Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act

by
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In 1994 Congress adopted the Violence Against Women Act (VAWA) in a noble effort to stop the unprecedented increase of violence motivated by gender.[1] During the years prior to enactment, Congress heard dramatic testimony regarding the unusually high numbers of violent crimes perpetrated upon women every year, often committed by their current or former husbands and boyfriends.[2] Because filing a domestic tort was often the only remedy for such a crime, Congress created a civil rights cause of action as an integral part of the VAWA.[3] As this article discusses, Congress enacted a dog with a bigger bark than bite as sub-part C of the Act: the civil rights remedy, when used as a separate tort, may not have provided any further relief to a victimized spouse than she had prior to 1994. In fact, Congress overstepped its bounds by enacting the civil rights remedy of the VAWA, as the Supreme Court has very recently ruled in *United States v. Morrison*[4] that 42 U.S.C. § 13981 is unconstitutional under both a commerce clause and 14th amendment analysis. Nevertheless, this article concludes that in the event that states enact similar civil rights remedies as the Supreme Court suggests, practioners may find the parallel provisions of the VAWA instructive in utilizing these valuable weapons in the prosecution of domestic torts.

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

2 *See* S. Rep. No. 103-38 (1993). *See also*, Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103rd Cong. 4 (1993).

3 *See* Violence Against Women Act (VAWA), 42 U.S.C. § 13981 (1996).

4 120 S. Ct. 1740 (2000).

I. Domestic Violence

A. *General Background of Domestic Violence*

Family violence strikes millions of homes each year, and it has only been a relatively short time since society has withdrawn its consent to family violence. As a result of society "just saying no" to domestic violence, victims, now less embarrassed to have been victimized, are able to speak out about their crimes, and can summon the support to prosecute their perpetrators, both in criminal and civil arenas.

Fairly recent studies have revealed that each year over one-half million women in the United States are terrorized by their spouses through rape or other sexual assaults.[5] Countless more suffer emotional and physical abuse at the hands of their significant others. Other statistics reporting domestic violence are equally disturbing: half of all marriages in this country have experienced at least one episode of battery;[6] nearly thirty percent of all female homicide victims were killed by their husbands, former husbands or boyfriends;[7] approximately 3.8 million women are assaulted every year;[8] violence is the leading cause of injuries to women ages 14-41[9]; seventy-five percent of all women in the United States will be a victim of some type of criminal violence during their lifetime.[10] Indeed, violence tops the list of dangers to the health and well-being of American women.

B. *State Criminal Response to Domestic Violence*

Historically, victims of domestic violence, and other gender motivated crime, relied on state laws to remedy abuse. Women depended on criminal statutes and protective orders for relief from abuse. Until recently, their relief has been ineffective, at

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5 *See* Bureau of Justice Statistics, U.S. Department of Justice, National Crime Victimization Survey, (August 1995).

6 *See* LENORE E. WALKER, THE BATTERED WOMAN, (New York: HarperPerennial 1979).

7 *See* Bureau of Justice Statistics, *supra,* note 4.

8 *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1517 (citing National Crime Victimazation Surveyors' Statistics from 1992-93).

9 *Id.*

10 *See* United States Department of Justice, Report to the Nation on Crime and Justice, (2d ed. 1988).

best, due to the pervasive attitude that domestic violence is a trivial crime. However, the tide is changing. All states now have some statutory law - criminal and/or civil - dealing with the problem of family violence.[11] In fact, law enforcement agencies and prosecutors have dramatically increased the kinds and volume of domestic criminal prosecutions in the last decade as a result of public awareness and support, and the increasing concern for victims of domestic violence. Examples of state laws used to protect a woman from domestic abuse include rape, assault and battery, kidnapping, false arrest, and imprisonment. Most states also have statutes and local procedures for obtaining domestic violence protective orders. Orders of protection are usually easy to obtain, with most statutes permitting the applicant to petition for an order of protection, in a court of inferior jurisdiction, ex parte.[12]

However, despite state efforts, state and local laws have fallen short in resolving the domestic violence problem, both in enforcement and prosecution. In fact, state justice systems just do not adequately protect women from rape, sexual assault and domestic violence, nor do such systems attempt to redress women for the losses they suffer upon becoming victims of gender based crimes. For example, in some states raping a spouse is not a crime.[13] In other states, a spousal rape carries an insignificant penalty or probation.[14] Less than one percent of all victims collect damages, even to reimburse them for medical expenses.[15] State studies have shown that crimes of domestic violence are treated as less serious than other crimes of violence, and that the attitudes of law enforcement, prosecutors, and even judges promote this treatment.[16] Arrest rates may be as low as one for every one hundred domestic assaults and almost one quarter of convicted rapists never go to prison and another one quarter re-

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11 *See* Family Violence Project, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 J. FAM. L. 197, 198-99 (1995). (As of 1995, 44 states and D.C. had custody statutes containing provisions regarding consideration of domestic violence).

12 *See, e.g.*, MO. ANN. STAT. 435.010 (Vernon 1980 & Supp. 1993)

13 *See* S. Rep. *supra* note 2, at 42.

14 *See* Julie Goldscheid & Susan J. Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 506 (1995).

15 S. Rep. No. 102-197 at 44.

16 *See* S. Rep. *supra* note 11.

ceive sentences in local jails where the average sentence is only eleven months.[17] Finally, state laws often do not prevent the "double victimization" of one who has been a victim of domestic violence, and in turn suffers psychological trauma from both the crime and from their experience in the criminal justice system. Specifically, when attempting to redress the wrong in the state criminal justice system, a victim must withstand heavy attack and scrutiny from defense attorneys, prosecutors, and even judges.

C. *Domestic Torts As Remedy To Domestic Violence*

At common law, the rule regarding interspousal torts was that an action between spouses for personal injuries was not allowed.[18] The reasons for the common law rule are numerous, and include the public policy argument that allowing a spouse to sue another destroys domestic tranquility.[19] However, the abolition of interspousal immunity, as well as the rise in the public awareness of the evils of domestic violence and related familial abuses, has brought the otherwise taboo subject of domestic torts into the limelight. No longer must an injured spouse rely upon the criminal justice system as a remedy to tortious conduct suffered at the hands of a violent or abusive spouse. Almost all states have now rejected the idea that interspousal suits promote marital discord. Most states have expressed confidence that courts are capable of detecting and preventing collusion, and recognize that it is unjust to deny a remedy to an injured spouse.[20]

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17 S. Rep. No. 101-545 at 38.

18 *See* Ferguson v. Davis, 102 A.2d 707 (Del. 1954); Sullivan v. Sessions, 80 So. 2d 706 (Fla. 1955). *See also* R.D. Hursh, Annotation, *Right of One Spouse to Maintain Action Against Other for Personal Injury*, 43 A.L.R.2d 632 (1955).

19 *See* Yellow Cab Co v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Holman v. Holman, 35 S.E.2d 923 (Ga. App. 1945).

20 *See* LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY ACTIONS, DEFENSES AND DAMAGES, HUSBAND AND WIFE, §502[1] at 117-19 (1981) (citing, Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Leach v. Leach, 300 S.W.2d 15 (Ark. 1957); Self v. Self, 376 P.2d 65 (Cal. 1962); Rains v. Rains, 46 P.2d 740 (Colo. 1935); Rogers v. Yellowstone Park Co., 539 P.2d 566 (Idaho, 1975); Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Hosko v. Hosko, 187 N.W.2d 236 (Mich. 1971); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974); Merenoff v. Merenoff, 388 A.2d 951 (N.J. 1978); Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932); Courtney v.

Today, a spouse may be able to recover money damages for the injuries she has sustained.

Almost every divorce case carries with it some form of domestic tort, and thus, the filing of such a claim must be considered in all divorce cases. When a marriage turns sour, spouses frequently engage in offensive and sometimes violent behavior towards each other, and many times towards their children. Thus, the filing of the tort usually, as in any other tort case, is weighted by considerations of your client's damages and the chances of recovery. Only when there is a serious physical or psychological injury, and a source of recovery, should a practioner consider pursuing a separate tort action. The source of recovery, however, need not be limited to the perpetrator's estate alone. Damages may be sought from third parties who may share in the responsibility for the injured spouse's damages, or from insurance coverage.[21] In other cases, when the damages are not as significant, or when a "deep pocket" defendant cannot be found, the threat of a domestic tort, along with a well prepared strategy to proceed, can be a bargaining chip for a larger share of the marital estate, or higher spousal maintenance payments at the negotiation table.

In assessing tort liability, the practioner must keep in mind the purposes of tort law: the need to compensate the injured, prevention of similar conduct, punishment of the tortfeasor, the convenience of judicial administration over the tort, and the ability of the tortfeasor to bear the loss. Reported tort cases involving spouses and ex-spouses are increasing at dramatic speed.

In drafting the cause of action, a practioner is limited only by his or her imagination. As a starting point, common legal theories that have been used as a basis for pleading a domestic tort case include: negligence, negligent infliction of emotional distress, negligence per se, defamation, deceit and fraudulent misrepresentation, false imprisonment, intentional infliction of

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Courtney, 87 P.2d 660 (Okla. 1938); Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941); Richard v. Richard, 300 A.2d 637 (Vt. 1973); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W.V. 1978)). *See also*, LEONARD KARP & CHERYL KARP, DOMESTIC TORTS: FAMILY CONFLICT, VIOLENCE AND SEXUAL ABUSE, Appendix B, (1989, Cum. Supp. 1999).

[21] *See* Ellen J. Morrison, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259 (1996).

emotional distress, wrongful death, assault and battery, and implied cause of action for the violation of a criminal statute, including sexual assault.[22] Thus, the causes of action available, coupled with the lesser burden of proof in a civil case for a victim, plus the absence of the constitutionally protected rights of the perpetrator and evidentiary rules protective of criminal defendants, make the filing of a domestic tort a realistic option for a victim to redress abuse.

II. Enactment of Violence Against Women Act

A. *The Purpose of Violence Against Women Act*

Responsive to the staggering domestic violence statistics, Congress, for four years, debated and studied the impact of domestic violence on the lives of Americans.[23] During that time, Congress found that gender-based violence affects interstate commerce. Specifically the Senate found that "[g]ender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."[24]

Thus, Congress enacted the Violence Against Women Act (VAWA) and its implementing provisions, which consists of a comprehensive statutory scheme designed to provide women (and men) greater protection from, and recourse against, those who commit violent crimes. The legislation is part of the Violent Crime Control and Law Enforcement Act of 1994, and has received a surprising amount of attention from the courts due to its creation of a civil right remedy for violence motivated by gender.

The passage of the Act was a turning point in our national response to the problems of domestic violence and sexual assault. Congress claimed it had the authority to enact the VAWA under both the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The congressional purpose for enacting the civil rights cause of action legislation was "to protect the civil rights of victims of gender motivated violence and to

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22 *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?* 55 M.D. L. REV. 1268 (1996).

23 *See* S. Rep. *supra* note 13.

24 *Id.*

promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender."[25]

B. *The Violence Against Women Act*

The VAWA consists of several parts, and has provisions scattered throughout the code. The VAWA, in addition to the provision of a gender related civil rights action, creates new federal crimes, strengthens penalties for existing federal sex crimes, and provides $1.6 billion over six years for education, research, treatment of domestic and sex crime victims, and the improvement of state criminal justice systems.[26] Specifically, Safe Streets for Women, Subtitle A, increases penalties for repeat sexual abusers, authorizes appropriation of funds to increase safety for women on public transportation, and creates a Department of Justice task force.[27] Safe Homes for Women, Subtitle B, creates new federal domestic violence crimes, requires that full faith and credit be given to protection orders from other states, and mandates restitution for federal crimes.[28] Subtitle B also authorizes appropriation of millions of dollars for shelters, youth education programs, and proliferation of pro-arrest policies.[29] Subtitle C, Civil Rights for Women which the Supreme Court ruled unconstitutional in *Morrison*, created a civil right to be free from gender-based violence and provides a civil remedy.[30] Equal Justice for Women in the Courts, Subtitle D, authorizes funding to train judges and other court personnel in combating gender bias in the courts.[31] The training includes the application of rape shield laws and other limits on the introduction of evidence; the use of expert witness testimony on rape trauma syndrome and post-traumatic stress syndrome, the legitimate reasons why victims may refuse to testify against a defendant and the physical, psychologi-

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25 42 U.S.C. § 13981(a).

26 *See* 42 U.S.C. §13931.

27 *See id. See, e.g.*, David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252 (1998).

28 *See* 42 U.S.C. § 13951.

29 *See* 42 U.S.C.§ 13971(c)(1).

30 *See* 42 U.S.C. § 13981.

31 *See* 42 U.S.C. § 13991.

cal and economic impact of domestic violence on the victim; and proper and improper interpretations of the defenses of self-defense and provocation used by defendants.[32] Subtitle E, Violence Against Women Act Improvements, authorizes funding to pay the cost of testing for sexually transmitted diseases for victims of sexual abuse, increase safety on college campuses, requires a government report on battered women's syndrome, and allows for enforcement of restitution orders through suspension of federal benefits.[33] Subtitle F, Domestic Violence Reduction, authorizes the provision of grants from the Attorney General to local governments, to improve crime keeping statistics, and authorizes increased access to national crime information regarding stalking and domestic violence offenders.[34] Finally, Subtitle G, Protections for Battered Immigrant Women and Children, addresses the special protection needs of battered immigrant women and children.[35]

The Act also contains criminal provisions codified at 18 U.S.C. § 2261-2265. The Act makes crossing state lines to commit an intentional crime of violence against a spouse, or intimate partner, a crime.[36] Furthermore, the Act makes crossing state lines to violate a protective order regarding domestic violence, harassment or bodily injury, a federal crime as well.[37] Additionally, the Act provides for the order of restitution to the victim, regardless of any other civil or criminal penalties the law provides, including holding the defendant liable for the amount of the victim's losses in the following areas: "medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorneys' fees, plus any costs incurred in obtaining a civil protection order; [and] any other losses suffered by the victim as a proximate result of the offense."[38] The most significant aspect regard-

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32 *See id.*

33 *See* 42 U.S.C. § 14011.

34 *See* 42 U.S.C. § 14031.

35 *See* 42 U.S.C. § 14051

36 *See* 18 U.S.C. § 2261 (defines "[c]rossing a state line [as] travel[ing] across a State line or enter[ing] or leav[ing] Indian Country.").

37 *See* 18 U.S.C. § 2262(a)(1)-(2).

38 18 U.S.C. § 2264(b)(3)(A)-(F).

ing restitution is that the court must issue a restitution order; it is a mandatory order subsequent to the conviction.[39]

C. *Civil Rights Violation Section*

During the four years of hearings, Congress found that victims of violence based on gender rarely sue their attackers despite the availability of a domestic tort or restitution proceedings to do so. Thus, Congress created a positive statutory right for individuals to be free from gender motivated violence, and a cause of action for damages if one is denied that right.

Since its inception, the most controversial part of the Act has been the civil rights violation section.[40] Congress established a new civil rights remedy for violent acts based on discriminatory motivation, either by a private individual or a person acting under color of law, and made a statement that violence against women was an actionable form of discrimination. Congress reasoned that gender based violence negatively impacts interstate commerce as well as denied those victims of gender motivated crime equal protection of the laws and deprived them of life liberty and property without due process of law.

Prior to the Supreme Court's ruling in *U.S. v. Morrison*, for a cause of action to have arisen under this legislation, the victim of a gender motivated crime must have proven that the crime was indeed motivated by gender, and that the victim suffered a crime of violence.[41] The Act defined "an act of violence" to mean a felony involving actual, attempted, or threatened use of physical force, or a substantial risk that physical force would be used.[42] It included any act against property if the conduct presents a serious risk of physical injury to another.[43] The Act did not require proof of a prior criminal complaint, prosecution, or conviction.[44] The Act did not require that a victim report the crime to authori-

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39 *See id.* at (b)(4). *See also* United States v. Hayes, 135 F.3d 133, 136-38 (2d Cir. 1998).

40 *See, e.g.,* Julie Goldsheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999).

41 *See* 42 U.S.C. § 13981(c).

42 *See id.* at (d)(2).

43 *See id.*

44 *See id.* at (e)(2).

ties at the time the crime was committed.[45] As in other civil cases, the burden of proof was by a preponderance of the evidence, and not beyond a reasonable doubt as required in a criminal case.

The plaintiff must also have proven that the "crime of violence" was committed because of, or on the basis, of gender, and due, at least in part, to an animus based on the victim's gender.[46] Specifically, to have proven the case, the plaintiff must have established that the defendant committed "a crime of violence motivated by gender."[47] The Act did not specifically define "motivated by gender"; however, it did provide that the crime must be committed on the basis of gender, or at least responsive to an animus based on gender.[48] The Act was clearly not limited to domestic violence, and included other types of torts, including: the transmission of sexual diseases, stalking, and claims against law enforcement for failure to enforce valid orders of protection. The legislative history of the Act indicates that, as with other civil rights claims, a claim for violence based on gender motivation should be proven case by case, and that triers of fact should look at the totality of the circumstances.[49] Commentators have concluded that "on the basis of gender" may have included the sexual orientation of the victim.[50] The defendant did not need to have acted out of a sexual desire; liability existed when a defendant's conduct stems from hostility toward the plaintiff's gender.[51] The Act permitted suits by men against men, or women against women, as long as the crime of violence was motivated by gender. On a practical note, to prove that a crime is motivated by gender a practitioner could have looked to evidence of the perpetrator's language, lack of provocation, severity of the attack, any prior history of similar incidents involving the perpetrator, and the absence of other apparent motives to help prove the case.[52] The Act limited the victim's cause of action, prohibiting

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45 *See* Kuhn v. Kuhn, 1998 WL 673629 (N.D. Ill. 1998).

46 *See* 42 U.S.C. § 13981(d)(1).

47 *Id.*

48 *See id.* at (c).

49 *See* S. Rep. No. 102-97 (1991).

50 Robert Rothstein, *New Federal Civil Rights Remedy for Gender Motivated Violence*, Volume XIII, Number 5, Matrimonial Strategist, 1 (June 1995).

51 *See id.* at 5.

52 *See id.*

relief for random acts of violence unrelated to gender, or for acts that cannot be proven to be motivated by gender.[53]

III. Case Law Interpreting the Violence Against Women Act

To date, several circuit courts have decided the constitutionality of the VAWA with differing analyses.[54] The response to constitutional challenges range from upholding the constitutionality of the VAWA,[55] upholding the constitutionality of the VAWA with strong reservations,[56] and declaring the VAWA, at least the civil rights remedy provision, unconstitutional.[57] At least twelve other federal district courts have upheld the civil rights remedy provided in 42 U.S.C. § 13981. Due to its controversial remedy, and the split amoung the circuit courts, the United States Supreme Court heard arguments regarding the constitutionality of the VAWA on January 11, 2000 and held the civil rights remedy unconstitutional on May 15, 2000.

The first case to rule on the constitutionality of the VAWA was *Doe v. Doe*.[58] In *Doe*, a woman sued her husband under VAWA's civil remedy for physical and mental abuse, which including kicking her, throwing sharp objects at her, threatening to kill her, and destroying her personal property. In fact, Doe had endured gender based violence throughout the duration of her seventeen year marriage to her husband.

In ruling on the defendant's motion to dismiss, the court held that the Act was a valid exercise of Congress's Commerce

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53 *See* 42 U.S.C. § 13981(e)(1).

54 This article does not discuss the numerous decisions discussing the constitutionality of the criminal provisions of the Act. For a discussion of that issue, *See* David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252 (1998). *See also*, United States v. Gluzman, 154 F.3d 49 (2nd Cir. 1998); United States v. Wright, 128 F.3d 1274 (8th Cir. 1997), *cert. Denied*, 118 S. Ct. 1376 (1998); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997).

55 *See* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).

56 *See* Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997).

57 *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996), *rev'd on other grounds*, 132 F.3d 949 (4th Cir. 1997), *cert. Granted subnon*, United States v. Morrison, 120 S. Ct. 11 (1999). The Court heard oral argument in this case on Jan. 11, 2000.

58 929 F. Supp. 608 (1996).

Clause power. The opinion focuses on the congressional findings accumulated during the four year period of debates, including the pervasive nationwide impact of women's limited participation in the workplace due to such violence, and the great sums of money used to treat victims of domestic violence. The court, thus, concluded that there was a rational basis existed for Congress to determine that gender-based violence is a national problem that affects interstate commerce.[59]

Once the court concluded that a rational basis existed for Congress's determination, the court held that the scope of the statute was reasonably related to its end.[60] The court cited the congressional findings documenting the lack of protection at the state court level.[61] The court disagreed with the defendant's position that the VAWA encroached on a state's traditional police powers, and impermissibly federalized criminal family and state tort law.[62] The court found instead that the VAWA compliments state tort law, and serves the distinct function of providing a special societal judgment against crimes motivated by gender bias. The court concluded that the VAWA remedy was consistent with prior precedent related to other civil rights remedies which upheld the Act under the Commerce Clause.[63]

Although, the plaintiff briefed whether the VAWA was a constitutional exercise of Congressional power, under both the Commerce Clause and the Fourteenth Amendment, the court did not address the issue of whether the VAWA is constitutional under the Fourteenth Amendment, since it found the Act was constitutional under the Commerce Clause, despite the holdings of *United States v. Lopez*.[64]

Not long after the *Doe* court held the VAWA constitutional, a university student brought a lawsuit under the VAWA after two fellow students, both football players for the school's team, took turns raping her.[65] The plaintiff sued both the players individually, and the University for its failure to provide a safe environ-

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59 *See id.* at 611.

60 *See id.* at 616.

61 *See id.*

62 *See* Doe, 929 F. Supp. 608 at 616.

63 *See id.* at 617.

64 *See id.*

65 *See* Brzonkala, *supra* note 53.

ment, and its creation of a hostile environment. However, unlike the court *Doe*, the court in *Brzonkala v. Virginia Polytechnic & State University*, found that the plaintiff could not proceed with her suit because the VAWA was unconstitutional.

The *Brzonkala* court agreed on the underlying facts, and found that the "egregious" rape and statements by one of the rapists "outwardly evidence[d] gender animus."[66] Thus, the court concluded that Brzonkala had a claim under the VAWA.[67][68] However, the court then proceeded to examine the constitutionality of the VAWA. The analysis began with a consideration of the United States Supreme Court's decision in

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66 *Id* at 785. (The opinion recites some of the crucial facts as follows: Antonia Morrision, one of the rapists, announced in the school cafeteria that he liked to get girls drunk and fuck the shit out of them. Morrision was allowed to continue his education at the University and was charged with using abusive language).

67 *See id*. at 784-85. (The court found sufficient evidence of gender animus based upon Brzonkala's allegations that she had met Morrison and Crawford less than a half-hour before she was raped, that Morrison and Crawford participated in a gang rape of Brzonkala, Morrison having sex with her one time before and one time after Crawford had sex with her, that neither Morrison nor Crawford used a condom, that, after raping her the second time, Morrison stated to Brzonkala, "You better not have any fucking diseases," and finally that, within about five months after the rapes, Morrison announced publicly in the dormitory's dining hall and in the presence of at least one woman, "I like to get girls drunk and fuck the shit out of them." *Id*. at 784. The court declined to decide whether an allegation of rape alone would be sufficient to state a claim, stating that "[a]ll rapes are not the same, and the characteristics of the rapes here alleged, when compared to other rapes, indicate that gender animus more likely played a part in these rapes than in some other types of rape." *Id.*).

68 (Some courts have not found the plaintiff's case states a claim under the Act. For example, the U.S. District Court for the District of Rhode Island, in Palazzolo v. Ruggiano, 933 F Supp 45 (1998), held that even though a psychiatrist repeatedly touched a patient in a sexual manner, this did not give rise to a claim under this statute. The district court dismissed the claim explaining that it was because the psychiatrist never threatened his patient with physical force. The court explained that it was a felony under state law for a doctor to examine a patient for the purposes of sexual arousal. Despite the fact that the psychiatrist's contact was unwelcome and may have even been deplorable, it wasn't a "crime of violence" within the meaning of the Act because there was no use of force or coercion. The court went on to state that under these circumstances, to allow the plaintiff to sue would "trivialize VAWA and would make every unwelcome sexual touching a violent crime." *Id.* at 48).

United States v. Lopez.[69] Like *Lopez*, the court found that the activity regulated under the VAWA was "not commercial or even economic in nature."[70] The court criticized Congress for regulating activities with only a relatively trivial impact on commerce.[71] The court reasoned that gender motivated violent acts are a private issue and the nature of violence is not economic. Although, the court found that Congress' findings regarding domestic violence were vast, and may even have effected the national economy, the mere effect of the national economy does not equate to a substantial effect on interstate commerce.[72] The court stated that the two, national economy and interstate commerce, were not interchangable.[73] The court also found that upholding the VAWA would "tip the balance away from the states" and "would lead to regulation of traditional state matters, including family law."[74]

Because the court found the VAWA unconstitutional under the commerce clause, the court next addressed the viability of the act under the Fourteenth Amendment.[75] Again, and not surprisingly, the court found that Congress exceeded its power under the Fourteenth Amendemnt and that a nexus to state action was required for the Fourteenth Amendment to reach private conduct.[76]

The third district court to rule on the constitutionality of the VAWA was *Doe v. Hartz*.[77] In this case, a woman filed a VAWA claim against her parish priest for sexually assaulting her while in church. She alleged twelve state claims, and one federal claim under the VAWA. After discussing the *Doe* and *Brzonkala* opinions, the *Hartz* court found that domestic violence substantially affected interstate commerce, and, therefore, VAWA properly

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69 115 S. Ct. 1624 (1995).

70 Brzonkala, *supra* note 53, at 791.

71 *See id*. at 786.

72 *See* S. Rep. *supra* note 19. (During its hearings, Congress found that an estimated five to ten billion dollars per year was spent for the medical care, criminal prosecution and other costs related to domestic violence).

73 *See* Brzonkala, *supra* note 53, at 792.

74 *See id*.

75 *See id.* at 793-96.

76 *See id.* at 794.

77 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998).

regulated it.[78] The court answered some of the *Brzonkala* court's reasons for striking down the VAWA and, unlike the *Doe* court, thoroughly discussed the Supreme Court's *Lopez* analysis.

Specifically, the court found that *Lopez* permitted the regulation of noncommercial activity. The court addressed the concern raised in both *Lopez* and *Brzonkala* that even if something affects the national economy, it does not necessarily equate with affecting interstate commerce.[79] The *Hartz* court noted, however, that the Supreme Court "has long recognized that a substantial effect on the national economy validates the exercise of Commerce Clause power, even when the activity [being] regulated . . . is purely intrastate."[80] The court said that what *Lopez* rejected was the premise that a "chain of inferences" from the activity to the national economy and in turn to interstate commerce could suffice to establish a substantial effect on interstate commerce. Congress still may regulate an activity that affects the national economy when Congress makes findings showing "a substantial direct effect on interstate commerce."[81]

Thus, the *Hartz* court cited the same congressional findings cited by the Doe court, and found that Congress had a rational basis for enacting the VAWA.[82] Finally, the court found that the means—providing a civil remedy for gender-motivated violence—were reasonably adapted to the end of preventing this violence.

As stated above, due to the split among the circuit courts, the United States Supreme Court granted certiorari in the Fourth Circuit's *Brzonkala* decision and affirmed the lower court's analysis that Congress lacked authority to enact the civil rights provision of the VAWA under either section eight of the Commerce Clause or section 5 of the 14th amendment. The Supreme Court, in an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy and Thomas, relied heavily upon its prior decisions in *United States v. Lopez*,[83] *United States*

78 *See id.* at 1409-13.

79 *See id.*

80 *Id.* at 1419.

81 *Id.*

82 *See* Doe, 970 F. Supp. 1375 at 1421-23.

83 514 U.S. 549 (1995).

v. Harris,[84] and the *Civil Rights Cases*,[85] in concluding, as the Fourth Circuit did, that Congress lacked the authority to enact the VAWA's civil remedy.

The Court first undertook the commerce clause analysis. In doing so, the Court reviewed its recent decision in *Lopez*, as that case also fell within the category of Commerce Clause regulation that seeks to regulate activity that substantially affects interstate commerce. The Court conducted a very detailed examination of the Commerce Clause's history and concluded that although Congress' authority is very broad in regulating conduct and transactions under the Commerce Clause, the authority is not without boundaries.[86]

In striking down the civil rights remedy of VAWA, the Court analogized the VAWA to the Gun-free School Zones Act of 1990. First, the Court found that gender motivated crimes were not economic acts and the Court has traditionally only upheld Congress' regulation of intrastate activity when the activity is economic in nature. Second, like the Gun-free School Zones Act of 1990, the civil rights remedy contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce. Third, the Court found that although the VAWA is supported by numerous findings regarding the impact that gender-motivated violence has on victims and their families (the Gun-free School Zones Act of 1990 contained no such congressional findings regarding the effects upon interstate commmerce and the possession of a gun in a school zone), the Court found that just "'because Congress concludes that an activity affects interstate commerce does not necessarily make it so.'"[87] The Court stated that if it were to find the VAWA constitutional because Congress's findings indicate that gender-motivated crimes affect intrastate commerce, Congress would be able to "regulate any crime as long as the nation-

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84 106 U.S. 629 (1883).

85 109 U.S. 3 (1883).

86 United States v. Lopez, 514 U.S. at 557. In *Lopez* the Court held that Congress lacked authority under the Commerce Clause to enact the Gun-free School Zones Act of 1990, which made it a federal crime to possess a firearm in a school zone.

87 *Lopez*, 514 U.S. at 557, n. 2 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981)).

wide, aggregate impact of that crime has substantial effects on employment, production, transit or consumption"[88] and such a conclusion would severely undermine the boundaries between federal and state authority. Finally, despite the preclusion in the VAWA from using the Act in the family law context, the Court stated that to allow Congress to regulate commerce in the way envisioned by the enactment of the VAWA is to open the door to Congressional regulation of other areas traditionally reserved for the states, including marriage, divorce and child-rearing.

After rejecting the VAWA's civil rights remedy under the Commerce Clause analysis, the Court addressed whether Congress had the authority to enact the remedy under the 14th amendment because gender-motivated crime either deprived persons from life, liberty or property without due process of law, or denied person equal preotection of the law as Congressional findings indicate that there is a "pervasive bias in various state justice systems against victims of gender-motivated violence."[89] However, the Court found that the fourteenth amendment, by its very terms prohibits only state action and does not allow punishment of private conduct, no matter how discriminatory or wrongful.[90] The Court held that the civil rights remedy is not "corrective in is character" and does not "redress the operation" of state systems' alleged bias against victims of gender-motivated crime.[91] The Court specifically looked to the consequences visited upon the state actors involved in the case before it: there were none. The Court concluded that the VAWA's civil rights remedy was unlike any that the court has upheld as it was not directed to state offficials or other state actors.

The Supreme Court instead suggested that because the Constitution requires a distinction between what is truly national and what is truly local and because the fourteenth amendment does not prohibit private conduct, no matter how egregious, the states should regulate and punish gender motivated violence. In fact, the court found that "no civilized system of justice could fail to provide [Brzonkala] a remedy for the conduct" visited upon

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88 United States v. Morrison, 120 S. Ct. 1740, 1752 (2000).

89 *Id.* at 1755.

90 *Id.* at 1757.

91 *Id.*

her.[92] The Court stated, "indeed, we can think of no better example of the police power, . . . than the suppression of violent crime and the vindication of its victims."[93]

IV. Analysis of Laws Similar to the VAWA's Impact on Domestic Torts

Because the Supreme Court suggested that states regulate the type of conduct prohibited by the VAWA and in fact, find a remedy for victims of gender motivated crime, state legislatures may be inclined to enact provisions similar to the civil rights remedy of VAWA.[94] For this reason, a review of the procedural advantages provided by the remedy is insightful.

A. *The Domestic Tort*

If a state enacts legislation providing remedies to the victims of violent crime motivated by gender, like all other domestic tort cases, the viability of the claim ultimately depends upon whether the judgment is, in fact, collectable. Many defendants are judgment proof, and most homeowners' insurance policies have intentional act, family member, or other exclusions that preclude recovery. Statistics and research shows that gender based violence is prevalent in all economic classes of society. If the defendant has "deep pockets", litigation can be practical, often resulting in large verdicts.[95]

Prior to filing, a practioner should analyze the following issues:

1. Who is the proper defendant? Because there were no interspousal or parental tort immunities connected with the VAWA legislation, the category of defendants is not limited. However, governmental

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92 *Id.*

93 *Id.*

94 In fact, such an enactment may be the only way for victims to be vindicated as some states now are slow to address the needs of domestic violence victims. For example, in some states, spouses are prevented from bringing tort claims in state court because of interspousal immunity doctrines, the statute of limitations and the prohibition of filing a domestic tort outside of dissolution litigation.

95 *See* Curtis v. Firth, 850 P2d 749 (Idaho 1993)(upholding a $1 million verdict for a victim of domestic violence). Hap Hazard, *Abused Woman is Awarded $10.2 Million*, Buffalo News, March 24, 1995, at 5.

agencies or officials and corporate entities, as in a "regular" domestic tort are possible defendants as well although their liability for punitive damages may be uncertain.

2. What kind of relief is available? Damages could be substantially greater under a state's civil rights remedy as the VAWA provided for damages not otherwise available in personal injury actions. A plaintiff could have requested compensatory damages, including loss of wages, medical expenses and pain and suffering. Punitive damages may also be available against the individual perpetrator. A plaintiff could also seek injunctive relief, including an order of protection and no contact order.[96] Finally, attorneys fees may be available to a plaintiff suing under a civil rights statute.
3. What is the statute of limitations period? The VAWA did not provide for its own statute of limitations. In the absence of a specific statutory limitation period, courts usually adopt the limitations of the state where the violation occurred that applies to the most nearly analogous state law claim.[97] In civil rights actions, this is normally the general tort statute of limitations. There is some controversy over which limitation period should be applied. Some argue that the statute of limitations for felony criminal offenses is most nearly analogous to a VAWA claim. Other commentators argue that the intent of the VAWA was to provide a uniform remedy and that in the absence of an express statutory provision, the federal four year catch-all statute of limitations should apply.[98] In any event, there may be a longer statute of limitations under a state civil rights statute than a personal injury action for assault and battery or other intentional or violent torts. States may address the VAWA's failure to set a specific statute of limitations in their own legiaslation.

B. *Effect of Criminal Proceedings*

Of course, under the doctrine of collateral estoppel, once a court makes a decision regarding a certain set of facts, that decision may preclude the relitigation of the issue in a different cause of action involving either party in the first case. Thus, victims of gender-motivated crime need not prove the convictions of the crime in a civil rights case. The same theory applies to a defendant's guilty pleas. Acquittals, on the other hand, should not be given preclusive effect as the victim of the gender-motivated crime was not a party in the criminal action but only a witness for the prosecution. Rather, because the standard of proof is differ-

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96 *See* 42 U.S.C. § 13981.

97 *See* Wilson v. Garcia, 105 S. Ct. 1938, 1941-43 (1985).

98 *See* Goldscheid & Kraham, *supra* note 12, at 508.

ent in a civil action than in the criminal action, even if a defendant is acquitted in a prior criminal action, the fact of the acquittal should not bar a subsequent civil rights action and in fact and should not even be mentioned in the case.

C. *Evidence Not Otherwise Generally Accepted*

One advantage of the VAWA was a plaintiff's ability to file in federal court, which has rules of evidence preferable to a plaintiff's case. States, when enacting their civil rights provisions against gender-motivated violence, should be sure to include the specific rules of evidence outlined in the VAWA. For example, under the VAWA bill Congress dramatically narrowed the circumstances under which a defendant in federal court may introduce evidence of plaintiff's sexual history, including sexual practices with people other than the alleged perpetrator. Under new Federal Rule of Evidence 412, evidence of plaintiff's sexual disposition or history is generally not admissible, while most states maintain evidentiary rules that allow questions about a victim's sexual history.[99] Specifically, in most civil cases there is no bar to the use of sexual history and other private information of a victim. A person who files a civil case claiming physical or emotional damages usually is deemed to have waived the right to confidentiality of medical and other records that may have a bearing on her physical and emotional condition. Most states have broad discovery rules inasmuch as discovery can be conducted regarding any relevant information or any information that may lead to potentially admissible evidence, which is broader than the basis for admissibility in court. As a result, in a state civil domestic tort, evidence of stressors or trauma are subject to discovery, and sexual and personal history are considered relevant for discovery purposes. Thus, states must include a provision regarding the protection of privacy of a victim of a crime motivated by gender. Specifically, a state's version of the VAWA should include a rule of evidence prohibiting the introduction of a victims's sexual history in addition to prohibiting a defendant from discovering private information about the victim.

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[99] *See, e.g.*, Maria Teresa Garcia, *The Amended Federal Rule of Evidence 412 Provides Some Relief to Victims of Harassment*, 19 WOMEN'S RTS. L. REP. 267 (1998).

Second, because the federal statute requires plaintiff to prove that the alleged violent act was motivated by gender, a victim may introduce evidence of the defendant's prior bad acts which is generally inadmissible in most state courts.[100] Thus, a state's version of VAWA should also include a provision which allows a plaintiff to introduce a defendant's prior bad acts when pursuing a cause of action under the statute.

D. *Damages*

Damages are much broader under the VAWA in federal court versus state court. A prevailing plaintiff may be awarded punitive damages and attorneys' fees, as well as compensatory damages, which are usually precluded in most state jurisdictions.[101] In fact, most states severely restrict, either by statute or through case law, the availability of punitive damages in a tort action, and while a victim must still prove her case, the VAWA legislation allows for the recovery of punitive damages. Thus, states should include new definitions of punitive damages in their civil rights statutes to allow punitive damages in a domestic violence tort action. Also, states should provide for the recovery of attorneys fees when a plaintiff sues under the legislation.

V. Conclusion

Attorneys who handle family law, civil rights, and personal injury cases must be aware of the benefits of filing claims or including counts under the VAWA despite its being found unconstitutional by the Supreme Court, as many states may enact similar legislation with similar provisions. Because there were procedural, evidentiary and tactical advantages in suing a defendant under the VAWA as well as the availability of damages substantially greater under the VAWA, progressive states or those who do not want to appear to maintain an uncivilized system of justice as Chief Justice Rehnquist opined, may soon pass "VAWA" like legislation as the Supreme Court suggested in order to provide a meaningful remedy for gender-motivated victims.

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100 *See generally*, 404(b), Ariz.R.Crim.Pro.

101 *See* 42 U.S.C. § 13981.