

1996

## 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

Julie Goldscheid

Sally Goldfarb

Betty Levinson

Jenny Rivera

Noel Brennan

*See next page for additional authors*

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

---

### Recommended Citation

Julie Goldscheid, Sally Goldfarb, Betty Levinson, Jenny Rivera, Noel Brennan & Elizabeth M. Schneider, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy - A Panel Discussion Sponsored by the Association of the Bar of the City of New York, September 14, 1995*, 4 J. L. & Pol'y (1996).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol4/iss2/3>

---

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

**Authors**

Julie Goldscheid, Sally Goldfarb, Betty Levinson, Jenny Rivera, Noel Brennan, and Elizabeth M. Schneider

**THE CIVIL RIGHTS REMEDY OF THE  
VIOLENCE AGAINST WOMEN ACT:  
LEGISLATIVE HISTORY, POLICY  
IMPLICATIONS & LITIGATION STRATEGY,  
A PANEL DISCUSSION SPONSORED BY THE  
ASSOCIATION OF THE BAR OF THE  
CITY OF NEW YORK, SEPTEMBER 14, 1995**

*Julie Goldscheid\**

INTRODUCTION

I would like formally to welcome you to our panel discussion on the 1994 Violence Against Women Act<sup>1</sup> ["VAWA"] Civil Rights Remedy Panel discussing VAWA's legislative history, and policy implications, as well as addressing strategies for litigating under this new civil rights provision. I do not know how many of you know this, but yesterday was the one year anniversary of the signing of the Violence Against Women Act, so it is very timely that we are having this panel here tonight.

---

\* Julie Goldscheid is a staff attorney at the NOW Legal Defense and Education Fund ("NOW LDEF"). She is the lead attorney for the organization's litigation and education efforts to end violence against women and also litigates issues of sexual harassment in the schools. She has published articles on litigating under the Violence Against Women Act's ("VAWA") ground breaking civil rights remedy and is currently involved in representing women who are litigating initial claims under that remedy. In addition, Ms. Goldscheid teaches Women and the Law at New York University School of Law. Ms. Goldscheid received her J.D., *cum laudé*, from New York University School of Law in 1991, after which she clerked for the Honorable Gary S. Stein of the New Jersey Supreme Court and was an Associate at Sonnenschein Nath & Rosenthal.

<sup>1</sup> Violence Against Women Act of 1994, 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)).

The enactment of the Violence Against Women Act marked an historic moment in our country's history because it was the first time that the federal government recognized, with a bipartisan blessing from Congress, the pervasiveness of and the devastation that results from violence against women. The civil rights remedy,<sup>2</sup> on which we will focus tonight, is one historic and ground breaking provision of VAWA.<sup>3</sup>

Our goal tonight is to provide guidance to lawyers who may represent women who have survived gender-based violence in VAWA claims. Since it is a new remedy, I imagine you have questions about how it will be used.<sup>4</sup> Our goal is to address who can use the civil rights remedy and consider under what circumstances it will prove most useful, identify practical guidelines for practitioners who are interested in identifying VAWA cases and discuss litigation strategies.<sup>5</sup>

---

<sup>2</sup> 42 U.S.C. § 13981 (1994). The civil rights remedy provides, 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) 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.

*Id.*

<sup>3</sup> In addition to the civil rights remedy, VAWA contains criminal provisions that create new federal felonies for acts of interstate domestic violence and interstate violations of protective orders. *See* 18 U.S.C. §§ 2261-66 (1994). The VAWA also authorizes \$1.6 billion dollars in funding for a wide range of programs to prevent and address violence against women. *See generally* Violence Against Women Act, Pub. L. No. 103-322 (Sept. 13, 1994).

<sup>4</sup> *See First Person Convicted Under Violence-Against-Women Act*, CHRISTIAN SCI. MONITOR, June 1, 1995, at 13; *see generally* Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245 (1995).

<sup>5</sup> For a more complete discussion of litigation strategies in VAWA cases, *see* Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505 (1995).

I want to thank the Civil Rights Committee of the Association of the Bar of the City of New York ("City Bar") for sponsoring this panel discussion, and I also want to thank all of the many cosponsoring committees and organizations.<sup>6</sup> The terrific support from all of the cosponsors helped make this discussion a success. I also want to thank Lenora Lapidus<sup>7</sup> and Sandy Hauser<sup>8</sup> who, with me, formed the subcommittee that organized this panel.

---

<sup>6</sup> The panel discussion was cosponsored by the following Committees of the Association of the Bar of the City of New York: Committee on Civil Rights; Committee on Federal Courts; Committee on Family Court and Family Law; Committee on Sex and Law; Committee on Tort Litigation; Committee on Women in the Courts; Committee on Lectures and Continuing Education. The panel discussion was in conjunction with the following organizations: American Civil Liberties Union, Women's Rights Project; American Civil Liberties Union of New Jersey; Asian American Legal Defense and Education Fund; Lambda Legal Defense and Education Fund; NAACP Legal Defense and Education Fund; National Lawyer's Guild; New Jersey State Bar Association, and its Individual Rights Special Committee, Family Law Section, Civil Trial Bar Section and Certified Trial Attorney's Section; New Jersey State Coalition Against Sexual Assault; New Jersey Coalition for Battered Women; New York Coalition Against Domestic Violence; New York State Bar Association, Committee on Women in the Law; New York Women's Bar Association; NOW Legal Defense and Education Fund; Puerto Rican Legal Defense and Education Fund, Latina Rights Initiative and the Victim Services Agency.

<sup>7</sup> Lenora M. Lapidus is the 1994-96 John J. Gibbons Fellow in Public Interest and Constitutional Law at Crummy, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey. As a Gibbons Fellow, Ms. Lapidus litigates a broad range of public interest and civil rights cases; she currently represents a battered woman who was convicted of homicide for the killing of her estranged husband. Ms. Lapidus received her J.D., *cum laude*, from Harvard Law School in 1990; she clerked for the Honorable Richard Owen in the United States District Court for the Southern District of New York from 1990-92 and was a Fellowship Attorney at the Center for Reproductive Law & Policy in New York from 1992-94.

<sup>8</sup> Sandra D. Hauser is presently an associate in the New York office of Sonnenschein Nath & Rosenthal. Before moving into private practice, she spent four and a half years as a staff attorney at the Center on Social Welfare Policy and Law in New York. Ms. Hauser is a 1991 graduate of Harvard Law School and a 1988 graduate of the University of Michigan. She serves on the Civil Rights Committee and the Project on the Homeless of the Association of the Bar of the City of New York.

My name is Julie Goldscheid. I am a staff attorney at the NOW<sup>9</sup> Legal Defense and Education Fund ("NOW LDEF" or "Fund") and a member of the Civil Rights Committee of the City Bar. The NOW Legal Defense Fund chaired the national task force of over 1000 groups that lobbied hard for over four years to urge passage of VAWA. It remains active in monitoring VAWA's enforcement and devising new strategies to stop violence against women. Sally Goldfarb, who is one of our panelists tonight and a former senior staff attorney at the Fund, will talk about what that process was like. At NOW Legal Defense Fund, we have established a legal clearinghouse on the Violence Against Women Act, through which we are tracking litigation and other legal developments under the Act.<sup>10</sup> We are available for and regularly provide technical assistance to lawyers, advocates and service providers concerning VAWA in particular, and violence against women in general.<sup>11</sup>

We have five distinguished speakers with us tonight. Each will speak for about ten minutes and then we will open the floor for your questions and discussion. The transcript from tonight's proceedings will be published in the *Journal of Law and Policy* which is published by Brooklyn Law School. So your friends who could not attend tonight can still learn from the presentations.

I want briefly to introduce each of our speakers ahead of time and then each will begin her presentation in turn. Our first speaker is Sally Goldfarb who is an associate professor at Rutgers University, School of Law in Camden. As I said, she formerly was a senior staff attorney at NOW Legal Defense Fund where she worked for nine years and she co-chaired the Violence Against Women Act Task Force which worked to enact the bill. While she was at the Fund, she was an adjunct professor and taught Women and the Law at New York University Law School. Before she was

---

<sup>9</sup> "NOW" stands for the National Organization for Women.

<sup>10</sup> In the months following the panel discussion, NOW LDEF has become involved in two of the first cases to be litigated under the VAWA civil rights remedy. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, No. 95-CV-1358-R (W.D. Va. filed Mar. 4, 1996); *Doe v. Doe*, No. 95-CV-2722 (D. Conn. filed Feb. 12, 1996).

<sup>11</sup> The NOW LDEF can be reached at (212) 925-6635.

at the Fund, she clerked for the federal district court after graduating from Yale Law School. Sally will discuss the Act's legislative history, including the process of lobbying for its passage, and ways that practitioners can use the legislative history in litigation.

Our second speaker is Betty Levinson of Levinson & Kaplan. She is a family law practitioner who has been counsel in a number of novel cases seeking to further the rights of women, particularly survivors of domestic violence. She was counsel for *amici* in *Bruno v. Codd*,<sup>12</sup> which was a successful challenge to the mistreatment of women by the Family Court, the police department and the probation department. She was counsel in *People v. Green* which involved the use of expert testimony to avoid a homicide indictment of a battered woman. She is currently counsel for Hedda Nussbaum in her civil damage action against Joel Steinberg<sup>13</sup> in which she is seeking to obtain a toll of New York State's statute of limitations which restricts the time in which a battered woman may bring a civil cause of action for assault against her batterer.<sup>14</sup> In addition to her practice, she teaches and lectures extensively on these and other litigation issues. Betty will discuss how the civil rights remedy compliments other civil remedies currently available for victims of gender-based violence.

Jenny Rivera is an assistant professor of law at Suffolk University Law School in Boston. Before that, she was a judicial clerk for the Honorable Sonia Sotomayor in the Southern District of New York. She was also an Administrative Law Judge at the New York State Division on Human Rights. She was Associate Counsel for PRLDEF [Puerto Rican Legal Defense & Education Fund] for a number of years where she worked on education and employment discrimination cases, on equity and testing and on language rights discrimination. She was the founding member of PRLDEF's Latina Rights Initiative, and she currently serves as a

---

<sup>12</sup> *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d (1979).

<sup>13</sup> *See People v. Steinberg*, 79 N.Y.2d 673, 595 N.E.2d 845, 584 N.Y.S.2d 770 (1992). Joel Steinberg was convicted in the Supreme Court, New York County, of the first degree manslaughter of his adopted six-year-old daughter, Lisa Steinberg, in 1992.

<sup>14</sup> N.Y. CIV. PRAC. L. & R. 208 (McKinney 1990); *Nussbaum v. Steinberg*, 204 N.Y. L.J. 21, 21 (1990).

co-chairperson of the Initiative's Advisory Committee. In addition, after graduating from NYU Law School, she served as a *pro se* clerk in the Second Circuit Court of Appeals and was a Staff Attorney at the Homeless Family Rights Project of Legal Aid. She serves on various boards and recently published an article on Domestic Violence against Latinas.<sup>15</sup> Jenny will discuss how the Violence Against Women Act civil rights remedy compliments other civil rights remedies to vindicate the rights of women, particularly women of color.

Nöel Brennan is the Deputy Assistant Attorney General at the Office of Justice Programs, Department of Justice. That Office provides federal leadership, coordination and assistance to help state and local jurisdictions fight crime and improve the justice system. Part of the Office's responsibilities include federal efforts to end violence against women. Before her appointment to the Department of Justice, she served as an assistant district attorney in the District of Columbia. After graduating from Georgetown Law Center, where she is currently a member of the adjunct faculty, she was a law clerk for the District of Columbia Superior Court and the U.S. District Court for the District of Columbia. She will address the current public policy concerns surrounding the Violence Against Women Act from the federal perspective, addressing both the Violence Against Women Act, in general, and the civil rights remedy in particular.

Our final panelist is Elizabeth Schneider, a professor of law at Brooklyn Law School and a visiting professor at Harvard Law School. She teaches Civil Procedure, Constitutional Law, Women and the Law, and Battered Women and the Law. She has published and lectured nationally in all of these fields. She graduated from Bryn Mawr College in 1968 and was a Levorholm Fellow at the London School of Economics and Political Science. She received her J.D. from New York University School of Law where she was an Arthur Garfield Hayes Civil Liberties Fellow. She is currently writing a book on feminist theory and practice and violence against

---

<sup>15</sup> Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).



women, and is co-authoring a casebook on domestic violence. She will address the role the civil rights remedy plays as a part of a broader theoretical framework for using the legal system to stop violence against women.

Without any further interruptions, we will start with Sally Goldfarb. Thank you.



Thanks, Julie. The Violence Against Women Act<sup>1</sup> declares for the first time that violent crimes motivated by gender are discriminatory and violate the victim's civil rights under federal law.<sup>2</sup> Since this legislation was enacted almost exactly a year ago, victims of violent felonies that are committed because of gender or on the basis of gender, and that are due, at least in part, to an animus based on gender, may bring a civil lawsuit in federal court to seek redress for the violation of their civil rights.<sup>3</sup> A successful plaintiff can win compensatory and punitive damages, as well as injunctive and declaratory relief and court-ordered attorney's fees.<sup>4</sup>

What was the vision that led us to the drafting and passage of the Violence Against Women Act—and I use “us” in a very broad sense, since this was a massive effort nationally over the course of four and a half years? The concept behind this legislation was that because of gender-based violence, American women and girls are relegated to a form of second-class citizenship.<sup>5</sup> Women and girls must fear not only all of the same crimes that affect men and boys, but also those that are targeted exclusively or overwhelmingly

---

\* Associate Professor, Rutgers University School of Law-Camden. Yale University, J.D.; Yale University, B.A.

<sup>1</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (civil rights provision codified at 42 U.S.C. § 13981 (1994)).

<sup>2</sup> 42 U.S.C. § 13981.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; 42 U.S.C. § 1988(b) (1994).

<sup>5</sup> See, e.g., S. REP. NO. 197, 102d Cong., 1st Sess. 33 (1991) [hereinafter 1991 SENATE REPORT] (“Women bear the disproportionate burden of some of the most pernicious crimes. . . . At the same time, survivors of these crimes often face barriers to justice not shared by male victims of assault. . . .”); see also *Women and Violence: Hearing Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violence Against Women*, 101st Cong., 2d Sess., Part 1, 57 (1990) [hereinafter 1990 Senate Hearing] (gender-based violence causes a form of second-class citizenship; statement of Helen Neuborne).

against female members of our society.<sup>6</sup> Just as we, in the course of American history, have passed civil rights laws to redress race-based and religious-based violence,<sup>7</sup> so too it was necessary to pass a law designed to redress gender-based violence.<sup>8</sup>

Obviously, some of the most basic insights of the feminist movement were brought to bear on this effort. Crimes like rape and domestic violence both reflect and reinforce women's subordination, and the resulting climate of terror makes all women, even those who have not themselves been victimized, unable to participate as equals in American society. Antidiscrimination laws that promise equality in the workplace, in schools, in the community, in the family, are worth little if our physical safety and bodily integrity are still at risk. Although these principles may seem straightforward and uncontroversial to those of us in this room, making the case for this legislation was not always easy.

On the record, as part of the legislative history, witnesses came forward to testify at Congressional hearings to prove several crucial points: that violence against women is a pervasive problem; that state laws are not adequate to address the problem; that existing federal civil rights laws were not adequate either; and finally, that rape and domestic violence are a form of discrimination.<sup>9</sup> It was also necessary, of course, to have testimony that Congress has the constitutional authority to enact this legislation under both the Commerce Clause<sup>10</sup> and Section 5 of the Fourteenth Amendment.<sup>11</sup>

Meanwhile, while we were going through these efforts on the record, behind the scenes the challenges were even more daunting.

---

<sup>6</sup> 1990 *Senate Hearing*, *supra* note 5, at 58 (statement of Helen Neuborne).

<sup>7</sup> *See, e.g.*, 42 U.S.C. §§ 1983, 1985 (1994).

<sup>8</sup> 1991 *SENATE REPORT*, *supra* note 5, at 42-43.

<sup>9</sup> *See generally Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) [hereinafter 1993 *House Hearing*]; *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); 1990 *Senate Hearing*, *supra* note 5; 1991 *SENATE REPORT*, *supra* note 5, at 42-54.

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>11</sup> 1991 *SENATE REPORT*, *supra* note 5, at 52-54 (citing testimony of Professors Burt Neuborne and Cass Sunstein).

The civil rights provision of the Violence Against Women Act was very controversial from the outset.<sup>12</sup> The objections to it included, first of all, that it would overload the federal courts, and secondly, that it wouldn't do any good because no cases would be brought. This was particularly confusing because in some instances the same people were bringing up both these arguments. We were told that the remedy was too broad and that it was too narrow. That it was too punitive and not punitive enough. Obviously those of us who lobbied on this bill had our work cut out for us.

The attacks came from both right and left<sup>13</sup> as well as from some self-styled feminists who objected that this legislation would be patronizing to women because it implied that women need special protection.<sup>14</sup> As to whether women need and deserve protection from violence, I submit that the statistics on rape and domestic violence speak for themselves.<sup>15</sup> Furthermore, the legislation is drafted in a gender-neutral manner. Anyone, male or female, who is the victim of gender-motivated violence as defined in the bill can bring a cause of action.

---

<sup>12</sup> Naftali Ben-David, *The Surprising Volatility of the Violence Against Women Act*, LEGAL TIMES, June 29, 1994, at 16; see also Jack Sirica, *Federal Protection of Women at Issue*, NEWSDAY, Feb. 16, 1992, at 17 (citing the Bush Administration, Chief Justice William Rehnquist, ABA President Talbot D'Alemberte and Rep. Don Edwards (D-CA) as among those voicing concerns that the civil rights provision of the bill would overburden the federal court system and unnecessarily expand its jurisdiction and authority).

<sup>13</sup> See David Frazee, *Gender-Justice Breakthrough*, ON THE ISSUES, Fall 1995, at 42 (describing efforts by American Civil Liberties Union to "sabotage" the Violence Against Women Act's civil rights provision, in part because it would "adversely affect other civil rights lawsuits" by flooding the federal courts); John Leo, *Radical Feminism in the Senate*, U.S. NEWS & WORLD REP., July 19, 1993, at 19 (attacking the Violence Against Women Act civil rights provision as an expression of "radical . . . gender feminis[m]").

<sup>14</sup> See, e.g., Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12; Cathy Young, *Gender Poisoning: In the Bobbitt Era, Facing the Real Truth About Male Violence*, WASH. POST, Jan. 16, 1994, at C5; see also *Debate Rages Over Definition of Rape and Date Rape* (National Public Radio broadcast, Sept. 1, 1993) (citing view of some women that the provision would codify fictitious notions of a rape epidemic).

<sup>15</sup> See, e.g., S. REP. NO. 545, 101st Cong., 2d Sess. 30-45 (1990) (statistics on rape and domestic violence).

Well, the Violence Against Women Act, including the civil rights provision, did finally pass as part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>16</sup> due largely to the stalwart support of Senator Joseph Biden [D-Del.], Chair of the Senate Judiciary Committee and the original sponsor of the Violence Against Women Act, and also to the support of Senator Orrin Hatch [R-Utah], who became the lead cosponsor of the bill after a series of compromises in the bill language which I'll discuss in a moment. Important help was also provided by Senator Barbara Boxer [D-Cal.], both when she was in the House and later when she joined the Senate. And House passage of the Violence Against Women Act took place under the able leadership of Representatives Pat Schroeder [D-Colo.], Chuck Schumer [D-N.Y.], Louise Slaughter [D-N.Y.] and Connie Morella [R-Md.].<sup>17</sup>

As the Violence Against Women Act neared the end of its somewhat tortuous passage through Congress, the civil rights provision, having attracted a great deal of controversy, squeaked through the Conference Committee by only one vote. Nevertheless, by the time the battle was joined between Congress and the President over what the final crime bill would look like, the Violence Against Women Act was virtually lost in the shuffle. You might recall that in the waning days of August last year [1994], the headlines were full of raging debates about so-called "pork" programs in the crime bill, such as midnight basketball games.<sup>18</sup> Meanwhile, the Violence Against Women Act, once such a lightning rod for criticism and controversy, had now become so widely accepted that the *New York Times* actually ran an article basically saying, "if there's one section of the crime bill that

---

<sup>16</sup> Pub. L. No. 103-322, 108 Stat. 1796 (civil rights provision of VAWA is codified at 42 U.S.C. § 13981).

<sup>17</sup> The version of the bill passed by the House of Representatives omitted the civil rights provision. H. REP. NO. 395, 103d Cong., 1st Sess. 28-29 (1993). The House then receded to the Senate bill's civil rights provision in conference. H. REP. NO. 711, 103d Cong., 2d Sess. 385-86 (1994).

<sup>18</sup> See, e.g., Erik Brady, *Program "Does Make Difference,"* USA TODAY, Aug. 19, 1994, at 2C; Heather Bruce, *Prevention or Pork? Crime Bill Debate Flares,* BOSTON GLOBE, Aug. 17, 1994, at 22.

everyone believes is a good idea, it is the Violence Against Women Act."<sup>19</sup>

A lot of work had gone into bringing us to that point. How did we get there? First of all, it was truly a grassroots effort. As Julie mentioned, the NOW Legal Defense and Education Fund had founded the National Task Force on the Violence Against Women Act, which ultimately encompassed more than 1000 organizations and individuals throughout the country: labor groups, women's groups, civil rights, religious organizations, community groups and so on, all of them concerned about the problem of rape, domestic violence and other forms of violence against women. It certainly was not the first time that a national coalition had been formed to pass federal legislation. But I think the coalition's extraordinary success was because the issue touched a nerve among so many American women.

Violence against women clearly was an issue of almost universal concern, and it had the ability to galvanize women from throughout the country, from every walk of life, and from every spot on the political spectrum. In fact, women in the grassroots put extraordinary pressure on their elected officials, and they also pressured organizations to which they belonged to endorse the legislation. For example, the AFL-CIO, the National Education Association, and the NAACP [National Association for the Advancement of Colored People] all endorsed the Violence Against Women Act largely based on pressure from within, from the female rank and file. By the time we came to the end of this process, the Task Force had lined up support for this legislation from groups ranging from the National Gay and Lesbian Task Force to the Girl Scouts to Feminists For Life and pretty much everybody in between.

---

<sup>19</sup> Catherine S. Manegold, *Quiet Winners in House Fight on Crime: Women*, N.Y. TIMES, Aug. 25, 1994, at A19. But see *Sink the Crime Bill*, RICHMOND TIMES, Aug. 23, 1994, at A8 (urging U.S. Senate to defeat crime bill, including "absurd" civil rights provision of the Violence Against Women Act); *Some Congressmen Critical of Violence Against Women Act* (National Public Radio broadcast, Aug. 18, 1994) (citing concerns by Representative Mike Synar (D-Okla.) and some federal judges about "federalizing" claims arising from violence against women).

It also helped that this was a consummate bipartisan effort. I mentioned that Senator Hatch was the lead cosponsor. There were 67 Senate cosponsors and 225 cosponsors in the House, from both sides of the aisle. We shouldn't overlook the fact too that there were finally women in real positions of power to help shepherd this through. At a time when much of the judiciary was opposing the Violence Against Women Act,<sup>20</sup> the National Association of Women Judges supported it.<sup>21</sup> Women members of Congress were extremely instrumental, as were feminist staff members on Capitol Hill. Feminist law professors including [fellow panelist] Elizabeth Schneider spoke to Congress about this legislation. Bonnie Campbell, who currently heads the effort within the U.S. Justice Department to implement this bill, acted in her capacity at that time as Attorney General of the state of Iowa, together with then-Attorney General of New York Bob Abrams, to line up forty-one state Attorneys General to endorse the legislation.<sup>22</sup> So if anyone tells you that having women in positions of power makes no difference, don't believe it.

And of course, let's not overlook the fact that the Anita Hill/Clarence Thomas hearings had a major effect on the outcome of the 1992 elections,<sup>23</sup> and Congress was looking for ways to

---

<sup>20</sup> See Judith Resnik, "*Naturally*" *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1687-88 (1991). The Judicial Conference of the United States later retracted its opposition. Victoria Nourse, *The Violence Against Women Act: A Legislative History*, in *VIOLENCE AGAINST WOMEN: LAW AND PRACTICE* (David Frazee & Ann Noel eds., forthcoming 1996) [hereinafter *A Legislative History*].

<sup>21</sup> *A Legislative History*, *supra* note 20 (citing statement of Hon. Judith Billings, President, National Association of Women Judges, *reprinted in* 1993 *House Hearing*, *supra* note 9, at 30-32).

<sup>22</sup> 1993 *House Hearing*, *supra* note 9, at 34-36 (letter from Robert Abrams et al. to Hon. Jack Brooks, Chair, House Judiciary Committee (July 22, 1993)).

<sup>23</sup> See, e.g., Martha Burk, *'Year of the Woman': First of Many*, U.S.A. TODAY, Nov. 5, 1992, at 19A.



make amends to women.<sup>24</sup> All those things came together to ensure the success of the legislation.

Let's turn now to what the legislation actually says. What did we win when we won the civil rights provision of the Violence Against Women Act? The statute states that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender."<sup>25</sup> It then goes on to define the term "motivated by gender" as follows: "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."<sup>26</sup> There is an interesting history behind this language. An early version of the legislation would have presumed that crimes of rape and sexual assault are *per se* gender-motivated.<sup>27</sup> That proved unpalatable to the U.S. Congress, and it was dropped. Also, in an earlier version, the legislation required only that the act was "committed because of gender or on the basis of gender."<sup>28</sup> The additional requirement of animus was inserted later under pressure from various forces, including the federal judiciary and Senator Hatch, whose support was very much needed to ensure its passage.<sup>29</sup>

So we now have a two-part definition. The first part—referring to acts "committed because of gender or on the basis of gender"—is based on Title VII of the 1964 Civil Rights Act,<sup>30</sup> and precedent under Title VII will be helpful in interpreting it.<sup>31</sup> The second portion of the definition relies on the term "animus", a term borrowed from the caselaw under 42 U.S.C. § 1985(3),

---

<sup>24</sup> See Anne Reifenberg, *Domestic Violence Measure May Face Legislative Hurdles*, DALLAS MORNING NEWS, Dec. 31, 1993, at A1 (quoting Pat Reuss, senior policy analyst for NOW Legal Defense and Education Fund, stating that Congressional leadership was looking for "a bill that says we care about women").

<sup>25</sup> 42 U.S.C. § 13981(b).

<sup>26</sup> 42 U.S.C. § 13981(d)(1).

<sup>27</sup> H.R. 1502, 102d Cong., 1st Sess. (1991).

<sup>28</sup> S. 15, 102d Cong., 1st Sess. (1992).

<sup>29</sup> *A Legislative History*, *supra* note 20.

<sup>30</sup> See 42 U.S.C. §§ 2000e(k), 2000e-2 (1994).

<sup>31</sup> S. REP. NO. 138, 103d Cong., 1st Sess. 52-53 (1993) [hereinafter 1993 SENATE REPORT].

commonly known as the Ku Klux Klan Act.<sup>32</sup> But it's important to realize that the language is not identical to that which has been applied under the Ku Klux Klan Act because the Supreme Court has held that the Ku Klux Klan Act requires a showing of "invidiously discriminatory animus,"<sup>33</sup> whereas the Violence Against Women Act requires simply animus.<sup>34</sup>

In the view of many observers, the term "animus" leaves some ambiguity about how the law will be interpreted. The legislative history does contain some clues, however. For example, a defendant's actions that demonstrate a decision to victimize women and not men can be sufficient evidence of animus.<sup>35</sup> Also, the Senate Judiciary Committee Report indicates that the finder of fact should determine gender motivation based on the totality of the circumstances.<sup>36</sup> And perhaps most important, the Report uses the words "purpose" and "intent" as synonyms for "animus,"<sup>37</sup> which I think indicates that the burden on the plaintiff to show gender-based animus is not as onerous as some have argued. There is no need, for example, to show that the defendant harbored a subjective animosity toward women; rather, you just need to show that the gender of the victim played a role in the purpose or intent of the defendant who committed the crime.

The major achievement of this statute is that it has created a civil right specifically to redress violence against women. The practical and symbolic value of this new legal right is enormous. But the significance of the Violence Against Women Act goes even further. The civil rights provision, as it was debated in Congress and in the press, became a focal point for a broader debate about the nature of rape and domestic violence and their impact on the lives of American women.<sup>38</sup>

---

<sup>32</sup> 42 U.S.C. § 1985(3) (1994) (Ku Klux Klan Act).

<sup>33</sup> See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

<sup>34</sup> 42 U.S.C. § 13981(d).

<sup>35</sup> 1993 SENATE REPORT, *supra* note 31, at 51-52.

<sup>36</sup> 1993 SENATE REPORT, *supra* note 31, at 52.

<sup>37</sup> 1993 SENATE REPORT, *supra* note 31, at 64.

<sup>38</sup> See, e.g., Helen Neuborne, *Mere Talk Won't Make Life Any Safer for Women*, L.A. TIMES, Aug. 16, 1993, at B7; Eloise Salholz, *Women Under Assault: Sex Crimes Finally Get the Nation's Attention*, NEWSWEEK, July 16,

Many feminists are disappointed that the legislation no longer contains a definition that would presume that rape and sexual assault are always gender-motivated.<sup>39</sup> But this may be a blessing in disguise. Now that the issue of gender motivation is going to have to be litigated in each case,<sup>40</sup> judges and juries will pick up where Congress left off, and we may, as a country, have an opportunity to continue the national dialogue on violence against women that began when this legislation was pending. For all of these reasons, the civil rights provision of the Violence Against Women Act can be a powerful instrument in the continuing effort to advance our understanding of what causes violence against women and what we can do to stop it.

Thank you.

---

1990, at 23.

<sup>39</sup> See, e.g., David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 (1993); Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L. J. 2197 (1992).

<sup>40</sup> See 42 U.S.C. § 13981(e)(1) ("Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender. . . .").



From the Halls of Congress, let's travel to my office, and to the Criminal Court, and to the Family Court, and to State Supreme Court, and the Federal District Court for the Southern District of New York, all here in Manhattan. On our tour, students and practitioners alike, we'll talk about the important tool recently given to us by some of our colleagues seated here beside me. The Violence Against Women Act ["VAWA"] is an important new weapon in our arsenal.<sup>1</sup> In the coming years it will be instrumental in facilitating our efforts to obtain redress for victims of gender-motivated violence.<sup>2</sup>

As we discuss VAWA, let's start with the following scenario: a woman calls your office. She has been the victim of a gender-based crime of violence. What legal remedies are available to her? What courts can give her relief? How does the advent of VAWA vary her options from those which have been traditionally available?

Let's compare some of the remedies which we might pursue under traditional theories of recovery with relief available under the new Act. We'll consider how our options may overlap and whether they can or should be pursued simultaneously. We'll also think about particular obstacles we will be likely to encounter along the way.

The Act tells us that it will provide compensatory and punitive damages [and] injunctive and declaratory relief.<sup>3</sup> Let's focus on injunctive relief. In practical terms, when a judge grants such relief the abuser is told: "Stop what you are doing and don't do it again."

---

\* Brooklyn Law School, J.D.; New York University, M.A.; Boston University, B.A. The speaker is a partner in Levinson & Kaplan and a general practitioner specializing in family law and the problems of battered women.

<sup>1</sup> Violence Against Women Act of 1994, 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)).

<sup>2</sup> 42 U.S.C. § 13981(d)(1) (1994).

<sup>3</sup> 42 U.S.C. § 13981(c).

Injunctive relief comes in the form of a restraining order, sometimes called an "order of protection" or a "stay away" order.<sup>4</sup> It tells the assailant, "Don't come to the house. Don't come within five blocks of the school. Don't come near the office." "Don't communicate by telephone, letter, fax, e-mail or any other means."

Injunctive relief is available in various state courts. Orders of protection are generally granted in connection with underlying proceedings, such as a criminal complaint for harassment<sup>5</sup> or assault<sup>6</sup> in the Criminal Court or for a family offense in the Family Court.<sup>7</sup> In the Supreme Court, orders of protection are available as ancillary relief in divorce actions.<sup>8</sup> They can also be obtained in civil damage cases, such as actions for money damages for assault or other intentional torts.<sup>9</sup> A bare summons for divorce, or a summons and complaint in any other kind of action, is a procedurally sufficient predicate to request injunctive relief.<sup>10</sup> In cases of domestic violence, it is common to serve an *ex parte* motion for injunctive relief simultaneously with the divorce summons.<sup>11</sup> This is accomplished by moving by order to show cause.<sup>12</sup>

When proceeding in Criminal Court, we should keep in mind that the "crime of violence" under VAWA must constitute a felony

---

<sup>4</sup> N.Y. CRIM. PROC. LAW § 530.13 (McKinney 1995 & Supp. 1996); N.Y. DOM. REL. LAW §§ 240(3), 252 (McKinney 1986 & Supp. 1996); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1996).

<sup>5</sup> N.Y. PENAL LAW §§ 240.25, 240.26, 240.30, 240.31 (McKinney 1989 & Supp. 1996). It is noteworthy that under New York's "stalking statute," there is no felony for aggravated harassment based on gender. *Id.* § 240.25. The felony charge is available only in cases of harassment based upon religion, race or ethnicity. *Id.* § 240.31.

<sup>6</sup> N.Y. PENAL LAW §§ 120.00, 120.05, 120.10 (McKinney 1987 & Supp. 1996).

<sup>7</sup> N.Y. FAM. CT. ACT. § 842 (McKinney Supp. 1996).

<sup>8</sup> See N.Y. DOM. REL. LAW §§ 240(3), 252; see also *Kurppe v. Kurppe*, 147 A.D.2d 533, 537 N.Y.S.2d 612 (2d Dep't 1989); *Richards v. Richards*, 130 A.D.2d 642, 515 N.Y.S.2d 570 (2d Dep't 1987).

<sup>9</sup> N.Y. CIV. PRAC. L. & R. 6301 (McKinney 1980).

<sup>10</sup> *Id.*; see also DAVID D. SIEGEL, NEW YORK PRACTICE 469 (2d ed. 1991).

<sup>11</sup> N.Y. CIV. PRAC. L. & R. 6313(a), 2217(b) (McKinney 1980); N.Y. DOM. REL. LAW 232 (McKinney 1986).

<sup>12</sup> N.Y. CIV. PRAC. L. & R. 2214(d) (McKinney 1991).

pursuant to state law.<sup>13</sup> If the evidence necessary to prove the commission of a felony is strong, the successful pursuit of a criminal conviction will satisfy one important element of the plaintiff's proof under the Act. If the outcome of the prosecution is in question, caution is in order.<sup>14</sup>

Decisions made early in the life of a criminal prosecution can have a dramatic impact on a woman's access to relief under VAWA. Gender-motivated crimes, which can include acts of domestic violence, are not always given a high priority by prosecutors and judges. Prosecutorial discretion can be exercised in favor of downgrading felony assaults to misdemeanor charges.<sup>15</sup> Prosecutorial indifference or judicial ignorance<sup>16</sup> and pressure to reduce felonies to misdemeanors in order to reach plea bargains, all can contribute to less than rigorous prosecution. In fact, the majority of domestic violence cases charged in Criminal Court are written as misdemeanors. Lucy Friedman, the director of New York's Victims' Services Agency, who I'm glad to see here this evening, is familiar with the problems in prosecuting these kinds of crimes.<sup>17</sup>

---

<sup>13</sup> 18 U.S.C. § 2261 (1994).

<sup>14</sup> The burden of proof in a criminal prosecution is "beyond a reasonable doubt." N.Y. CRIM. PROC. LAW § 70.20 (McKinney 1992). In a civil proceeding, the burden is "by a preponderance of the evidence." PRINCE - RICHARDSON ON EVIDENCE § 3-206 (Farrell ed., 11th ed. 1995).

<sup>15</sup> A person is guilty of assault in the third degree, a class A misdemeanor, when a person "with intent to cause physical injury to another person, he causes such injury to such person . . . ." N.Y. PENAL LAW § 120.00. In contrast to assault in the third degree, and in more accord with the facts surrounding many domestic abuse cases, a person is guilty of assault in the second degree, a class D felony, when "with intent to cause *serious* physical injury to another person, he causes such injury to such a person. . . ." N.Y. PENAL LAW § 120.05 (emphasis added). In New York, a class A misdemeanor conviction imposes a maximum prison sentence of one year, whereas a class D felony conviction allows for a sentence of up to seven years. N.Y. PENAL LAW §§ 10.00(4), (5); 70.00(2)(d) (McKinney 1987).

<sup>16</sup> Mary Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 216-18 (1995).

<sup>17</sup> According to Victim Services, in 1991 in New York City, "only 25 to 30% of domestic violence calls to the police resulted in written reports required by law, and only 7 to 12 % resulted in arrests." Ariella Hyman et al., *Laws*

On the other hand, an advantage to proceeding in Criminal Court is that the District Attorney is responsible for prosecuting the victim's case on behalf of the state. Thus, in the ideal case, where a conscientious prosecutor will invest the necessary time and effort to work hard to secure a good outcome, the complainant need not have her VAWA counsel spend time and money developing the proofs upon which a substantial portion of her federal claim will depend.

In addition to the criminal and family courts, many women who are the victims of gender-motivated violence have looked to the matrimonial courts for relief. The results have often been disappointing. New York, like many other states, has deliberately obscured the connection between marital fault and the financial outcome of a divorce case. Since the advent of the Equitable Distribution Law in 1980, courts have routinely held that unless the impact of marital fault is extreme and outrageous, it should have no impact upon the economic outcome of a divorce action.<sup>18</sup> The circumstances under which judges have been willing to compensate wives with an increased share of equitable distribution awards for actionable cruelty during the marriage are rare. In fact, courts are more likely to award a greater portion of the marital estate to a wife whose husband has committed economic waste than one who has physically abused her.<sup>19</sup> Indeed, some courts refuse to find

---

*Mandating Reporting of Domestic Violence: Do They Promote Patient Well Being*, 273 JAMA 1781 (1995); see also Hillary Johnson & Francine G. Hermelin, *The Truth About White Collar Domestic Violence*, WORKING WOMEN, Mar. 1, 1995, at 54 (citing the Justice Department's 1994 National Crime Victimization Survey which found that only about half the women who suffered domestic abuse between 1987 and 1991 reported it to the police); Erik Kriss, *Domestic Arrests Up, but Few Get to Trial*, SYRACUSE HERALD J., Nov. 17, 1995, at A17 (indicating that wives may not want their husbands convicted of a felony for fear of losing financial support of self and child).

<sup>18</sup> See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 589-90, 489 N.E.2d 712, 719, 498 N.Y.S. 2d 743, 750 (1985) (holding that marital fault is not considered in determining equitable distribution "except in egregious cases that shock the conscience of the court"); see also *Blickstein v. Blickstein*, 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dep't 1984).

<sup>19</sup> Compare *Kellerman v. Kellerman*, 187 A.D.2d 906, 590 N.Y.S.2d 570 (3d Dep't 1992) (granting wife divorce on grounds of cruel and inhuman treatment



marital fault and thus grounds for divorce, even when physical abuse has been proven.<sup>20</sup> Even when physical violence justifies the granting of a divorce on the grounds of cruel and inhuman treatment, it does not generally bring with it a financial result which will compensate the wife for her physical or emotional suffering.<sup>21</sup> Even if alimony is awarded to support a disabled spouse, it tends to be of short duration,<sup>22</sup> it is taxable to her<sup>23</sup> and it is terminable upon her remarriage or the death of the payor spouse.<sup>24</sup> Given the general failure of the matrimonial courts to afford relief, VAWA can provide a welcome new remedy under appropriate circumstances.

Another issue we should think about is the quality of proof a plaintiff must sustain in order to obtain injunctive relief. A plaintiff seeking a preliminary injunction must demonstrate the likelihood of prevailing on the merits.<sup>25</sup> In the family and criminal courts, that burden depends upon what must be proven to show the commission of a "family offense" or a violation of the Penal Law, which runs the gamut from felonies to misdemeanors to violations. The likelihood of success on the merits may be stronger in the Family Court and the Supreme Court, where the burden of proof is "on the preponderance of the evidence."<sup>26</sup>

---

but denying economic relief because husband's misconduct, i.e., physical and verbal abuse, did not warrant apportionment of marital assets in wife's favor) *and Conceicao v. Conceicao*, 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994) (awarding wife 70% of marital assets where husband attempted to secrete money and dissipate marital assets through gambling).

<sup>20</sup> See *Orofino v. Orofino*, 215 A.D.2d 997, 997-98, 627 N.Y.S.2d 460, 461-62 (3d Dep't) (holding that verbal and physical abuse which included throwing an "ashtray at plaintiff causing a laceration to her scalp," threats to commit arson, and placement of "the muzzle of a rifle to plaintiff's head and threat[ened] to kill her" did not constitute marital fault), *appeal denied*, 86 N.Y.2d 706, 656 N.E.2d 599, 632 N.Y.S. 500 (1995).

<sup>21</sup> See *supra* note 18.

<sup>22</sup> See *Zabin v. Zabin*, 176 A.D.2d 262, 262-263, 574 N.Y.S.2d 75, 76-77 (2d Dep't 1991).

<sup>23</sup> I.R.C. § 71 (1996).

<sup>24</sup> *Id.*

<sup>25</sup> N.Y. CIV. PRAC. L. & R. 6301.

<sup>26</sup> See *supra* note 14.

In the federal district courts, the plaintiff seeking injunctive relief will be required to show the likelihood of success on her underlying VAWA claim.<sup>27</sup> In view of both procedural and substantive matters which may become the subject of litigation under the new statute, and in view of the fact that many federal district court judges do not frequently deal with crimes of violence inflicted by spouses or intimate partners, it may be most sensible to seek immediate injunctive relief in state court. Keep in mind, however, that VAWA provides for compensatory damages, including attorney's fees and expenses incurred in obtaining an order of protection in a state court.<sup>28</sup> Also remember that VAWA claims can be brought in state court if the climate in a particular jurisdiction suggests a better result there.<sup>29</sup>

Another issue to be considered in selecting a forum, particularly with respect to injunctive relief, is the duration of the order of protection which the court is empowered to grant. In Family Court a "permanent" order of protection can last only up to a maximum of three years.<sup>30</sup> In Criminal Court, it can last up to a maximum of five years after a felony conviction.<sup>31</sup> Under the new federal civil rights act, a permanent injunction should be just that—permanent.

In addition to injunctive relief, what other kinds of civil remedies are available to victims of gender-based violence? In civil proceedings, one can sue for money damages, i.e., economic relief which is designed to provide a remedy for financial damages.

---

<sup>27</sup> FED. R. CIV. P. 65(a).

<sup>28</sup> 42 U.S.C. § 13981(c).

<sup>29</sup> It remains to be seen how federal district court judges, most if not all of whom have never received any education or training about gender-motivated violence, will respond to actions under the Violence Against Women Act ("VAWA"). If one decides to commence a VAWA action in state court for reasons of strategy, such as the chances of litigating claims before a more sympathetic or, at least, neutral court, the case cannot be removed to the federal court. 28 U.S.C. § 1445(d) (1994).

<sup>30</sup> N.Y. FAM. CT. ACT § 842 (McKinney Supp. 1996) (requiring a showing of aggravating circumstances); *see* N.Y. FAM. CT. ACT § 827(a)(vii) (McKinney Supp. 1996) (listing aggravating circumstances).

<sup>31</sup> N.Y. CRIM. PROC. LAW § 530.13 (McKinney 1995 & Supp. 1996).

This may include lost wages, property damage, medical expenses and damages for physical and emotional pain and suffering.<sup>32</sup>

Although interspousal tort immunity has been generally repealed across the country,<sup>33</sup> we have not seen a wealth of successful tort claims against spouses or other intimate partners. One reason for this failure is that intentional torts generally have short statutes of limitations.<sup>34</sup> In New York, for example, the statute of limitations for intentional torts such as assault, battery, the intentional infliction of emotional distress and the transmission of sexually transmitted diseases is only one year.<sup>35</sup>

Attorneys in different parts of the country have tried to contend with this problem in different ways. In an Idaho case, *Curtis v. Firth*,<sup>36</sup> and two New Jersey cases, *Giovine v. Giovine*<sup>37</sup> and *Cusseaux v. Pickett*,<sup>38</sup> courts have accepted the theory that ongoing abuse creates a continuous tort, thereby removing the impediment of a short statute of limitations.

Here in New York, after conducting an evidentiary hearing, I am awaiting a decision in which I hope to toll the one-year statute of limitations for Hedda Nussbaum in her assault case against Joel Steinberg.<sup>39</sup> This statute provides a toll for the commencement of an action for plaintiffs who are incapacitated by reason of

---

<sup>32</sup> It will be interesting to see what damages will be allowable under VAWA for emotional pain and suffering unaccompanied by physical injury. Under state law, such recoveries have been limited. See *Roy v. Hartogs*, 85 Misc. 891, 893-94, 381 N.Y.S.2d 587, 589 (1st Dep't 1976) (finding that damages in excess of \$25,000.00 were excessive in action brought by patient who proved that her psychiatrist had had sexual intercourse with her as part of her "therapy").

<sup>33</sup> See N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1989) (abolishing interspousal tort immunity in New York); see, e.g., *Beattie v. Beattie*, 630 A.2d 1096 (Del. 1993); *Tader v. Tader*, 737 P.2d 1065 (Wyo. 1987); *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979); *Merenoff v. Merenoff*, 388 A.D.2d 951 (N.J. 1978).

<sup>34</sup> *N.B.* The statute of limitations is tolled during the pendency of criminal proceedings. N.Y. CIV. PRAC. L. & R. 215(8) (McKinney 1990).

<sup>35</sup> *Id.* at 215(3).

<sup>36</sup> 850 P.2d 749 (Idaho 1993).

<sup>37</sup> 663 A.D.2d 109 (N.J. Super. Ct. 1995).

<sup>38</sup> 652 A.D.2d 789 (N.J. Super. Ct. 1994).

<sup>39</sup> N.Y. CIV. PRAC. L. & R. 208 (McKinney 1990); *Nussbaum v. Steinberg*, 204 N.Y. L.J. 21, 21 (1990).

"insanity," which term has been defined in *McCarthy v. Volkswagen*<sup>40</sup> as an "inability to function overall in society." What is the statute of limitations under VAWA? For acts of violence committed after 1990, a four-year statute of limitations will apply.<sup>41</sup> For acts committed prior to that date, we may still have to litigate issues of continuous tort, tolling and equitable estoppel.

Another longstanding impediment to women victimized by violent men has been the disinclination of the personal injury bar to pursue these kind of tort claims. Tort attorneys are compensated according to contingency retainer agreements which generally give them one-third of the damages recovered, after reimbursement for the expenses of the litigation which they have paid "up front."<sup>42</sup> Under these circumstances, it has been difficult for plaintiffs with mid-range or modest damage claims to find lawyers willing to pursue their cases. While the civil rights remedy under VAWA does not itself refer to attorney fees,<sup>43</sup> fees are recoverable under the Civil Rights Attorney's Fees/Awards Act of 1976.<sup>44</sup> Thus, the courthouse doors should be opened to many women whose cases would not otherwise have been litigated.

My time is up, so let me conclude by saying that VAWA has created a brand new civil rights cause of action for women. It will broaden our clients' access to redress and permit us to seek an entirely new federal civil remedy. By understanding the benefits and limitations of relief available in state court, we can all look forward to the challenge of implementing the new Act for the benefit of our clients, the victims of gender-motivated crimes of violence.

---

<sup>40</sup> 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1992).

<sup>41</sup> 28 U.S.C. § 1658 (1994).

<sup>42</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7 (1995).

<sup>43</sup> 42 U.S.C. § 13981.

<sup>44</sup> 42 U.S. § 1988(b) (1994).

*Jenny Rivera\**

Good evening. First let me thank the Association of the Bar for inviting me tonight. I have been asked to address the strategic role of the Violence Against Women Act<sup>1</sup> ["VAWA"] as part of a legal reform struggle. Although ten minutes is not much time to talk about decades of work, I would like to put this in a broader context. I recently returned from Beijing, China, where I participated in the United Nations Fourth World Conference on Women.<sup>2</sup> I want to share with you some thoughts on violence against women from a global perspective.

I. THE INTERNATIONAL CONTEXT—FROM BEIJING'S PLATFORM OF ACTION TO THE VAWA

At the Beijing Conference there were thousands of women from around the world gathered to discuss women's issues and strategies for improving women's status. While some of you are familiar with the Conference and its goals, many of you may not be fully cognizant of what has transpired. It appears that media coverage may not have provided an accurate and comprehensive portrayal of what occurred at the Conference.<sup>3</sup> I will focus on those aspects of the Conference relevant to this panel's topic. At the Conference,

---

\* Assistant Professor of Law, Suffolk University Law School. Columbia University School of Law, LL.M.; New York University School of Law, J.D.; Princeton University, B.A.

<sup>1</sup> Violence Against Women Act of 1994, 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)).

<sup>2</sup> Rone Tempest, *Beijing Women Speak Their Minds; Conference: Despite Censorship, U.N. Forum Has an Impact, Inspiring Hope, Envy and Anger*, L.A. TIMES, Sept. 11, 1995, at 4.

<sup>3</sup> See, e.g., Laura King, *Spotlight: Women's Conference Delegates Glimpse the Past; A Walk Through Beijing Offers Stark Reminder*, CINCINNATI ENQ., Sept. 11, 1995, at A2; Trudy Rubin, *Women's Rights, Human Rights; Beijing Brings Big Gain*, MILWAUKEE J. & SENT., Sept. 17, 1995, at 1.

participants discussed and finalized a Platform for Action,<sup>4</sup> a document which sets an agenda—a global agenda—for reform throughout the world.

While many important issues were discussed at the Conference, and subsequently were incorporated into the Platform, two issues which took center stage during the Conference were the economic empowerment of women and the elimination of violence against women. These issues were at the forefront of the discussions in Beijing, the topics of various plenary sessions and workshops, and are persistent themes throughout the Platform for Action. These issues were treated by the women at the Conference as interconnected. Indeed, they are, for the latter is exacerbated by the absence of the former. So in any of our discussions we must incorporate an analysis of the economic status of women—all women—and the distinctions between economic classes that exist in the United States.

Globally, violence against women is manifested through persecution, torture, rape and violence by intimate partners.<sup>5</sup> Much of the violence occurs in private arenas, such as the home. Places which traditionally have been a safe haven, but which for too many women are war zones even during times of peace.<sup>6</sup> Many countries encourage or support violence against women through their legal

---

<sup>4</sup> *Beijing Declaration and Platform for Action, Adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace*, held in Beijing, China, Sep. 15, 1995 (available on the Internet at: [gopher://gopher.undp.org:70/00/unconfs/women/off/a-20.en](http://gopher.undp.org:70/00/unconfs/women/off/a-20.en)).

<sup>5</sup> See Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 326-41 (1994) (discussing rape and sexual abuse of women during armed conflict in the international arena); see, e.g., M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA*, OCCASIONAL PAPER NO. 1 (Int'l Human Rights Law Institute 1996).

<sup>6</sup> In their homes, women are the targets of violence committed by their intimate—former and current—partners, the targets of sexual assault by acquaintances and relatives, and, as they grow older, the targets of elder abuse by children. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 349 (1994) (arguing that “gender-based violence in the home plays a role—albeit a complex one—in the formation of adult personality and in the perpetuation of discrimination and violence in families and the society”).

systems, policies and cultural practices.<sup>7</sup> Even where violence against women is illegal, or at least in theory carries the possibility of some legal sanction, the violence continues.<sup>8</sup>

Domestic violence is blind to distinctions based on race, class, ethnicity and sexual orientation. Women with limited financial resources, without support mechanisms, and who are more isolated due to various types of discrimination, such as discrimination based on immigrant status or language, are in a unique position and partially subject to isolation and dislocation.<sup>9</sup> Informed by the truth of the extent of violence globally, we must consider and assess the

---

<sup>7</sup> See generally Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992) (presenting female genital mutilation from a feminist perspective); Adrienne Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149 (1994) (discussing the role of custom and women in the subjugation of Palestinian women).

<sup>8</sup> In the United States, despite state and federal legislation, violence continues to permeate the lives of women. Every year, three to four million women suffer violence at the hands of their spouses and intimate partners. Nancy Kathleen Sugg & Thomas Inui, *Primary Care Physicians' Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157, 3157 (1992). According to one estimate, approximately 3.9 million women in the United States are abused each year. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 275 (1995) (citing Maria Puente, *Legislators Tackling the Terror of Stalking*, USA TODAY, July 21, 1992, at 9A).

The presence of violence within the home begins at an early age. Approximately 3.3 to 10 million children in the United States witness domestic violence each year. See MARTHA B. WITWER & CHERYL A. CRAWFORD, NATIONAL INSTITUTE OF JUSTICE, A COORDINATED APPROACH TO REDUCING FAMILY VIOLENCE: CONFERENCE HIGHLIGHTS 35 app. B (1995) (citing HOWARD DAVIDSON, AMERICAN BAR ASS'N, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994)). Young women are also experiencing violence at alarming rates. One commentator has noted that one out of 10 high school students has experienced violence in a dating relationship. See Stacy L. Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. L.Q. 331, 331 n.1 (1995) (citing Denise Gamache, *Domination and Control: The Social Context of Dating Violence*, in DATING VIOLENCE, YOUNG WOMEN IN DANGER 73 (Barrie Levy ed., 1991)).

<sup>9</sup> Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 324-29 (1995).

Violence Against Women Act and its potential for genuine reform as it affects the lives of women who have the least access to social services, economic assistance and legal protection. Despite the attractiveness of legal reform work, all laws have limitations. The Violence Against Women Act is not a panacea.

## II. THE VAWA AND THE STRUGGLE FOR CIVIL RIGHTS

The history of the civil rights struggle in the United States is passionate and charged, and while the efforts of individuals in organizations in those struggles have indeed reaped extraordinary gains for people of color, and, consequently, all people in this country, women of color have yet to fully benefit from those struggles. Moreover, while the civil rights and feminists movements brought women of color closer to the goal of equality, by all measures—whether statistical or anecdotal—women of color have not achieved similar gains as compared with both men of color and with other women.<sup>10</sup> Equal opportunity and economic stability, continue to be illusory for the majority of women of color for a variety of reasons. First and foremost, because Latinas, African American, Asian and Native American women face multiple barriers to success and equality.

Discrimination based on race, national origin, ethnicity, language and immigrant status are a daily reality for women of color as highlighted by the following examples. Consider the attack on reproductive rights and the related ongoing diminution in quality health care services for poor women and women of color in the United States.<sup>11</sup> Discrimination is palpable in the anti-affirmative

---

<sup>10</sup> Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 238-39 (1994); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CALIF. L. REV. 775, 778, 796-97, 805 (1991); see also Peggie R. Smith, *Separate Identities, Black Women, Work and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991).

<sup>11</sup> See Leslie G. Espinoza, *Dissecting Women, Dissecting Law: The Court-Ordering of Cesarean Section Operations and the Failure of Informed Consent to Protect Women of Color*, 13 NAT'L BLACK L.J. 211, 226, 234 (1994); Louise G. Trubek & Elizabeth A. Hoffmann, *Searching for a Balance in Universal*



action legislation and rhetoric,<sup>12</sup> in the passage of Proposition 187<sup>13</sup> and other anti-immigrant laws and regulations,<sup>14</sup> and in the increasing number of English-only workplace rules,<sup>15</sup> and, I think most highlighted with respect to Latinas, in a recent case that came out of Texas, which some of you may be familiar with, where the judge denied custody to a Latina because she speaks to her child in Spanish at home.<sup>16</sup> Judge Samuel C. Kiser accused the mother of

---

*Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DEPAUL L. REV. 1081, 1089-90 (1994); see also Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255 (1992); Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349 (1994).

<sup>12</sup> Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1684 (1995) ("The anti-affirmative-action rhetoric of our time perpetuates the dominant norm of whiteness by treating the current distribution of power and access as natural and just. This rhetoric also makes the structural economic problems of working-class whites invisible by blaming the advent of people of color for the downturn in white working-class earning power.").

<sup>13</sup> 1994 Cal. Legis. Serv. Prop. 187 (West 1994); see also Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1517-18, 1559-60 (1995).

<sup>14</sup> Johnson, *supra* note 13, at 1509, 1517-18, 1559-60.

<sup>15</sup> See generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) [hereinafter Perea, *Demography and Distrust*]; Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265 (1990); see also Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 86 (1994) (discussing racism against Asian immigrants as seen in the "controversies over English-only rules"); Dottie Enrico, *English-Only Translates to Trouble*, NEWSDAY, Oct. 9, 1994, at 7 (describing several English-only rules implemented by employers); Seth Mydans, *Pressure for English-Only Job Rules Stirring a Sharp Debate Across U.S.*, N.Y. TIMES, Aug. 8, 1990, at A12 (citing the growing number of English-only job rules, many of which are discriminatory according to civil rights agencies).

For a discussion of the legal challenges that English-only rules in the workplace have faced, see generally Jeffrey D. Kirtner, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871 (1995).

<sup>16</sup> Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES, Aug. 30, 1995, at A12; see also Tim Chavez, *It's Time to Stop Blaming Latinos for the Ills of this Nation*, UTICA OBSERVER-DISPATCH

the five-year-old of "abusing that child and . . . relegating her to the position of a housemaid."<sup>17</sup> This woman is fully bilingual and fully competent to nurture her child. Nevertheless, her right to raise and educate her child was jeopardized because she wanted her daughter to retain some part of her culture. Cultural identity, in the opinion of the court, is at odds with the "best interests" of her child.<sup>18</sup>

Within this theoretical and experiential context, we must localize the VAWA. The VAWA is part of a continuum of legal strategies. The VAWA can provide a bridge between what has been typical civil rights litigation and gender-based legislation. As with other civil rights legislation, the VAWA contains various elements that are critical to the reform movement: the funding and facilitation of community, local anti-violence initiatives.<sup>19</sup> It serves—or can serve, depending on how we as activists are willing to use it—as a centerpiece for community organizing. In a sense, it may serve as a rallying cry, as Sally [Goldfarb] was saying, a way to motivate all people, not just women, around the issue of violence against women. For litigators, it provides a federal forum for litigation. The federal courts have traditionally been seen as a more hospitable arena than the state courts for antidiscrimination and gender rights cases.<sup>20</sup>

---

(discussing the adverse attitudes by politicians toward Latino immigrants and their measures to reduce immigration), *available in* LEXIS, Nexis Library, CURNWS File.

<sup>17</sup> *Mother Scolded by Judge for Speaking in Spanish*, *supra* note 16, at A12.

<sup>18</sup> In the wake of pressure from the Latino community, Judge Kiser offered a limited apology. Judge Kiser did not apologize for his order, but rather for the public statements he made regarding his decision: "The order I signed stands, but my apology for a mischoice of words in trying to explain the reasoning behind it is sincere." *Judge in English-Only Flap Apologizes for Insensitivity*, L.A. TIMES, Sept. 9, 1995, at A4.

<sup>19</sup> 42 U.S.C. § 10418.

<sup>20</sup> For example, state courts do not provide adequate remedies for violence against women. As of 1995, only California, Connecticut, Iowa, Massachusetts, Michigan, New Jersey, Vermont, Washington and the District of Columbia have created civil remedies for such crimes. Federal courts may also be more attractive because Federal Rule of Evidence 412 disallows intrusive questions about the victim's sexual activity whereas many states still allow such questions. *See generally* Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the*

In addition, the particularities of the VAWA which provide assistance to women of color specifically or consequentially are another example of the VAWA's position within a feminist and civil rights context.<sup>21</sup> The VAWA's inclusion of Puerto Rico within its geographic coverage is of particular interest to Puerto Rican women.<sup>22</sup> This provides assurances and an additional protection in terms of orders of protection and other types of court orders for Puerto Rican women who may migrate between the island and the states. The VAWA also provides for self-petition by immigrant women for legally recognized status.<sup>23</sup>

As I have already stated, the Violence Against Women Act and other antidiscrimination legislation are not a panacea; they are fraught with limitations. A significant one for women of color, and Latinas in particular, is awareness of the remedy. What good is a law providing for civil lawsuit if you do not know about it, and if you do not have attorneys in your community who are informed about how to bring these cases and who recognize that the cases are worthwhile? Consequently, public education is absolutely necessary, and the Violence Against Women Act allocates funding for public community education efforts.<sup>24</sup>

Funding allocation is insufficient without funding policies which recognize and respond to the needs of diverse populations. Therefore, grassroots organizations must receive funding to do public education and outreach, so that we may continue with the project that Sally [Goldfarb] described.<sup>25</sup>

---

*Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505 (1995); Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78 (1995); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 461 (1996);

<sup>21</sup> Two critical provisions for Latinas in particular are the geographic definitions and the self-petitioning sections. See *infra* notes 22-23.

<sup>22</sup> See, e.g., 42 U.S.C. § 10410(c) (1994). By law, Puerto Ricans are citizens of the United States. See 8 U.S.C. § 1402 (1994).

<sup>23</sup> 8 U.S.C. § 1154(a) (1994).

<sup>24</sup> 42 U.S.C. § 10418 (1994).

<sup>25</sup> See Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L.

Moreover, interest and trust in the legal system are of critical importance, otherwise, there is a breach of what I will call the "social contract" with communities of color. The trust and confidence of communities of color has been dwindling over the last several years.<sup>26</sup> It has dwindled as the Supreme Court and lower courts continue to hack away at the civil rights of people of color,<sup>27</sup> and as demonstrated by the Texas case,<sup>28</sup> as judges become desensitized to the needs of women and women of color specifically. That trust has dwindled with the denial of services based on immigrant status and a woman's inability to speak English regardless of citizenship. In addition, the denial of, or at least the lack of provision for translation services and bilingual and bicultural services to help women through the court system. These services are necessary to help women negotiate the possible remedies outlined by Betty [Levinson].<sup>29</sup>

---

& POL'Y 391 (1996).

<sup>26</sup> For example, there is the "absence of the bonds of mutual trust among law enforcement and [B]lack communities." Dwight L. Greene, *Criminal Justice and Race: Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2054 (1993); see also Perea, *Demography and Distrust*, *supra* note 14, at 362 ("Americans share a common cultural heritage in which differences from the core culture, including differences of race, national origin and language, have been viewed as 'foreign' and subversive of American democracy. . . . Difference in America has truly become a focal point of distrust. . . .") (citations omitted).

<sup>27</sup> Recent affirmative action, voting rights and Title VII cases illustrate this point. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (striking down, under equal protection analysis, Georgia's congressional redistricting plan which would have considered race in order to ensure representation for people of color); *Reno v. Shaw*, 113 S. Ct. 2816 (1993) (striking down, under equal protection analysis, North Carolina's congressional districts drawn in accordance with Section Five of the Voting Rights Act, which similarly relied on race); *Hopwood v. Texas*, 1996 U.S. App. LEXIS 4719 (5th Cir. Mar. 18, 1996) (striking down Texas School of Law admissions program and concluding that the use of racial preferences in such a program constitute Fourteenth Amendment violations); *Spun Stake v. Garcia*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994) (rejecting EEOC guidelines which treated English-only workplace rules as *per se* discrimination).

<sup>28</sup> See *supra* notes 16-18 and accompanying text.

<sup>29</sup> Rivera, *supra* note 10, at 250-55 (discussing the different treatment of Latinas in the legal and social service arenas and the lack of bilingual-bicultural

No discussion of the civil rights' aspects of the Violence Against Women Act could be complete without considering how the VAWA addresses institutional and individual racism and bias based on ethnicity and national origin within the judicial system. There are sections of the Violence Against Women Act which provide for appropriations to educate law enforcement officials and judges.<sup>30</sup> Nevertheless, education about the VAWA needs to be integrated with a much fuller component of education dealing with race-, ethnicity- and language-based discrimination as they exist in the courts. Indeed, the existence and vitality of such discrimination is the topic of many official reports.<sup>31</sup>

There is also the issue of patriarchy and the attitudes of those in the position of enforcing the laws, whether they be prosecutors, judges or court officers. In a recent article, I compared the Violence Against Women Act to domestic violence legislation in Puerto Rico, legislation which predates the Violence Against Women Act.<sup>32</sup> I indicated how implementation of Puerto Rico's law has been obstructed due to paternalistic attitudes of many of the people in charge of enforcing the law. We have much to learn from Puerto Rico's experience. We may conclude, based on such experiences, that education in a vacuum is inefficient. There is a need for extensive change in attitudes. Indeed, women and people

---

services and personnel within law enforcement and social services); see also Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts*, 19 FORDHAM URB. L.J. 391, 407-08, 479-81, 487-88 (1992) (arguing that New York City courts do not adequately address the need for bilingual services).

<sup>30</sup> See, e.g., 42 U.S.C. §§ 13701, 13991, 13992, 14036 (1994).

<sup>31</sup> See Judith Resnik, *Symposium on Civic and Legal Education, Panel One: Legal Education, Feminist Values, and Gender Bias*, 45 STAN. L. REV. 1525, 1539-40 nn. 65-69 (1993); see also Suellen Scarnecchia, *Symposium on Racial Bias in the Judicial System: State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, 16 HAMLINE L. REV. 923 (1993); Stephan Thernstrom, *Critical Observations on the Draft Final Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 1995 PUB. INT. L. REV. 119 (1995).

<sup>32</sup> See Rivera, *Puerto Rico's Domestic Violence*, *supra* note 20.

of color must be brought into legislative and law enforcement positions in significant numbers to help facilitate such change.

As a final point, we must consider the intrusive nature of the role of the state in enforcement, prosecution and adjudication of these cases. For many women of color in this country the state has acted not as a benevolent brother, but as an intrusive entity. The state has acted as an arm that removes children from their homes and their parents, which incarcerates men of color at statistically significant high numbers, and which is unreceptive to the issues of communities of color, thus devastating the communities.<sup>33</sup> Thus, the appropriateness and implementation of such measures as mandatory arrest and their endorsement by the VAWA must be analyzed and considered fully by reviewing comprehensively its application within communities of color and its availability to women of color.<sup>34</sup> The role that the state plays in terms of the implementation of the VAWA, in helping to eliminate violence against women, must be assessed in light of this history and these concerns. Thank you.

---

<sup>33</sup> See Rivera, *supra* note 10, at 243-51 (discussing the historical animosities and tensions between law enforcement officials and the Latino community).

<sup>34</sup> See Rivera, *supra* note 10, at 243-49 (discussing the applicability of mandatory arrest to the Latino community).

Good evening. I am very pleased to join you this evening at this forum on the topic of violence against women. Yesterday was the anniversary of the passage of the Crime Bill,<sup>1</sup> and I was reflecting on the way here about my experience over the past year and how much has changed during this time.

The Violence Against Women Act<sup>2</sup> ["VAWA"] is landmark legislation, combining tough law enforcement strategies with important safeguards for victims of domestic violence and sexual assault. In its first year, VAWA and its related provisions have proven extremely effective in our effort to provide protection and peace of mind for women and their families. Early on, the Department [of Justice] adopted an aggressive implementation strategy and moved quickly in reaching out to those who had worked on the legislation to draw them into the planning process for the Act's implementation.

Tonight I would like to thank the NOW Legal Defense ["NOW LDEF"] and Education Fund for all of the support and honest feedback they have given us at [the] Justice [Department] as we have gone through the process of putting in place a number of VAWA programs. I would also like to thank the Association of the Bar of the City of New York for hosting this event.

In many respects, working on issues related to violence against women has resulted in many wonderful reunions for me. Before I was a lawyer, I worked in the late 70s in the D.C. community with the shelter movement, helping establish a shelter called My Sister's

---

\* Georgetown University, J.D.; Marywood College, B.A. The author is a deputy assistant attorney general at the Office of Justice Programs, Department of Justice.

<sup>1</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)).

<sup>2</sup> Violence Against Women Act of 1994, 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)).

Place, then sponsored by the Women's Legal Defense Fund. I also worked with friends and colleagues at the Women's Legal Defense Fund drafting legislation for women to seek *pro se* protection orders in cases of domestic violence.<sup>3</sup> Twenty years ago when I worked on this issue, it was a very different time. The notion of pro-arrest policies for a crime of domestic violence was unheard of; shelters were scarce and victim advocates were a new phenomenon. My work in the Administration on the issue of violence against women has enabled a sort of homecoming for me with a number of women's and victim's groups who have worked hard during these years to get us where we are today. We have come far and should take heart that there is a strong national commitment to address problems of violence against women.

For those young lawyers here tonight, I want to say that it is an important evening for you because one of the good things that we women do for others is networking, and you have an opportunity tonight to network with some very impressive people, and I am excluding myself from that group. I am so pleased to be on this panel with each of you.

To those of you here tonight who are experienced practitioners, defense lawyers and prosecutors, you play a key role in your bar, and in the New York community. I applaud you for the work you are doing in your community to understand and increase the understanding about this issue, and for your work in developing effective programs to combat violence against women—violence in the home, on the streets and in the workplace. You have access to the decisionmakers. You are the ones who can help elevate this issue in the bar. You are the messengers who can talk with the judges, police and prosecutors and engage in the kind of public education which remains so fundamentally important on this issue. Many Americans, including some in the criminal justice system, have thought of domestic violence as a private matter. However, we must all take responsibility for helping to put a face on violence against women so that it is no longer hidden behind doors.

The Violence Against Women Act delivers a heavy message. In addition to creating new rights and remedies and turning statutes

---

<sup>3</sup> See D.C. Code Ann. §§ 16-1003 to -1006 (1989 & Supp. 1995).



protecting battered spouses into offensive weapons, VAWA has served as an awakening. Historically, the government condemns terrorism. We have efforts to take back our streets. The Violence Against Women Act sends a message that it is about time that we stop giving men the freedom to dominate and to terrorize women in their lives! I want to explain a few reasons why I think this is so.

VAWA is a rather comprehensive roadmap offering a variety of programs, remedies and studies to address domestic violence and sexual assault. For example:

- It authorizes the creation of a number of programs through which states and localities receive resources—incentives to engage in coordinating among police, prosecutors, the courts and victim's groups, in focusing efforts on these problems.<sup>4</sup> In the past, we have not implemented the type of coordinated response that is envisioned in the Violence Against Women Act.
- Funds also are authorized for programs in rural jurisdictions dealing with domestic violence,<sup>5</sup> and for a national hotline for victims to call for help.<sup>6</sup>
- A number of significant studies also can be conducted as a result of the Act related to critical issues like:
  - The capability of state databases as they relate to the enforcement of protective orders;<sup>7</sup>
  - a study of the means by which abusive partners obtain addresses of domestic violence victims;<sup>8</sup> and
  - an effort by the National Academy of Sciences panel of experts from a variety of

---

<sup>4</sup> See, e.g., 42 U.S.C. § 10407 (1994) (information and technical assistance centers); 42 U.S.C. § 10410 (1994) (state domestic violence coalitions).

<sup>5</sup> See, e.g., 42 U.S.C. § 13971 (1994).

<sup>6</sup> 42 U.S.C. § 10416 (1994). The national toll free number is 1-800-799-SAFE.

<sup>7</sup> 42 U.S.C. § 13962 (1994).

<sup>8</sup> 42 U.S.C. § 14014 (1994).

disciplines to develop a research agenda on issues of violence against women.<sup>9</sup>

One of the areas which I was asked to address tonight relates to current policy questions on the issue of violence against women. While my colleagues tonight are focusing on the civil rights remedy provision of the Act<sup>10</sup>—I am more of the generalist, here to talk about the broader context surrounding that provision. This is not an exhaustive list, but I would like to share with you some of the questions that we constantly ask ourselves at the Department [of Justice]:

- How do we enable the cultural change that must take place among police, prosecutors and the courts? For the system to work on behalf of victims in these cases, we must find ways to go beyond the law in order to work with the people and institutions charged with law enforcement. For the system to work effectively—in a unified manner—we must remove the institutional barriers that keep us separate from one another. We must develop a common understanding of each others' strengths and limitations and perhaps re-examine traditional approaches to how courts, prosecutors and the police function.
- We are talking about people. This is after all about people. How do we change attitudes? How can we apply the notion of a problem-solving approach to violence against women within and across institutions?
- How do we encourage the connections between the non-profit, nongovernmental victim advocates—the victims' services deliverers—and police and prosecutors and the courts?
- What steps can we take at the federal level to draw into discussions emergency room personnel, [and] members of the health and mental health professions, to help foster an integrated system locally?

---

<sup>9</sup> 42 U.S.C. § 13961 (1994).

<sup>10</sup> 42 U.S.C. § 13981 (1994).

- How do we get the defense bar to the table? It seems to me that there is somewhat of an ethical issue here, but it does not operate as a bar to participation. How do we draw into the discussions those who defend batterers? I do not think batterers and those who defend them can be dismissed simply as “bad people.” Rather, we need to find ways to draw the defense bar into the process. How do we get a defense lawyer to the table to talk about someone who is a chronically sick person and whose sickness is beating his wife? What else ought they be thinking about trying to do for their clients?

Let me return for a moment to the programmatic aspects of VAWA. The Violence Against Women Act is prescriptive in its requirements for accessing funds. I serve in the Office of Justice Programs, which is like the “foundation” arm of the Department [of Justice]. We do not do prosecution, we do not do litigation and we do not do investigations—those things most associated with the Department of Justice. We administer a large amount of money that is distributed to states and localities—police departments, victim services agencies, prosecutors’ offices, courts and nonprofit organizations—to support programs in a variety of issue areas related to crime and delinquency prevention, including violence against women.

Through the Violence Against Women Act, the Department has the statutory leverage to require systems to take an approach that we hope will make a difference—a new approach that involves collaboration and coordination among all the players. Our hope is that these federal funds will be used to create an integrated system of law enforcement, prosecution and victim services to address the needs of battered and sexually assaulted women—one that will provide greater safety to women, deter violent behavior by men and provide equal treatment for cases of domestic violence and sexual assault.

Training and technical assistance efforts are critical to supporting systemic change. Providing training for judges, police and prosecutors, and offering information on “best practices,” are both central roles for the federal government, so that jurisdictions might

learn from one another innovations taking place among police, prosecutors and judges.

There are additional incentives for better treatment for victims through VAWA. The Act requires a state, in order to qualify for funds, to include nonprofit, nongovernmental victim service providers in its planning.<sup>11</sup> VAWA demands a planning process and the development of a plan for the distribution of funds to prosecutors, police and victim services agencies. There are also certain statutory requirements that states must agree to in order to qualify for funds:

- States must certify that they will not charge filing and service fees in domestic violence cases,<sup>12</sup> and
- states must also certify that the victim will not have to pay for testing in a rape case.<sup>13</sup>

Through our technical assistance efforts, we are working with states and sharing ideas on how jurisdictions are handling these provisions. Also through our technical assistance efforts, we have brought together practitioners to learn from each other and to plan together.

Another issue that I want to touch upon tonight is what we can do at the federal level to help build the capacity for media and public awareness campaigns at the state and local level. This is an additional opportunity for us at the federal level in terms of helping states and local people think about public awareness campaigns and public education and media campaigns. We are working with some very good people in the field, and want to be able to give guidance and help individuals at the state and local levels to engage in undertaking these campaign efforts.

There is an additional section in the Violence Against Women Act that I want to mention tonight. It is what is known as the Full Faith and Credit Provision.<sup>14</sup> It is not a self-enforcing provision, but one in which the Department hopes can be helpful. The Department will play a leadership role in working with the

---

<sup>11</sup> 42 U.S.C. § 3796gg-1 (1994).

<sup>12</sup> *Id.* § 3796gg-5.

<sup>13</sup> *Id.* § 3796gg-4.

<sup>14</sup> 18 U.S.C. § 2265 (1994).

states on issues related to intrastate and interstate enforcement of protection orders. As we all know, jurisdictions have idiosyncratic processes grounded in law and due process. A police officer in one county, let alone one state who is handed a protection order from another county or state by a battered woman is likely to say, "this does not look like a form that I know. I cannot help you." At the Department, we are analyzing the laws and working with the Battered Women's Justice Project<sup>15</sup> to understand the steps that need to be taken, the databases that need to be in place and the training that must occur, for protection orders to operate effectively.

Finally, there are several steps the Justice Department has undertaken specifically with regards to the civil rights remedy under VAWA. First, the Civil Rights Division is working with the NOW Legal Defense and Education Fund in examining the issues that could emerge in relation to cases that may arise. To my knowledge there has not been a case to date.<sup>16</sup> On the other hand, in the criminal area there already have been a couple of federal prosecutions under VAWA,<sup>17</sup> but we are studying the statute so that when a case is brought we will be prepared. I know that we can count on NOW LDEF to let us know when a case arises. Deval Patrick, the assistant attorney general for civil rights, has met with a number of you on this issue and will want to continue to talk with you as things unfold.

In closing, I believe that during the past year we have put in place substantial cornerstones and have made great strides in undertaking programs to address violence against women. Much remains to be done. Many of you have been terrific in helping lead

---

<sup>15</sup> The Battered Women's Justice Project is a national resource center on civil and criminal justice laws, policy and practice. It provides technical assistance to domestic violence advocates, law enforcement personnel, prosecutors, the private bar and courts.

<sup>16</sup> Since this presentation, given on September 14, 1995, two cases have been brought under the civil provisions of the Violence Against Women Act: *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, No. 95-CV-1358-R (W.D. Va. filed Mar. 4, 1996) and *Doe v. Doe*, No. 95-CV-2722 (D. Conn. filed Feb. 12, 1996).

<sup>17</sup> *Ex-Husband Indicted for Spousal Threats*, 214 N.Y. L.J. 4 (1995).

the charge to make sure the Violence Against Women Act was included in the Crime Act that was passed in 1994.<sup>18</sup> We at the Justice Department promise to continue to move forward. In closing, I would therefore like to echo the words of Attorney General Janet Reno: "Unless we end violence in the home we are never going to end it on the streets [of America]."<sup>19</sup>

Thank you.

---

<sup>18</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)).

<sup>19</sup> Attorney General Janet Reno, Press Conference (July 19, 1994) (transcript available in LEXIS, News Library, CURNWS File).

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.<sup>1</sup> 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

---

\* Professor of Law, Brooklyn Law School; Visiting Professor of Law, Harvard Law School. New York University Law School, J.D.; The London School of Economics and Political Science, M.Sc.; Bryn Mawr College, B.A.

<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> cautionary instructions,<sup>4</sup> and the resistance

---

<sup>2</sup> 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).

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

<sup>4</sup> 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.<sup>5</sup> Rape shield legislation has been enacted in many states,<sup>6</sup> 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.

<sup>5</sup> 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 (1992); see also Rosemary J. Scalo, 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).

<sup>6</sup> 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.<sup>7</sup> Orders of protection, mandatory arrest policies,<sup>8</sup> the notion of stalking as a crime<sup>9</sup>—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);<sup>10</sup> of violence against women as a hate crime;<sup>11</sup> of freedom from gender violence as an international human right;<sup>12</sup> 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

---

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> 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.

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

<sup>11</sup> 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).

<sup>12</sup> 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."<sup>13</sup> 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 Act<sup>14</sup>—which does not, by the way, allow for

---

<sup>13</sup> 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.").

<sup>14</sup> 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.<sup>15</sup> 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

---

<sup>15</sup> 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.<sup>16</sup>

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

---

<sup>16</sup> 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.<sup>17</sup> 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,<sup>18</sup> 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.

---

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

<sup>18</sup> 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).