be inferred from other aspects of the marital relationship (that is, the couple may have been arguing); gender-based language might not be used; and the perpetrator's history may include raping his wife, but not other women. If a totality of the circumstances test is applied to VAWA, such an interpretation of marital rape will likely allow rapist-husbands to escape from liability under the Act, thus clearly defeating the legislative intent behind VAWA.[43]

Furthermore, the fact that gender-bias is not included in many hate-crime statutes is evidence that there is a perceived distinction between gender-based hate crimes and other crimes of discrimination.[44] The distinction made is that personal relationships existing

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[42] *See id.* at 10 (discussing factors that may be used to identify gender-bias crimes).

[43] One purpose of VAWA is to provide a Civil Rights Remedy for women who are denied remedies against their husbands under state laws providing for a marital rape exemption or interspousal tort immunity. *See, e.g.*, S. REP. NO. 138, at 42 (noting the inadequate response of the legal system to crimes against women, including Congressional findings that "[a] few States still fail to recognize rape of a spouse as a criminal act [*see infra* note 51 for more recent data regarding the marital rape exemption]; other States do not prosecute husbands for rape unless a wife suffers additional degrees of violence like kidnapping or being threatened with a weapon; others classify rape of a spouse as a less serious crime with lesser penalties").

[44] *See* Steven Bennett Weisburd & Brian Levin, Symposium, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 34 & n.117 (1994) (reporting that many states have excluded the category of gender from hate crime statutes). *But see* STEPHSON, *supra* note 41, at 30-31 (listing fourteen states with hate crime statutes providing protection for gender, including Alaska, California, Connecticut, Illinois, Iowa, Michigan, Minnesota, Mississippi, Nevada, New York, North Dakota, Vermont, Washington and West Virginia, as well as the District of Columbia). On the federal level, the Hate

between the victim and aggressor in certain crimes disqualifies such crimes from being "gender-based."[45] This is known as the "lack of victim interchangeability" argument. However, the presence of a personal relationship should not preclude crimes from being labeled as motivated by gender.[46] The fact that many states accept this argument suggests that the adoption of a totality of the circumstances test under VAWA will constrain many victims of rape from procuring a Civil Rights Remedy due to a personal relationship with the aggressors.[47] If one accepts that all rape is committed because the perpetrator entertains some degree of gender animus,[48] then it follows that a totality of the circumstances test, as used for other hate crimes, must not be used under VAWA as it may preclude many victims from successfully asserting claims under the Civil Rights Remedy.

III. GENDER ANIMUS AS PRESENTLY DEFINED UNDER VAWA

VAWA's supporters on Capitol Hill have interpreted the Act in two ways. Senator Orrin Hatch (R-Utah), a co-sponsor of VAWA,

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Crime Statistics Act of 1990, Public Law 101-275, 28 U.S.C. § 534, does not include gender as a category. STEPHSON, *supra* note 41, at 5 (noting that the Hate Crime Statistics Act requires the Department of Justice to collect statistics concerning cases where there is "evidence of prejudice based on race, religion, sexual orientation, or ethnicity" or disability but does not require the same recording for cases involving gender-bias).

[45] STEPHSON, *supra* note 41, at 12 (discussing the argument that a personal relationship between a victim and her attacker may suggest a motive for the crime, other than gender-bias).

[46] STEPHSON, *supra* note 41, at 12-13.

[47] The acceptance of this argument is indicated by the prevalence of state statutes which exclude gender-bias from hate crimes. These states include: Colorado, Florida, Idaho, Maryland, Maine, Missouri, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia and Wisconsin. STEPHSON, *supra* note 41, at 30-31 (reprinting the Anti-Defamation League's chart of "State Hate Crime Statutory Provisions," which reflects the statutory provisions for the fifty states and the District of Columbia).

[48] For a discussion of the argument that all rape is motivated, to some degree, by gender animus, *see infra,* Part IV.

distinguished between rapes motivated by gender animus and those committed due to some other motivation:

> Say you have a man who believes a woman in attractive. He feels encouraged by her and he's so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let's say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, "You're wearing a skirt! You're a woman! I hate woman! I'm going to show you, you woman!" Now, the first one's terrible. But the other's much worse. *If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus.*[49]

Clearly for Senator Hatch, marital rape would not constitute a civil rights violation under VAWA, as a husband most likely "loves" his wife. If this were the proper interpretation of VAWA, there would be no need for Section 13981(d)(2)(B),[50] which applies VAWA to cases of marital rape and domestic violence which would be excluded under state laws providing for some variation of a marital rape exemption or interspousal tort immunity.[51] Senator Hatch's distinction between rapes predicated on

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[49] Ruth Shalit, *Caught in the Act; Congress; Violence Against Women Act of 1993,* THE NEW REPUBLIC, July 12, 1993, at 12 (emphasis added).

[50] 42 U.S.C. § 13981(d)(2)(B) (1994) ("The term 'crime of violence' . . . includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.").

[51] In nine states, spouses are barred from making claims of intentional torts, either in whole or in part, by the doctrine of interspousal tort immunity. *See* Siegel, *supra* note 30, at 2163 & n.163 (noting that Florida and Louisiana retain the doctrine in its entirety). Although no state retains an absolute marital rape exemption, one author has counted "at least thirteen states [that] still offer preferential or disparate treatment to perpetrators of spousal sexual assault." Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 682 & n.35 (1996) (listing the following states offering preferential or disparate treatment: Arizona, California, Connecticut, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maryland, Nevada, Tennessee, Washington and West Virginia). For example, Idaho allows a wife to prosecute her husband for rape only where he uses force,

"lust" and those based on "animus" is grounded in the notion that it is more comprehendible to rape a woman when her attractiveness disables a man from controlling his passion. Under this construction, rape would only violate a woman's civil rights when it is based on an explicit, overt dislike of women. The fact that rape is an expression of underlying societal views toward women,[52] and the socialization of men to believe all women are inferior and made to be acted upon by force,[53] is ignored in the Hatch interpretation of "gender animus."

Alternatively, Senator Joseph Biden (D-Del.), the primary sponsor of VAWA, commented that "[t]heoretically, I guess, a rape could take place that was not driven by gender animus, but I can't think of what it would be."[54] This statement might have elicited hope among those proponents of VAWA who consider all rape to be motivated by gender animus.[55] However, the first decision to be rendered with respect to rape and VAWA, *Brzonkala v. Virginia Polytechnic Institute & State University*,[56] does not bode well for those in the Biden camp.

On the evening of September 21, 1994, Christy Brzonkala, a student at Virginia Polytechnic University, and her friend and fellow student, Hope Handley, met, for the first time, two men who identified themselves as members of the football team.[57] Christy and Hope joined the two football players, who were later identified

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violence or a threat of harm but not where he rapes her while she is temporarily incapable of consent or where she is unconscious. IDAHO CODE §§ 18-6101, 18-6107 (1997). A person may be prosecuted for raping an unconscious person, however, where that person is not his or her spouse. *Id.*

[52] See *infra* Part IV (arguing that all rape reflects animus towards women which is developed through the American male socialization process).

[53] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 389 (1975) (noting that "[t]he theory of aggressive male domination over women as a natural right is so deeply embedded in our cultural value system . . . ([and includes notions of] man as doer; woman as bystander). . . .").

[54] Shalit, *supra* note 49, at 12.

[55] *See, e.g.*, Hallock, *supra* note 24, at 609-10 (optimistically commenting that rape will eventually be seen as "a per se act of gender bias" under VAWA).

[56] 935 F. Supp. 779 (W.D. Va. 1996).

[57] *Id.* at 781-82.

as Morrison and Crawford, in a third floor dormitory room.[58] After approximately fifteen minutes, Hope and Crawford left the room.[59] Immediately after the two left, Morrison asked Christy to engage in sexual intercourse, to which she twice responded "no."[60] Morrison then forcibly raped Christy, pinning her down with his hands and knees in such a manner that she could not push him away.[61] Crawford returned to the room and proceeded to rape Christy before she could recover from the first rape by Morrison.[62] Morrison then raped Christy a third time.[63] Five months after this event, Christy learned the true identities of both Morrison and Crawford and filed a complaint against both men under Virginia Polytechnic's Sexual Assault Policy.[64] Crawford was found not guilty; Morrison was found guilty of sexual assault; however, sanctions against him were set aside without notice to Christy.[65]

Christy Brzonkala eventually filed a claim against both Morrison and Virginia Polytechnic under the VAWA Civil Rights Remedy.[66] In a memorandum opinion, Chief Judge Jackson L. Kiser found that gender animus was present in the rape of Christy Brzonkala.[67] Although this finding might seem favorable to the

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[58] *Id.*

[59] *Id.* at 782.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 781.

[67] *Id.* at 785. Notwithstanding Judge Kiser's finding of gender animus, Christy Brzonkala did not prevail because the Judge also found the law unconstitutional in its entirety. *Id.* at 801 ("Although plaintiff states a claim under VAWA . . . VAWA is an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment."). This issue is now on appeal in the 4th Circuit. Four other District Courts have deemed the law constitutional under the Commerce Clause. Anisimov v. Lake, 1997 WL 538718 at *12 (N.D. Ill. Aug. 27, 1997) (upholding VAWA Civil Rights Remedy as constitutional under the Commerce Clause but declining to address constitutionality under the Equal Protection clause); Seaton v. Seaton, 971 F. Supp. 1188, 1195-96 (E.D. Tenn. 1997) (mem.)

proponents of VAWA on its face, the reasoning underlying Chief Judge Kiser's opinion is quite disturbing.

Chief Judge Kiser based his finding of gender animus on three factors. First, he found that the rape was similar to a gang rape, thus suggesting a conspiracy against one woman.[68] Second, he found language suggesting gender animus. Specifically, after raping Brzonkala, Morrison said "[y]ou better not have any fucking diseases," showing disrespect toward Brzonkala.[69] Additionally, months later Morrison stated in a dining hall, filled with both men and women, "I like to get girls drunk and fuck the shit out of them," showing disrespect for all women.[70] Finally, Chief Judge Kiser suggested that Brzonkala's rape was close to a stranger rape and, therefore, was likely to be the product of gender animus, as Morrison and Crawford had little personal knowledge of their victim.[71]

The rationale in this memorandum opinion outlines a series of distinctions between types of rape, all of which fall on a continuum similar to that created by Senator Hatch's "lust" or "animus" rape distinction.[72] Chief Judge Kiser asserted that "gang rape generally is more egregious than one-on-one rape"[73] and that "stranger rape and rapes such as the one in question generally are more egregious than date rape."[74] According to Chief Judge Kiser, date rape may not involve gender animus but "could involve a misunderstanding and is often less violent than stranger rape"[75] or might "involve

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(upholding VAWA under Commerce Clause but expressing fear that it might "become a gateway for domestic relations issues to slip into this federal court"); Doe v. Hartz, 970 F. Supp. 1375, 1423 & n.38 (N.D. Iowa 1997) (upholding VAWA under Commerce Clause but failing to address Equal Protection clause); Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996) (upholding VAWA under Commerce Clause).

[68] *Brzonkala*, 935 F. Supp. at 784.

[69] *Id.* at 785.

[70] *Id.*

[71] *Id.* at 784-85.

[72] *See supra* notes 49-53 and accompanying text (discussing Orrin Hatch's lust/animus distinction).

[73] *Brzonkala*, 935 F. Supp. at 784.

[74] *Id.* at 784-85.

[75] *Id.* at 785.

a situation where a man's sexual passion provokes the rape by decreasing the man's control."[76] Apparently the Hatch construction of VAWA, including traditional rape myths,[77] has found its way into the case law and prevailed over the Biden construction.[78]

Following *Brzonkala*, it is reasonable to expect that further developing case law under VAWA will likewise reflect traditional gender biases, rape myths and sexual stereotypes.[79] Such a development in the law may preclude many rape victims from seeking relief under VAWA as the language of traditional stereotypes will defeat arguments tending to prove that gender animus was present in a given rape. Unfortunately, the sexual stereotypes which may impede women from bringing successful claims under VAWA are the same stereotypes which create and foster the gender animus motivating most rapes.

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[76] *Id.*

[77] *See supra* notes 49-53 and accompanying text (discussing Hatch construction of VAWA). Some examples of traditional rape myths include the ideas that "it wasn't rape, only 'rough sex'" (a misunderstanding); the act was not harmful because there are no bruises; the victim precipitated her rape by the way she dressed or acted; and the man "didn't mean it." MARY P. KOSS et. al., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 8-9 (1994) (charting "Common myths and stereotypes about male violence against women").

[78] *See supra* note 54 and accompanying text (discussing Biden construction of VAWA).

[79] The second rape case decided under VAWA, *Anisimov v. Lake*, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997), explicitly rejected the "broad characterizations of rape made in *Brzonkala*," and stated that rape cases not motivated by gender "appear to th[e] Court to be few and far between." 1997 WL 538718 at *13. However, the court stated that the issue of "whether a crime is motivated by gender—must be addressed on a case by case basis." *Id.* That this one court rejected the rationale set forth in *Brzonkala* does not change the fact that other District Courts and Circuit Courts considering rape cases under VAWA may still apply the sexual stereotypes cited in *Brzonkala* and historically found in court decisions involving rape cases.

IV. ALL RAPE AS MOTIVATED BY GENDER ANIMUS

Contrary to the belief of Senator Hatch and others, rape is rarely, if ever, caused by "lust" or "sexual passion."[80] Instead, numerous individual determinants may cause a person to rape.[81] In addition to those various determinants, gender animus is an underlying factor in almost all rapes. The presence of gender animus in rape is twofold. First, the American socialization process teaches men to harbor gender animus. When this learned gender animus (be it conscious or unconscious) is combined with other factors, it may cause a man to rape. Second, acts of rape are a means of asserting power and control over women, thus serving to subordinate women. As such, instances of rape are overt displays of gender animus or hostility toward women as a class.

The American socialization process has deep historical roots and is reflected in and reproduced by sexual stereotypes in popular culture.[82] Historically, rape was considered a property crime against the man to whom the rape victim "belonged."[83] Marital rape was considered impossible.[84] The definition of rape eventually changed from a property crime to a crime against a person.

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[80] CROWELL, *supra* note 8, at 59 (discussing research which has found "that motives of power and anger are more prominent in the rationalizations for sexual aggression than sexual desires"); KOSS, *supra* note 77, at 29 (noting a study suggesting that power and anger motives in nonincarcerated sexually aggressive men may outweigh sex motives).

[81] *See infra* notes 140-142 (discussing individual determinants).

[82] CROWELL, *supra* note 8, at 62-69.

[83] BROWNMILLER, *supra* note 53, at 18 ("Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property."). *See* RICHARD A. POSNER, SEX AND REASON 395 (1992) ("Traditionally, rape was the offense of depriving a father or husband of a valuable asset—his wife's chastity or his daughter's virginity." (footnote omitted)).

[84] CROWELL, *supra* note 8, at 65; SUSAN ESTRICH, REAL RAPE 72 (1987) (quoting Lord Chief Justice Hale's assertion that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" (citing 1 HALE, HISTORY OF PLEAS OF THE CROWN 629)).

However, rape laws were typically written to require stringent proof, including a showing of physical force by a defendant[85] and a woman's physical resistance[86] to prove non-consent and corroboration.[87] These strict requirements often discouraged rape victims

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[85] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1095, 1098-99 (discussing force requirement for rape cases and noting that force is generally "defined according to the woman's will to resist").

[86] *See* People v. Carey, 223 N.Y. 519, 520 (per curiam) (1918) The *Carey* court defined "utmost resistance" as follows: "Rape is not committed unless the woman oppose the man to the utmost limit of her power. A feigned or passive or perfunctory resistance is not enough. It must be genuine and active and proportioned to the outrage." *Id.* (citation omitted). The *Carey* court reversed the rape conviction of "a youth of 19 years" based upon a lack of evidence proving utmost resistance where the defendant testified that the complainant consented to engage in intercourse with him once in the past and the complainant, "an unmarried woman," testified that defendant had taken liberties with her in the past, and that she continued to allow him to visit. *Id.* at 519-20. *See also* State v. Beeny, 203 P.2d 397 (Utah 1949). The *Beeny* court held that a prosecutrix need not have made "uttermost resistance" but must only "do what her age, strength, the surrounding facts and all attending circumstances make it reasonable for her to do in order to manifest opposition to the act of sexual intercourse." *Id.* at 399. However, the court noted that "[m]ere objections in words, or such objections coupled with some resistance are not enough to . . . constitute rape." *Id.*

[87] For an example of a state law requiring corroboration, see, e.g., State v. Elsen, 187 P.2d 976 (Idaho 1947). The *Elsen* court described the Idaho corroboration rule as follows:

> A defendant may be convicted of the crime of rape upon the uncorroborated testimony of the prosecutrix; but this is only so when the character of the prosecutrix for chastity, as well as for truth, is unimpeached, and where the circumstances surrounding the commission of the offense are clearly corroborative of the statements of the prosecutrix.

Id. at 977.

The twelve year old prosecutrix in *Elsen* was impeached by her own testimony that she had engaged in sexual intercourse with two men other than the defendant. Thus, the court required direct evidence of the alleged rape. *Id.* at 978. The prosecutrix testified that the fifty-nine year old defendant had sexual intercourse with her in a car on the way to a hotel, then denied being with the prosecutrix at all on the night in question. Three witnesses testified to seeing the defendant with the prosecutrix at the hotel she testified about; however, the court found this evidence insufficient to corroborate the rape and reversed the

from reporting the crimes.[88] In cases where a victim did report a rape and the case advanced to trial, the rape victim was often cross-examined in a victim-blaming manner.[89]

In recent years, rape laws have been amended so as to eliminate requirements such as force, "utmost resistance" and corroboration.[90] Additionally, rape-shield laws have been enacted on both

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defendant's conviction. *Id.* at 978-79. *See also* Strickland v. State, 61 S.E.2d 118, 120-22 (Ga. 1950) (stating a general rule that "there can be no conviction for rape . . . on the uncorroborated testimony of the female upon whom the alleged offense was committed" but finding sufficient corroboration where a thirteen year old girl, raped by her uncle and temporary guardian in Georgia, promptly reported the incident to her mother in Florida and left school in Georgia, immediately moving in with her mother earlier than they had planned).

For a general discussion of old rape statutes, see CROWELL, *supra* note 8, at 124-25 ("Before the mid-1970's, most states' rape laws required prompt reporting of the crime; corroboration by other witnesses; physical resistance by the victim; and cautionary instructions to the jury about the difficulty of determining the truth of a victim's testimony."); Estrich, *supra* note 85, at 1099, 1108-09, 1114, 1131 (discussing rape prosecutions under old laws requiring proof of force, "utmost" or "reasonable" physical resistance, victim's nonconsent and corroboration; also noting other impediments to a successful rape prosecution including cautionary jury instructions, the fresh complaint rule and evidentiary rules allowing evidence of victim's prior sexual conduct).

[88] CROWELL, *supra* note 8, at 33 ("[T]he rate of forcible rape reported to police [between 1973-1993] increased 54.9 percent, but it is not known how much of that increase may reflect increased willingness of women to report rape to the police and how much is an actual increase in the rate of rape." (citation omitted)).

[89] *See, e.g.*, Frank v. State, 35 N.W.2d 816, 822 (Neb. 1949) ("[I]n cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and . . . direct evidence of the general reputation of the prosecutrix for sexual morality may be shown by defendant . . . cross-examination of the prosecutrix should be as unrestrained and searching as is consistent with rules of law" and it is error to exclude "any direct competent evidence not too remote in time, showing specific immoral or unchaste acts and conduct by her with others."). *See also* CROWELL, *supra* note 8, at 126 (discussing admissibility of victim's sexual history prior to rape law reform); CENTER FOR WOMEN POLICY STUDIES, VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUES 2 (1991).

[90] *See* CROWELL, *supra* note 8, at 125 (listing changes in rape laws including: "gradation of offenses; focus on behavior of offender rather than consent of victim; inclusion of rape shield provisions; elimination of witness

federal and state levels such that, with minor exceptions, a rape victim may not be questioned as to her sexual past or her character for "promiscuity."[91] Notwithstanding these statutory changes, the

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corroboration; elimination of prompt reporting; elimination of cautionary instructions; and elimination of marital exclusion" as well as "gender-neutral definition[s] of rape"); PEGGY REEVES SANDAY, A WOMAN SCORNED 178-83 (1996) [hereinafter, A WOMAN] (discussing reform of rape laws between 1974 and 1980).

[91] SANDAY, A WOMAN, supra note 90, at 179 (noting that after law reform "defense attorneys were no longer able to probe into a victim's sexual history at will"). FED. R. EVID. 412(a) provides the following statutory rape-shield language:

Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

Id.

See also ALA. CODE § 12-21-203 (1995); ALASKA STAT. § 12.45.045 (Michie Supp. 1996); ARK. CODE. ANN. § 16-42-101 (Michie 1995); CAL. EVID. CODE §§ 782, 1103(b) (West 1995); COLO. REV. STAT. §18-3-407 (1997); CONN. GEN. STAT. ANN. § 54-86f (West 1994); DEL. CODE ANN. tit. 11 §§ 3508, 3509 (1995); FLA. STAT. ANN. § 794.022(2), (3) (West 1992); GA. CODE ANN. § 24-2-3 (Michie 1995); HAW. REV. STAT. ch. 626, Rule 412 (1993); IDAHO CODE § 18-6105 (1997); 725 ILL. COMP. STAT. ANN. 5/115-7 (West 1993); IND. CODE ANN. § 35-37-4-4 (West 1994); IOWA R. EVID. 412 (1996); KAN. STAT. ANN. § 21-3525 (1995); KY. REV. STAT. ANN. § 510.145 (Michie 1990); LA. CODE EVID. ANN. art. 412 (West 1996); ME. R. EVID. 412 (1997); MD. ANN. CODE art. 27, § 461A (1996); MASS. GEN. LAWS ANN. ch. 233, § 21B (1986); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1991); MINN. STAT. ANN. § 609.347(3),(4),-(6) (West 1987); MISS. CODE ANN. §§ 97-3-68,-69 (1994); MO. REV. STAT. § 491.015 (1996); MONT. CODE ANN. § 45-5-511(2),(3) (1997); NEB. REV. STAT. § 28-321 (1995); NEV. REV. STAT. §§48.069, 50.090 (1986); N.H. REV. STAT. ANN. § 632-A:6 (1996); N.J. STAT. ANN. § 2C:14-7 (West 1995); N.M. STAT. ANN. § 30-9-16 (Michie 1995); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1997); N.C. GEN. STAT. § 8C-1, Rule 412 (1992); N.D. CENT. CODE §§ 12.1-20-14,-15 (1997); OHIO REV. CODE ANN. §§ 2907.02(D)-(F) (Anderson 1996); OKLA. STAT. tit. 12, § 2412 (1993); OR. REV. STAT. § 40.210 (1995); 18 PA. CONS. STAT. ANN. § 3104 (West 1983); R.I. GEN. LAWS § 11-37-13 (1994); S.C. CODE ANN. § 16-3-659.1 (Law Co-op. 1997); S.D. CODIFIED LAWS § 23A-22-15 (Michie 1988 & Supp. 1997); TENN. R. EVID. 404 (1997); TEX. R. CRIM. EVID. 412 (1995); UTAH R. EVID. 412 (1996); VT. STAT. ANN. tit. 13, § 3255 (1994

victim-blaming attitude toward rape has not been removed from societal thinking and it remains part of the American socialization process.[92]

Sexual stereotypes are also part of the socialization process which fosters rape.[93] While women are socialized to "resist sexual advances,"[94] men are taught to "initiate sexual activity" thus creating a framework for rape.[95] The notion that men are to be sexually aggressive and women sexually passive lays the foundation for a myriad of "rape myths."[96]

& Supp. 1997); VA. CODE §§ 18.2-67.7,-67.10(5) (Michie 1996); WASH. REV. CODE ANN. §§ 9A.44.020(2)-(4) (West 1988); W. VA. CODE § 61-8B-11(a), (b) (1997); WIS. STAT. §§ 972.11(2), 971.31(11) (1985 & Supp. 1997); WYO. STAT. ANN. § 6-2-312 (Michie 1988 & Supp. 1997). *See also* State v. Reinhold, 597 P.2d 532 (Ariz. 1979).

[92] *See, e.g.*, SANDAY, A WOMAN, *supra* note 90, at 208-21. In discussing the 1991 rape trial of William Kennedy Smith, Sanday addresses the defense lawyer's ability to portray the victim as an "unattached young woman, who had left her illegitimate child at her mother's for the night, [who] was out for a night on a town famous for its bars frequented by rich men and fortune seeking women" without ever violating the state rape shield laws. SANDAY, A WOMAN, *supra* note 90, at 219. Sanday also notes the media reaction which tended to blame the victim while praising Smith. SANDAY, A WOMAN, *supra* note 90, at 214-17. For example, the New York Times published two articles covering the rape: the first revealed the victim's name and profiled her private life, while the second "glowing" article wrote about Smith and his "thoughtful" and "harmless" personality. SANDAY, A WOMAN, *supra* note 90, at 215-16. The Times described Smith's victim as a woman who led a "leisurely life in South Florida" courtesy of her wealthy stepfather and noted that she "gave birth to a daughter by a local man she did not marry." Fox Butterfield & Mary B.W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance*, N.Y. TIMES, Apr. 17, 1991, at A17. The Times also stated that the victim had "a little wild streak" and "below-average grades" in high school, that she had numerous speeding tickets and that she "frequented Palm Beach's expensive bars." *Id. See also infra* notes 96-106 and accompanying text (discussing persistent rape myths in society).

[93] CROWELL, *supra* note 8, at 66 ("[Sexual] scripts support violence when they encourage men to feel superior, entitled, and licensed as sexual aggressors with women as their prey, while holding women responsible for controlling the extent of sexual involvement.").

[94] CROWELL, *supra* note 8, at 66.

[95] CROWELL, *supra* note 8, at 66.

[96] Rape myths are a series of sexual scripts learned by men and women which perpetuate American rape culture. Studies show that more men than

The first set of rape myths serves to "excuse the rape."[97] First is the idea that women secretly wish to be raped, and therefore, the rapist is not truly acting against the woman but is fulfilling her wishes.[98] This notion was put into words by a Maryland judge who, in a dissent to an appellate decision upholding a conviction of rape, remarked that the facts did not suggest "anything other than a pattern of conduct consistent with the ordinary seduction of a female acquaintance who *at first* suggests her disinclination . . . ."[99] A corollary to the myth that women desire rape is the common belief that when a "nice girl" says "no" to sex, she really means "yes."[100] She is only acting out her role as a proper woman by pretending to be disinterested in intercourse which she really desires. This belief extends into the proposition that victims of rape are not "nice girls," but are actually "fallen women" who

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women accept rape myths and that more "self-reported, sexually aggressive" men accept these myths. CROWELL, *supra* note 8, at 66.

The rape myths embedded in American society are identified and discussed in Susan Griffin, *Rape: The All-American Crime, reprinted in* WOMEN AND VALUES: READINGS IN RECENT FEMINIST PHILOSOPHY 203 (Marilyn Pearsall ed., 2d ed. 1993).

[97] CROWELL, *supra* note 8, at 66.

[98] Griffin, *supra* note 96, at 205 ("A young woman who was raped by the husband of a friend said that days after the incident the man returned to her home, pounded on the door and screamed to her, 'Jane, Jane. You loved it. You know you loved it.'").

[99] State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J. dissenting), *cert. denied*, 467 U.S. 1255 (1984) (emphasis supplied). After giving the defendant a ride home from a bar, the victim in *Rusk* refused the defendant's invitation to join him in his apartment. In response to this refusal, the defendant took the victim's car keys, thus luring her into the apartment against her wishes. *Id.* at 721. Inside the apartment the victim, who was frightened to death, submitted to kissing the defendant while "begging him" to let her go. *Id.* at 722. The defendant did not let her go. Instead he continued to kiss and touch the victim until she acquiesced to oral sex and vaginal intercourse with him as he "lightly choked" her. *Id.*

[100] KOSS, *supra* note 77, at 8 (describing "victim masochism" myths: "It wasn't rape, only 'rough sex.' Women say no when they mean yes. Some women enjoy rape."); Griffin, *supra* note 96, at 206 (describing the myth that "not only does a woman mean 'yes' when she says 'no,' but that a really decent woman ought to begin by saying 'no,' and then be led down the primrose path to acquiescence").

provoke their attackers by their dress, their words or their actions.[101] These myths, that women desire rape, deserve rape or provoke rape, allow men to justify rape and relieve themselves from any guilt or personal responsibility resulting from rape.

A second set of rape myths "minimize the seriousness of rape."[102] Some of these "minimizing" myths justify men's behavior: "he paid for her date," "he had to release sexual 'tension,'" "he was drinking" and "he didn't mean it."[103] Others deny any true harm because the victim "wasn't a virgin" or she suffered "no bruises."[104] A final myth asserts that rape does not occur at all: women "cry rape" for revenge or to protect their "reputations."[105] The fact that rape is actually one of the most under-reported of crimes belies this final myth.[106]

Our culture reflects and promotes violence against women; women and men are socialized in an environment of deep gender animus. Graphic depictions of violence against women in both mainstream television and movies may serve to "desensitize" men to "real world violence" against women.[107]

Additionally, pornography reflects societal hatred of women and may encourage sexual violence against women.[108] One woman

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[101] KOSS, *supra* note 77, at 8 (describing "victim precipitation" myths: "Women provoke rape by the way they dress, by 'leading men on.' . . . It only happens to certain types of women."); Griffin, *supra* note 96, at 205, 207-08.

[102] CROWELL, *supra* note 8, at 66.

[103] KOSS, *supra* note 77, at 8-9.

[104] KOSS, *supra* note 77, at 9.

[105] KOSS, *supra* note 77, at 8 (describing "victim fabrication" myths).

[106] KOSS, *supra* note 70, at 160 (showing rape as one of the most underreported crimes according to Uniform Crimes reports assembled by the FBI).

[107] CROWELL, *supra* note 8, at 64.

[108] Accounts of rape victims whose assaults were incited, in part, by pornography can be found in *Testimony from Public Hearings on the Ordinance to Add Pornography as Discrimination Against Women, in* MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY 48-62 (Diana E. H. Russell ed., 1993). One account goes as follows: three men on a hunting trip, reading pornographic magazines, saw a thirteen-year-old Girl Scout in the woods. *Id.* at 48-49. One man yelled "[t]here is a live one," and the three began to chase the young girl. *Id.* The three men caught the girl and raped her, forcing her to engage in both vaginal and oral intercourse. *Id.* at 48-49. After raping the young Girl Scout, they kicked leaves and pine needles on her and "told [her] that if

[she] wanted more [to] come back the next day." *Id.* at 49.

Another woman recalls being sexually terrorized by a man for years. At times he would look at pornographic magazines and would make "hateful, obscene, violent remarks about women in general and about me. He told me that because I am female I am here to be used and abused by him, and that because he is a male he is the master and I am his slave." *Id.* at 51.

A former prostitute recounts a story of being raped by a group of three men. *Id.* at 59. Upon meeting one man in a hotel room, she was tied to a chair and gagged. *Id.* The man then left the room, returning about one hour later with two other men and some S and M magazines. *Id.* The three men proceeded to attach nipple clips to her breasts, to burn her with cigarettes, and to rape and beat her continuously for twelve hours. *Id.* The woman summarized her experiences as a prostitute stating:

> [m]en constantly witness the abuse of women in pornography and if they can't engage in that behavior with their wives, girlfriends, or children, they force a whore to do it. My wish is that you could see with my eyes just for a day how clear the relationship is between pornography and the systematic abuse of women.

Id. at 60.

Research supports the testimony of these victims of pornography, showing that it is significantly related to misogyny and does indeed encourage male violence against women. *See, e.g.,* CROWELL, *supra* note 8, at 63 (noting that "exposure to pornography under laboratory conditions has been found to increase men's aggression toward women, particularly when a male participant has been affronted, insulted, or provoked by a woman"); KOSS, *supra* note 77, at 26-27 (discussing research which has found that, in addition to sexual offenders, "males who have not been sexually aggressive may also be aroused by rape depictions that involve adult women, especially if the woman is portrayed as enjoying the experience"; also noting that "the U.S. Attorney General's Commission on Pornography [has] concluded that exposure to media depictions of violence against women promotes rape"); SANDAY, A WOMAN, *supra* note 90, at 205-06 (citing 1993 article by Neil Malamuth, who, after major research on the connection between pornography and violence against women, concluded that "[t]here seems to be scientific support for the hypothesis of harmful effects on some men of certain types of pornographic stimuli," especially those which are violent and degrading).

Finally, pornography not only incites violence against women, it "*is* violence against women." ANDREA DWORKIN, *Pornography's Part in Sexual Violence, in* LETTERS FROM A WAR ZONE 206-09 (1993). For example, Linda Lovelace, an ex-pornography actress recounts "years as a sexual prisoner during which she was tortured and restricted from all normal human contact." Gloria Steinem, *The Real Linda Lovelace, in* MAKING VIOLENCE SEXY, *supra* at 23-24. Ms. Lovelace was "beaten and raped so severely and regularly that she suffered rectal damage

explains that her sexually abusive husband "got his ideas from . . . pornography":

> Having sex, how he wanted it, was nonnegotiable. He had a fetish about hating pubic hair. He used to shave his and mine. Once he slipped and slit my clitoris. . . . Once we saw an X-rated film that showed anal intercourse. After that, he pressed me to try it. I agreed to once, but found the experience very painful, but he kept trying to do it again. . . . He also used to pinch and bite me. . . . [H]e said "It's supposed to hurt." . . . [P]ornography is part of making our husbands into rapists.[109]

Wife-rape is one example of how American society fosters gender animus and perpetuates rape. Marital rape is not uncommon. One study, using a narrow definition of rape, found that "14% of ever-married women had been raped by a husband or ex-husband at least once."[110] This statistic likely underestimates instances of marital rape as it is "least likely to be reported by [adult] women victims."[111]

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plus permanent injury to the blood vessels in her legs." *Id.* at 25.

[109] Rev. Susan Wilhem, *Testimony on Pornography and Marital Brutality*, *in* MAKING VIOLENCE SEXY, *supra* note 108, at 46-47.

[110] KOSS, *supra* note 77, at 44; Eskow, *supra* note 51, at 685 (citing 1978 study of 930 women in San Francisco which showed that 14% of married women had been raped by their husbands at least one time). Some women have been raped by their husbands multiple times. One woman asserted:

> I actually refer to my whole marriage as marital rape. Several times, especially following the incidents where my husband asked our friends to come to bed with us when I was already asleep, he felt it was his privilege if he was at all sexually turned on or needing to be gratified, to rape me. Most of the time I would wake up. Sometimes I would just keep my eyes closed and try to tolerate it.

Testimony from Public Hearings on the Ordinance to Add Pornography as Discrimination Against Women, in MAKING VIOLENCE SEXY, *supra* note 108, at 54.

[111] KOSS, *supra* note 77, at 47. The reasons given for not reporting marital rape are "humiliation, fear [of disbelief of others] or of [being] devalued for having participated in such sexual activity, and belief that forcible sexual relations are the right of a husband or other male partner." *Id.*

Historically, marital rape was exempted from the criminal law based on notions of women as property, marital privacy and the idea that a wife consents to all sexual intercourse within marriage.[112] Although marital rape is now a crime in all states, distinctions between rape within marriage and other types of rape still exist.[113]

Marital rape myths serve to perpetuate traditional notions of property, privacy and consent within marriage. These myths are identified by Lisa Eskow,[114] and illustrated by the writing of Professor Glanville Williams in his argument against wholly abolishing the marital rape exemption.[115] First is the myth that "husbands . . . have an absolute right to sex on demand."[116] In distinguishing between stranger rape and marital rape (not involving a weapon or physical injury), Williams explains:

> [o]ccasionally some husband continues to exercise what he regards as his right when his wife refuses him, the refusal most probably resulting from the fact that the pair have had a tiff. What is wrong with his demand is not so much the act requested but its timing, or the manner of the demand.[117]

This idea of a husband's right to sexual intercourse was also expressed by a South Carolina husband acquitted of a violent marital rape who remarked: "How can you rape your own wife?"[118] This marital rape myth has its counterpart in women

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[112] *See supra* note 84 and accompanying text (discussing Lord Hale's notions of "consent" and marital rape).

[113] *See supra* note 51 and accompanying text (discussing treatment of marital rape under state laws).

[114] *See* Eskow *supra* note 51, at 688 (discussing marital rape myths).

[115] Glanville Williams, *The Problem of Domestic Rape, in* RAPE AND THE CRIMINAL JUSTICE SYSTEM 269, 271 (Jennifer Temkin ed., 1995). Williams' article refers to the English marital rape exemption, however, he refers to the American Law Institute's Model Penal Code, the American police experience and an Oregon case in making his argument against the abolition of marital rape). *Id.* at 270.

[116] Eskow, *supra* note 51, at 688.

[117] Williams, *supra* note 115, at 270.

[118] KOSS, *supra* note 77, at 15. *See* POSNER, *supra* note 83, at 389-90. Posner lists reasons for the traditional marital rape exemption, some of which are

who "feel duty-bound to submit to sex in marriage."[119] Moreover, this myth is expressed in women's failure to recognize instances of marital rape, or their hesitation to admit to these occurrences. For example, wives speaking about sexual contacts with their husbands have stated: "'[I]t was almost like rape'; or 'he pinned me down like he was raping me'; or 'it was just like a rape, except I was on [my own] bed.'"[120]

A final marital rape myth is the "view [of] marriage as consenting perpetual, even contractual consent."[121] In accordance with this myth, Williams explains why a stranger rapist is worse than a husband-rapist stating that "the first offender never received consent, while the second has received favour in the past and is now perhaps only temporarily out of favour."[122] These myths allow for the perpetuation of marital rape and the American ideal which "equat[es] conjugal relations with domestic bliss."[123]

A second example of how American society fosters and encourages rape can be found in a study of fraternity life, and fraternity gang rape in particular. Gang rape on college campuses is, unfortunately, not rare:

> Gang Rapes have become a despicable and horrifying trend within the higher education community, usually perpetrated by athletic team members and fraternity brothers. Virginia Tech's wide receiver is again facing rape charges, along with the team's fullback, not even two years after his assault on Kristy [sic] Brzonkala. Three Morehouse basketball players were charged last October for raping a

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reflective of marital rape myths. For example, the idea of a husband's right to intercourse is found in the description of marriage in sexually repressive societies which prize "premarital virginity" and "marital chastity." POSNER, *supra* note 83, at 389. In such marriages "virtually the only services that a wife contributes to the marriage are sexual and procreative, and if she tries to deprive her husband of these services, she is striking at the heart of the marriage." POSNER, *supra* note 83, at 389.

[119] Eskow, *supra* note 51, at 688.

[120] Eskow, *supra* note 51, at 690.

[121] Eskow, *supra* note 51, at 688; *see supra* note 84 (discussing "consent" and marital rape).

[122] Williams, *supra* note 115, at 270.

[123] Eskow, *supra* note 51, at 690.

> Spellman freshman in the dormitory; five Grambling State football players were charged last November for raping a local 17-year-old girl who wandered into their dormitory; three Southwestern Michigan College basketball players were charged with raping an 18-year-old woman and video taping their crime last November . . . other recent gang rapes committed by students were reported at Appalachian State, Virginia State University and Clemson University. Sexual assaults on campus have reached epidemic proportions according to studies which indicate that approximately 25% of all college co-eds will be victimized during 4 years of undergraduate study.[124]

In an effort to demonstrate how American society fosters and encourages rape, the college fraternity, viewed as a microcosm of traditional Western (heterosexual) male society, may be used as an example.[125] In a study of fraternity life, one author observed that

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[124] *Higher Education Reauthorization; Hearing on Campus Crime and the Accuracy in Campus Crime Reporting Act of 1997: Hearings on H.R. 715 Before the Subcomm. on Higher Education and the Workforce Comm.*, 105th Cong., *available in* 1997 WL 11235069 (testimony of Benjamin F. Clery, President, Security on Campus, Inc.).

[125] This is not to say that all fraternities encourage or partake in gang rape. In fact, in a later work by Peggy Reeves Sanday, the author of FRATERNITY GANG RAPE, *infra* note 126, Sanday emphasized "that being a member of a fraternity per se is not related to sexual assault." SANDAY, A WOMAN, *supra* note 90, at 201.

Sanday notes that regular alcohol and nicotine use and "participation in organized athletics" are more important predictors of "sexual aggression" than "fraternity affiliation." SANDAY, A WOMAN, *supra* note 90, at 201. *See also* William Douglas, *Disturbing Pattern Seen in Gang Rapes; Many Linked to Male Rules of 'Bonding,'* N.Y. NEWSDAY, May 13, 1990, at 2 (noting that college gang rapes will generally be found where "peer pressure, alcohol and drug abuse and all-male groups" co-exist and citing Cornell University professor Andrea Parrot who estimates "that about 80 to 90 percent of the men involved in gang sex attacks are members of fraternities or student-athletic groups, usually the football or basketball team").

Finally, Sanday has recognized (though not optimistically) that fraternities have the potential to be "constructive agents for change . . . where young males can learn responsible sexual behavior." SANDAY, A WOMAN, *supra* note 90, at 201-02. For example, at least two national fraternities have formally denounced

discourse between fraternity brothers focuses on sexuality and sexual conquest as the primary expression of masculinity.[126] Conversations with fraternity brothers often refer to "working a yes out," that is, coercing a woman into sexual intercourse either through verbal pressure or through giving her drugs and alcohol, or both.[127] Language reflective of the previously discussed rape myths is abundant in this study.[128] For example, a "no" might mean "yes" because "[i]f she sticks around, that's your signal that she's not quite ready to do anything, but she's still interested in

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sexual abuse. ROBIN WARSHAW, I NEVER CALLED IT RAPE 110 (1988). An article in Sigma Alpha Epsilon's national magazine wrote:

> We thought the friendly "gang bang" was O.K. After all, the woman went along with it. Wrong, brothers. Not only is the "gang bang" itself wrong by legal standards — it's rape no matter how you rationalize it — but it's an act of violence based on a perverted myth of masculinity and sexuality.

Id.

[126] PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 113 (1990) [hereinafter, FRATERNITY]. The author of this study trained students to interview the fraternity brothers quoted in the following conversations, as well as interviewing other men and women around one campus where a highly publicized gang rape occurred. *Id.* at 16. The interviews took place over the course of two years. *Id.* All conversations were tape recorded and later transcribed, with the permission of the interviewees. *Id.* Some students wrote about their fraternity experiences for the author. *Id.* The author studied instances of gang rape at other campuses through newspaper and magazine reports, a police report, an interview with a victim from another campus, and a nationwide study conducted by Mary P. Koss. *Id.* at 17.

[127] *Id.* at 115. Other examples of "fraternity" language which reflect attitudes that might foster gang rape are collected in ROBIN WARSHAW, I NEVER CALLED IT RAPE, *supra* note 125. For example "new meat" refers to freshman and transfer women; "cattledrives" and "hogfests" are synonyms for parties; "landsharking" occurs when "a frat member kneels on the floor behind [a] woman and bites her" buttocks; a "rude hogger award" refers to the "fraternity member who has sex with the woman deemed most ugly by the other frat members"; and "ledging" refers to "woman's being driven to the point of suicide" by months of harassment she is subjected to by brothers who were secretly invited to watch her engage in intercourse with one fraternity brother. WARSHAW, *supra* note 125, at 108-09.

[128] *See supra* notes 96-106 and accompanying text (discussing rape myths).

you, so it's worth trying . . . ."[129] Other myths are reflected in comments about a victim of a gang rape who "just totally brought everything onto herself."[130] The comments go on to state that "[s]he drugged herself . . . she was responsible for her condition, and that just [left] her wide open . . . ."[131] Additionally, fraternity brothers generally divide women into four groups: "frigid," who are unresponsive to sexual advances; "teases," who allow sexual advances up to a point; "sluts," who have had sex with "too many" men; and "girlfriends," who are likely the only women deemed "nice girls" by the other brothers.[132]

Discourse between fraternity brothers also centers around male dominance. In fact, fraternities are formed because the group structure provides more power or control on campus.[133] Watching pornography, reading pornographic magazines and making sexual jokes are all aspects of the fraternity culture which encourage male-bonding and male power.[134] In its extreme, the ritual and bonding of fraternity culture leads to gang rape.[135] Fraternity gang rape (and rape involving college athletics) has been reported at "'public, private, religiously affiliated, Ivy League, large and small'"

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[129] SANDAY, FRATERNITY, *supra* note 126, at 121.

[130] SANDAY, FRATERNITY, *supra* note 126, at 119.

[131] SANDAY, FRATERNITY, *supra* note 126, at 119.

[132] SANDAY, FRATERNITY, *supra* note 126, at 125-26.

[133] SANDAY, FRATERNITY, *supra* note 126, at 125.

[134] SANDAY, FRATERNITY, *supra* note 126, at 126-30. *See also* WARSHAW, *supra* note 125, at 107-08 (discussing "antiwomen sentiments" displayed in fraternity "rush" events, rituals, skits and publications).

[135] SANDAY, FRATERNITY, *supra* note 126, at 19-20; WARSHAW, *supra* note 125, at 105-06:

> The culture of many fraternities instills in members a group ethos which objectifies and debases women through language and physical aggression, which lauds heavy drinking and other drug use, and which reinforces group loyalty through united behavior—especially antisocial and sometimes illegal behavior. [This culture] provide[s] a good medium for gang rape.

See also Douglas, *supra* note 125, at 2 (citing Professor Andrea Parrott on gang rape: "These men are raping for each other, raping to prove their virility to their other friends . . . its also to prove loyalty to their friends, a way of saying 'If you'll do it, I'll do it.'").

universities alike.[136] The rape becomes part of the fraternity culture, and the fact that no one person raped a woman takes responsibility away from all of the actors.

In the larger American society, rape is often committed by an individual actor.[137] However, the male socialization process and the surrounding culture which fosters male bonding and male dominance often allows men to deny any responsibility for the victimization of women. People view rape as an isolated and private incident of violence between two people, where the aggressor happens to be male and the victim female.[138] The difficulty with this "private" view of rape, as described by May and Strikwerda, is that "[b]oth the 'climate' that encourages rape and the 'socialization' patterns which instill negative attitudes about women are difficult to understand or assess when one focuses on the isolated individual perpetrator of rape."[139]

In fact, rape as sexualized violence reflects the gender animus inculcated in men through the American socialization process. The socialization process itself does not cause men to rape. The gender animus which is instilled in most men through this process, when coupled with individual determinants, however, may cause an individual to rape. Individual determinants may include physiology,[140] alcohol use,[141] psychopathology and personality traits.[142] Rapists may display a variety of individual determinants;

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[136] SANDAY, FRATERNITY, *supra* note 126, at 2.

[137] CROWELL, *supra* note 8, at 1 (reporting that more than 75% of rapes are committed by an individual known to the victim).

[138] Larry May & Robert Strikwerda, *Men in Groups: Collective Responsibility for Rape*, 9 HYPATIA 13, 135-36 (1994) (arguing that rape is actually a "crime against humanity" "perpetrated by men as a group" "not merely a crime against a particular woman" committed "by the individual rapist").

[139] *Id.* at 137.

[140] CROWELL, *supra* at 8, at 52-54 (noting that physiology may contribute to male aggression although no conclusive studies of humans have shown this to be true).

[141] CROWELL, *supra* note 8, at 54-56 (noting that alcohol use is reported in up to 75% of acquaintance rapes, but recognizing that "many . . . sexual assaults occur in the absence of alcohol, and many people drink without engaging in violent behavior").

[142] CROWELL, *supra* note 8, at 56-58 (noting that "a wide variety of

however, a common link among rapists is that all have been socialized to harbor gender animus which is expressed in the rapes they commit.[143]

While the male socialization process serves to make gender animus an underlying factor in almost all rapes, every rape can be seen as an expression of gender animus on a societal level, as rape serves to maintain the American power structure of dominance and dependency. Rape is a crime which systematically subordinates all women by instilling a fear of rape among women as a collective group.[144] Rape is a means for a man to assert his perceived

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psychiatric and personality disorders have been diagnosed among sexual offenders, frequently some type of antisocial personality disorder").

[143] In her study of convicted rapists, Diana Scully notes:

> It is important to understand that the socialization process of all members of society is influenced, to some degree, by a common set of values. Thus, men who rape should not harbor beliefs that are drastically different from those of other men, but they may have more extreme attitudes. The difference should be one of degree, not of kind.

SCULLY, *supra* note 1, at 78.

It should be noted that Richard A. Posner, a judge and scholar, believes that "rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women . . . ." POSNER, *supra* note 83, at 384. However, Posner recognizes that the infrequency of male homosexual rape, and the virtual non-existence of rape "among man's closest relatives, the non-human primates . . . lends some credence to the view that misogyny is an element in many rapes." POSNER, *supra* note 83, at 384-85. As previously noted, to make a successful claim under VAWA, misogyny or "gender animus" need not be the sole cause of a rape, but must be one "element" underlying a rape. *See supra* note 39.

[144] Single acts of rape institutionalize the subordinate position of women in American society as the fear of rape prevents women from freely engaging in civic activities and, instead, forces women to become dependent upon men for protection. BROWNMILLER, *supra* note 53, at 15 ("[Rape] is nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear." (italics in original)); Griffin, *supra* note 96, at 203-04 (describing the "fear of rape" as "a daily part of every woman's consciousness" which is learned by women during youth and is carried throughout their lifetimes). Catharine MacKinnon describes the institutionalization of women's subordinate position through acts of rape as follows:

> Sexual violation symbolizes and actualizes women's subordinate social status to men . . . . In social reality, rape and the fear of rape operate

> cross-culturally as a mechanism of terror to control women . . . . Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression. Sexual aggression by men against women is normalized. In traditional gender roles, male sexuality embodies the role of aggressor, female sexuality the role of victim, and some degree of force is romanticized as acceptable.

MacKinnon, *supra* note 35, at 1302.

That the fear of rape prevents women from fully engaging in civic life is seen in daily adjustments women make to protect themselves. For example, one study showed that nearly 50% of women do not want to travel alone at night, while only 8% of men felt this way. CROWELL, *supra* note 8, at 87. This fear precludes women from engaging in social activities (going to a night time movie), as well as economic activities (seeking night time employment). Stellings, *supra* note 6, at 6. *See generally* MARGARET GORDON & STEPHANIE RIGER, THE FEMALE FEAR (1989) (describing the fear of rape and its effects on all women).

Congress recognized that such a fear is instilled in all women through gender-motivated violence where they wrote: "The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated." S. REP. No. 138, 103d Cong., 1st Sess. 37, 49 (1993).

The fear of rape benefits men as a class as it forces women to seek male protection, thus maintaining the male position of power. BROWNMILLER, *supra* note 53, at 399 (noting that society teaches women that "[d]espite the fact that it is men who are the rapists, a woman's ultimate security lies in being accompanied by men at all times"); May & Strikwerda, *supra* note 138, at 148 ("In a larger sense, men benefit from the prevalence of rape in that many women are made to feel dependent on men for protection against potential rapists."). Rape myths and sexual stereotypes, discussed *supra* notes 96-106 and accompanying text, serve to foster the rape culture and relieve men from responsibility for the rape which benefits them as a class. One purpose of VAWA was to address these stereotypes underlying American society in an effort to end violence against women. *See, e.g.*, S. REP. NO. 138, at 42 ("The Violence Against Women Act is designed to remedy not only the violent effects of the problem, but the subtle prejudices that lurk behind it."). In effect, VAWA is intended to address and cure the subordination of women through gender-motivated violence, including rape.

It should be mentioned that Richard A. Posner has taken issue with the assertion that rape is a "method of establishing or maintaining male domination." POSNER, *supra* note 83, at 384. Rather, Posner believes that "most rapists want to have sex, not to make a statement about, or contribute to, the subordination of women." POSNER, *supra* note 83, at 385. Yet, in discussing the "rational

power to dominate and subordinate women.[145] As explained by Andrea Dworkin, men rape "because of the kind of power that men have over women. That power is real, concrete, exercised from one body to another body, exercised by someone who feels he has a right to exercise it, exercised in public and exercised in private."[146] Women are raped because they are women.[147] They are not raped individually, but are raped indistinguishably by men, that is, the rapist does not choose his victim based upon a personal

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model of human behavior," Posner recognizes that "licensing utility monsters such as Bluebeard or de Sade to rape would not really be utility maximizing, if only because of the fear that it would engender in the community as a whole and the expense of the self-protective measures that this fear would incite." POSNER, *supra* note 83, at 386-87. Despite this recognition, Posner fails to see that the history of state and police inaction in rape cases, as well as American attitudes toward rape, have effectively created such a license. As a result, as recognized by Congress, women as a community do carry a fear of rape and this fear comes at great cost to society in general. Congress recognized the cost of this fear on society, thus enabling them to use the Commerce power to enact VAWA.

[145] One author has noted that men who assault their wives or girlfriends "are not committing violent acts against an individual who happens to be a woman. Rather their acts may express a belief that they have a right to dominate and punish women. This is particularly clear given that up to 75% of domestic assaults reported to the police occur after separation of the couple." STEPHSON, *supra* note 41, at 12. *See also* BROWNMILLER, *supra* note 53, at 13 ("[R]ape became not only a male prerogative, but a man's basic weapon of force against woman, the principal agent of his will and her fear . . . [it] became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood."); CROWELL, *supra* note 8, at 59 (discussing research which has found "that motives of power and anger are more prominent in the rationalizations for sexual aggression than sexual desires"); KOSS, *supra* note 77, at 29 (noting study suggesting that power and anger motives in nonincarcerated sexually aggressive men may outweigh sex motives).

[146] DWORKIN, *I Want a Twenty-Four Hour Truce During Which There Is No Rape*, *in* LETTERS FROM A WAR ZONE, *supra* note 108, at 163.

[147] MacKinnon, *supra* note 31, at 1301, 1307 (asserting that but for a woman's sex, she would not be sexually assaulted). *See* BROWNMILLER, *supra* note 46, at 309 ("Rape has something to do with our sex. Rape is something awful that happens to females . . . ."). *See also* Stellings, *supra* note 6, at 193 ("That violence against women is sexualized is no accident or mere inevitability of nature: women are raped because our society views women as appropriate targets of such aggression by virtue of their femaleness, and because our legal system as a whole permits it." (footnote omitted)).

relationship—he does not rape his wife, or his girlfriend, his date or a stranger as an individual—but rather, he rapes the woman.[148]

The acceptance of rape as an act of subordination and an expression of power where the victims are interchangeable is evidence that acts of rape are acts of gender animus. Each act of rape is an act of hostility and disrespect toward women. As some authors have noted, these acts are analogous to the post-Civil War lynchings of African-Americans, which were similarly expressions of dominance committed upon random citizens because of their race.[149]

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[148] MacKinnon, *supra* note 35, at 1293, 1301 ("Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender." (footnote omitted)). *See* STEPHSON, *supra* note 34, at 12 (remarking that men who assault their wives or girlfriends "are not committing violent acts against an individual who happens to be a woman. Rather their acts may express a belief that they have a right to dominate and punish women.").

In rare instances men do rape men. Between 0.6% to 7% of men may be raped in their lifetimes. Stellings, *supra* note 6, at 186 n.3 (citing MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS 27 (2d ed. 1991). Most male rapes occur in prison, and many prison rapists return to a heterosexual life quickly following their release. Stellings, *supra* note 6, at 196 n.44. However, these instances of male-on-male rape are often consistent with the notion that men rape in part based on an internalized gender animus, in that men often "'feminize' their male victims in the process." Stellings, *supra* note 6, at 196. As described by Stellings, the male rapist reinforces his masculinity through his domination of another man, while the victim takes on the role of a "weak" and "passive" "woman . . . whore . . . bitch . . . [or] old lady." Stellings, *supra* note 6, at 196. These instances of male-on-male rape, and the process of emasculation that occurs during the rapes, serve to reinforce the idea that gender animus is a factor in rapes committed by men on women.

[149] *See, e.g.*, MacKinnon, *supra* note 35, at 1303 ("[S]exual assault in the United States today resembles lynching prior to its recognition as a civil rights violation."); Stellings, *supra* note 6, at 209-12 (describing post-Civil War violence against African-Americans and the similarities to modern violence against women and noting that the Ku Klux Klan Act of 1871 was "remarkable . . . [in] its willingness to reach private conduct and its recognition that private acts of terror threaten the public role of the citizen").

Indeed, Senator Biden likened violence against women to historic race discrimination when he remarked: "I intend for [VAWA's] primary purpose to

Even if one does not accept the argument that acts of rape are expressions of gender animus as they serve to reinforce women's subordinate status in society, it remains clear that all rapes share one common theme, namely an underlying basis in gender animus. Regardless of the individual determinants that cause a person to commit a stranger rape, an acquaintance rape, date rape or a marital rape, each act of rape is committed in part because the rapist has been socialized by American society to maintain some degree of gender animus.[150] This underlying factor common to all rapes is all that is required under the language of VAWA in order to bring a claim.[151] The law, and especially VAWA, should recognize that gender animus is present in all cases of rape. In recognizing this, the law should cease to distinguish between the "real rape," defined by Susan Estrich as the pure stranger rape occurring between a black male and a white female,[152] and "non-traditional rapes" which include all rapes involving less force than the "real rape."[153] As case law under VAWA has already begun to make this distinction,[154] Congress should amend the statute to prohibit this distinction such that rape cases under VAWA will be decided in accordance with the underlying purpose of the statute. In addition, federal district courts and circuit courts should adopt a rebuttable presumption of gender animus in rape cases, thus creating positive case law in various United States districts.[155]

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be the symbolic recognition that violence against women is a national tragedy that warrants the commitment of our National Government — much the same way as fighting race discrimination has for much of this century." 140 CONG. REC., *supra* note 11, at S6102.

[150] *See generally* Part IV (describing the American male socialization process and how it encourages the development of gender animus).

[151] 42 U.S.C. § 13981(d)(1). "[T]he term 'crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, *at least in part*, to an animus based on the victim's gender." *Id.* (emphasis added).

[152] Estrich, *supra* note 85, at 1092.

[153] Estrich, *supra* note 85, at 1092.

[154] *See supra* notes 56-79 and accompanying text (discussing early case law defining gender animus in a VAWA rape case).

[155] Birgit Schmidt Am Busch has also suggested the adoption of a rebuttable presumption of gender motivation in domestic violence cases brought under the

V. THE APPLICATION OF A REBUTTABLE PRESUMPTION TO VAWA

In 1973, the Supreme Court decision in *McDonnell Douglas Corporation v. Green*,[156] first introduced the concept of a rebuttable presumption for cases involving race-based employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[157] In *McDonnell Douglas* the court articulated four elements necessary for a plaintiff to make a prima facie case of racial discrimination under Title VII. The elements required to make a prima facie case are: "(i) [plaintiff] belongs to a racial minority; (ii) [plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [plaintiff's] qualifications, [plaintiff] was rejected; and (iv) that, after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications."[158] After making a prima facie case, the burden of proof shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the alleged racial discrimination.[159] If the defendant fails to articulate such a reason, judgment may be entered for the plaintiff.[160]

VAWA Civil Rights Remedy. *See* Schmidt, *supra* note 21, at 24-25. Without such a presumption, Schmidt believes that many victims of domestic violence will otherwise be unable to find relief under VAWA. *See* Schmidt, *supra* note 21, at 24-25. She also notes that "by requiring victims to prove gender-motivation, the bill fails to recognize that violence against women in their homes is gender-motivated and reflects societal misogynist attitudes," thus, "in its present form, [VAWA] fails to meet its educational and remedial goals." Schmidt, *supra* note 21, at 24-25. This same reflection of societal attitudes and the resulting failure of VAWA also arises in cases of rape falling under the Act.

[156] 411 U.S. 792 (1973).

[157] 42 U.S.C. §§ 2000a-2000h-6 (1994).

[158] *McDonnell Douglas*, 411 U.S. at 802.

[159] *Id.*

[160] If the defendant asserts a "legitimate, nondiscriminatory reason" and thus meets the burden of production, the court will not grant summary judgment. Instead, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were

The *McDonnell Douglas* rule has since been assumed applicable in employment discrimination cases involving age, as well as those involving race.[161] The rule was distinguished and slightly modified for cases involving Title VII gender discrimination in *Price Waterhouse v. Hopkins*.[162] The Supreme Court in *Price* distinguished between mere "pretext" cases where an employer chooses not to hire a person based on his or her race, and "mixed motive" cases, such as *Price*, where an employer's hiring and promotion decisions are based on both legitimate, non-discriminatory reasons (e.g. performance) and illegitimate discriminatory reasons (e.g. gender).[163] The Court recognized that in a "mixed motive" case, a rebuttable presumption which only required an employer to articulate a "legitimate, nondiscriminatory reason" for an employment decision would allow employers to consider illegitimate reasons in making employment decisions without reproach.[164] Instead, the Court held that:

> [W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[165]

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a pretext for discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In fact, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

[161] *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) (assuming "that application of the Title VII rule to the ADEA [Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.] context is correct"). For lower court holdings applying the Title VII rule to ADEA claims, see Matthews v. Department of Labor, 767 F. Supp. 1140 (M.D. Fla. 1991) (recognizing a rebuttable presumption of discrimination by the employer once plaintiff has established a prima facie case of age discrimination) and Naphtali v. Reilly, 777 F. Supp. 1193 (S.D.N.Y. 1991) (same).

[162] 490 U.S. 228 (1989).

[163] 490 U.S. at 240, n.6.

[164] 490 U.S. at 273-74 (O'Connor, J. concurring).

[165] *Price*, 490 U.S. at 258.

In effect, this holding maintains a rebuttable presumption in Title VII discrimination cases. The difference between this case and race discrimination cases lies in the burden of persuasion placed upon the defendant after the plaintiff has made a prima facie case. In a Title VII case following *Price*, an employer seeking to overcome the rebuttable presumption of discrimination must articulate more than a "legitimate, non-discriminatory reason" for an employment decision; the employer must prove, by a preponderance of the evidence, that he or she would have made the same employment decision regardless of the plaintiff's gender.

The Supreme Court advocates that the concept of a rebuttable presumption is useful in discrimination cases. Since the VAWA Civil Rights Remedy addresses gender discrimination as manifested through acts of violence, a rebuttable presumption in VAWA cases would similarly be useful. A "rebuttable presumption" is generally defined as a presumption giving "particular effect to [a] certain group of facts in [the] absence of further evidence, and [the] presumption provides [a] prima facie case which shifts to defendant the burden to go forward with evidence to contradict or rebut [the] fact presumed."[166] Following this definition, as well as Supreme Court case law, Congress should amend VAWA such that:

> Where a person commits a crime of violence rising to the level of a felony under 42 U.S.C. § 13981(d)(2)(A) or (d)(2)(B), and that crime constitutes a rape as defined by the applicable State or Federal penal code, a rebuttable presumption of gender animus is created and the plaintiff meets a prima facie case under 42 U.S.C. § 13981(c). When this rebuttable presumption of gender animus arises, the burden of proof shifts to the defendant to prove by a preponderance of the evidence that such animus was not a factor in the rape.[167]

Practically, such an amendment would require that the plaintiff make a prima facie case establishing by a preponderance of the evidence, that (i) she is a woman; (ii) she was the victim of a rape as defined by the applicable state or federal penal code; and (iii)

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[166] BLACK'S LAW DICTIONARY, *supra* note 5, at 1267.

[167] For a discussion of the way "rape" should be defined, *see supra* note 6.

that her attacker was a man.[168] Once this prima facie case is made, the defendant should have a burden of persuasion similar to that in *Price*, as rape cases typically involve "mixed motives" rather than mere "pretext."[169] Thus, a defendant must show that he raped the victim while taking no account of her gender.[170]

Such an amendment will allow victims of rape to employ VAWA in a manner consistent with the primary purposes of Congress in enacting VAWA, as defined by Senator Biden. These purposes are:

> [T]o educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer; to the women the support and the assurance that their attackers will be prosecuted; and to ensure that the focus of criminal proceedings will concentrate on the conduct of the attacker rather than the conduct of the victim.[171]

A Congressional recognition that all rape, unless otherwise proven,[172] results from gender animus which is learned through the

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[168] Although this formula assumes a female plaintiff and male defendant, the language of VAWA is gender neutral. In a case where a male is raped he could present a similar prima facie case asserting that he is a man, he was raped and his attacker was a woman. In cases of same-sex rape a person again could make a prima facie case. It is likely that a defendant in either of these cases would overcome the burden of persuasion that gender animus was not a factor, thus requiring the plaintiff to prove that it was indeed a factor.

[169] *See supra* notes 81, 140-142 and accompanying text (discussing underlying gender animus which, when combined with various individual determinants, may cause a person to rape).

[170] *See infra* note 172 (discussing ways to rebut presumption of gender animus).

[171] S. REP. NO. 138, at 38.

[172] In some cases a rapist will be able to overcome the rebuttable presumption and prove he has raped a woman for some reason independent of any gender animus. For example, sexual sadism, a sexual paraphilia recognized in the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-IV] 493, 530 (4th ed. 1994), has been diagnosed in some rape cases (fewer than 10 percent). GERALD C. DAVISON & JOHN M. NEALE, ABNORMAL PSYCHOLOGY (5th ed. 1990). A sexual sadist will be able to prove that he has raped due to an illness rather than animus toward women, as the sexual sadist "derives sexual excitement from the psychological

American male socialization process will educate the public as to the problem of archaic notions of women and rape myths which foster our American rape culture. Only through such public education can the true goal of VAWA be reached, that is, to eradicate rape and gender-motivated violence in its entirety. A rebuttable presumption of gender animus in rape cases under VAWA will insure that women are afforded a civil rights remedy against their attackers, and that civil rights court proceedings will not focus on the victim's conduct, but rather on the rapist's conduct. If such measures are not taken under Congress' Civil Rights Remedy, the goal of granting such rights to rape victims on a state criminal level will not be realized. Congress must take the lead in protecting the rights of rape victims in the courtroom.

CONCLUSION

VAWA was properly enacted under Congress' authority to protect citizens who have suffered civil rights violations. Congress recognized both the growing problem of violence against women, especially in the forms of rape and domestic violence, and the fact that much of this violence is based on discriminatory gender animus. Congress sought to address discriminatory acts of violence against women through the Title III Civil Rights Remedy of VAWA. Unfortunately, the Civil Rights Remedy fails to recognize that sexual stereotypes and attitudes underlying the American socialization process serve to create a gender animus which is harbored within many American men, and which encourages the

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or physical suffering (including humiliation) of the victim." DSM-IV, *supra*, at 530. "Sadism overlaps the concept of rape, though not all rapists are sadists, nor is the contrary true." ROBERT G. MEYER, ABNORMAL BEHAVIOR AND THE CRIMINAL JUSTICE SYSTEM 98 (1992). Some sexual sadists "act on their sadistic sexual urges with nonconsenting victims." DSM-IV, *supra*, at 530. These sexual sadist-rapists are likely to repeat their acts until apprehended. *Id.*

In addition to sexual sadism, elevated levels of male hormones or other biochemical abnormalities have been suggested to incite rape. MEYER, *supra*, at 224. Although "there is no convincing general evidence for this claim," an individual rapist may be able to prove by medical testimony that he has suffered from some biochemical disorder which caused him to rape. MEYER, *supra*, at 224-25.

acts of almost all rapists. Gender animus is at least a contributing factor in most instances of rape, regardless of other causes. There should be no distinction between the stranger-rapist, the date-rapist and the husband-rapist when determining whether gender animus was, at least, a partial cause of his act. One federal court has already made this distinction.[173] Other courts may or may not follow this lead. As a preemptive strike, however, Congress should amend VAWA by recognizing the connection between gender animus and rape. In addition, district and circuit courts should adopt a rebuttable presumption of gender animus in rape cases. Without this recognition, VAWA will not serve its purpose of breaking down the sexual stereotypes and prejudices, and the American rape culture, that encourage violence against women.

[173] *See supra* notes 68-71 and accompanying text (discussing the *Brzonkala* court's distinctions between stranger rape and date rape).