Brooklyn Law Review

Volume 66
Issue 2
The Second Circuit Review: 1999 - 2000 Term

Article 6

12-1-2000

ESSAY: The Second Circuit Addresses Gender-Based Violence: A Review of Violence Against Women Act Cases

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ESSAYS

THE SECOND CIRCUIT ADDRESSES GENDER-BASED VIOLENCE: A REVIEW OF VIOLENCE AGAINST WOMEN ACT CASES*

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INTRODUCTION

On May 15, 2000, the United States Supreme Court decided the seminal case, *United States v. Morrison*,[1] which declared the civil rights remedy of the Violence Against Women Act ("VAWA")[2] unconstitutional.[3] According to the Court, the statute, which provided a civil cause of action for victims of gender-motivated crimes, was beyond the scope of Congress' power to legislate under both the Commerce Clause and Section 5 of the Fourteenth Amendment.[4] However, *Morrison* does not end federal courts' adjudication of gender-motivated crimes. The *Morrison* decision did not disturb the vitality of the federal felonies enacted as part of VAWA,[5] which have

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[1] 120 S. Ct. 1740 (2000).

[2] 42 U.S.C. § 13981 (1994). The Violence Against Women Act of 1994 was enacted as Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18 and 42 U.S.C.).

[3] *Morrison*, 120 S. Ct. at 1754, 1759.

[4] *Morrison*, 120 S. Ct. at 1754, 1759; *see also* U.S. CONST. art. I § 8 (Commerce Clause); U.S. CONST. amend. XIV § 5. Although courts within the Second Circuit had upheld VAWA's constitutionality, *see, e.g.*, Crisonino v. New York City Hous. Auth., 985 F. Supp. 385, 394 (S.D.N.Y. 1997); Doe v. Doe, 929 F. Supp. 608, 610 (D. Conn. 1996), the *Morrison* decision put the constitutional issue to rest.

[5] 18 U.S.C. § 2261 (2000) (establishing felony for interstate domestic violence); 18 U.S.C. § 2262 (2000) (establishing felony for interstate violations of protective orders).

been the basis for successful prosecutions within the Second Circuit. Additionally, while the 1994 VAWA civil rights remedy is no longer good law, efforts are underway to introduce alternative federal and state legislation to provide redress for victims of gender-motivated crimes, while avoiding the constitutional infirmities identified by the *Morrison* Court. The pre-*Morrison* decisions interpreting the civil rights remedy's statutory elements and addressing its procedural applications may provide the foundation for interpreting those laws.

This Essay reviews VAWA's statutory provisions addressing gender-based violence and analyzes the Second Circuit's application of those provisions. Specifically, it analyzes decisions of district courts within the Second Circuit that integrate the VAWA policies. This Essay also assesses the Second Circuit's decisions interpreting the VAWA civil rights remedy and identifies ways in which those decisions can be used in future cases in which plaintiffs seek redress for gender-motivated violence.

I. STATUTORY BACKGROUND

In 1994, Congress enacted VAWA as a comprehensive effort to address the "escalating problem of violence against women,"[6] which was termed "a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street."[7] Following four years of legislative deliberations, encompassing nine hearings in which more than 100 witnesses submitted testimony,[8] Congress con-

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[6] S. REP. NO. 103-138, at 37 (1993).

[7] S. REP. NO. 102-197, at 39 (1991).

[8] *See generally Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. (1994); *Domestic Violence: Hearing on the Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women Before the Senate Comm. on the Judiciary*, 103d Cong. (1993); *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. (1992); *Violence Against Women: Victims of the System: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. (1991); *Women and Violence: Hearings on*

cluded that crimes of violence motivated by gender have a "substantial adverse effect on interstate commerce,"[9] and that "bias and discrimination in the criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws."[10] VAWA represented a multi-strategic approach to this problem. It included congressional authorization for $1.6 billion in federal spending over six years for a range of programs addressing violence against women, including training for law enforcement officials,[11] victim services programs,[12] battered women's shelters,[13] rape prevention and education,[14] and a national domestic violence hotline.[15] VAWA also required states to afford full faith and credit to protective orders issued by other states,[16] and it authorized a range of research projects.[17]

Specifically, VAWA established federal felonies for (1) acts of interstate domestic violence[18] and (2) interstate violations of protective orders.[19] VAWA also required courts to order defendants convicted under those statutes to pay full restitution to the victims for their losses resulting from the crime, which could include costs incurred for medical services, physical and occupational therapy, transportation and housing expenses, lost income, and attorneys' fees.[20]

The VAWA civil rights provision was a historic provision that added to the existing panoply of federal civil rights laws a cause of action for victims of gender-motivated crimes committed by private individuals.[21] It permitted suits for damages

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Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary, 101st Cong. (1990); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. (1990).

[9] H.R. CONF. REP. NO. 103-711, at 385 (1994).

[10] *Id.*

[11] *See* 42 U.S.C. § 13991-94 (2000).

[12] *See id.* § 3796gg(a).

[13] *See id.*

[14] *See id.* § 300w-10.

[15] *See id.* § 10416.

[16] 18 U.S.C. § 2265 (2000).

[17] *See, e.g.*, 42 U.S.C. § 13961-63 (2000).

[18] 18 U.S.C. § 2261 (2000).

[19] *Id.* § 2262.

[20] *Id.* § 2264.

[21] Prior to the civil rights remedy, federal remedies were available for instanc-

arising from "crimes of violence motivated by gender."[22] But as soon as victims of gender-based violence began to assert their statutory "right to be free from crimes of violence motivated by gender," defendants began to challenge the law's constitutionality.[23] After substantial litigation in federal district courts, which almost unanimously upheld the law as constitutional,[24] the Supreme Court struck down the civil rights provision as beyond the scope of constitutional federal legislation.[25]

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es of gender-based crimes that occurred at work, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq.; that were committed by state actors, 42 U.S.C. § 1983; and that were committed as part of a conspiracy to deprive someone of their civil rights, 42 U.S.C. § 1985(3) (2000). But no civil rights law covered the most common form of gender-motivated violence—that committed by private individuals.

[22] The civil rights remedy declared that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). A "crime of violence" was defined as an act or acts that would constitute a felony under existing federal or state law, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." *Id.* § 13981(d)(2). A crime was "motivated by gender" if it was "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1). The civil rights remedy permitted recovery of both compensatory and punitive damages and other forms of relief. *See id.* § 13981(c). Although gender-motivated violence disproportionately affects women, the law was drafted in gender-neutral terms. *See id.* § 13981.

[23] *See generally* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *aff'd en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom.*, United States v. Morrison, 120 S. Ct. 1740 (2000).

[24] *See generally* Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass. 1999), *vacated and remanded sub nom.*, Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 14, 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Williams v. Bd. of County Comm'r, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22309 (D. Kan. Oct. 27, 1998); Mattison v. Click Corp., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). *But see generally* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom., Morrison*, 120 S. Ct. 1740 (striking law as unconstitutional); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (same).

[25] *Morrison*, 120 S. Ct. at 1754, 1759; *see also* U.S. CONST. art. I § 8 (Commerce Clause); U.S. CONST. amend. XIV § 5. In so doing, the Court rejected arguments that the law was a rational response to the formidable evidence before

Nonetheless, federal and state legislators have begun to respond with alternative statutory formulations. For example, during the debate over the reauthorization of VAWA's funding provisions, several members of Congress sought to introduce a revised civil rights remedy that would retain VAWA's essential elements but would correct the aspects of VAWA that proved fatal under the Court's analysis.[26] In addition, several states have introduced analogous legislation that would provide a parallel remedy in state court for victims of gender-motivated violence seeking redress for their injuries.[27]

Congress that violence against women substantially affected interstate commerce and that it was a congruent and proportionate response to persistent bias in the administration of justice of gender-based crimes. *See generally* Brief of the United States, United States v. Morrison, 120 S. Ct. 1740 (2000) (Nos. 99-5 & 99-29), *available at* http://www.usdoj.gov/osg/briefs/search.html (last visited Feb. 25, 2001). The Court recognized that the civil rights remedy was supported by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." *Morrison*, 120 S. Ct. at 1752. But the Court nonetheless struck down the law based on its conclusion that upholding the law would "completely obliterate the Constitution's distinction between national and local authority." *Id.* The Court also acknowledged that a "voluminous congressional record" demonstrated "pervasive bias in various state justice systems against victims of gender-motivated violence." *Id.* at 1755. Nonetheless, the Court deemed the law beyond Congress' powers under Section 5 of the Fourteenth Amendment because it was directed at individuals rather than state actors. *Id.* at 1758. This Essay will not focus on the constitutional arguments, but instead it will focus on Second Circuit decisions under the VAWA felonies and on civil rights remedy decisions that may have enduring application in other statutory schemes that address gender-motivated violence.

[26] Representatives Conyers, Baldwin, and Jackson-Lee attempted to introduce an amendment to a bill that would reauthorize the spending provisions of VAWA and would amend the 1994 civil rights remedy by adding a requirement that each case have a proven nexus with interstate commerce. *See* Proposed Amendment to Committee Print of H.R. 1248, 106th Cong. (2000), offered June 27, 2000, to amend Violence Against Women Act of 1994, 42 U.S.C. § 13981, *repealed by Morrison*, 120 S. Ct. at 1740. The proposed amendment was rejected because it was not germane to the bill under consideration. *See* Mark-up in the House Judiciary Committee (June 27, 2000) (transcript available at House Judiciary Committee and notes from mark-up on file with author).

[27] *See, e.g.*, S.R. 1535, 44th Leg., 2nd Reg. Sess. (Ariz. 2000); S.R. 7903, 223rd Leg. (N.Y. 1999); H.R. 4407, 91st Leg. (Ill. 2000). Each of these provisions imported the requirements of the 1994 VAWA civil rights remedy into a cause of action that could be brought in each particular state's courts. Moreover, several states' bias crime laws permit civil recovery for gender-based crimes, although those statutes do not track the VAWA civil rights remedy's language. *See, e.g.*, CAL. CIV. CODE §§ 52(b)(2), 52.1(b) (2000); D.C. CODE ANN. § 22-4004 (1999); 720 ILL. COMP. STAT. 5/12-7.1(c) (2000); IOWA CODE § 729A.5 (1999); MASS. ANN. LAWS ch. 12, § 11*I* (Law. Co-op. 2000); MICH. STAT. ANN. § 750.147b (Mitchie 1999); MINN.

Before the Supreme Court decided *Morrison*, district courts within the Second Circuit and throughout the country adjudicated VAWA civil rights remedy claims, resulting in decisions that not only analyzed the remedy's key elements and interpreted its procedural implications, but also ruled on the law's constitutionality.[28] While the VAWA civil rights remedy, as enacted in 1994, is no longer available to victims of gender-motivated crimes, these VAWA civil rights remedy decisions may provide a foundation for courts evaluating claims arising from acts of gender-motivated violence under analogous state-sponsored statutory formulations.[29]

II. VAWA FEDERAL FELONY PROVISIONS CASES

An eastern district of New York case, *United States v. Hayes*,[30] was one of the first prosecutions in the country under the VAWA provision creating a federal felony for interstate violations of protective orders.[31] In 1992, Patricia Hayes left her home in Ohio after hostile and aggressive abuse by her then-husband, Wayne Hayes, which escalated to Mr. Hayes threatening her with a hammer.[32] Ms. Hayes moved to her parents' home in New Jersey, and she obtained an order of protection from a New Jersey court.[33] Mr. Hayes then began a campaign to effect a reconciliation in which he sent her approximately 600 letters over the next few years, demanding that she return to him and threatening to kidnap their son and to injure or kill her if she did not return.[34] In addition, Mr. Hayes traveled from Ohio to New Jersey, parked outside of Ms.

STAT. § 611A.79 (1999); N.J. STAT. § 2A:53A-21 (2000); N.C. GEN. STAT. § 99D-1(b) (1999); VT. STAT. ANN. tit. 13, § 1457 (2000); WASH. REV. CODE ANN. § 9A.36.083 (West 2000).

[28] *See supra* notes 23 & 24; *see also infra* Part III.

[29] Additionally, VAWA civil rights remedy decisions, although overruled by *Morrison*, may provide guidance to courts interpreting what constitutes "gender-motivation" in other contexts. *See, e.g.*, Jones v. Clinton, 990 F. Supp. 657, 674 (E.D. Ark. 1998) (citing the *Crisonino* court's analysis of gender-motivation in assessing whether facts alleged stated claim of hostile work environment sexual harassment), *appeal dismissed per stipulation*, 161 F.3d 528 (8th Cir. 1998).

[30] 135 F.3d 133 (2d Cir. 1998).

[31] 18 U.S.C. 2262(a)(1) (2000).

[32] *Hayes*, 135 F.3d at 135.

[33] *Id.*

[34] *Id.*

Hayes' residence, and was arrested by New Jersey law enforcement for approaching her residence while brandishing a replica of a gun.[35] This incident led Ms. Hayes to obtain a second order of protection, but this did not deter Mr. Hayes. He again traveled from Ohio to New Jersey and was seen near Ms. Hayes' New Jersey home.[36] On December 20, 1995, Mr. Hayes was arrested by FBI agents[37]; he pled guilty to crossing state lines to violate orders of protection and was sentenced to thirty-seven months in custody, with three years of supervised release.[38] Mr. Hayes appealed the amount of restitution he was ordered to pay, but each of his claims was rejected.[39]

The *Hayes* case illustrates the importance of this federal felony statute. Although Ms. Hayes sought assistance from New Jersey law enforcement, and even though Mr. Hayes was arrested under state law, he was not deterred from continuing to stalk Ms. Hayes. Because of federal law enforcement officials' expertise in prosecuting interstate crime, they were uniquely capable of addressing this offense. In addition, *Hayes* highlights the usefulness of VAWA's restitution provision, as Mr. Hayes was required to pay the fees that Ms. Hayes incurred as a result of his violation of the protective order, including housing costs, lost income, and school expenses.[40]

Moreover, in *United States v. Casciano*, the Second Circuit addressed a due process challenge to a conviction under the VAWA felony provision for interstate violation of a protective order.[41] *Casciano* involved a woman who had obtained two protective orders against a man she had briefly dated but who had begun to harass and threaten her when she attempted to end the relationship.[42] Mr. Casciano disputed whether the second protective order had been properly served, but the jury found that he was guilty.[43] Casciano appealed from the judgment against him, arguing that the trial court erred in permit-

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[35] *Id.*
[36] *Id.*
[37] *Hayes*, 135 F.3d at 135.
[38] *Id.* at 136.
[39] *Id.* at 136-40.
[40] *Id.*
[41] 124 F.3d 106 (2d Cir. 1997).
[42] She obtained the second order after the first one expired. *Id.* at 108-09.
[43] *Id.*

ting the jury, rather than the judge, to decide the validity of the protective order on which his conviction was based.[44] Perhaps reflecting the Second Circuit's concern that it interpret the statute in accordance with the statute's legislative history, the court requested an *amicus* brief from NOW Legal Defense and Education Fund, which was involved in the law's enactment.[45] The Second Circuit reasoned that it was unlikely that Congress intended federal juries to interpret the intricacies of the protective orders of fifty states, and it concluded that the issue "is at most an issue for the judge to resolve."[46] The court rejected Casciano's remaining claim that he was denied due process because service was imperfectly effected, and his other objections to the jury charges and the application of the sentencing guidelines.[47]

Additionally, in *United States v. Von Foelkel*,[48] the Second Circuit addressed the constitutionality of the VAWA interstate domestic violence felony. Mr. Von Foelkel was convicted under VAWA after he stalked and harassed his former wife, even after she had changed her and her son's identities and moved to another state.[49] The court upheld the conviction and ruled that the statute was a constitutional exercise of Congress' authority under its Commerce Clause power to regulate the channels of interstate commerce.[50] In so doing, the Second Circuit agreed with the United States Court of Appeals for the Eighth Circuit's earlier decision in *United States v. Wright*,[51] which deemed the statute constitutional under similar reasoning.[52]

Lastly, *United States v. Gluzman*[53] generated substantial news coverage because the case involved the prosecution of a woman under VAWA's felony provision. Ms. Gluzman was convicted of murder and conspiracy to commit murder in the

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[44] *Id.* at 110-11.

[45] *See* Letter from Second Circuit Court of Appeals to, among others, Martha Davis, Legal Director, NOW Legal Defense and Education Fund (July 10, 1997) (on file with author).

[46] *Casciano*, 124 F.3d at 111.

[47] *Id.* at 113-15.

[48] 136 F.3d 339 (2d Cir. 1998) (per curiam).

[49] *Id.* at 341.

[50] *See id.*

[51] 128 F.3d 1274 (8th Cir. 1997).

[52] *See Von Foelkel*, 136 F.3d. at 341.

[53] 154 F.3d 49 (2d Cir. 1998).

death of her estranged husband.[54] This homicide was covered by the VAWA interstate domestic violence felony provision because Ms. Gluzman conspired to commit murder in New Jersey and later crossed the state border into New York, where she took part in the homicide.[55] Ms. Gluzman and a co-conspirator entered Mr. Gluzman's apartment while he was out of the house.[56] Upon his arrival, they murdered him with axes and dismembered his body with the intent of hiding their crime.[57] The next day, a police officer discovered Ms. Gluzman's co-conspirator attempting to dump plastic bags containing Mr. Gluzman's remains into the Passaic River, which led to the arrest and ultimate conviction of both co-conspirators.[58]

The Second Circuit quickly dismissed Ms. Gluzman's constitutional challenge to the VAWA interstate domestic violence felony provision.[59] The court relied on its decision in *Von Foelkel*, which upheld the VAWA interstate violation of a protection order felony, and it saw no reason to treat the two VAWA felonies differently.[60] In reaching that result, the Second Circuit joined the other federal courts that have addressed this issue, which unanimously have upheld the constitutionality of both VAWA felonies as falling well within Congress' commerce clause power.[61] The Second Circuit also rejected Ms. Gluzman's remaining challenges, which included allegations of improprieties in the jury selection system and claims of prejudicial error.[62]

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[54] *Id.* at 50.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Gluzman*, 154 F.3d at 50.
[59] *Id.*
[60] *Id.*
[61] *See, e.g.*, United States v. Lankford, 196 F.3d 563, 572 (5th Cir. 1999) (18 U.S.C. § 2261) *cert. denied*, 120 S. Ct. 1984 (2000); United States v. Page, 167 F.3d 325, 334 (6th Cir. 1999) (en banc) (same) *cert. denied*, 120 S. Ct. 496 (1999); United States v. Bailey, 112 F.3d 758, 766 (4th Cir. 1997) (same); United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997) (18 U.S.C. § 2262).
[62] *Gluzman*, 154 F.3d at 50-51.

III. VAWA CIVIL RIGHTS REMEDY CASES

Although the Second Circuit did not adjudicate any claim under the VAWA civil rights provision, district courts within the Second Circuit produced groundbreaking rulings that upheld the law's constitutionality,[63] which were widely cited until the *Morrison* Court found the statute unconstitutional. However, in addition to addressing the constitutionality of the civil rights remedy, these courts interpreted the key elements of a VAWA civil rights claim and evaluated procedural questions that arise from adjudications of such claims. Those rulings may have enduring use for courts interpreting analogous laws that provide remedies for gender-based crimes.

For example, two cases analyzed the VAWA civil rights remedy's statutory element requiring proof of "gender motivation."[64] First, in *Crisonino v. New York City Housing Authori-*

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[63] For example, a Connecticut district court was the first court in the country to rule on, and uphold, the civil rights remedy's constitutionality. *See* Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996). Courts in every federal circuit, except the 11th and the D.C. Circuits, cited *Doe* as support for the VAWA civil rights remedy's constitutionality. *See, e.g., Bailey*, 112 F.3d at 765; Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 917 (4th Cir. 1999) (Motz, J., dissenting); Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 968 (4th Cir. 1997); Burgess v. Cahall, 88 F. Supp. 2d 319, 322 (D. Del. 2000); Jugmohan v. Zola, No. 98 Civ. 1509 (DAB), 2000 U.S. Dist. LEXIS 1910, at *12 (S.D.N.Y. Feb. 24, 2000); Bergeron v. Bergeron, 48 F. Supp. 2d 628, 631 n.6 (M.D. La. 1999); Culberson v. Doan, 65 F. Supp. 2d 701, 710 (S.D. Ohio 1999); Dill v. Oslick, No. 97-6753, 1999 U.S. Dist. LEXIS 10746, at *25 (E.D. Pa. July 19, 1999); Doe v. Mercer, 37 F. Supp. 2d 64, 66 (D. Mass. 1999); Liu v. Striuli, 36 F. Supp. 2d 452, 476 (D.R.I. 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010, at *4 (N.D. Ill. July 14, 1999); Williams v. Bd. of County Comm'r, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532, at *9 (D. Kan. Aug. 24, 1999); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22309, at *9 (D. Kan. Oct. 27, 1998); Mattison v. Click Corp., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720, at *20 (E.D. Pa. Jan. 27, 1998); McCann v. Rosquist, 998 F. Supp. 1246, 1247 (D. Utah 1998); Timm v. Delong, 59 F. Supp. 2d 944, 958 (D. Neb. 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 609 (E.D. Wash. 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385, 394 (S.D.N.Y. 1997); Seaton v. Seaton, 971 F. Supp. 1188, 1193-94 (E.D. Tenn. 1997); Anisimov v. Lake, 982 F. Supp. 531, 536 (N.D. Ill. 1997); Doe v. Hartz, 970 F. Supp. 1375, 1380 n.1, 1409-10 (N.D. Iowa 1997); United States v. Wright, 965 F. Supp. 1307, 1312 n.4 (D. Neb. 1997). The United States District Court for the Southern District of New York was the first court to address the law's constitutionality after the Fourth Circuit Court of Appeals found the law unconstitutional in *Brzonkala v. Virginia Polytechnic Institute & State University*. Ericson v. Syracuse Univ., 45 F. Supp. 2d 344, 345 (S.D.N.Y. 1999).

[64] For an in-depth analysis of the proper interpretation of the "gender-motivation" element, see generally Julie Goldscheid, *Gender-Motivated Violence: Develop-*

ty,[65] the United States District Court for the Southern District of New York considered a claim that a woman's supervisor called her a "dumb bitch" and then "shoved her to the ground."[66] The court adhered to Congress' directive to follow the factual analysis for race or sex discrimination under other civil rights laws such as Title VII, and it recognized that the determination of whether a particular act is gender-motivated will be based on the "totality of the circumstances."[67] Ultimately, the court found the evidence sufficient to permit a jury to determine that the acts were gender-motivated.[68] Indeed, numerous courts have cited *Crisonino* when analyzing whether VAWA civil rights remedy cases sufficiently alleged gender-motivation.[69]

For example, in *Jugmohan v. Zola*,[70] the United States District Court for the Southern District of New York found the defendant's conduct to be gender-motivated. The defendant, a male cardiologist at a hospital, approached a female nurse, who was a stranger to him, made sexual comments about the size of her breasts, forcibly rubbed her stomach, and grabbed her breasts.[71] After she pushed him away and attempted to escape, he followed her into an elevator where he subjected her to additional unwanted sexual advances.[72] As soon as the elevator opened, she escaped and reported the assault.[73] The record revealed that the doctor had an "extensive history" of conduct that was humiliating, abusive, or sexually degrading

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ing a Meaningful Paradigm for Civil Rights Enforcement, 22 HARV. WOMEN'S L. J. 123 (1999).

[65] 985 F. Supp. 385, 390 (S.D.N.Y. 1997).

[66] *Id.* at 389.

[67] *Id.* at 391.

[68] *Id.*

[69] *See, e.g.*, Jugmohan v. Zola, 2000 U.S. Dist. LEXIS 1910, at *10 (S.D.N.Y. Feb. 24, 2000); Harris v. Franklin-Williamson Human Servs., 97 F. Supp. 2d 892, 906 (S.D. Ill. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1198 (9th Cir. 2000); Culberson v. Doan, 65 F. Supp. 2d 701, 706 (S.D. Ohio 1999); Wesley v. Don Stein Buick, Inc., 42 F. Supp. 2d 1192, 1205 (D. Kan. 1999); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357, 1361 (M.D. Ala. 1998); Kuhn v. Kuhn, No. 98-C-2395, 1998 U.S. Dist. LEXIS 11010, at *14 (N.D. Ill. July 14, 1999); Wilson v. Diocese of New York of the Episcopal Church, 1998 U.S. Dist. LEXIS 2051, at *40 (S.D.N.Y. Feb. 23, 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 605 (E.D. Wash. 1998).

[70] No. 98 Civ. 1509, 2000 Dist. LEXIS 1910 (S.D.N.Y. Feb. 24, 2000).

[71] *Id.* at *1-3.

[72] *Id.* at *3.

[73] *Id.* at *3.

toward women.[74] Relying on *Crisonino* and similar cases from other circuits that recognize such circumstantial evidence as reflecting gender-motivation, the *Jugmohan* court concluded that the allegations of the defendant's sexually degrading comments, unwanted sexual conduct, and pattern of unwanted sexual advances toward women sufficiently pled a claim of "gender motivation" under the law.[75]

Moreover, *Peddle v. Sawyer*,[76] a Connecticut district court case, was one of a few cases in the country to address the question of whether institutions could be held liable under the VAWA civil rights remedy for conduct committed by an employee.[77] In *Peddle*, the court analyzed a claim against the federal correctional institution in Danbury, Connecticut, based on an officer's repeated unwanted sexual assaults on one of the female inmates.[78] The court reasoned that supervisory liability should apply in VAWA civil rights cases because the law was analogous to 42 U.S.C. § 1983, under which standards for supervisory liability have been defined.[79] The court imported the standard for assessing supervisory liability under 42 U.S.C. § 1983 and held that supervisors could be liable if:

> (1) the defendant directly participated in the alleged infraction; or (2) the defendant, while acting in a supervisory capacity, either (a) failed to remedy the alleged wrong after learning of the violation, (b) created a policy or custom under which the unconstitutional practices occurred or allowed such policy or custom to continue; or (c) was grossly negligent or displayed deliberate indifference to the plaintiff's rights in managing subordinates who actually caused the constitutional violation.[80]

Applying this standard, the court upheld the claim of supervisory liability, finding that the Danbury prison officials created a policy or custom of tolerating prisoners' rights violations by continuing to employ the guard, despite their knowl-

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[74] *Id.* at *4-5.

[75] *See Jugmohan*, No. 98 Civ. 1509, 2000 Dist. LEXIS 1910 at *9-11.

[76] 64 F. Supp. 2d 12 (D. Conn. 1999).

[77] *Id.* at 17-19.

[78] *Id.* at 14-15.

[79] *Id.* at 14. The court referenced VAWA's legislative history, which recognizes that the VAWA civil rights remedy was " 'a civil rights remedy in the tradition of Sections 1981, 1983 and 1985(3).' " *Id.* at 18 (quoting S. REP. NO. 101-545, at 41 (1990)).

[80] 64 F. Supp. 2d at 18.

edge of his "sexual misconduct."[81] The few other courts in the country that have addressed this question have employed similar reasoning to conclude that institutions might be liable for VAWA civil rights violations under supervisory liability theories.[82]

A southern district of New York case, *Ericson v. Syracuse University*,[83] was the first case in the country to address a procedural issue with significant practical importance to plaintiffs—the appropriate statute of limitations for VAWA civil rights remedy claims.[84] In *Ericson*, two former college students alleged that their former tennis coach sexually harassed them over a period of approximately three years.[85] Among other claims, the women alleged that the school's inadequate response to their complaints violated Title IX and that the coach violated the VAWA civil rights provision.[86] The court first addressed the defendant's challenge that the VAWA claim was time-barred.[87] It rejected the challenge and ruled that the applicable statute of limitations for VAWA civil rights remedy claims was three years, applying the limitations period of New York State's personal injury law.[88] The court borrowed the analysis used in civil rights cases, such as those brought under 42 U.S.C. § 1983, and it applied the statute of limitations for the state law it deemed most analogous, which it determined,

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[81] *Id.*

[82] *See, e.g.*, Grace v. Nissan, 76 F. Supp. 2d 1083, 1089 (D. Or. 1999) (rejecting institutional liability under respondeat superior theory but determining that such a claim could survive upon a showing that the perpetrator had final policymaking authority, that the policymaker ratified a subordinate's conduct, or that the policymaker acted with deliberate indifference to that conduct, a showing that was not made under the facts of the case); *accord* Chase v. Genesis Consol. Servs., Inc., 1999 WL 1327395, at *6 (D.N.H. 1999) (following *Grace* but rejecting claims as insufficient); *cf.* Dill v. Oslick, No. 97-6756, 1999 WL 508675, at *10 (E.D. Pa. July 19, 1999) (assuming *arguendo* that institutional actors could be liable for aiding or encouraging employee's conduct but rejecting claim on facts presented).

[83] 35 F. Supp. 2d 326, 329-30 (S.D.N.Y. 1999) (adjudicating, *inter alia*, Title IX and VAWA civil rights remedy's statute of limitations)

[84] *Id.* at 329-30.

[85] *See id.* at 327; *see also* Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (adjudicating constitutionality of VAWA civil rights remedy).

[86] The court held that the complaint stated a cognizable Title IX claim based on the allegations that school officials had actual notice that the coach had been harassing female student-athletes for twenty years and that school officials conspired to conduct a "sham" investigation." *See Ericson*, 35 F. Supp. 2d at 328.

[87] *Id.*

[88] *Id.*

without much analysis, to be New York State's personal injury law.[89]

However, the *Ericson* approach was rejected by an Oregon district court because it failed to address the federal "catch-all" statute of limitations applicable to all federal laws enacted after 1990 that do not explicitly identify a limitations period.[90] Under that federal "catch-all," a four-year limitations period should apply to VAWA civil rights remedy claims.[91] The failure of the *Ericson* and *Wesley* courts to apply the federal "catch-all" statute of limitations likely reflects a lack of familiarity with the statute because neither decision addressed the applicability of this provision. Resolution of this issue can be critical to victims of gender-based violence who may not have brought claims within the short statutes of limitations typically applicable to intentional torts.[92]

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[89] *Id.* at 330. Other courts adopted similar reasoning and applied analogous state statutes of limitations to VAWA civil rights remedy claims. *See* Arnold v. County of Nassau, 89 F. Supp. 2d 285, 308 n.10 (E.D.N.Y. 2000) (following *Ericson* in assuming that a three-year state statute applies); Wesley v. Don Stein Buick, Inc., 42 F. Supp. 2d 1192, 1197 (D. Kan. 1999) (applying two-year statute of limitations for state personal injury claim); Mackensie v. Smith, No. 98-5419, 1999 U.S. App. LEXIS 14119, at *5 (6th Cir. June 23, 1999) (assuming one-year state statute of limitations for state personal injury claims would apply); Santiago v. Alonso, 66 F. Supp. 2d 269, 271 (D.P.R. 1999) (assuming one-year state statute of limitations for civil negligence or fault would apply).

[90] *See* Grace v. Nissan, 76 F. Supp. 2d 1083, 1090 (D. Or. 1999) (applying four-year statute of limitations under required under the federal catch-all, 28 U.S.C. § 1658); *accord* DAVID FRAZEE ET AL., VIOLENCE AGAINST WOMEN LAW AND LITIGATION § 11:22 (1998) (explaining that four-year "catch-all" statute of limitations applies); Lisa Barre-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 431 & n.61 (1998) (same); Betty Levinson, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 401, 407 n.41 (1996) (same).

[91] *See* 28 U.S.C. § 1658 (2000).

[92] The statute of limitations for battery and assault typically is two or three years. *See generally* LEONARD KARP AND CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE App. B., 1999 Supp. § 1.31. The short limitations period seriously curtails the ability of domestic violence victims to, for example, sue for personal injury. *See* Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 357 (1997).

CONCLUSION

Congress' enactment of the 1994 Violence Against Women Act turned federal attention to the problem of gender-based violence, which has taken an enormous toll on our nation. The federal felonies enacted as part of VAWA have provided an important complement to state law enforcement efforts to more effectively combat crimes such as domestic violence, sexual assault, and stalking. The Second Circuit Court of Appeals' decisions have advanced the case law interpreting those felony statutes. In addition, decisions from district courts within the Second Circuit, in cases brought under VAWA's civil rights remedy, have made important contributions by analyzing VAWA's statutory elements and evaluating its procedural questions. Those decisions may have enduring value as new remedies to provide redress to victims of gender-motivated crime develop and as we continue to advance our national commitment to full equality and safety for all.