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The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy

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As Julie [Goldscheid] suggested in her introduction, my task is to put the civil rights remedy of the Violence Against Women Act ["VAWA"] in the broader context of issues of gender discrimination. I want to explore the possibilities of this aspect of the Act, and the important and, I think, deeply radical meaning of the Act. I will also identify some of the contradictions with respect to issues of gender that are reflected in the Act.

The radical core of the Act is embodied in the notion that it is a civil right to be free from violence, and that all persons within the United States have a right to be free from crimes of violence motivated by gender.¹ As has been the case in the articulation of many other rights that women have fought for and identified, particularly over the last twenty to twenty-five years, the core concept of the right is important and profound. The Act states that women are targeted for violence because of their gender. The articulation of this concept in the Act is the culmination of the process (as Sally [Goldfarb] and Noël [Brennan] and others have described) by which the coalition around the Act came together. The issue of gender is central in this articulation, for the Violence Against Women Act states that the violence must be "motivated by

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¹ The civil rights remedy states, in pertinent part:

(b) . . . All persons within the United States shall have the right to be free from crimes of violence motivated by gender

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

42 U.S.C. § 13981 (1994).

gender." Like other important rights, VAWA is a potential vehicle of empowerment and can have considerable impact.

At the same time, there are profound contradictions in the Act itself and in the legislative history of the Act. We need to confront these contradictions, in order to do the most effective job that we can as litigators, strategizing with those who will be bringing challenges and those who will be assisting in bringing challenges. The framework in which I assess this Act is one that I have described in much of my writing, and that I have discussed in other contexts. It is the notion that there is a dialectical relationship between rights and the politics or vision which underlies the articulation of rights.² A vision of gender equality led to the passage of the civil rights provision, but the future of the civil rights provision will also shape our vision of gender equality. Now that VAWA has passed, we will see the slow case-by-case implementation of the rights set forth in the Act and in this process we will be determining whether the radical vision of gender equality embodied in the Act will be realized. As Noël [Brennan] suggested, it is a moment of enormous possibility and excitement for those of us who have been involved with issues of women's rights for many years, as well as for the younger lawyers in the room.

The Violence Against Women Act has to be understood as part of a continuum of reform of laws relating to gender violence over the last twenty-five years. For example, respecting the law of rape, there have been a wide range of reforms: the abolition of corroboration requirements,³ cautionary instructions,⁴ and the resistance

² See generally Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movements*, 61 N.Y.U. L. REV. 589 (1986) (setting forth a dialectical perspective on the relationship between rights and politics by drawing upon the women's rights experience).

³ See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling and Law*, 88 NW. U. L. REV. 1271, 1319 n.248, 1333 (1994).

⁴ The cautionary instruction began in England in the 17th century. A. Thomas Morris, Note, *The Empirical, Historical, and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 154 (1988). The three common elements of the cautionary instruction are: "(1) rape is a charge that is easily made by the victim, (2) rape is a charge that is difficult

“to the utmost” standard.⁵ Rape shield legislation has been enacted in many states,⁶ and there has been wide recognition of both formal and informal barriers to women obtaining justice in the courts. But we also see that, even when we change the laws, social attitudes lag and limit effective implementation. So, for example, regardless of the change in the corroboration requirement or the cautionary instruction, commentators of Mike Tyson’s rape case still ask, “why did she go to the hotel room? If she did, she was asking for it.” Jurors in stranger rape trials still want to know what the woman was wearing. New laws can be vehicles for changing social attitudes. Yet it is frequently a lag in social attitudes that impairs the implementation of legal reform efforts. Social attitudes must change for legal reform efforts to be meaningful.

We have also seen dramatic changes in the area of intimate violence, or what has been known as “domestic” violence. The concept of intimate violence as a harm did not exist twenty-five

for the defendant to disprove, and (3) the testimony of the victim requires more careful scrutiny by the jury than the testimony of the other witnesses in the trial.” *Id.* at 154-55.

⁵ Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1783 (1995); see also Rosemary J. Scalò, Note, *What Does “No” Mean in Pennsylvania?—The Pennsylvania Supreme Court’s Interpretation of Rape and the Effectiveness of the Legislature’s Response*, 40 VILL. L. REV. 193, 221 n.151 (1995).

⁶ See, e.g., ALA. CODE § 12-21-203 (1995); ALASKA STAT. § 12.45.045 (1995); COLO. REV. STAT. ANN. § 18-3-407 (West 1986); CONN. GEN. STAT. ANN. § 54-86f (West 1994); FLA. STAT. ANN. § 794.022 (West 1992); ILL. REV. STAT. ch. 725, § 5/115-7 (1995); IND. CODE ANN. § 35-37-4-4 (West 1994); KAN. STAT. ANN. § 21-3525 (1994); KY. R. EVID. 412 (1995); LA. CODE EVID. ANN. art. 412 (West 1995); MD. ANN. CODE art. 27, § 461A (1992); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 1986); MICH. COMP. LAWS ANN. § 750.520j (West 1991); MISS. CODE ANN. § 97-3-68 (1994); MO. ANN. STAT. § 491.015 (Vernon 1996); NEV. REV. STAT. ANN. § 50.090 (Michie 1995); N.H. REV. STAT. ANN. § 632-A:6 (1995); N.J. STAT. ANN. § 2A:84A-32.1 (West 1994); N.J. STAT. ANN. § 2C:14-7 (West 1995); N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1992); N.C. R. EVID. 412 (1992); OHIO R. EVID. 404 (1995); 18 PA. CONS. STAT. ANN. § 3104 (1983); R.I. GEN. LAWS § 11-37-13 (1994); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985); VA. CODE ANN. § 18.2-67.7 (Michie 1988).

years ago. There was almost no understanding of battering in the way that it is understood now.⁷ Orders of protection, mandatory arrest policies,⁸ the notion of stalking as a crime⁹—these are all recent law reforms. The notion of gender violence as a civil rights violation (not only in the Violence Against Women Act, but under state law);¹⁰ of violence against women as a hate crime;¹¹ of freedom from gender violence as an international human right;¹² of tort remedies for battering—these are all legal remedies which did not exist ten years ago. Each of these different remedies reflects differing conceptions of the link between violence and gender discrimination. But, we also see the familiar lag in social attitudes that shape implementation of these legal reforms. The premise of

⁷ Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245, 1246-50 (1995); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 977-82 (1995).

⁸ See N.Y. PENAL LAW § 140.10 (4) & (5) (McKinney 1989 & Supp. 1996) (addressing police arrests on domestic violence complaints when they have reasonable cause).

⁹ See CAL. PENAL CODE § 646.9 (West Supp. 1996) (defining and enjoining “stalking”); N.Y. PENAL LAW § 240.25 (McKinney 1989 & Supp. 1996) (criminalizing repetitive harassment); N.Y. PENAL LAW § 240.26 (McKinney Supp. 1996) (addressing first-time harassment); N.Y. PENAL LAW § 240.31 (McKinney 1989) (focusing on harassment based upon the race, color, religion or national origin of another person); see also Richard Reoper, *Madonna’s Stalker Got a Verdict He Deserved*, CHI SUN-TIMES, Jan. 10, 1996, at 11; *Madonna Stalker Case Ends*, NAT’L L.J., Jan. 22, 1996, at A8.

¹⁰ See, e.g., CAL. PENAL CODE § 422.6(a) (West 1998 & Supp. 1996) (treating gender-based violence as a civil rights violation).

¹¹ See, e.g., MASS. GEN. LAWS ANN. ch. 22C, § 32 (West Supp. 1995); R.I. GEN. LAWS § 42-28-46 (Supp. 1995); WASH. REV. CODE ANN. § 9A.36.078 (Supp. 1996).

¹² The World Conference on Human Rights held in Vienna, which promulgated the Vienna Declaration and Programme of Action, recognized gender violence as an international human right: “Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.” U.N. Doc. A/CONF.157/24 (1993), 32 I.L.M. 1661, 1668 (1993).

the Violence Against Women Act is that gender-based violence has a systematic impact on women's equality. As Sally Goldfarb suggested in her comments, gender violence has a role in keeping women powerless, in keeping women subordinate; and it affects all women, not just women who have been the targets of that violence. It tells us to keep silent, to stay home and out of the streets, and to stay out of the public arenas. It reinforces the notion of domination and privilege, which, as Jenny [Rivera] observed, is fundamental to patriarchy. But this link between violence and gender equality may be difficult for society and courts to comprehend.

However, I want to suggest that while the impact of gender-based violence as an issue of equality may be difficult for society and courts to comprehend generally; but it may be easier for society and courts to comprehend it in the area of rape than in domestic violence. I would argue that there is a broader social understanding of the role that rape, particularly stranger rape, plays in keeping women down and powerless that has been commonly understood in domestic violence. This is partially due to the fact that, in public consciousness, "real" rape is more likely to be viewed as involving strangers and taking place in public settings. Domestic violence by definition involves intimates and more conventionally "private" circumstances. However, rape and domestic violence must be understood as on a continuum of forms of gender terrorism. But in order for judges to understand and interpret the meaning of the phrase "motivated by gender" consistently with this radical vision, there will have to be an extraordinary amount of public and judicial education. Judges will have to interpret the meaning of "gender-motivation" in light of the "totality of the circumstances."¹³ So a major issue is what will the "totality of the circumstances" be? What "circumstances" will be taken into account in determining whether violence was motivated by gender?

There is an analogous problem of interpretation under the Hate Crimes Statistics Act¹⁴—which does not, by the way, allow for

¹³ S. REP. NO. 138, 103d Cong., 1st Sess. 52 (1993) ("Judges and juries will determine motivation from the totality of the circumstances surrounding the event.").

¹⁴ 28 U.S.C. § 534 (1994).

collection of data on the basis of gender, but only on the basis of race, religion, sexual orientation or ethnicity. The issue is what circumstances indicate the existence of a "hate crime." I want to share with you portions of the FBI [Federal Bureau of Investigation] guidelines that have been applied under the Hate Crimes Statistics Act in situations involving racial, ethnic, and religious animosity, in order to highlight this problem of interpretation.¹⁵ As I read these examples, try to translate them to the context of violence against women:

- [a] The offender and the victim were of different racial, religious, ethnic/national origin, or sexual orientation groups. For example, the victim was Black and the offenders were White.
- [b] Bias-related oral comments, written statements, or gestures made by the offender which indicates his/her bias. . . .
- [c] Bias-related drawings, markings, symbols or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.
- [d] Certain objects, items or things which indicate bias were used ([such as] the offenders wore white sheets with hoods covering their faces) or left behind by the offender(s) (. . . a burning cross was left in front of the victim's residence).
- [e] The victim is a member of a racial, religious, ethnic/national origin, or sexual orientation group which is overwhelmingly outnumbered by members of another group in the neighborhood where the victim lives and the incident took place. . . .
- [f] The victim was visiting a neighborhood where previous hate crimes had been committed against

¹⁵ See Joseph M. Fernandez, *Bringing Hate Crime into Focus—The Hate Crime Statistics Act of 1990*, *Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261, 285 n.129 (1991) (quoting FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T. OF JUSTICE, UNIFORM CRIME REPORTING SUMMARY REPORTING SYSTEM: DRAFT HATE CRIME DATA COLLECTION GUIDELINES 2 (1990)); see also Marguerite Angelari, *Hate Crime Statistics: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 107 (1994).

other members of his/her racial, religious, ethnic/national origin, or sexual orientation group and where tensions remain high against his/her group.

- [g] Several incidents occurred in the same locality, at or about the same time, and the victims were all of the same racial, religious, ethnic/national origin, or sexual orientation group.
- [h] A substantial portion of the community where the crime occurred perceives that the incident was motivated by bias.
- [i] The victim was engaged in activities promoting his/her racial, religious, ethnic/national origin, or sexual orientation group. For example, the victim is a member of the NAACP, participated in gay rights demonstrations, etc.
- [j] The incident coincided with a holiday relating to, or a date of particular significance to, a racial, religious, or ethnic/national origin group ([such as] Martin Luther King Day, Rosh Hashanah, etc.).
- [k] The offender was previously involved in a similar hate crime or is a member of a hate group.
- [l] There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.
- [m] A historically established animosity exists between the victim group and offender group.¹⁶

These examples offer a set of indicators or circumstances which, in the racial context, are generally understood as suggesting bias. As you can see, it is hard to draw easy parallels from these examples to interpretation of gender violence under VAWA. Consider the problem of the context of domestic violence which, to begin with, is not commonly viewed as a “hate crime,” but if anything, a “love crime.” Some of the legislative history of the Act, particularly statements by Senator Joseph Biden, suggests that

¹⁶ Fernandez, *supra* note 15, at 285 n.129.

“ordinary” domestic violence would not qualify as an act “motivated by gender” under the civil rights provision.¹⁷ So then, in the domestic violence context, how do judges interpret verbal abuse, physical abuse or stalking? The problem is that the same social attitudes that we have seen in other domestic violence contexts, that it is a personal or family issue, prevent intimate violence from being understood as an issue of gender. The view that intimate violence is an “individual family problem,” a matter of privacy,¹⁸ is likely to limit the implementation of the Act. Thus, our task must be to do the public and judicial education that makes the broader link to gender equality.

In a situation where a woman is beaten and there are gender epithets, that’s a different scenario, a scenario more analogous to a traditional “hate” crime. But how often does that happen? Men don’t say, “I’m beating you because you’re a woman.” The deeply gendered fabric of domestic violence is something that is easy for judges to miss without substantial education. Perhaps I am overly sanguine about the degree to which rape can ever be understood as gender violence, and perhaps this is only possible in cases of stranger rape. I am interested in hearing from members of the audience as to whether you agree.

With the passage of the Violence Against Women Act we have just started this process of change. The passage of the Act has just opened the door. The same social attitudes which have limited the effectiveness of reforms in the area of rape and domestic violence may limit VAWA, or VAWA can become an instrument of change. But it is only with the careful and thoughtful work of armies of litigators, legal scholars and activists, many of you in this room, that we have any chance to realize the potential of VAWA and effectuate its radical vision.

Thank you.

¹⁷ See S. REP. NO. 545, 101st Cong., 2d Sess. 40-41 (1990).

¹⁸ See generally Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (exploring ways in which concepts of privacy impact upon violence against women).