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Julie Goldscheid
CUNY School of Law

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The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out

JULIE GOLDSCHEID*

I. Introduction

The 1994 Violence Against Women Act (VAWA) was historic in many respects. Although federal legislation previously had addressed violence against women in a smattering of contexts, VAWA represented the first federal attempt comprehensively to address the myriad social and legal problems faced by victims of domestic and sexual violence. Among its numerous provisions, VAWA created new federal felonies; required

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* Associate professor, CUNY School of Law. As senior staff attorney at Legal Momentum (formerly known as NOW Legal Defense and Education Fund), the author litigated the United States v. Morrison case in the district, circuit and Supreme courts, and has been involved in several of the legislative initiatives described in this article. Many thanks to Beryl Blaustone for her comments on a previous draft, to Elizabeth Bruise, Jackie DeVore, and Shira Galinsky, for their most helpful research assistance, and to Vicki Konkowski for her administrative support.


states to recognize protective orders issued by other jurisdictions;\(^4\) and provided means by which battered immigrant women could obtain immigration status without having to rely on their batterers.\(^5\) It also authorized federal funding for an array of programs that would support services\(^6\) and improve law enforcement responses to domestic violence and sexual assault survivors,\(^7\) and mandated research on violence against women and reports on issues such as campus sexual assault and the use of battered women's syndrome testimony.\(^8\)

Perhaps the most controversial provision in VAWA was its civil rights remedy. That new law was modeled after other civil rights legislation and authorized a victim of gender-motivated violence to bring a civil cause of action against the perpetrator.\(^9\) As such, it offered a powerful remedy for victims of gender-based violence, such as domestic violence and sexual assault. The goals of the VAWA civil rights remedy were manifold and complex. They can be thought of as falling into two broad categories. The first was practical. The civil rights remedy sought to provide a cause of action that would be useful to victims of gender-motivated crime who


\(^7\) See, e.g., 42 U.S.C. § 3796gg (2004) (authorizing grants to assist states, state and local courts and governments to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women); 42 U.S.C. § 3796hh (2004) (authorizing grants to encourage states, local governments and courts to treat domestic violence as a serious violation of criminal law).


otherwise might lack an adequate remedy under then-existing laws. For example, family law attorneys representing battered women brought claims under the new law as a means of obtaining compensation from the clients’ abusers. The second goal was aspirational. The law sought to transform the terms of debate in which violence against women was framed, to bring public attention to its severity and impact, and to counter the historic subordination violence against women both reflects and perpetuates.

The Supreme Court struck the law as an unconstitutional exercise of Congressional authority in United States v. Morrison. That decision was heavily criticized by civil rights advocates and others as a setback to women’s rights and as one of a line of cases in which the Supreme Court set newly restrictive limits on Congress’ power. The loss of the federal civil rights remedy was significant and leaves many without recourse. Nevertheless, the Morrison decision by no means eliminates legal claims asserting that violence against women violates victims’ civil rights. Moreover, the litigation and associated public debate surrounding the civil rights remedy advanced public awareness of violence against women as a problem of discrimination. The Morrison decision has not ended that transformative process; nor has it curtailed its associated legal and policy advances.

Both pre-existing and newly created legal remedies continue to provide redress for violence against women as a civil rights violation. Federal and state laws remain vital vehicles for advancing the two broadly conceived

12. A fuller discussion of the ramifications of the loss of the civil rights remedy is beyond the scope of this article. This article will focus instead on the remedies that remain available and those that have emerged following the Morrison decision.
14. Although both men and women can be victims of gender-based violence, this article will refer to the problem as one of violence against women, in recognition that most gender-based violence is committed by men against women. See, e.g., CALLIE MARIE RENNISTON, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001, (NCJ 197838 2003), (reporting, inter alia, that violence by an intimate partner accounted for twenty percent of all nonfatal violent crime experienced by women in 2001 and three percent of the nonfatal violent crime experienced by men that same year).
goals of VAWA: providing civil redress for victims of gender-based violence and transforming public dialog about the ways violence against women violates women’s civil rights. Although the Morrison decision struck down the 1994 law, it did not bar alternate approaches to addressing those still-crucial goals.

This article will review and analyze legal theories and strategies that remain available to those seeking redress for the civil rights violations violence against women produces. It will start by briefly summarizing the civil rights remedy’s history, including its use during the years in which it was in effect. The article will then review the range of laws still available to victims of domestic violence and sexual assault in seeking civil redress for the civil rights violations that result. This discussion will include new laws and legislative proposals modeled after the VAWA civil rights remedy enacted by states and localities; the pre-VAWA state statutes that authorize civil recovery for bias-motivated violence based on sex; and the reach of both traditional and newly enacted legislation prohibiting sex discrimination to address discriminatory acts and practices that interfere with victims’ civil rights and prevent their economic independence and full participation.

II. The VAWA Civil Rights Remedy’s Abbreviated and Controversial History

The VAWA civil rights remedy sought explicitly to connect violence against women with the longstanding manifestations of sex inequality that perpetuate women’s second-class citizenship. It has been described as “the most ambitious and most visible attempt ever made in this country to apply the discrimination model to violence against women,”15 and as an “historic” step towards equality for women.16 By situating women’s experience of violence within the category of sex discrimination, the civil rights remedy reframed the problem as a public, societal, and political concern rather than a private matter of interpersonal dynamics or pathology.17

The law enabled claimants to identify and seek redress for domestic and sexual violence as problems of sex inequality.18 This had significance

18. Id. at 17; MacKinnon, Disputing Male Sovereignty, supra note 11, at 138. In this sense, the VAWA civil rights remedy builds on the evolution of sexual harassment law. Sexual harassment at work historically was viewed as a private tort. Early claims were rejected as falling outside the scope of conduct for which employers should be responsible and about which federal courts would exercise jurisdiction. The recognition of sexual harassment instead as a
both in terms of the types of evidence that could be offered in a particular case and in terms of the claims’ anticipated broader social impact. It was modeled after federal civil rights laws, which historically have been instrumental in redressing systematic deprivations of equality and citizenship. The law sought to reinforce women’s status as equal citizens and to counter the inequality that violence against women enforces.

During the debates preceding the civil rights remedy’s enactment, the legislation was subject to criticism from a range of perspectives. Prominent opponents included Justice Rehnquist, who, in his capacity as chair of the Judicial Conference, objected to the law as an over extension of Congress’s legislative power that could open the door to federal jurisdiction over broader areas of criminal and family law traditionally reserved to the states. Others, such as the ACLU, objected that the law was too vague, that it would dilute existing civil rights remedies, and that the burden would fall most heavily on men of color. Still others questioned whether the poten-

problem of discrimination reframed the issue as a systemic and widespread problem and has resulted in a transformation of workplace policies that address the issue. See generally, e.g., CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (arguing that sexual harassment is a form of sex discrimination); Katherine M. Franke, What’s Wrong with Sexual Harassment?, 49 STANFORD L. REV. 691, 698-729 (1997) (tracing evolution of sexual harassment law); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183 (1989) (discussing sexual harassment as an example of enduring sex discrimination in the workplace).

19. See infra n. 32, and accompanying text.
20. See, e.g., Gil Freeman, April 1991, S. Hrg. 102-369, at 125 (recounting during hearing on the civil rights remedy the ways that a civil rights claim can garner public attention and lead to change in ways that tort law claims cannot). As Reva Siegel observed in analyzing the civil rights remedy’s reframing of intimate violence as a civil rights violation: “The very struggle over the interpretation of VAWA’s civil rights remedy will, of necessity, modernize gender status discourse. . . . Considered in larger historical perspective, controversy over the civil rights remedy contained in the Violence Against Women Act has set in motion a legal regime that will restate sexual assault law in the gender mores of American society at the dawn of the twenty-first century.” Reva B. Siegel, The Rule of Love: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2206 (1996).
22. Id.
tial the law represented could be realized by women who might lack access to information about the law or to the legal system itself. 26

The civil rights remedy’s statutory formulation was modified during the four years of debate that preceded its enactment. 27 As enacted, the law contained two basic elements of proof: a plaintiff would have to establish that: (1) she was the victim of a “crime of violence” of sufficient severity to meet the statutory criteria; 28 and (2) would have to establish that the act was “gender-motivated.” 29 Under that second prong, a plaintiff would have to prove that the act 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.” 30 Some advocates and scholars feared that these statutory requirements, particularly the definitional requirement that “animus” be proved as part of the “gender-motivation” element, might bar many from the relief the law was intended to provide. 31

Notwithstanding these concerns, as a practical matter, the law held promise for several reasons. The civil rights remedy allowed plaintiffs to describe the harm they suffered more accurately than they would under traditional tort laws by making circumstantial evidence of discrimination directly relevant. 32 It facilitated access to representation by authorizing fee shifting for successful plaintiffs, 33 and it contained a number of other proce-

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27. For a recounting of the legislative history and concerns raised over the narrowing of the statutory formulation, see, e.g., Nourse, supra note 24; Goldfarb, supra note 17 at 45-57.
28. 42 U.S.C. § 13981(d)(2) (1994) (subsequently repealed). The statute contained a two-part definition of the term “crime of violence.” The plaintiff first would have to establish that the “act or series of acts . . . would constitute a felony against the person” or “against property if the conduct presents a serious risk of physical injury to another,” 42 U.S.C. § 13981(d)(2)(A); and that the act came within the meaning of 18 U.S.C. § 16 (1994), which is a federal statute defining “crime of violence.”
30. Id.
31. See, e.g., Nourse, supra note 24, at 29 & n.157 (1996); Goldfarb, supra note 17, at 45-57; accord Goldfarb, supra note 13, at 260-69 (suggesting that the narrowly defined statutory terms may have unduly limited the law’s effectiveness).
32. 42 U.S.C. § 13981(c) (1994) (requiring proof of gender motivation). Accordingly, evidence of a defendants’ misogynist epithets or other circumstantial evidence of gender-bias would be relevant to a civil rights remedy claim, but might not be relevant to a claim for battery or assault. For a fuller discussion of the circumstantial evidence that could be probative in VAWA civil rights remedy cases, see, e.g., Julie Goldscheid, Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement, 22 Harv. Women’s L.J. 123 (1999).
33. 42 U.S.C. § 1988 (1994) (amended by VAWA to include the civil rights remedy as one of the statutes under which prevailing parties could recover attorneys’ fees).
dural and strategic advantages.\textsuperscript{34} It provided a cause of action for women where criminal prosecutions or state law tort claims may have been barred due to interspousal immunity doctrines.\textsuperscript{35} It provided a remedy to those whose state law tort claims would have been barred by short statutes of limitations that did not take into account the difficulty of commencing a civil claim in the aftermath of domestic or sexual violence.\textsuperscript{36} It also responded to the inadequacies of the criminal justice system by providing a remedy that victims, not prosecutors, would control. Perhaps most important, it allowed a civil rights lawsuit against individuals in circumstances not otherwise covered by then-existing civil rights laws.\textsuperscript{37} The law held particular promise for victims of domestic and sexual violence who now had an addi-

\textsuperscript{34} For example, the civil rights remedy explicitly authorized recovery under the civil "preponderance of the evidence" rather than the more onerous "beyond a reasonable doubt" standard that governs criminal matters. See 42 U.S.C. § 13981(e)(1) (1994). Federal court offered a favored venue, particularly for plaintiffs whose perpetrators were members of or familiar with, local law enforcement and judiciary officials. See Goldfarb, supra note 13, at 260; Goldfarb, supra note 17, at 539; Julie Goldscheid & Susan Krahm, The Civil Rights Remedy of the Violence Against Women Act, 29 CLEARINGHOUSE REV. 505, 521 (1995) (recounting Congress's preference for the federal forum, and explaining that federal court may be preferable for cases in which local bias or familiarity between defendants and state court officials may prove problematic). In addition, a federal civil action would be covered by the newly enacted amendment to the federal rape shield law, which VAWA extended to cover civil as well as criminal proceedings. See Fed. R. Evid. 412 (covering civil and criminal cases, as amended by VAWA, Pub. L. 103-322, § 40141). That amendment responded to Congressional findings that state laws limiting rape shield provisions to criminal prosecutions exposed women bringing tort actions based on domestic or sexual violence to intrusive questioning that could deter them from bringing suit or impact the outcome. S. Rep. No. 102-97, at 46 (1991).

\textsuperscript{35} See 42 U.S.C. § 13981(d)(2)(A) (1994) (authorizing cause of action regardless of whether the acts actually resulted in criminal charges, prosecution or conviction). As Senate Reports preceding VAWA's enactment recounted, as of 1990, seven states did not permit prosecutions of marital rape; 26 others allowed marital rape prosecutions only under limited circumstances, such as where there was evidence of physical injury; and numerous other states limited prosecutions of cohabitants or dating companions. S. Rep. No. 103-38 (1993), at 42; S. Rep. No. 102-97 (1991), at 45 & nn.49-50, 54; S. Rep. No. 101-545 (1990), at 41 n.78. Ten states still formally barred women from bringing tort actions against their abusive husbands. Women and Violence: Hearing Before the Senate Comm. on the Judiciary, 101st Cong. 64 (1990) (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund).

\textsuperscript{36} The VAWA civil rights remedy provided a longer statute of limitations, see 28 U.S.C. § 1658 (2004) (four year statute of limitations), than most state civil actions, which generally provide a two to three-year limitations period. See THOMAS M. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 53 (2001).

tional remedy, with fewer barriers, through which they could seek redress from their abusers.

As the first VAWA civil rights claims were brought, defendants immedi-
ately challenged the law as an unconstitutional exercise of Congress’s legisla-
tive power. Accordingly, instead of focusing on issues of statutory inter-
pretation, the initial litigation centered on the scope of Congress’s power to legislate under the commerce clause and the enforcement clause of the fourteenth amendment, the two primary constitutional bases Congress invoked in enacting the law. As the first cases made their way through the courts, nearly all of the lower courts to address the issue upheld the law’s constitutionality. One of the few courts that found the law unconstitutional, however, was the District Court for the Western District of Virginia. In Brzonkala v. Virginia Polytechnic, a college freshman alleged she was sexually assaulted by several student members of the school’s football team in a college dorm. Ms. Brzonkala’s civil rights remedy claim made its way to the Supreme Court, where it was litigated under the name United States v. Morrison. The Court struck the civil rights remedy as an unconstitutional exercise of Congress’s power under both the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment.

While it was still in effect, the civil rights remedy produced a body of decisions under which judges interpreted the new statutory terms. Despite concern that the statutory language including proof of “animus” as part of the formulation of “gender-motivation” would bar relief, most courts recognized that violent crimes such as domestic violence and sexual assault

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41. 529 U.S. 598 (2000). Justices Souter and Breyer, in separate dissents, contested the majority’s Commerce Clause ruling. Id. at 628 (Souter, J., dissenting); id. at 655 (Souter, J., dis-
senting). Justice Breyer additionally questioned the Court’s Fourteenth Amendment holding. Id. at 664. See supra note 11, for a listing of some of the commentary criticizing the decision.
were gender-motivated. The statutory requirement that the act be a "crime of violence," as the statute defined that term, proved to be somewhat more problematic for plaintiffs, although even that statutory formulation did not bar many claims. Although it is impossible to predict what contours the caselaw would have taken had the law been upheld, the cases adjudicated during the civil rights remedy's short life have created a foundation that can be drawn on in gender-based civil rights claims under alternative statutory schemes.

III. State and Local Legislative Responses to the Morrison Decision

In the course of striking the law on federalism grounds, the Morrison majority declared that the Court could "think of no better example of the police power, which the Founders . . . reposed in the States, than the suppression of violent crime and vindication of its victims." With that reasoning, the Court essentially invited states and localities to enact comparable civil rights legislation. California, Illinois, New York City, and Westchester followed up on this invitation and enacted civil rights remedies that were modeled after the now-defunct federal law. Other states have introduced legislative proposals that sought to fill the gap left by the Morrison opinion but have not yet been enacted. Other than restricting plaintiffs to a state

42. Julie Goldscheid & Lisa E. Kaufman, Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory, 6 Mich. J. Race & L. 265, 273-83 (2001) (recounting cases interpreting "gender motivation" requirement); cf. J. Rebekka S. Bonner, Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation, 111 Yale L.J. 1417 (2002) (recommending framework for analyzing gender-motivation under new civil rights remedies). Most courts evaluating whether a claim contained evidence of gender motivation relied on circumstantial evidence such as gender-based epithets, patterns of behavior, statements reflecting gender-based bias, to reach their conclusions. See Goldscheid, supra note 32. Statements in the legislative history, such as those by Senator Biden that the law would not cover "random muggings or beatings in the home or elsewhere" or "everyday domestic violence" as opposed to "discriminatory domestic violence," led attorneys bringing VAWA civil rights remedy claims to ensure that claims contained that type of circumstantial evidence; see Goldfarb, supra note 13, at 270 (citing legislative history).


44. Morrison, 529 U.S. at 618.


versus federal forum, these laws provide virtually identical substantive relief, with similar elements of proof, to that which was provided for in the now-unavailable federal law. At least as a theoretical matter, these laws should serve as a rough substitute for the VAWA civil rights remedy in the jurisdictions in which they have been enacted.

In addition to these state reforms, members of Congress have introduced post-Morrison civil rights remedy legislation. These proposals would retain the essential civil cause of action but would amend the language of the 1994 law to avoid the aspects the Supreme Court found constitutionally infirm. To date, however, none of the federal proposals have been enacted.

The state statutes enacted after the Morrison decision have received little public attention and do not yet appear to be widely used. One can speculate about the reasons for the laws’ limited use, although it is difficult to determine whether any underutilization reflects a lack of general awareness about the law’s availability, some structural limitation of an approach that provides a private cause of action for a civil rights violation, or the relative superiority of a federal forum. To date, only one reported decision involves a survivor’s attempt to use any of these new laws. In Cadiz-Jones v. Zambetti, a domestic violence survivor brought a claim against her former fiancé based on allegations of his ongoing physical abuse and violence. She brought suit under New York City’s then-recently enacted law after her VAWA civil rights remedy claim in federal court was dismissed in response to the Morrison decision. The court rejected the defendant’s arguments that the local law would not apply retroactively, and that the new city law was preempted by state legislation governing statutes of limitations for

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49. See infra notes [77-82] and accompanying text for a discussion of possible limitations of the VAWA civil rights remedy’s reach.
intentional torts. It reviewed the law's legislative history and concluded that the New York City Council had enacted the law to fill the void created when the United States Supreme Court struck the VAWA civil rights remedy, and that the City Council sought to restore a cause of action for victims of gender-motivated violence. According to the court, it could give effect to the legislative purpose driving the law only by allowing the plaintiff's claim to proceed, since her VAWA civil rights claim was struck and dismissed before a federal court could adjudicate her claims. Although the decision currently stands alone, it demonstrates that these state laws hold potential for survivors seeking civil recovery from their abusers.

IV. State Civil Rights Remedies for Gender-motivated Violence

Although the VAWA civil rights remedy was the first express federal legislative acknowledgment that violence against women violates women's rights, many state and local laws provided similar relief even before VAWA was enacted. Many states had, and continue to have, laws on the books that provide civil as well as criminal remedies for bias-motivated violence. Since many of these laws are part of the state's bias crime statutes, they will be referenced here as the "state gender-bias crime" laws. Currently, eleven states and the District of Columbia include "sex" or "gender" as one of the categories that can give rise to civil recovery under those state bias crime frameworks.

Not unlike the state civil rights laws enacted after Morrison, these laws are neither widely used nor widely publicized. Their relative lack of use may similarly reflect the public's general lack of awareness about the laws' existence and the redress they authorize. Although these laws authorize suit in a state rather than a federal forum, and although they offer only a patchwork of protection nationwide, as a substantive matter, these laws provide

51. Id.
52. Id.
53. Id.
56. See supra note 49; infra notes 77-82 and accompanying text.
relief that is similar to, if not broader than, that provided by either the VAWA civil rights remedy or the state civil rights statutes that were modeled after the VAWA provision.57

Several substantive and procedural comparisons highlight the state laws’ potential reach. For example, in contrast to the VAWA civil rights remedy, which contained a relatively complex formulation for proving gender-motivation,58 many of the state statutes allow recovery based on the more simple proof that the individual suffered an injury based on her actual or perceived sex or gender.59 Most of the state statutes authorize a broad range of remedies like those Congress authorized under the VAWA civil rights remedy. For example, most of these state laws allow plaintiffs to recover damages for emotional distress as well as punitive damages.60 Most also expressly authorize injunctive relief in addition to money damages.61

57. Id. Notably, these statutes have tended to be overlooked by those discussing civil rights remedies available to victims of gender-based violence in the aftermath of the Morrison decision. See, e.g., Bonner, Reconceptualizing VAWA’s “Animus,” supra note 42 (discussing only legislation modeled after the VAWA civil rights statute in discussing post-Morrison civil rights remedies); Sarah F. Russell, Covering Women and Violence: Media’s Treatment of VAWA’s Civil Rights Remedy, 9 Mich. J. Gender & L. 327 (2003) (surveying media coverage of VAWA civil rights remedy and state legislation enacted after Morrison).

58. 42 U.S.C. § 13981(d)(1) (requiring proof that the act be committed “because of gender or on the basis of gender, and due, in part, to an animus based on gender”). See supra note 29.


Virtually all of the state statutes allow successful plaintiffs to recover attorneys’ fees. Many state laws are governed by statutes of limitations that are longer than what a victim would be bound by in a traditional tort action. Some mirror the VAWA civil rights remedy in specifying that the burden of proof is a preponderance of the evidence. Given this comparable if not broader coverage, to the extent that the VAWA civil rights remedy held both practical and transformational potential, these analogous state laws should hold similar, if not identical, promise.

What is remarkable about the body of decisions under these laws, beyond its small size, is that none of the reported decisions analyze the merits of the claim of gender-motivated harm. The majority of decisions involve allegations of sexual harassment at work in which the threshold question concerning the state civil rights statute was whether that law authorized recovery that was duplicative of recovery available under other state laws. Courts upheld claims under the state civil rights statute where the alleged wrongdoing was not covered by another state law, such as the state statute prohibiting employment discrimination based on sex. Yet


64. See supra note 36, and accompanying text. Many of the state civil bias crime laws are governed by longer statutes of limitations than what would apply under traditional tort law. See, e.g., 720 ILL. COMP. STAT. ANN. 82/25 (West 2004) (ten-year statute of limitations); MINN. STAT. ANN. § 611A.79(3)(b) (2004) (six-year statute of limitations); NEB. REV. STAT. § 28-113(2) (2004) (four-year statute of limitations); N.Y.C. ADMIN. CODE § 8-905(a) (2004); but see, e.g., IOWA CODE ANN. § 729A.5 (West 2004) (two-year statute of limitations).

65. See, e.g., MINN. STAT. ANN. § 611A.79(3) (2004); NEB. REV. STAT. § 28-113(3) (2004).

66. Compare, e.g., O’Connell v. Chasdi, 511 N.E.2d 349 (Mass. 1987) (upholding civil rights claim because Massachusetts employment discrimination law didn’t then cover the small employer defendant) with Bergeson v. Franchi, 783 F. Supp. 713 (D. Mass. 1992) (barring claim based on sexual assault and harassment at work because it was covered by state antidiscrimination law); Doe v. Purity Supreme, 664 N.E.2d 815 (Mass. 1996) (barring claim under Massachusetts civil rights law for rape and sexual assault by co-worker because it was covered by state antidiscrimination law); Guzman v. Lowenger, 664 N.E.2d 820 (Mass. 1996) (barring claim based on sexual assault and harassment at work because it was covered by state antidiscrimination law); Brimage v. City of Boston, 2001 Mass. Super. LEXIS 154 (Suffolk Cty. 2001) (barring claim based on sexual assault and rape by supervisor because it was covered by state antidiscrimination law); Dahms v. Cognex Corp., 2000 Mass. Super. LEXIS 575 (Middlesex Cty. 2000) (barring claim based on sexual assault and rape by supervisor because it was covered by state antidiscrimination law); Kennedy v. Duggan, No. 94-2837, 2000 Mass. Super. LEXIS 583 (Middlesex Cty. 2000) (same); and Damato v. Jack Phelan Chevrolet Geo, Inc., 927 F. Supp. 283 (N.D. Ill. 1996) (barring claim under the Illinois hate crime law for employment sexual harassment and assault based on legislative intent to prevent duplicative claims.}

even those decisions upholding claims have focused on procedural issues, rather than analyzing the merits of the claims.68

Cases outside of the sexual harassment context also have hinged on procedural rather than substantive analyses. For example, a case arising out of domestic violence that included a claim under the VAWA civil rights remedy contained, and upheld, a claim under the state statute prohibiting malicious harassment "motivated by the perpetrator's perception of the victim's gender."69 The court rejected an argument that the claim was time-barred and upheld the state civil rights claim without addressing its merits.70 A claim that a male National Guard member sexually assaulted a fellow (male) guard member during a hazing ritual was upheld against an immunity challenge, and the plaintiff's claim for attorneys' fees was sustained.71 Similarly, a tenant who was sexually harassed by her apartment manager was able to proceed with her claim under the California civil statute authorizing damage relief from gender-motivated violence based on the court's determination that respondent superior liability could apply.72

The Zenobile v. McKecuen decision offers the most extensive discussion of the merits of a claim seeking civil recovery based on gender motivated violence.73 That case arose out of events that took place at a social gathering at the defendant, McKecuen's, parents' house. Nicole Zenobile was a dispatcher for the Elizabeth City Police Department (ECPD), and the defendant, McKecuen was an officer with the department. During the gathering, Zenobile "became helpless," and McKecuen videotaped her after others had removed her bathing suit.74 McKecuen displayed the videotape to other people at the house that night and to members of the police department and others the following day.75 The complaint alleged that McKecuen and others mixed a drink that caused her to become unconscious and that when she regained consciousness, she was being sexually assaulted by one of the other men at the gathering. The reported decision on the civil rights claim involves Zenobile's appeal of the trial court's dismissal of her claim against a woman involved in the videotaping and

68. See supra note 66.
70. Id.
72. Beliveau v. Chris Caras, 873 F. Supp. 1393, 1399 (C.D. Cal. 1995). Her claims under the Fair Housing Act and other state civil rights acts were upheld as well.
74. Id.
75. Id.
alleged subsequent cover-up. The court concluded that the defendant, along with two others, "acted upon a common scheme" to harass and discredit Zenobile in furtherance of a common scheme "to interfere" with her "civil rights as a woman." 76 Nevertheless, even this decision did not explain what it meant for the defendants' conduct to violate the victim's civil rights.

The relative lack of use of these state statutes stands in stark contrast to the interest and attention generated by the federal law. 77 Yet some have suggested that VAWA was underutilized as well. In addition to litigants' lack of awareness of what the law would offer, this phenomenon could also reflect the constitutional controversy that surrounded the VAWA civil rights remedy since its enactment 78 or the narrow crafting of its statutory terms. 79 The apparent limited use of the more broadly crafted state laws raises the question whether the utility of a civil remedy in this context may be limited by systemic factors, such as domestic violence victims' reluctance to re-engage with the batterer, or their fears that the batterer will use the civil litigation context as a further device for perpetuating a pattern of coercion and control over her. 80 The laws may be underutilized as well due to the difficulty victims of domestic and sexual violence continue to face in obtaining counsel notwithstanding fee-shifting provisions. 81 In addition, these laws may not offer the remedies most victims of domestic and sexual violence seek, such as financial assistance (from sources other than the batterer), jobs, childcare, immigration assistance, and legal representation. 82 Nevertheless, to the extent that civil remedies can offer practical assistance and can be a catalyst for the transformation the VAWA civil rights remedy's drafters hoped to inspire, the state statutes may in time advance both goals for victims of gender-based violence.

76. Id. at 111.
79. See Goldfarb, supra note 13, at 260-69.
82. Goldscheid, supra note 80, at 418.
V. Expanding Concepts of Civil Rights
Redress for Gender-based Violence

The civil rights formulations reflected in the VAWA civil rights remedy and analogous state civil bias crime laws are not the only avenues through which survivors of domestic and sexual violence can recover for the civil rights violations they sustain as a result of the violence. Of course, the VAWA civil rights remedy, and its state and local analogs, are significant because they render violence against women a civil rights violation regardless of the context in which it occurs. One of the primary arguments in support of the civil rights remedy was the lack of remedies for gender-based violence that occurs outside of traditionally recognized contexts such as employment, or violence committed by a state actor. The importance of a broad-ranging remedy that reaches all instances of gender-based violence, including domestic violence and sexual assault, regardless of the context in which it is committed, cannot be underestimated.

However, existing laws remain an important source of relief and continue to assist victims of gender-based violence harmed under circumstances covered by them. New interpretations of those existing laws, and new legislation specifically addressing the types of discrimination victims of domestic and sexual violence face when coping with the violence, advance the VAWA civil rights remedy’s goals by identifying and providing redress for the complex ways violence interferes with its victims’ civil rights.

A. Traditional Antidiscrimination and Civil Rights Laws and
Gender-based Violence

Even under traditional interpretations, courts readily recognize that rape or sexual assault in the workplace may violate the victim’s equality rights. It is well settled that a single instance of rape or sexual harassment committed by a supervisor or agent may create a hostile environment under laws prohibiting sexual harassment at work and in school. Sexual violence may also constitute illegal sexual harassment when it was committed by a

83. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (sexual assault by supervisor with whom employee had a prior social relationship). This is true both in the workplace, see, e.g., Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002); and in school sexual harassment cases. See, e.g., Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57 (D. Me. 1999) (sexual assault in school).

84. See, e.g., Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999) (single incident didn’t have to be sexual in nature if it was committed because victim was a woman); Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (“every rape committed in the employment setting is also discrimination based on the employee’s sex”); Jones v. United States Gypsum, 81 Fair Emp. Prac. Cas. (BNA) 1695 (N.D. Iowa 2000) (upholding sexual harassment claim based on assault in genital area, including discussion citing cases).
coworker or a nonemployee such as a customer, when it involved the workplace and when the employer knew or should have known of the abuse and failed to take prompt and appropriate remedial action.\textsuperscript{85} Because sexual harassment laws apply even-handedly to all employees, regardless of the relationship between the perpetrator and the victim, these laws apply to sexual violence within intimate relationships as well, and may have ramifications for an employer when the violence is committed at work.\textsuperscript{86} Other employment laws, such as the Family and Medical Leave Act, cover domestic violence victims who require leave when they or a family member are incapacitated due to a serious health condition resulting from domestic or sexual violence.\textsuperscript{87} Similar analytic frameworks render sexual violence in a woman’s home a civil rights violation under circumstances, for example, when a landlord or housing manager commits the violence.\textsuperscript{88}

Domestic or sexual violence committed by someone acting under color of state law may also give rise to civil liability, although these claims are more often adjudicated as due process or Eighth Amendment, rather than equal protection, violations. For example, government entities and officials, such as police officers, prison guards, and other government employees have been found liable for violating women's constitutional rights when they have committed sexual assaults while carrying out their


\textsuperscript{86} See, e.g., Fuller v. City of Oakland, 47 F.3d 1523, 1529 (9th Cir. 1995) (holding city liable for failing to take steps to stop a police office from harassing another officer after she ended their relationship); see also Excel v. Bosley, 165 F.3d 635 (8th Cir. 1999) (finding that sexual harassment at work by employee’s ex-husband violated Title VII).

\textsuperscript{87} This can include mental incapacity, such as posttraumatic stress disorder (PTSD) resulting from the abuse. See, e.g., Anchorage v. Gregg, 101 P.3d 181 (Alaska 2004).


\textsuperscript{89} See, e.g., Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002) (upholding prison official’s liability for rape and sexual assault by prison guard); Daskalea v. District of Columbia, 227 F.3d 433 (D.C. Cir. 2000) (upholding prison officials’ liability for sexual assault of female prisoner by fellow inmates and forced strip tease by prison guards); Rogers v. City of Little Rock, 152 F.3d 790 (8th Cir. 1998) (upholding police officer liability for sexual assault following traffic stop); Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997) (same); Smith v.
B. New Approaches to the Intersections of Gender-based Violence and Discrimination

One response to the limitations of traditional civil rights approaches is to examine how victims of domestic and sexual violence experience violations of their civil rights as a result of the violence, and to consider how legal remedies can respond to and redress those violations. If civil rights violations include acts that interfere with victims’ ability to fully and equally participate in institutions where discrimination is prohibited, civil rights remedies prohibiting discrimination in those settings may be an appropriate source of redress. For example, violence may have ramifications in institutions with which the victim interacts even though the violence doesn’t take place in the institution itself. In the employment context, for example, many victims of domestic violence have difficulty maintaining their jobs as they cope with abuse. They may be fearful that their abuser will commit an act of violence in the workplace; their batterer may interfere with their ability to do their job; or they may need time off to address legal or social service issues relating to the abuse. These women may become subject to adverse job actions due to the abuse, and those adverse job actions may constitute denials of their civil rights.

1. EMERGING LEGISLATION PROHIBITING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT

Some jurisdictions have begun to recognize that taking an adverse job action against an employee because she is the victim of abuse is a form of discrimination. The state of Illinois and the city of New York have enacted

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laws that flatly prohibit employment discrimination against domestic violence victims. In the first reported decision under the New York City law, the New York City Department of Corrections was found to have discriminated against a corrections officer by terminating her while she took approved leave time from work in order to find a new home after she left her abusive husband. The facts of the case illustrate the formidable challenges battered women face when attempting to negotiate both safety and the economic and workplace security.

Ms. Reynolds was the mother of two preteenage children. She left their father, who abused her and was a crack and alcohol abuser with a criminal history, and went to live with a relative. When that situation did not work out, she requested vacation time to find a new home and was granted a ten-day leave. At the end of that leave, she was still homeless and asked for additional time off to continue looking for a place to live. Her employer put her on sick leave and demanded that she provide them with an address. Apparently, her employer, the department of corrections, had a policy requiring all employees who are on sick leave to remain in their residence except when receiving medical treatment. The policy also required employees to apprise the department of their location at all times. Ms. Reynolds explained that she was homeless and told the department the reason she was homeless. When the department continued to demand that she provide an address and threatened to fire her if she did not provide one, she gave her husband’s address, where they unsuccessfully attempted to find her. Because of her difficulty finding housing, she returned to her husband’s home briefly during this period. As she may have feared, he continued to abuse her, and she again had to seek police intervention. She left after he again assaulted her.

Ms. Reynolds finally obtained a stable residence when she was admitted to a domestic violence shelter. She contacted the department to let them know about her new abode and gave the shelter’s office address, since the shelter, like most shelters, did not disclose its street location. The shelter would have told the department the shelter’s location if it signed the shelter’s confidentiality form, but the department’s representative refused to sign it. The department subsequently fired Ms. Reynolds.

The court held that the department violated the antidiscrimination law by failing to make reasonable accommodations for Ms. Reynolds’s status as a homeless victim of domestic violence. It recognized that her loss of a job at exactly the point where she was obtaining the assistance she needed

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93. Id. at 887-88.
94. Id. at 891.
was the precise type of harm the law was intended to prevent. The court noted the developing public policy awareness of the ways domestic violence interferes with a victim’s ability to keep her job. The department’s decision to terminate her at the very point when she was living in a shelter with an apparent unverifiable address constituted impermissible discrimination prohibited by the statute.\textsuperscript{95} This case demonstrates the complex interaction between abuse and economic security as well as the ways that violence produces civil rights violations for its victims. By specifically acknowledging the link between domestic violence and women’s economic independence and civil rights, the new New York City law and others like it can play a critical role in victims’ ability to leave the abuse and move toward independence.

Other states have enacted similar laws that prohibit employment discrimination against domestic violence victims under certain enumerated circumstances. For example, some jurisdictions prohibit employment discrimination against employees who take time off to address domestic or sexual violence.\textsuperscript{96} Others prohibit employment discrimination against those who take leave to pursue legal redress associated with the violence.\textsuperscript{97} Pending legislation in Congress, as well as in a number of states, would provide similar protection.\textsuperscript{98}

2. \textbf{EVOLVING INTERPRETATIONS OF ANTIDISCRIMINATION LAWS}

In jurisdictions that have not adopted these domestic violence-specific provisions, new interpretations of more familiar antidiscrimination laws may provide relief when domestic or sexual violence leads to discrimina-

\textsuperscript{95} Id.

\textsuperscript{96} See, e.g., 26 ME. REV. STAT. ANN., tit. 26, § 8505 (2004) (prohibiting sanctioning of employees who exercise their right to “reasonable and necessary” leave to address domestic or sexual violence).

\textsuperscript{97} See, e.g., CAL. LAB. CODE § 230.1 (2004) (prohibiting discrimination against employees for taking time off to obtain or attempt to obtain judicial relief in response to domestic or sexual violence); CONN. GEN. STAT. ANN. § 54-85b (2004) (prohibiting discrimination against employees who have to participate in court appearances or in investigations or prosecutions of a case in which the employee is a victim); N.Y. PENAL LAW § 215.4 (McKinney 2004) (prohibiting adverse job actions against employees who take time off from work to participate in criminal justice system); R.I. GEN. LAWS § 12-28-10 (2004) (prohibiting adverse job actions against employees who seek or obtain or refuse to obtain protective orders).

\textsuperscript{98} See, e.g., The Security and Financial Empowerment Act, S. 1801 & H.R. 3420, 108th Cong. (2003) (addressing a variety of workplace concerns facing victims of domestic and sexual violence, including prohibition of employment discrimination); S.B. 2438 & H.B. 2123, 21st Leg. (Haw. 2002) (prohibiting employment discrimination against domestic violence victims and providing leaves of absence for them to address legal, medical, psychological and other needs relating to the abuse); H.B. 385, 102d Gen. Assembly (Tenn. 2001) (prohibiting employment discrimination against domestic violence victims because of their status as battered women or because they take domestic violence-related leaves from work).
tory employment decisions that violate a victim’s right to sex-based equality. For example, an employee may be subject to adverse job actions because she was the victim of abuse, and the decision may be based on stereotypes about battered women.\footnote{99} Alternatively, an employer may take an adverse action against the victim, but not the perpetrator. That decision may constitute impermissible disparate treatment based on the employee’s sex.\footnote{100} In one case, for example, a domestic violence victim whose batterer was a co-worker has alleged that the employer violated Title VII and state law by firing her, but not penalizing her batterer, after she obtained a protective order.\footnote{101}

Analogous developments provide recourse for victims of domestic and sexual violence who face discrimination in housing even when the violence does not take place in the home itself. Some states have enacted laws prohibiting landlords or homeowners from discriminating against domestic violence victims.\footnote{102} Courts have begun to recognize that adverse actions

\footnote{99} Similar arguments have supported claims that municipalities violated domestic violence victims’ equal protection rights by providing less adequate police responses to domestic violence victims than they would to victims of similar crimes between strangers. These cases have proceeded both under disparate treatment theories based on circumstantial evidence of gender bias, and based on evidence that the police had a policy or practice of treating domestic violence victims differently than victims of other similar acts of violence. See, e.g., Hynson \textit{v.} City of Chester, 864 F.2d 1026 (3d Cir. 1988), on remand, 731 F. Supp. 1236 (E.D. Pa. 1990); see, e.g., Balistreri \textit{v.} Pacifica Police Dep’t, 901 F.2d 696 (9th Cir. 1990) (evidence included police officer’s statement that he “did not blame the plaintiff’s husband for hitting her, because of the way she was ‘carrying on’”); Watson \textit{v.} City of Kansas City, 857 F.2d 690 (10th Cir. 1988); Smith \textit{v.} City of Elyria, 857 F. Supp. 1203 (N.D. Ohio 1994) (allowing equal protection claim to proceed based on evidence, e.g., of a written policy urging officers not to arrest a man for domestic violence in “his” home because female complainants are often irrational and because the loss of the arrested man’s wages is detrimental to the children); but see, e.g., Eagleston \textit{v.} Guido, 41 F.3d 865 (2d Cir. 1994), \textit{cert. denied}, 516 U.S. 808 (1995) (rejecting claim due to lack of evidence beyond statistical evidence of low arrest rates in domestic violence cases); Ricketts \textit{v.} City of Columbia, 36 F.3d 775 (8th Cir. 1994), \textit{cert. denied}, 514 U.S. 1103 (1995) (same). In early 2005, the United States Supreme Court will review a Tenth Circuit Court of Appeals ruling upholding a similar claim against a municipality on the basis that the police department’s failure to enforce a domestic violence victim’s protective order violated the victim’s procedural due process rights. See Gonzales \textit{v.} City of Castle Rock, 366 F.3d 1093 (10th Cir.), \textit{cert. granted}, 125 S. Ct. 417 (Nov. 1, 2004).

100. For example, an employer who fires a woman who was a victim of abuse, but keeps a male abuser on the job, may be liable for disparate treatment sex discrimination. The fear that retaining a female domestic violence victim would risk bringing violence to the workplace, alone is not enough to justify the termination. See, e.g., Equal Opportunity Comm’n \textit{v.} St. Anne’s Hosp., 664 F.2d 128 (7th Cir. 1982) (finding that employer violated Title VII when it discharged employee who had hired an African American man in order to minimize threats from anonymous caller who protested the hiring by threatening violence and making racially discriminatory remarks).


taken against tenants who are coping with abuse may be a form of impermissible sex discrimination. For example, an Oregon property management company agreed to end housing discrimination against domestic violence victims after it was sued by a domestic violence victim who was evicted under a “zero tolerance policy” under which all tenants would be evicted if there is any evidence of violence in the household.\textsuperscript{103} A Michigan housing commission similarly agreed to stop enforcing a “no-strike rule” against domestic violence victims following a case in which it sought to evict a tenant after she called the police following an assault by a former boyfriend.\textsuperscript{104} Similarly, a Vermont federal court concluded that a landlord’s termination of a domestic violence victim’s lease may have been due to impermissible sex discrimination.\textsuperscript{105}

Concern about the impact of such “zero tolerance policies” on battered women’s ability to maintain their housing in the face of violence has prompted a range of policy responses, including an ABA recommendation supporting federal, state, local, and territorial legislation prohibiting housing discrimination against domestic violence victims.\textsuperscript{106} The issue came into sharp focus after the Supreme Court’s decision in \textit{H.U.D. v. Rucker}, which interpreted a provision of a federal antidrug law to prohibit a tenant’s eviction based on a household member’s drug-related activity or violence, regardless of whether the tenant knew about or could control the criminal activity.\textsuperscript{107} Victims of domestic violence had been subject to evictions under similar policies authorizing eviction from public housing when any household member committed an act of violence, regardless of whether the domestic violence victim knew about or could control the violence. In response to advocacy efforts highlighting the impact of those policies on domestic violence victims, HUD issued a statement urging public housing directors to evict tenants as “the last option explored,”\textsuperscript{108} and incorporated recommendations into its Public Housing Occupancy Guidebook urging

\begin{itemize}
  \item [\textsuperscript{106}] \textit{See} http://www.legalmomentum.org/issues/vio/abahousingreport.shtml (citing recommendation).
  \item [\textsuperscript{107}] Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).
  \item [\textsuperscript{108}] \textit{See} Letter from Secretary Mel Martinez to Public Housing Directors, April 16, 2002, available at http://www.legalmomentum.org/issues/vio/Martinez4-16-02ltr.pdf.
\end{itemize}
housing managers to consider the domestic violence victim’s need for safety and housing when responding to complaints of violence in a household.  

3. PUBLIC EDUCATION AND AWARENESS

The legislative and litigation inroads described above may promote the VAWA civil rights remedy’s practical goal of affording a legal remedy to victims of domestic and sexual violence who previously lacked adequate recourse under existing law. They may also advance the transformative goals of reshaping public debate by reframing violence against women in the context of civil rights violations. At the same time that litigation can help victims of gender-based violence obtain compensation for the physical and psychic harms that result from violence, other strategies have made critical contributions to eliminating the inequality violence against women produces and perpetuates. Public education is one such tool. Recent initiatives, such as campaigns to address domestic violence as a form of torture, to expose the prevalence of rape in prison, and to engage men in efforts to eliminate the discriminatory attitudes that perpetuate domestic and sexual violence advance these broader goals. Other educational programs, including judicial education and sexual assault prevention initiatives continue to reveal and address the discriminatory attitudes that allow violence against women to persist. International initiatives have made significant inroads in recognizing violence against women as a civil rights violation and in holding states accountable for ending it.

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115. See, e.g., United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (11th Sess., 1992) (declaring that “gender-based violence is a form of discrimination” and holding states responsible for exercising due diligence to prevent violations of the rights to be free from discrimination established by the Convention to Eliminate Discrimination Against Women, and for investigating and punishing acts of violence,
VI. Conclusion

The VAWA civil rights remedy can be viewed as one in a line of initiatives expressly linking, and seeking to remedy, gender-based violence as a violation of its victims' civil rights. The Morrison decision striking the law reflected a cramped view of federal power that rejected Congress's progressive insight that violence against women violated women's civil rights. Nevertheless, the civil rights remedy's enactment marked a milestone of progress in our collective understanding of violence against women as a form of discrimination and in the panoply of remedies available to victims of domestic violence and sexual assault. Although the civil rights remedy no longer is available, new initiatives pick up on the aspirations that underlay the civil rights remedy's enactment and chart new courses for advancing women's equality rights and helping those who have survived domestic violence and sexual assault move to safety and independence.

and for providing compensation); United National General Assembly Resolution 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993) (recognizing violence against women as a manifestation of historically unequal power relations between men and women and calling on states to condemn and take steps to eliminate it); United Nations Div. for Advancement of Women, Beijing Declaration and Platform for Action, Fourth World Conf. on Women, ¶¶ 112-129 (Oct. 17, 1995) (recognizing that violence against women is an obstacle to the achievement of equality and calling on states to take a range of measures to redress and eliminate it); see generally, e.g., Berta Esperanza Hernandez-Truyol, Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century, 60 ALB. L. REV. 607, 611-22 (1997) (describing history of international human rights recognition of violence against women); see also, e.g., Kelly D. Askin, A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993-2003, 11 HUM. RTS. BRIEF 16 (2004) (summarizing prosecutions of rape and sexual assault as violations of international law).