Monitoring Health Care Conversions Can Yield Billions of Dollars for Health Care
The Civil Rights Remedy of the Violence Against Women Act

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I. Introduction

In September 1994, Congress passed the first federal law recognizing and attempting to stop gender-motivated violence. /1/ The Violence Against Women Act (VAWA or the Act) contains a historic civil rights provision designed to address gender-motivated violence. That provision, called the civil rights remedy, enacted after four years of intensive lobbying and a series of congressional hearings, declares for the first time that violent crimes motivated by the victim's gender are discriminatory and violate the victim's federal civil rights. /2/ Under this new law, victims of gender-motivated violence may bring a civil rights suit in federal court for compensatory or punitive damages, declaratory or injunctive relief, and attorney fees. The civil rights remedy proclaims that violence motivated by gender is not merely an individual crime or a personal injury but a form of discrimination -- an assault on a publicly shared ideal of equality.

II. Reasons for Enactment of the Civil Rights Remedy

Congress' passage of the civil rights remedy was motivated by the recognition that "millions of women and girls who each year become victims of rape, domestic violence and many other crimes are not selected at random, nor are they singled out because of their individual circumstances; rather, they are exposed to terror, brutality, serious injury and even death because of their sex." /3/ Hearings held on the VAWA since its introduction in 1990 presented ample evidence that neither state legal systems nor existing federal civil rights laws adequately addressed gender-motivated crimes. /4/ VAWA's enactment signaled bipartisan recognition of the depths to which violence plagues women's lives and of the fact that none of the traditional remedies have succeeded in stopping domestic violence and sexual assault. Much as Congress enacted federal laws to provide uniform redress nationwide for racially motivated violence during the Reconstruction era, Congress through the VAWA invoked those same powers to address the pressing problem of violence against women.

With the VAWA's enactment, many individual victims who had no opportunity for civil legal redress now could recover their losses and obtain injunctive relief and attorney fees. Federal recognition that gender-based violence is a form of discrimination also sends a
powerful message condemning all forms of gender-based violence, including the pervasive problem of sexual assault and domestic violence.

A. Insufficient Reach of Federal Civil Rights Laws

The civil rights remedy was designed to complement existing federal civil rights laws which did not protect citizens from gender-motivated violence. Before the civil rights remedy was enacted, federal civil rights laws prohibited discrimination in the workplace, some racially-motivated acts of violence, and certain class-based wrongdoing by private groups. /5/ But outside of the employment context, no federal civil rights law protected people from gender-motivated discriminatory acts of violence by private individuals. The Reconstruction-era civil rights laws, which address actions taken under color of state law, 42 U.S.C. Sec. 1983, or private actions committed as part of a conspiracy, 42 U.S.C. Sec. 1985(3), exclude the possibility that women of any race can redress what is arguably the most common and most damaging form of gender discrimination: acts of violence committed by private individuals, including sexual assault and domestic violence.

B. Inadequate Remedies of State Laws

State civil and criminal statutes, and gender-biased administration of justice in some state courts, often deny adequate remedies to victims of gender-motivated violence. For example, in some states a man who rapes his wife is subject to lower penalties than if he rapes a stranger; in others he may be immune from prosecution altogether; and in other states a criminal remedy is unavailable unless the victim of a marital rape reports the incident within an extremely short time frame. /6/ Several states have statutes exempting cohabitants and dating companions from rape laws. /7/ In at least six states, women who are beaten or assaulted by their husbands still are denied access to a tort remedy by interspousal tort immunity doctrines. /8/

In states throughout the country, police, prosecutors, juries, and judges routinely subject female victims of rape, assault, and domestic violence to a wide range of unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes. /9/ In a much-publicized case, a Maryland judge sentenced a man who killed his wife to only eighteen months, to be served on work release, because the defendant pled guilty after finding her in bed with another man. Justifying the minimal sentence, the judge noted, "I seriously wonder how many married men, married five years or four years[,] would have the strength to walk away, but without inflicting some corporal punishment . . . ." /10/ In a similar vein, jurors acquitted an accused rapist in Florida because they felt that the way the victim was dressed showed that she was "asking for" the sexual attack. The defendant subsequently was convicted of raping another woman. /11/

Numerous state task forces on gender bias in the courts have issued official reports exposing the sexist biases that affect their states' legal systems and that pervade the administration of justice, especially in cases involving violence against women. /12/ For example, in domestic violence cases, instead of focusing on why men batter and what can
be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence. Several state task forces have cited judges who disbelieve female petitioners unless there is visible evidence of severe physical injury, trivialize domestic violence complaints by their demeaning and sexist comments (e.g., "Let's kiss and make up and get out of my court"), and characterize victims' complaints as mere domestic problems that belong in family court. The New York State task force found that in some communities judges shunt victims back and forth between the police and family court until they give up seeking protection. /13/

As with domestic violence cases, rape prosecutions frequently end up placing the complainant rather than the defendant on trial. The civil rights remedy was designed to complement existing federal civil rights laws which did not protect citizens from gender-motivated violence. As one judge testified before the New York State task force, "[W]hile the overt snickering and insensitivity to victims which characterized the manner in which sex crimes were handled not so long ago have moderated, there are still all too many instances of the woman victim being put on trial with an underlying insensitivity permeating the courtroom." /14/

Reflecting some progress in states' recognition of the inadequacies of current legal remedies, eight states and the District of Columbia have enacted civil remedies for gender-based violence. /15/ A recent case brought under the Massachusetts law illustrates that civil rights remedies are a valuable and workable addition to traditional criminal and tort remedies for violence against women. The attorney general obtained an injunction under the Massachusetts hate crimes law against a man who engaged in a pattern of domestic violence against four women. /16/ The success under this state law underscores the need addressed by VAWA to create a nationally uniform remedy for victims of gender-based crimes of violence. /17/

III. Litigating a Civil Rights Claim Under the Violence Against Women Act: Elements of Proof

The plain language of the VAWA states explicitly that every citizen is entitled to be free from gender-motivated violence. The civil rights remedy provides a civil cause of action against "a person /18/ (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b)." /19/ Plainly, then, a plaintiff must prove: (1) that the defendant committed a "crime of violence" and (2) that the crime was "motivated by gender," as both those terms are statutorily defined. Attorneys can look to existing law, as well as the legislative history driving the civil rights remedy's enactment, to prove a claim.

A. Crime of Violence

The VAWA defines a "crime of violence" as an act or series of acts that would constitute a felony under state or federal law and that involves violent acts against a person or
against property if the acts put a person at risk of physical injury. /20/ Recognizing both
the failure of traditional state court remedies and state practice to provide redress for
serious crimes against women, the statutory definition is intended to bring within the
sweep of the VAWA violent acts that result in actual or threatened physical harm. It
covers acts that do not result in prosecution or conviction. /21/ Consequently, the Act
specifically covers criminal acts that would constitute a felony but for the relationship
between the perpetrator and the victim, thereby permitting women to seek civil redress in
those states that prohibit marital rape prosecutions or bar civil suits against husbands for
raping their wives, as well as in those states that bar criminal prosecution of sexual
assaults between acquaintances. /22/ The remedy's inclusion of acts that would constitute
a felony under either state or federal law similarly reflects the VAWA's provision of a
remedy that transcends the peculiarities of a state laws and constitutes a more uniform
basis for recovery nationwide. /23/ Of course, an act or series of acts that would result in
a conviction under the VAWA, for example, for committing an act of interstate domestic
violence, /24/ could form the basis for a VAWA civil rights claim as well.

By its plain language, the VAWA does not require either a criminal prosecution or a
conviction to support a civil rights claim. /25/ Consequently, women need not rely for
legal relief on the criminal justice system, a system in which they lack control, which
frequently "shine[s] a spotlight of suspicion on the victim," and in which they cannot
obtain civil relief. /26/ If there has been no criminal prosecution or conviction, the civil
rights action will include a hearing in which the elements of the felony must be proved by
a preponderance of the evidence. Nevertheless, it will be easier to prove that a defendant
committed a "crime of violence" when the defendant has been convicted of a felony
because a conviction will, in most instances, establish conclusively this element of proof.
/27/ From a practical perspective as well, evidence gained in the course of a criminal
investigation may be useful in proving gender-based animus, the second prong of the
civil rights remedy. Civil practitioners and law enforcement officials are expected to
coordinate their efforts, as they currently do now when crime victims pursue civil tort
actions, to pursue vigorously criminal remedies while preserving women's rights to
litigate for a civil recovery.

**B. Gender-based Motivation**

The second prong of a VAWA civil rights claim requires a plaintiff to prove the
connection between the defendant's violent acts and the victim's gender. She must prove
that the violent 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." /28/ While the statute
enumerates a two-part analysis to prove gender motivation, the legislative history is clear
that this statutory element was drafted with one goal: to ensure that only gender-
motivated violent acts, rather than "random" acts of violence, form the basis for a VAWA
recovery. /29/ The two parts of this statutory requirement thus should be read in tandem
to define and clarify the proof necessary to establish that a violent act or series of acts
was sufficiently gender-based to warrant civil recovery. Practically speaking, the same
evidence frequently will satisfy both parts of this element.
The legislative history makes clear that gender motivation under the VAWA civil rights remedy should be proved in the same manner as some existing civil rights violations are proved: by evaluating the "totality of the circumstances" for such evidence as epithets, patterns of behavior, statements evincing bias, and other circumstantial as well as direct evidence evincing gender-based bias. /30/ The legislative history is replete with references to existing civil rights laws and directs courts to look to those laws in evaluating circumstantial evidence as proof of discrimination. /31/ In particular, Congress stated that the Reconstruction-era civil rights statutes, notably 42 U.S.C. Secs. 1981, 1983, and 1985(3), as well as Title VII of the Civil Rights Act of 1964 ("Title VII"), offer "substantial guidance" in assessing gender motivation. /32/ Not coincidentally, the civil rights remedy's wording directly reflects the statutory language of Title VII /33/ and incorporates some of the language used by courts in adjudicating claims brought under 42 U.S.C. Sec. 1985(3). /34/

The first part of this "gender-motivation" element requires a plaintiff to prove that the violent act was committed "because of gender or on the basis of gender." /35/ Title VII in general, and sexual harassment cases in particular, provide useful examples of disparate treatment cases from which to draw analogies. /36/ Courts generally conclude that sexual harassment occurred "because of or on the basis of gender" when a woman is subjected to different terms and conditions of employment based on her gender. This can take several forms. In quid pro quo cases a woman's employment status is conditioned on her acceding to sexual demands. /37/ Hostile environment sexual harassment cases involve severe or pervasive acts of a sexual nature that create "a discriminatorily hostile or abusive environment." /38/ Particularly in hostile environment sexual harassment cases, patterns of behavior, language and actions that are sexual in nature may be presumed to reflect gender-based discriminatory intent and to create an "arbitrary barrier to sexual equality in the workplace." /39/ Consequently, much as discriminatory intent is inferred from the sexual nature of an act in sexual harassment cases, discriminatory intent may be inferred when a woman is the victim of a gender-motivated crime. Analogies may be drawn between cases in which a supervisor requires a subordinate to submit to sexual advances in order to maintain her job or in which a coworker creates a hostile environment through persistent use of sexual epithets, and cases of sexual assault, or cases in which a husband forces his wife to engage in nonconsensual sex or subjects her to physical abuse. Nonsexual violent acts committed because of a woman's gender also can reflect the discriminatory gender motivation the VAWA requires.

The second part of the "gender-motivation" element requires that the violent act was "due, at least in part, to an animus based on the victim's gender." /40/ The Reconstruction-era statutes provide a body of analogous law that have addressed the meaning of "animus" in the context of class-based discriminatory acts. /41/

The VAWA's legislative history suggests that "animus" should be interpreted as the term was used in Griffin v. Breckenridge. /42/ That case involved a racially-motivated attack by several white persons on a group of African Americans and whites believed to be civil rights workers. The plaintiffs sued, alleging that the defendants had conspired to deprive them of their equal protection or equal privileges and immunities rights in violation of 42
U.S.C. Sec. 1985(3). /43/ In construing Section 1985(3)'s requirement that the conspiracy be committed for the "purpose" of depriving any person of that person's rights, the Griffin Court inferred the defendants' "intent to deprive a person of the equal protection of the laws and of equal privileges and immunities" from the nature of the violent acts. /44/

In a more recent ruling concerning antiabortion blockades, the Supreme Court interpreted the gender-based animus required to prove a Section 1985(3) violation to mean "a purpose that focuses upon women by reason of their sex." /45/ In Bray v. Alexandria Women's Health Clinic, the Court specifically ruled that a plaintiff need not prove malicious motivation. /46/ Although the Bray Court found that opposition to abortion alone did not present sufficient evidence of gender-based animus because "there are common and respectable reasons for opposing" abortion, /47/ the Court recognized that in other instances gender or other class-based animus might be inferred from the nature of the act itself. /48/ Within that framework, courts will evaluate circumstantial evidence to adduce discriminatory motivation. At least one post-Bray court found "abundant evidence" of racial motivation in countless episodes of racial slurs and other actions reflecting racial animus. /49/ The court specifically distinguished Bray, finding "an element missing in Bray is present -- the use of racial slurs, which are certainly evidence of the prohibited intent." /50/ We can expect other courts to follow suit and find sufficient evidence of gender-based animus to prove VAWA civil rights claims from such facts as gender-based epithets, slurs, and patterns of behavior. /51/ Developing the precise contours of the VAWA's "animus" requirement following Bray will be left to the courts as litigation proceeds.

Drawing from the precedents under both Title VII and the Reconstruction-era statutes, a showing of discriminatory intent or motive will demonstrate whether a violent act reflects the requisite gender-based animus to state a VAWA civil rights claim. The same type of epithets, comments evincing discriminatory attitudes, absence of any other apparent motive, lack of provocation, and other patterns of behavior used to prove disparate treatment in sexual harassment cases and class-based animus in other civil rights cases may be used in proving gender bias under the VAWA. /52/ Nonetheless, questions remain, including whether acts of rape or domestic violence, without additional evidence, suffice to prove gender-based motivation. As a practical matter, it may be prudent to bring initial VAWA civil rights cases that contain plentiful evidence from which courts may deduce the required "gender-based motivation."

The statute itself makes clear that a violation may be established as long as it is based "in part" on gender-based animus. The statutory language thus establishes that the civil rights remedy can be used in cases where the violent act was motivated by gender as well as another type of class-based discrimination, for example, discrimination based on race, age, marital status, religion, or sexual orientation, or where the act was motivated in part by nondiscriminatory purposes.

IV. Practice Concerns
A. Violence Against Women Act Plaintiffs

As with many statutes, the VAWA civil rights remedy's plain language governs who may bring suit. By its terms, the VAWA provides a cause of action to the "party injured" against "a person . . . who commits a crime of violence motivated by gender." /53/ There can be no doubt that a "party injured" includes individuals who themselves were the victims of gender-motivated violent acts that rise to the level of a felony. Courts also may permit VAWA civil rights suits brought by a decedent's personal representative, /54/ by aliens /55/ or by convicted felons. /56/ A "party injured" also may include corporations, nonprofit organizations, or government entities, /57/ as well as third parties or family members related to individuals who suffered gender-motivated violence who can prove some independent or derivative injury. /58/

B. Standing to Sue

Once a plaintiff establishes that she falls within the intended class of statutorily defined plaintiffs, she must be able to assert that she has standing to bring suit. While VAWA claims asserted in federal court are governed by federal case law, /59/ VAWA claims asserted in state court are analyzed under the standing laws of the forum state. /60/ For federal court claims, a plaintiff must be able to allege actual or threatened injury, not an injury that is conjectural or hypothetical. /61/ The injury must be "fairly traceable" to the defendant's alleged unlawful conduct and likely to be redressed by the requested relief. /62/ She must assert injury that is peculiar to herself or to a distinct group of which she is a part; generalized grievances are insufficient even if they are of wide public concern. /63/ The VAWA's statutory requirement limiting claims to "injured parties" likely will ensure that plaintiffs meeting that statutory definition also satisfy these standing concerns.

Third parties who meet the statutory definition of plaintiffs also are required to establish that they have standing to bring a VAWA claim. /64/ As a general matter, a plaintiff must assert her own rights and interests and not those of a third party. /65/ However, courts typically permit a plaintiff to assert the rights of a third party when the plaintiff can demonstrate her own injury and "(1) the relationship between the plaintiff and the third party is such that the plaintiff is nearly as effective a proponent of the third party's right as the third party itself, and where (2) there is some obstacle to the third party asserting the right." /66/ Thus, an individual who was injured as a result of a gender-motivated act of violence committed against another person may have standing to seek redress under the VAWA for his or her injuries based on the right of that other person to be free from gender-motivated violence. That plaintiff, of course, would have to establish the requisite relationship to the third party and the obstacle precluding the third party from asserting her own rights.

An organization may have standing if it can demonstrate sufficient injury either to itself /67/ or to its members. /68/ Gender-based violent acts directed at an organization committed because of the gender of the organization's members, or because of the organization's views, may establish sufficient injury to meet this test.
C. Right to Proceed Pseudonymously

Although the Federal Rules of Civil Procedure require all complaints to include "the names of the parties," courts have recognized the right to proceed pseudonymously in exceptional cases in which an overriding privacy interest justifies concealment of the claimant's true identity. Plaintiffs may proceed pseudonymously in cases involving sensitive, personal information, in which the claimant credibly fears reprisal or in cases in which the privacy concerns outweigh the presumption of openness in judicial proceedings.

Courts evaluate applications to proceed pseudonymously on a case-by-case basis. Courts have permitted plaintiffs to proceed by pseudonym in cases concerning pregnancy and childbirth and sexual conduct, or when disclosure would result in the harm the plaintiff's action seeks to prevent. However, "subjective feelings of confidentiality or embarrassment" may not be enough to warrant confidential proceedings. Reasoning that "basic fairness" requires a plaintiff to reveal her name if she is naming an individual and accusing him of wrongdoing, some courts have denied plaintiffs' requests to proceed pseudonymously. Other courts and commentators have noted the public's interest in knowing the plaintiff's identity as well as in knowing all the facts surrounding a lawsuit.

Whether a plaintiff may proceed pseudonymously is within the court's discretion. While some courts have construed strictly the requirement that a complaint contain a plaintiff's name, and have gone so far as to dismiss a complaint filed by pseudonym as if it effectively had not been filed, most courts will consider a plaintiff's application to proceed under a fictitious name. To protect a plaintiff's ability to proceed anonymously before proceeding with litigation, a plaintiff may be well advised to move the court for a protective order authorizing pseudonymous filing, to use pseudonyms in the complaint but set forth the plaintiff's true name in an attached letter, or to use a fictitious name in the complaint but verify the complaint by signing the plaintiff's true name. The court may impose conditions on fictitious filing, such as requiring a plaintiff to disclose her name under seal.

VAWA plaintiffs may wish to protect their identity because their claims likely involve sensitive and personal information. Plaintiffs should be warned, however, that the fear of publicity alone may not warrant use of a fictitious name. VAWA plaintiffs who base their request to proceed pseudonymously on their fear of reprisal by the named defendant may face opposition. They may successfully argue that, at a minimum, identifying information such as phone numbers and addresses must be shielded.

D. Class Actions

VAWA plaintiffs commencing class action suits in federal court must establish the prerequisites for class certification set forth in Federal Rule of Civil Procedure 23. This rule requires that (1) the class is so numerous that joinder of all members is
impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties fairly and adequately protect the interest of the class. /83/

While nothing in the VAWA precludes class actions, the bulk of VAWA claims are not likely to be litigated on behalf of a class since the Act is geared principally to claims asserted by individuals. /84/ Nonetheless, certain circumstances may give rise to VAWA class actions provided the numerosity requirement can be met. For example, claims brought against serial rapists who commit "signature" crimes evidencing gender-based animus may be brought on behalf of the class of women who may be the victims of such a crime. Similarly, a class of women who have been battered by a particular man may seek VAWA relief. /85/ Such claims may be particularly suited for injunctive or declaratory relief. /86/

E. Violence Against Women Act Defendants

VAWA's language defines the class of defendants that may be held liable for violating another's right to be free from gender-based violence. A defendant may be any "person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) [the right to be free from gender-based violence] . . ." /87/ Both the statutory language and the legislative history make clear that the VAWA civil rights remedy applies against the perpetrators of violent crimes, including gender-based domestic abuse and sexual assault, where the perpetrator is a private individual. /88/

1. Corporate Defendants

Whether and to what degree the VAWA will be interpreted to permit suits against entities other than natural persons is likely to be addressed through litigation. The statutory language indicates that corporate defendants may be subject to suit. The statutory term "person . . . who commits a crime of violence" is likely to encompass corporate defendants, who are considered "persons" in most states. /89/

Under certain circumstances, corporations may be subject to VAWA liability because they may be held criminally liable for "crimes of violence" that constitute a felony. Under the Model Penal Code, which most states have adopted, /90/ corporations may be criminally liable, and will be deemed to have had the requisite mental state to establish criminal liability under any of three circumstances: (1) if the act was committed by a corporate agent acting within the scope of employment; /91/ (2) if the offense consists of a failure to perform a specific duty; /92/ or (3) if a corporate board of directors or a "high managerial agent," acting on behalf of the corporation within the scope of his employment, authorized, requested, commanded, performed, or recklessly tolerated the criminal act, /93/ making it reasonable to assume that the act reflected the corporation's policy. /94/ Corporations are not liable if the agent took the action solely to advance his
own interests or the interests of a third party. /95/

Under these general theories, corporations have been held criminally liable for felonies such as manslaughter and even murder. /96/ Yet most of those cases involved liability for deaths resulting from negligent acts. It remains to be seen how courts will rule on cases involving crimes of gender-based violence such as rape and sexual assault committed with a corporate defendant's apparent blessing.

2. Governmental Defendants

VAWA's language also contemplates suits against governmental defendants. The Act's express inclusion of "persons" acting under "color of state law" brings into VAWA's sweep claims against governmental officials or private individuals exercising governmental authority. That language invokes the body of law developed under 42 U.S.C. Sec. 1983, pursuant to which courts extensively have explored the circumstances under which government officials or private individuals exercising governmental authority may be liable for civil rights violations. /97/ Nonetheless, because the VAWA provides a cause of action against individuals whether or not they acted under color of state law, many of the limitations on Section 1983 claims do not apply to VAWA claims.

The VAWA itself contains no provisions concerning the liability of governmental entities. However, VAWA's legislative history provides that "[t]he 'under color of law' language in Title III [the civil rights remedy] permits claims against governmental entities only where a governmental entity could be sued under Sec. 1983 . . . . Future interpretation of Title III [the civil rights remedy] 'under color of law' language should be governed by the prevailing interpretation of the similar language in section 1983." /98/ That body of case law, detailed with far greater specificity elsewhere, sets forth several guiding principles for VAWA civil rights litigation. /99/

a. Municipalities

Municipalities generally are immune from suit unless the civil rights violation resulted from a government agent following an official policy, ordinance, regulation, decision or custom. /100/ For example, if a plaintiff could establish that a municipality had a policy of strip searching all women, but not men, and if she had been strip-searched in a manner that rose to the level of a felony, she likely could maintain a suit against the municipality.

In VAWA suits against municipalities, the question may arise whether a municipality would be subject to the punitive damages expressly authorized by the VAWA. /101/ That express statutory authorization may be found to trump case law interpreting Section 1983 liability to exempt municipalities entirely from punitive damages. /102/

b. States

States, state officials sued in their official capacity, and state agencies are shielded from Section 1983 suits for damages or other retrospective relief in both state and federal
court. However, the Supreme Court permits suits against state officials, acting in their official capacity, when sued for prospective injunctive relief. Consequently, a VAWA action for prospective injunctive relief may be maintained against a state official for violating a federal right, which could include the right to be free from gender-motivated violence. Furthermore, a state official sued in his personal capacity may be liable for damages and declaratory and injunctive relief for violating a person's right to be free from gender-motivated violence.

**F. Immunity Defenses**

In civil rights actions as well as actions seeking tort recovery for domestic violence or sexual assault, defendants may argue that they are shielded from suit by various common-law immunity doctrines. These defenses are particularly important because they govern amenability to suit rather than liability. Consequently, if successful, a defendant is dismissed from the case before having to present evidence concerning his liability.

Like other civil rights remedies such as Section 1983, the VAWA's statutory language does not contain any express immunity provisions. Generally, courts have reasoned that statutory silence with respect to immunities does not indicate that Congress intended "to abolish wholesale" all common-law immunities. On the other hand, reasoning that federal courts should apply state law immunity doctrine only when consistent with the federal statute's purpose and recognizing that civil rights actions raise federal questions concerning construction of federal law, federal courts do "not assume" that Congress intended to incorporate into federal law every common-law immunity.

Whether VAWA civil rights claims are analyzed like Section 1983 claims for purposes of applying immunity defenses is not entirely certain. In the Reconstruction-era statutory context, 42 U.S.C. Sec. 1988 directs federal courts analyzing claims to apply state law where the controlling civil rights provision is silent. Because the VAWA contains no such express provision, federal policies may be weighted more heavily in analyzing immunity defenses against VAWA claims. Nevertheless, federal courts applying a Section 1983-type analysis to a state law immunity defense in a VAWA civil rights claim would examine the common-law immunities that were established at the time the civil rights law was enacted, the current common law, and federal common law. Courts may not recognize the state common-law immunity defense unless the immunity defense is "compatible with the purposes and policies" of the federal civil rights law.

**1. Interspousal Immunity**

When VAWA civil rights claims arise out of crimes of violence committed by one spouse against the other, defendants in states maintaining the interspousal immunity doctrine may argue that it exempts them from suit under the VAWA. Early common law barred tort actions between married persons, who were deemed to be a single legal entity. If courts analyze the common law at the time of the VAWA's passage, as they would do for defenses to Section 1983 claims, federal courts likely will reject interspousal
immunity defenses in VAWA claims. The vast majority of states no longer recognize interspousal immunity, reflecting the striking trend over recent years to abrogate the defense. Courts will reach the same result if they analyze the question as a matter of federal common law. That analysis would favor a uniform interpretation nationwide and would credit the legislative history reflecting Congress' intent to provide a federal remedy in states where interspousal immunity would have barred suits. In light of that strong legislative history, state immunity laws might well be rejected as "inconsistent" with the federal policies underlying the VAWA.

2. Parental Tort Immunity

The VAWA civil rights remedy contemplates that children may sue their parents in cases of sexual abuse that meet the other statutory requirements. Like interspousal immunity, parental tort immunity is a largely outmoded doctrine that increasingly has been rejected by the states. The same analysis that is applied to interspousal immunities is likely to lead a court to reject parental immunities in VAWA civil rights claims. Much as the VAWA's legislative history reflects Congress' specific intent to provide a civil remedy otherwise denied to victims in states that retain the outdated interspousal immunity doctrine, Congress similarly intended to afford a means of redress for injured parties in states that retain the parental tort immunity. Both to reflect the general common-law trend abrogating this immunity and to effect Congress' legislative intent, courts are likely to reject defendants' attempts to avoid suit based on this antiquated theory.

3. Government Officials

An extensive body of law has developed under Section 1983 concerning governmental immunity for civil rights actions that may be analogous to VAWA claims. Two kinds of immunity defenses may shield governmental bodies and public officers from suit. Courts have recognized "absolute immunity" for state entities and officials and for officials exercising special governmental functions. "Qualified immunity" may shield government officials from suit when they are exercising discretionary functions in good faith. State officials performing discretionary functions sued individually nonetheless may be liable for violations of "clearly established" law of which the defendant should reasonably have been aware.

VAWA civil rights litigation brought against governmental officials likely will withstand qualified immunity challenges. Any VAWA claim will be based on allegations that the official committed a violent act that rose to the level of a felony. As an initial matter, it is unlikely that any such action would have been committed as part of an official's "discretionary" functions. However, in the event such a case arises, in most, if not all, instances, it would be "clearly established" that such an action violated the law. Although plaintiffs in early VAWA litigation might not be able to establish that their right to be free from gender-motivated violence was "clearly established," any such plaintiff likely would be able to establish that a governmental official should have known that a violent act that would rise to the level of a felony violated clearly established law.
is difficult to imagine that the official successfully could argue that he acted reasonably in committing the felonious violent act nonetheless.

**G. Choice of Forum**

The VAWA expressly vests both state and federal courts with jurisdiction over claims brought under the civil rights provision, 42 U.S.C. Sec. 13981(e)(3). Practical differences between state and federal courts with respect to the applicable procedural and evidentiary rules, the court's receptiveness to VAWA claims, the time delay for trial in each court, and other strategic considerations may guide a plaintiff's choice of forum.

The VAWA's legislative history suggests that legislators contemplated federal courts as the primary forum for determination of VAWA civil rights claims. /128/ The Senate Judiciary Committee reports issued during the VAWA's consideration brought to light problems state court plaintiffs face when litigating claims arising from gender-based violent acts. /129/ For example, many states' evidentiary rules allow intrusive questions about the plaintiffs' consensual sexual activity unrelated to the attack. /130/ Because these state evidentiary rules would govern in a state court VAWA claim, plaintiffs may prefer federal court where the Federal Rules of Evidence now largely prohibit this abusive practice in civil, as well as criminal, cases. /131/ Traditional rationales for selecting federal over state courts, such as local bias and familiarity between defendants and court officials in state systems, may apply similarly in VAWA civil rights cases.

In addition, plaintiffs who intend to seek a jury trial may prefer federal court, where a judge exercises stricter control over jury selection. /132/ Furthermore, because the constitutional right to a jury trial has not been incorporated by the states, a jury trial may not be available in every state. /133/

Despite the preference for federal court evidenced by VAWA's legislative history, the statute clearly confers concurrent jurisdiction. Several factors may weigh in favor of a state court forum. When a plaintiff intends to join state law tort claims with the VAWA claim, she may select the state court to take advantage of the judge's familiarity with the state law claims. A state court action may proceed more quickly than a federal action, although this may vary widely by jurisdiction. /134/ In addition, some state courts may be more likely to provide interim relief than their federal counterparts. /135/ Finally, the scope of discovery varies among state courts. /136/ Plaintiffs who are concerned about extensive and intrusive discovery requests by defendants may opt to bring a VAWA action in state court if that state's discovery rules are more restrictive than the federal rules. Ultimately, a plaintiff must weigh carefully the above considerations and other tactical issues before selecting a forum. /137/

**H. Removal**

As a general matter, a defendant in a civil case filed in a state court may remove the action to federal district court if the federal district court would have had original jurisdiction. /138/ However, the VAWA specifically excludes from this rule actions
arising under VAWA’s civil rights provision. /139/ Thus, a VAWA case filed in state court must be tried or otherwise resolved in state court.

I. Supplemental Jurisdiction

Supplemental, or pendent, jurisdiction allows a federal court, in an action in which that court has original jurisdiction, to exercise jurisdiction over any other "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." /140/ With the exception of the limitations specified by the statute, plaintiffs who choose to bring their VAWA civil rights claim in federal court also may bring their state law claims arising from the same factual predicate in the same proceeding. /141/ For example, a person who was the victim of gender-motivated violence may file a federal court complaint alleging a VAWA violation and a state law tort claim for assault. Under 28 U.S.C. Sec. 1367, the VAWA claim confers jurisdiction on the federal court to decide the state claim as well.

In addition to the generally-applicable limitations imposed by section 1367, the VAWA specifically excludes from supplemental jurisdiction "any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or a child custody decree." /142/ For example, a victim of a gender-motivated crime perpetrated by a spouse who files a VAWA civil rights complaint against her spouse and also seeks a divorce based on extreme cruelty arising out of the same facts must file a separate state court complaint for divorce. /143/ A plaintiff may not litigate a divorce action in federal court. Likewise, a plaintiff may not seek custody, alimony, or equitable distribution in federal court. However, this prohibition should not interfere with a VAWA plaintiff’s ability to seek damages from a defendant even if the defendant is a current or former spouse.

J. Timeliness of Suit

Practitioners seeking to bring a VAWA civil rights claim must ascertain (1) whether the violent acts occurred during a period of time covered by the VAWA and (2) what the proper statute of limitations is, when it accrues, and under what circumstances it may be tolled.

1. Timing of "Gender-Based" Violent Act

The VAWA was enacted on September 13, 1994. /144/ Because laws presumptively operate prospectively absent a clear expression of congressional intent to the contrary, and because the civil rights remedy provision contains no express language to the contrary, /145/ it takes effect on that same day. /146/ Recent Supreme Court precedent reinforces this presumption. /147/ Consequently, VAWA civil rights remedy actions likely are limited to those based on gender-based violent acts that occurred on or after September 13, 1994.

Nonetheless, as with other civil rights causes of action, preenactment acts may be used as
evidence to prove motivation. For example, in early Title VII cases, preenactment acts provided evidence of patterns of employment discrimination. Preenactment acts similarly may prove gender-based animus in VAWA claims.

2. What Statute of Limitations Applies

Practitioners quickly will note that the VAWA itself enumerates no applicable limitations period. Some may argue that VAWA claims should be treated like Reconstruction-era civil rights claims, under which federal courts would be directed to apply the most analogous state statute of limitations. By contrast, the strong legislative intent that the VAWA provide a uniform remedy and the absence of any express statutory direction in the Act to apply state law counsel that courts apply federal law. Consequently, the recently enacted federal "catch-all" statute of limitations likely will be applied to VAWA civil rights claims. That provision would apply to VAWA claims commenced in state as well as federal court. The "catchall" provides a four-year limitations period for civil actions arising under federal laws that do not specify otherwise.

3. Claim Accrual

In addition to lacking any express statute of limitations, the VAWA does not enumerate when a claim accrues or when the statute of limitations will be tolled. Nor does 28 U.S.C. Sec. 1658, the federal "catchall" statute of limitations likely to apply to VAWA civil rights claims. However, federal courts routinely apply federal law in determining when a federal cause of action accrues, even in cases applying state statutes of limitations. A body of federal common law has developed providing that federal civil rights claims accrue when the plaintiff "knows or has reason to know of the injury that is the basis of the action." Under this doctrine, a claim accrues when the plaintiff becomes aware that she is suffering from a wrong for which damages may be recovered. In a case closely analogous to those likely to be brought under the VAWA, a federal court recently applied this "discovery rule" to a student's federal civil rights claim that she was sexually abused by a teacher. The court held that her claim did not accrue until she reasonably would have known the defendant school board had violated her constitutional rights. Applying that reasoning to VAWA claims, a court would permit a VAWA plaintiff to bring her claim when she reasonably recognized that a violent act violated her right to be free from gender-based violence even if the limitations period would have expired if it was calculated from the date the violent act was committed.

If VAWA civil rights cases mirror litigation under analogous civil rights laws, questions may arise concerning the date the claim accrues and the application of the "continuing violations" theory. Under existing law, the cause of action accrues when the act that caused the injury occurred, not when the effects of that act were felt.

4. Tolling of Claims
Although they frequently have the same practical effect as accrual rules, different rules govern tolling the statute of limitations. As noted earlier, VAWA claims are likely to be governed by the federal limitations period in 28 U.S.C. Sec. 1658 rather than by state law. /162/ While section 1658 contains no express tolling provision, principles of federal equitable tolling are read into every federal statute of limitations absent contrary congressional intent. /163/ Arguably, by enacting section 1658, Congress impliedly delegated to the federal judiciary the power to make related rules for tolling actions governed by section 1658. /164/

Alternatively, if courts rule that VAWA's limitations period is governed by state law, it may be argued that state tolling rules apply to VAWA claims. /165/ Because tolling rules constitute "an integral part of a complete limitations policy," /166/ courts generally would "borrow" the state's tolling provisions as part of the state's statute of limitations, unless those rules are deemed "inconsistent" with the policies underlying the federal statute. /167/ State tolling rules, however, may bar VAWA claims that would have been allowed under federal principles of equitable tolling. To that extent, state tolling rules may be rejected as "inconsistent" with the strong policies underlying VAWA favoring access to the courts for women who otherwise would be barred under restrictive state rules. /168/ It would be anomalous to prejudice VAWA plaintiffs based on precisely the same restrictive state rules Congress specifically sought to avoid through the VAWA.

**K. Preclusive Effect of Prior Criminal Proceedings**

1. Conviction

A central issue in VAWA actions is whether a felony conviction in a criminal case has any preclusive effect in the VAWA action. Under the doctrine of collateral estoppel, also known as issue preclusion, once a court makes a decision on an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. /169/ Federal courts must give state court judgments the same preclusive effect the judgment would receive in another court of that state. /170/ Under these general principles, a criminal conviction in a state proceeding conclusively establishes the fact of the conviction for purposes of the VAWA civil rights action. /171/ The conviction, however, may not have preclusive effect against other defendants. /172/

2. Guilty Pleas

The same general rule applies to guilty pleas and requires federal courts to give a guilty plea the same preclusive effect it would receive in another state court. Collateral estoppel may preclude litigation only of those issues necessary to support the plea entered in the first case. /173/ However, no preclusive effect will be given to issues not necessary to the plea. /174/

3. Acquittal
Acquittals present a different issue and are not likely to be accorded preclusive effect in a subsequent civil action. Unlike a conviction, which would be used in a subsequent civil action against a defendant, an acquittal would be applied against a VAWA plaintiff, who would have no opportunity to litigate the felony in the civil case. Moreover, even if a defendant had been acquitted, he still might be found to have committed the felonious act by a preponderance of the evidence, the applicable standard in VAWA civil rights cases. Consequently, VAWA plaintiffs should be permitted to proceed with their cases even if the defendant had been acquitted in the prior criminal action.

L. Timing of Filing Civil Rights Claim

The VAWA expressly provides that a VAWA plaintiff need not wait to file her action until conclusion of a criminal investigation or prosecution. /175/ In an analogous context, at least one court similarly ruled that a plaintiff bringing suit under Illinois's Hate Crimes statute need not wait until conclusion of the state's criminal action. /176/ Nonetheless, counsel may choose to wait until the conclusion of the criminal action provided she does not prejudice her client's rights by waiting beyond the applicable limitations period. /177/ If the defendant is convicted, that judgment might be given preclusive effect in the VAWA action. Alternatively, a court may stay the civil action while the criminal action is pending. /178/ As a practical matter, the criminal prosecution may be useful in gathering evidence to establish that the violent act was gender motivated.

IV. Conclusion

As with any new statute, numerous issues undoubtedly will arise through litigation. Guidance for practitioners necessarily will expand as litigants assert and enforce their right to be free from gender-motivated violence and as courts grapple with the substantive and procedural issues raised by the civil rights remedy.

Footnotes


/2/ The Civil Rights Remedy states: "(b) All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . . (c) Cause of Action. A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. Sec. 13981 (1994).

/3/ Women and Violence: Hearing Before the Senate Comm. on the Judiciary, 101st


/7/ Id.; see, e.g., Del. Code Ann. tit. 11, Secs. 774, 775 (Supp. 1992).


/9/ Hearings 1992, supra note 4, at 2, 70 (statements of Chairman Charles Schumer and Margaret Rosenbaum); Hearings 1990, supra note 3, at 29 (statement of Marla Hanson).


/13/ Documenting Gender Bias, supra note 12, at 283 -- 84.

/14/ Id. at 284.


/17/ Congress grounded its constitutional authority to enact VAWA's civil rights remedy in both section five of the Fourteenth Amendment and the Commerce Clause, noting that "a federal civil rights action . . . is necessary to guarantee equal protection of the laws and

/18/ Although the remedy is drafted in gender-neutral terms and permits suits by persons of either gender, this article will refer to plaintiffs as female, reflecting the fact that women are more often the victims of the gender-based violence addressed by the VAWA's civil rights remedy.

/19/ 42 U.S.C. Sec. 13981.

/20/ The remedy's requirement that the violent act must involve either the use or attempted or threatened use of force or a risk that force will be used is reinforced by the requirement that the act fall within the definition of a "crime of violence" under 18 U.S.C. Sec. 16 (1994). 42 U.S.C. Sec. 13981(d)(2)(A). Echoing the language of the remedy itself, this provision includes offenses that involve the use, attempted use, or threatened use of physical force against a person or property as well as other felonies that involve a substantial risk that physical force will be used against a person or property.


/22/ See S. Rep. No. 197, supra note 21, at 45.

/23/ The statute does not specify whether the felony must be prohibited by the law of the state in which the act or acts occurred or whether it could be prohibited by the law of any state. In addition, federal criminal offenses can provide the basis for a VAWA civil rights claim even without any jurisdictional basis to support a federal prosecution. E.g., a woman could predicate a VAWA civil rights claim on an act that would satisfy the elements for a rape if it had taken place on an Indian reservation even if it had not in fact occurred there.


/25/ 42 U.S.C. Sec. 13981(e)(2).

/26/ See S. Rep. No. 197, supra note 21, at 44.

/27/ See pt. IV.K., infra, and accompanying notes.

/28/ 42 U.S.C. Sec. 13981(d)(1).

/29/ E.g., the 1993 Senate Report treats "proof of gender motivation" as a single statutory

/30/ See id.

/31/ See id. at 64.

/32/ Id. at 52-53.

/33/ Title VII prohibits discrimination "because of or on the basis of sex." 42 U.S.C. Sec. 2000e-2.


/35/ 42 U.S.C. Sec. 13981(d)(1).

/36/ The nearly-identical language of Title VII requires proof that the behavior was committed "because of . . . sex." 42 U.S.C. Sec. 2000e-2. Case law discussions applying the Title VII standard interchangeably use the terms "motivated by," "because of," "on the basis of" or "based on" sex or gender further support applying Title VII case law to prove a VAWA civil rights claim.


/38/ Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); see also Meritor, 477 U.S. at 65 -- 67.

/39/ Meritor, 477 U.S. at 67 (citations omitted). Courts have recognized that sexual harassment is a form of disparate treatment which, by definition, proves intentional sex discrimination. See, e.g., Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982); cf. Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) (holding that intentional discrimination is synonymous with disparate treatment).

/40/ 42 U.S.C. Sec. 1389(d)(1).

/41/ Practitioners should note that whether the VAWA's "animus" language adds anything to the proof required remains an issue to be addressed through litigation.

/42/ Griffin, 403 U.S. at 88. See Hearings 1993, supra note 4, at 6, 85 (statement of Sally Goldfarb); S. Rep. No. 138, supra note 17, at 51 n.59.

/43/ Griffin, 403 U.S. at 88. 42 U.S.C. Sec. 1985 prohibits conspiracies committed "for the purpose of depriving" a person or class of persons of equal protection of or equal privileges or immunities under the law.

/44/ Griffin, 403 U.S. at 100.

/46/ Id.

/47/ Id at 760.

/48/ Id. at 759 (recognizing that acting with a purpose to "'sav[e] women' from a combative, aggressive profession such as the practice of law" reflects gender-based animus); id. at 760 (noting that "[a] tax on wearing yarmulkes is a tax on Jews").


/50/ Id. at 1284.

/51/ See also Libertad v. Welch, __F.3d __, 1995 WL 239004 at *19 (1st Cir. April 28, 1995) (finding sufficient evidence of gender-based animus to preclude summary judgment for defendants from discriminatory epithets and testimony concerning women's ignorance and inability to know the "facts" concerning abortion). Several other post-Bray decisions have not offered extended analyses of the proof needed to establish discriminatory animus. See Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993) (remanding for further review of animus showing); cert. denied, 114 S. Ct. 185 (1993); Larson v. School Bd. of Pinellas County, 820 F. Supp. 596, 602 (M.D. Fla. 1993) (upholding Sec. 1985(3) claim alleging gender-based animus on motion to dismiss); Board of Managers v. West Chester Areas Sch. Dist., 838 F. Supp. 1035, 1041-45 (E.D. Pa. 1993) (finding evidence that blacks and Latinos will be predominantly affected by town's decision concerning school property is insufficient to establish racial animus under section 1985(3)), aff'd in part, rev'd in part, 62 F.3d 313 (3d Cir. 1995); Thornton v. City of Albany, 831 F. Supp. 970, 979--82 (N.D.N.Y. 1993) (finding single, racially neutral statement insufficient to establish racial animus under section 1985(3)).

/52/ For further discussion of factors used in identifying gender and other class-based violent crimes, see Center for Women's Policy Studies, Violence Against Women as Bias Motivated Hate Crime: Defining the Issues 8-12 (1991); Amy Stephson, Northwest Women's Law Center, Gender Bias Crimes, A Legislative Resource Manual 10 (1994); U.S. Dep't of Justice, Summary Reporting System, Hate Crime Data Collection Guidelines 2 -- 4; U.S. Dep't of Justice, Training Guide for Hate Crime Data Collection 14 -- 21.

/53/ 42 U.S.C. Sec. 13981(c).

/54/ As with most other federal laws containing no express contrary direction, the survival of an action grounded in federal law is governed by federal common law. Carlson v. Green, 446 U.S. 14, 23 (1980) (Clearinghouse No. 25,066). Courts have permitted survivorship claims seeking remedial, rather than punitive, relief. See Schreiber


/56/ See Ginter v. Stallcup, 869 F.2d 384, 387 (8th Cir. 1989); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); see also Cook & Sobieski, supra note 55, Para. 7.07; Schwartz & Kirklin, supra note 55, Sec. 2.2.

/57/ As with other civil rights claims, courts likely will recognize that corporations, both for-profit and not-for-profit, as well as governmental agencies, may assert VAWA civil rights claims if they are the target of gender-motivated violent attacks. See United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31 (6th Cir. 1992) (Section 1983 claim); Board of Managers, 838 F. Supp. at 1035 (section 1985 claim), aff'd in part, reversed in part, 52 F.3d 313 (3d Cir. 1995). For discussion of whether corporations may sue under 42 U.S.C. Sec. 1983, see generally Cook & Sobieski, supra note 55, Para. 7.07 n.4a; Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation, Sec. 1.05, at 7 -- 10 (3d ed. 1991); Schwartz & Kirklin, supra note 55, Sec. 2.3.

/58/ E.g., bystanders or individuals injured while attempting to aid a sexual-assault or domestic-violence victim may assert a claim. See also discussion of third-party standing, pt. IV.B., infra.

/59/ Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992); See generally Schwartz & Kirklin, supra note 55, Sec. 2.5.


Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216-17 (1974).

See generally, 13 Wright & Miller, supra note 54, at Sec. 3531.9.


Knight v. Alabama, 14 F.3d 1534, 1554 (11th Cir. 1994) (affirming district court's dismissal of cross-claims on behalf of third parties who already had appeared as plaintiffs and thus had no obstacle to their representation) (citing Singleton v. Wulff, 428 U.S. 106, 114 -- 16 (1976) (Clearinghouse No. 14,356) (concluding that doctor may assert right of women patients to be free from governmental interference with abortion decision)).

See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); see, e.g., El Rescate Legal Services, Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 748 (9th Cir. 1991) (Clearinghouse No. 45,687); Housing Opportunities Made Equal v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991).

See, e.g., New York State Club Assoc. v. New York City, 487 U.S. 1, 9 (1988) (stating that "an association has standing to sue on behalf of its members when those members would have standing to bring the same suit" in a case involving discrimination by private clubs).


Doe v. Frank, 951 F.2d 320 (11th Cir. 1992).

Id. at 320; see also Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981); Southern Methodist Univ. Ass'n v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979). See generally Henry H. Perritt, Jr., Americans with Disabilities Act Handbook Sec. 5.2C (2d ed. 1993); Schwartz & Kirklin, supra note 55, Sec. 2.9, at 87 -- 88; Joan Steinman, Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?, 37 Hastings L.J. 1 (1985); Wendy M. Rosenberger, Note, Anonymity in Civil Litigation: The "Doe" Plaintiff, 57 Notre Dame L. Rev. 580 (1982); Mark Albert Mesler II, Case Comment, 23 Mem. St. U. L. Rev. 881 (1993).


See, e.g., Doe v. Lally, 467 F. Supp. 1339 (D. Md. 1979) (seeking injunctive and
declaratory relief after homosexual rape); Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973) (case challenging act that would require invasion of patients' right to privacy concerning use of controlled substances).

/74/ See, e.g., Doe v. Prudential Ins. Co., 744 F. Supp. 40, 41 -- 42 (D. R.I. 1990) (suit for insurance recovery by parents of man who died of AIDS); see also Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981) (alleging that mandatory draft registration violated right of privacy); Southern Methodist Univ. Ass'n, 599 F.2d at 712 -- 13 (fear of retaliation against Title VII plaintiffs not of "utmost intimacy" to warrant use of fictitious names). But see In re Seaman, 627 A.2d 106, 110 (N.J. 1993) (maintaining complainant's anonymity in case charging sexual harassment by judge due to "offensive, highly invasive, psychologically hurtful and often deeply embarrassing nature of charges").

/75/ See Southern Methodist Univ. Ass'n, 599 F.2d at 713.

/76/ See Rosenberger, supra note 71, at 583 -- 84, n.12-21.


/78/ See Borup, 500 F. Supp. 127 (E.D. Wis. 1980) (rejecting "highly mechanical interpretation" of Roe v. New York and noting the "host of cases" permitting use of fictitious names).


/80/ See Schwartz & Kirklin, supra note 55, at Sec. 2.9 n.192 and cases cited therein.

/81/ VAWA civil rights plaintiffs' applications to proceed pseudonymously may be bolstered by the sense of the Senate contained in the VAWA urging news media, law enforcement officers, and other persons to "exercise restraint and respect a rape victim's privacy" by limiting disclosure of the victim's identity without her consent. See 42 U.S.C. Sec. 13962.

/82/ See generally Harbert B. Newberg, Class Actions (3d ed. 1992). VAWA class actions brought in state court would have to comply with the state rule governing class actions, which could differ substantially from the rules governing class actions in federal court. See Steven H. Steinglass, Section 1983 Litigation in State Courts Sec. 8.8 (1994) (noting different class action policies in state as opposed to federal courts).


is a resident of or visitor to the Commonwealth.

/86/ See id.

/87/ 42 U.S.C. Sec. 13981(c).


/89/ See Wayne R. LaFave & Austin W. Scott, Jr., Criminal law Sec. 3.10, at 259 (2d ed. 1986) (citing general rule that the term "person" generally includes artificial as well as natural persons and therefore includes corporations when consistent with statutory purpose and spirit); 18B Am. Jur. 2d Secs. 2137, 2139; Nora A. Uehlein, Annotation, Corporation's Criminal Liability for Homicide, 45 A.L.R. 4th 1021, Sec. 3(a) (1986); but see id. at 1021, Sec. 3(b) (listing decisions in which courts refused to treat corporations as "persons" based on common law or intention of legislature in particular statutory context).

/90/ See Model Penal Code Sec. 2.07, at 340 -- 41 n.18 (1980).

/91/ This basis for liability applies only where the offense "evidences a legislative purpose to impose liability on a corporation." Id. Sec. 2.07(1)(a).

/92/ Id. Sec. 2.07(1)(b). This subsection, establishing liability for statutorily defined criminal negligence, is not likely to give rise to VAWA liability, which is likely to be based on the commission of violent acts.

/93/ Id. Sec. 2.07(1)(c). This is the subsection most likely to give rise to VAWA liability, e.g., for corporate policies condoning assaults against women.

/94/ See generally id. Sec. 2.07; LaFave & Scott, supra note 89, at Sec. 3.10; Charles E. Torcia, Wharton's Criminal Law Sec. 49 (15th ed. 1993); Uehlein, supra note 89; see also Kathleen F. Brickey, Rethinking Corporate Liability Under the Model Penal Code, 19 Rutgers L. J. 593 (1988).

/95/ See LaFave & Scott, supra note 89, at 262; Torcia, supra note 94, Sec. 49, at 313.

/96/ See LaFave & Scott, supra note 89, Sec. 3.10, at 258; Torcia, supra note 94, Sec. 49, at 315; Uehlein, supra note 89.


See pt. IV.F.3, infra, and sources cited therein.

See Monell v. Dep't of Social Servs, 436 U.S. 658 (1978) (Clearinghouse No. 17,739).

42 U.S.C. Sec. 13981(c).


Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (Clearinghouse No. 43,129); Kentucky v. Graham, 473 U.S. 159 (1985). States sued in federal court are shielded by the Eleventh Amendment. At least under 42 U.S.C. Sec. 1983, states also are shielded from suit in state court because the Supreme Court's definition of "person" for purposes of 42 U.S.C. Sec. 1983 reflects many of the same concerns underlying the Eleventh Amendment and ultimately yields the same result. Thus, the distinction made between retrospective and prospective relief applies in both state and federal court, although supported in the former forum by statutory considerations and in the latter by both constitutional and statutory concerns. See Schwartz & Kirklin, supra note 55, Sec. 8.1, n.14.

Will, 491 U.S. at 72 n.10.

Federal officials whose actions meet the statutory definition of "crime of violence motivated by gender" may be liable for damages and declaratory and injunctive relief only when sued in their personal capacity. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

See Wyatt v. Cole, 112 S. Ct. 1827, 1831 (1992) (noting that Congress would have specified if it had intended to override the firmly-rooted common-law immunity traditions); see also Pierson v. Ray, 386 U.S. 547, 554 (1967). Courts reasoned that Congress was familiar with common-law immunities and "likely intended these common-law principles to obtain, absent specific provisions to the contrary." City of Newport, 453 U.S. at 258.


The VAWA's legislative history may appear to direct courts to follow the Reconstruction-era statutes for procedural purposes. See S. Rep. No. 545, 101st Cong., 2d Sess. 51 (1990). Whether this includes Section1988's direction to apply state law where the statute is silent is not clear. It may be argued that the specific legislative history underlying a particular VAWA civil rights claim constitutes federal policy that may trump the legislative history's general directive to follow the Reconstruction-era statutes.

In initial VAWA cases, the common law at the time of enactment likely is virtually
the same as the current common law.


/113/ Restatement (Second) of Torts Sec. 895(f) comment a (1977).

/114/ As of November 1994, two months after the VAWA's enactment, only six states still recognize interspousal immunity. See Karp & Karp, supra note 8, at app. B (Supp. 1995) (noting that Florida, Georgia, Louisiana, Massachusetts, Nevada, and Vermont continue to recognize some form of interspousal immunity).

/115/ In only the last ten years, thirteen states fully abrogated the interspousal immunity defense and three others substantially limited its applicability. See id. at 330 (Delaware, Hawaii, Illinois, Kansas, Maryland, Mississippi, Missouri, Montana, Ohio, Oregon, Rhode Island, Texas, and Wyoming have abrogated interspousal immunity doctrine since 1985, while Florida, Georgia, and Louisiana limited its application).


/117/ Hearings 1993, supra note 4, at 9 (statement of Sally Goldfarb).

/118/ As of November 1994, two months after the VAWA's enactment, only two states fully retained the doctrine of parental tort immunity. Karp & Karp, supra note 8, at 397 -- 409, app. F (Supp. 1995) (Delaware and Louisiana). Thirty-five states had abrogated parental tort immunity, although a few of these states retain some form of the immunity for negligent supervision claims or some forms of motor-vehicle-related negligence. Even those remaining states recognizing immunity for claims of negligence would permit VAWA claims, which likely would be premised on intentional acts.

/119/ See pt. IV.F.1, supra, and accompanying footnotes.

/120/ See S. Rep. No. 197, supra note 21, at 45.

/121/ At least nine states have liberalized their laws over the past ten years to permit suits by children against their parents for the type of violent acts likely to be the subject of VAWA claims. See Karp & Karp, supra note 8, at app. F (citing Alabama (abrogating immunity for sexual abuse); Colorado (abrogating immunity for willful, wanton, or intentional misconduct); Connecticut (same); District of Columbia (abrogating immunity); Indiana (same); Massachusetts (abolishing absolute protection); Missouri (abrogating immunity); New Jersey (same); Tennessee (limiting immunity to exercise of
In most instances, federal immunity doctrine applies to VAWA actions brought in state court as well. See Martinez v. California, 444 U.S. 277 (1980); see generally Steinglass, supra note 82, at Sec. 15.2(d). In addition, federal officials may be liable for violating others' constitutional rights. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Federal officials' liability is judged by the same standards that govern state officials' liability for constitutional violations. See Butz v. Economou, 438 U.S. 478 (1978).

E.g., courts extend absolute immunity to legislators exercising their legislative functions, to judges exercising their judicial functions, and to prosecutors and other executive officers engaged in adjudicative functions. Harlow v. Fitzgerald, 457 U.S. 800, 806 -- 7 (1982). See also Howlett, 496 U.S. at 356; Will, 491 U.S. at 58.

Malley, 475 U.S. at 335 (1986). For a discussion of absolute and qualified immunity, see generally Abigail Cooley Modjeska, Employment Discrimination Law Secs. 10.17 -- 10.20 (3d ed. & Supp. 1994); Nahmod, supra note 57, Secs. 7.01 -- 8.21; Schwartz & Kirklin, supra note 55, Secs. 9.1 -- 9.24; Civil Actions Against State and Local Governments, supra note 97, at Secs. 11.1 -- 11.50.

Harlow, 457 U.S. at 818 -- 19.

See Lee v. Dugger, 902 F.2d 822, 824 (11th Cir. 1990) (holding that a single case construing a new statute could not support assertion that law was clearly established).

A plaintiff may be able to defeat an official's immunity claim because he violated state penal laws; however, that violation alone may not be sufficient. See Davis v. Scherer, 468 U.S. 183 (1984) (violating state law ordinarily not sufficient basis for establishing qualified immunity; however, state law violation is relevant if it bears on constitutional violation asserted). Nonetheless, government officials may well have violated other constitutional rights of which they should have been aware in committing felonious violent acts.


Steinglass, supra note 82, Sec. 7.3(d). For a discussion of the availability of jury
trials on federal claims brought in state courts, see Schwartz & Kirklin, supra note 55, Sec. 7.3(d).


/134/ Steinglass, supra note 82, Sec. 8.2(e).

/135/ Id. Sec. 8.4.

/136/ Id. Sec. 8.5.

/137/ See generally, Nahmod, supra note 57, Sec. 1.14; Schwartz & Kirklin, supra note 55, Sec. 1.16; Steinglass, supra note 82, Secs. 7.1 -- 8.12.


/139/ 42 U.S.C. Sec. 13981(e)(5).

/140/ Historically, the exercise of jurisdiction over a claim for which the federal court did not have original jurisdiction was referred to as "pendent jurisdiction." See, e.g., United Mine Workers v. Gibbs, 383 U.S. 715 (1966). With the passage of the Judicial Improvements Act of 1990, it is referred to as "supplemental jurisdiction" codified at 28 U.S.C. Sec. 1367(a) ("Sec. 1367").

/141/ The district courts may decline to exercise jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction. 28 U.S.C. Sec. 1367(c).

/142/ 42 U.S.C. Sec. 13981(e)(4).

/143/ The "single controversy" or "entire controversy" doctrine adhered to in some states may preclude a plaintiff from "splitting" her claims. However, most states allow separate actions for divorce and interspousal personal injury. See Karp & Karp, supra note 8, Sec. 1.42 and cases cited therein. It is likely that VAWA claims would be treated similarly.


not favored in the law . . . . Even when some substantial justification for retroactive rulemaking is presented, Courts should be reluctant to find such authority absent an express statutory grant."); Bennett v. New Jersey 470 U.S. 632 (1985) (refusing to apply retroactively amendments changing the substantive standards of Title I of the Elementary and Secondary Education Act to claims pending under the old Act). See also 2 Norman J. Singer, Sutherland Statutory Construction, Sec. 33.06 (5th ed. 1993).

/147/ See Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) (stating that statute should not have retroactive effect, absent express congressional authorization, if it serves to increase a party's liability for past conduct).


/149/ See Schwartz & Kirklin, supra note 55, Secs. 12.4, 12.9 (charting state statutes of limitations applied to civil rights claims). VAWA's legislative history directing courts to treat VAWA claims like Reconstruction-era statutes for procedural purposes could be cited to support that argument. See S. Rep. No. 545, supra note 109, at 51.

/150/ Any contrary result likely would be rejected as "inconsistent" with the VAWA's purpose. See pt. II, supra.

/151/ That statute provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. Sec. 1658 (1990).

/152/ See North Star Steel Co. v. Charles A. Thomas, Nos. 94-834, 94-835, 1995 U.S. LEXIS 3641, at *1 n.1 (May 30, 1995) (noting that the federal catch-all statute of limitations would apply for federal statutes passed after December 1, 1990 that contain no express statute of limitations).

/153/ See Felder v. Casey, 487 U.S. 131 (1988) (Clearinghouse No. 42,957); see generally Steinglass, supra note 82, Sec. 20.3(a) (noting that state courts are required to apply federal policies governing the cause of action); Brown v. Western Railway., 338 U.S. 294, 296 (1949) (noting that the assertion of federal rights "cannot be defeated by the forms of local practice"); see also Nahmod, supra note 57, Sec. 1.14, at 52-53.


/155/ See pt. IV.J.2, supra.
See, e.g., Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir. 1993); Leon v. Murphy, 988 F.2d 303, 309 (2d Cir. 1993) (holding that federal law governs claim accrual even when using state statute of limitations); LaFont-Rivera v. Soler-Zapata, 984 F.2d 1, 2-3 (1st Cir. 1993) (same); Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992) (same). VAWA cases brought in state court also may be governed by the federal accrual rule because state courts applying federal statutes cannot frustrate or undermine the federal claim by applying conflicting rules. See pt. IV.J.2, supra.

See Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir. 1994); Pete v. Metcalfe, 8 F.3d 214, 217 (5th Cir. 1993); Kelly v. City of Chicago, 4 F.3d 509 (7th Cir. 1993); Baker, 991 F.2d at 632; Leon, 988 F.2d at 309; LaFont-Rivera, 984 F.2d at 2 -- 3; Wilson v. Giesen, 956 F.2d 738, 740 (7th Cir. 1992); National Advertising Co. v. City of Raleigh, 947 F.2d 1158, 1162 (4th Cir. 1991), cert. denied, 509 U.S. 932 (1992); Gentry v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). See generally ; Cook & Sobieski, supra note 55, Para. 4.02; Schwartz & Kirklin, supra note 53, Sec. 12.4


Id. at 1375 -- 76.

See Chardon v. Fernandez, 454 U.S. 6 (1981) (cause of action for unconstitutional termination of employment accrued when notified that job would be terminated, not on date employment actually terminated); Delaware State College v. Ricks, 449 U.S. 250 (1980) (cause of action for discriminatory refusal to grant tenure accrued when tenure bid first denied, not when grievance procedure completed).

See pt. IV.J.2, supra.

Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); see, e.g., Cook v. Deltona Corp., 753 F.2d 1552, 1562 (11th Cir. 1985).

Federal courts have permitted equitable tolling of other limitations periods established by federal law. See, e.g., Zipes v. Trans World Airlines, 455 U.S. 385 (1982) (Title VII's filing requirement is subject to waiver, estoppel, and equitable tolling); see generally, Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law ch. 28.I.C, 28.II.D.

This could result, e.g., if courts were to require VAWA claims to be treated in the same manner as Reconstruction-era statutes. See pt. IV.J.2, supra.

Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980); accord Hardin v. Straub,


/168/ See, e.g., Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (Clearinghouse No. 21,679) (rejecting wholesale adoption of state statute of limitations and upholding federal courts' duty "to assure that the importation of state law will not frustrate or interfere with the implementation of national policies"); Dixon v. Chrans, 986 F.2d 201, 203 -- 5 (7th Cir. 1993) (rejecting state tolling provision found to be "inconsistent" with the purposes underlying Section 1983).


/172/ See, e.g., Parker, 862 F.2d at 1474-75. Most states, however, recognize the preclusive effect of one judgment in a second suit even if that suit is brought by different parties. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313 (1971).


/174/ See, e.g., Haring v. Prosise, 462 U.S. 306, at 315 (1983) (refusing to afford preclusive effect in civil rights action to unlawful search, which had not been litigated and was not necessarily determined in prior criminal action).

/175/ "Nothing in this section requires a prior criminal complaint, prosecution or conviction to establish the elements of a cause of action." 42 U.S.C. Sec. 13981 (1994).


/178/ In other civil rights actions, courts may be required to stay a federal action for damages until the related state court proceeding is completed. See Bezerra v. County of Nassau, 846 F. Supp. 214, 220 (E.D.N.Y. 1994).