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Proving Gender Motivation in Civil Rights Remedy Claims Under the Violence Against Women Act

by Julie Goldscheid

In 1994 Congress enacted, as part of the Violence Against Women Act (VAWA), a civil rights remedy that creates a federal civil rights cause of action for gender-motivated violent crimes.\(^1\) This groundbreaking new law declares for the first time that violent crimes motivated by the victim's gender are discriminatory and violate the victim's federal civil rights.\(^2\)

The civil rights remedy permits victims of gender-motivated violence to bring a civil rights suit in federal court against the perpetrator of a gender-based crime. It contains two basic elements of proof.

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\(^2\) 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. § 13981 (1997).

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First, a plaintiff must establish that she was the victim of a "crime of violence" of sufficient severity. Second, she must establish that the crime was "gender motivated." The law permits her to bring a civil rights claim for compensatory or punitive damages, declaratory or injunctive relief, and attorney fees. While the law may be most useful for women who were violently assaulted by defendants with substantial assets, practitioners should consider whether a VAWA civil rights remedy lawsuit would enable their client to recover monetary damages, for example, by garnishing a batterer's wages.

The injunctive relief that may be ordered as part of a state or federal civil rights claim can be broader than what clients can obtain under state or local protective order laws. The penalties for violations, particularly of a federal court order, may be stronger as well.

While other articles have reviewed the background of the law and procedural issues that may arise in litigating VAWA civil rights remedy cases, in this article I focus on the element requiring proof of gender motivation. I describe the statutory language and legislative history, review the first cases in which women are begin-

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ning to use the law, direct practitioners to analogous bodies of case law, and address key issues that practitioners may encounter as future cases are litigated.\textsuperscript{7}

I. Statutory Language and Legislative History

The statute’s gender-motivation element requires a plaintiff to prove the connection between the defendant’s violent acts and the victim’s gender. Specifically the victim must prove that the violent act was committed (1) because of gender or on the basis of gender and (2) due, at least in part, to an animus based on the victim’s gender.\textsuperscript{8}

The civil rights remedy’s legislative history directs courts to analyze whether a violent act was gender motivated in the same manner that bias is assessed in other civil rights statutes: by evaluating the “totality of the circumstances” for such evidence as epithets, patterns of behavior, statements evincing bias, and other circumstantial and direct evidence.\textsuperscript{9} Congress specifically stated that the Reconstruction-era civil rights statutes and Title VII of the Civil Rights Act of 1964 (Title VII) would offer “substantial guidance” in assessing gender motivation.\textsuperscript{10} As the first VAWA civil rights remedy cases demonstrate, courts have followed Congress’ direction in assessing whether violent acts against women were gender motivated.

II. Civil Rights Remedy Case Law

The first reported decisions in VAWA civil rights remedy cases held that claims of both sexual assault and domestic violence were gender motivated. For example, one court treated as gender motivated allegations that a woman’s employer made inappropriate sexual advances, including fondling, attempting to remove her clothing, grabbing her breasts, assaulting and attempting to rape her, and ultimately raping her.\textsuperscript{11} Another court found that a reasonable jury could infer gender motivation from allegations that a male supervisor called a female employee a “dumb bitch” and later shoved her to the ground.\textsuperscript{12} Similarly two other courts “had little doubt” that allegations of sexual assault or sexual exploitation were gender motivated, although they both suggested that whether other, unspecified crimes were commit-


\textsuperscript{8} See 42 U.S.C. § 13981(d)(1).


\textsuperscript{11} Anisimov, 982 F. Supp. at 541.

\textsuperscript{12} Crisonino, 985 F. Supp. at 391.
ted "because of" or "on the basis of" gender might be difficult to determine.\(^\text{13}\)

In another case, a Utah court concluded that allegations of sexual assault and sexual harassment by a chiropractor for whom three women worked described a gender-motivated crime.\(^\text{14}\) Although that court rejected the women's claims because they failed to establish the crime-of-violence element of the civil rights remedy, it nonetheless reasoned that the claims would satisfy the gender motivation element.\(^\text{15}\) Responding to the defendant's argument that he was motivated by "amorous" feelings rather than bias, the court stated that

[i]n the notion that non-consensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong. . . . In fact, the perception that a man is somehow less culpable in taking inappropriate liberties with members of the female gender if his motivations are amorous seems to be just the type of "animus" that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women.\(^\text{16}\)

In the most detailed analysis to date, a Fourth Circuit panel, in a decision subsequently vacated pending rehearing en banc, concluded that a gang rape of a college student in a dormitory was gender motivated.\(^\text{17}\) Applying the "generally accepted guidelines for identifying hate crimes" referred to by Congress when it enacted the remedy, the court analyzed the evidence.\(^\text{18}\) It cited allegations that the college student was raped three times by two virtual strangers within minutes of meeting them and that the acts were committed without provocation and determined that "gang rape itself constitutes an

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\(^\text{15}\) Id. at 1252.

\(^\text{16}\) Id. at 1252–53.


In this case, which was the first sexual assault case to be litigated under the civil rights remedy, the district court upheld the plaintiff's claim that the alleged gang rape was gender motivated but, ruling that the civil rights remedy was unconstitutional, dismissed the complaint. 935 F. Supp. at 784–85, 788–801. The appellate panel agreed that the complaint stated a claim of gender motivation and reversed the district court's ruling on the constitutional question. 132 F.3d at 963, 966–74. Nonetheless, the Fourth Circuit reheard the case en banc on March 3, 1998, but has not issued a decision as of this writing.

\(^\text{18}\) See Brzonkala, 132 F.3d at 963 (citing S. REP. No. 103-138, at 522; see also S. REP. No. 102-197, at 50 n.72 (1991) (also referencing hate crime guidelines). The guidelines include factors such as "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense," S. REP. No. 103-138, at 52 n.61. See also discussion of Federal Bureau of Investigation Guidelines, infra pt. III.A.1.
attack of significant severity.”¹⁹ One of the assailants conceded during a college disciplinary hearing that the victim twice told him “no” before the alleged rape, and there was no other apparent motive, such as robbery or theft, for the act.²⁰ The court also cited one of the defendants’ comments during and after the rape as further evincing gender motivation.²¹ Specifically, when he finished raping her for the second time, the assailant told the victim: “You better not have any fucking diseases.” He later announced to the college dining room, “I like to get girls drunk and fuck the shit out of them.”²² Based on that evidence, the court concluded that “[v]irtually all of the earmarks of ‘hate crimes’ are asserted here” and upheld the college student’s claim.²³

In the first decision to elaborate on the meaning of gender motivation in a domestic violence case, a Washington federal court looked to the totality of the circumstances and found ample evidence of gender bias.²⁴ The court cited evidence of rape and evidence of gender-specific epithets and acts that perpetuated stereotypes of women’s submissive roles, such as the defendant husband controlling all of the family’s financial information and documents, holding all the victim’s personal documents such as her passport, not placing her name on title documents, not disclosing insurance information to her, and becoming angry if she questioned him about the family affairs.²⁵

Applying the standards for recognizing hate crimes identified by Congress, the court relied on evidence of severe and excessive attacks on the plaintiff, especially during her pregnancy, and on evidence that the alleged violence often occurred without provocation and specifically at times when the plaintiff asserted her independence.²⁶ While recognizing that “there may be many causes of violence within a marital relationship,” the court nonetheless found that the alleged facts “present[ed] more than conclusory allegations” and supported an inference of gender motivation.²⁷ Similarly an Illinois court concluded that allegations of marital rape were gender motivated.²⁸ That court stated that it had “little doubt that an alleged criminal sexual assault is motivated by gender and that cases in which a criminal sexual assault is not motivated by gender are few and far between.”²⁹

In contrast with these cases, a few courts, finding that women’s claims did not contain allegations of gender motivation, have rejected such claims. For the most

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¹⁹ 132 F.3d at 963–64. The court did not specify the standard it was applying when making this judgment. Presumably the court was applying the “generally accepted guidelines for identifying hate crimes” that Congress cited when it enacted the civil rights remedy; the guidelines include the severity of the attack among several factors to consider. See id. at 963 (citing S. Rep. No. 103-138, at 52).

²⁰ Id.

²¹ Id. at 964.

²² Id.

²³ Id.


²⁵ Id. at 607.

²⁶ Id. at 606 (citing S. Rep. No. 102-197, at 50, n.72 (1991) (referring generally to accepted guidelines for identifying hate crimes as useful in analyzing gender motivation)); see also id. at 607.

²⁷ Id.


²⁹ Id.
part, those claims lacked any circumstantial evidence of gender bias.\textsuperscript{30} Dictum in the \textit{Brzonkala} trial court decision, although subsequently reversed and then vacated pending rehearing \textit{en banc}, reflects objections that may be raised in cases of acquaintance rape.\textsuperscript{31} Although the trial court upheld Brzonkala's claim based on the facts before the court there, the court posited that date rape "could involve a misunderstanding and is often less violent than stranger rape"; the court theorized that

\[\text{Date rape could also involve a situation where a man's sexual passion provokes the rape by decreasing the man's control. ... Date rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim's personality to some extent.}\textsuperscript{32}\]

That reasoning has been roundly criticized as making sweeping generalizations, contrary to Congress' direction to analyze each case on a case-by-case basis.\textsuperscript{33} The court missed the essential point: forced sexual contact in the name of passion or personality may support rather than refute a claim of gender motivation because it shows a disrespect for women.\textsuperscript{34} The reasoning also contradicts research indicating that acquaintance rapes frequently are premeditated and are often predicated on discriminatory biases about male entitlement to coerced sexual relations with women against their will.\textsuperscript{35}

Evidence in sexual assault and domestic violence cases other than the workplace sexual assaults and the gang rapes analyzed in the first VAWA civil rights remedy cases similarly may reflect gender motivation. A perpetrator may have uttered gender-derogatory epithets such as "bitch,"

\textsuperscript{30} Two rejected claims alleged assault with no allegations relating to gender bias. \textit{See} Dolin \textit{v.} West, 22 F. Supp. 2d 1343, 1351 (M.D. Fla. 1998). \textit{See} also \textit{Wesley v. Don Stein Buick Inc.}, 985 F. Supp. 1288, 1300 (D. Kan. 1997). Another case alleged same-sex sexual assault with no other circumstantial evidence of gender motivation. \textit{See} \textit{Wilson v. Diocese of New York of the Episcopal Church}, 96 Civ. 2400 (JGK), 1998 U.S. Dist. Lexis 2051 at *41 (S.D.N.Y. Feb. 23, 1998). That court, based on plaintiff's failure to produce any evidence that the assault was gender related, rejected plaintiff's claim. \textit{Id.} While the court offered virtually no analysis of its conclusion, the decision can be interpreted as reflecting an unwillingness to infer bias motivation from allegations of same-sex sexual assault absent any circumstantial evidence of gender bias. That conclusion does not cast doubt on whether a court may be willing to infer gender bias from a sexual assault committed by a male against a female. In another decision, a district court rejected a civil rights remedy claim based on a sexual assault by a woman's supervisor. \textit{See} \textit{Braden v. Piggly Wiggly}, 4 F. Supp. 2d 1357 (M.D. Ala. 1998). That court seemingly accepted that an allegation of sexual violence alone might be "itself indicative of gender animus" and would therefore be "sufficient" to satisfy the civil rights remedy's gender-motivation element. \textit{Id.} at 1361–62. Nonetheless, the court rejected the complaint because of the complaint's misreading of the gender-motivation element. It found that the complaint did not specifically allege harassing sexual behavior, unwanted sexual advances, or gender-biased statements and that the predicate felony sexual offense did not itself contain proof of gender animus as one of its elements. \textit{Id.} In addition to lacking any legal support whatsoever, that analysis is illogical since Congress did not specifically require evidence of sexual harassment and because felony statutes do not generally require proof of gender motivation as one of their elements.


\textsuperscript{32} \textit{Id.} at 785.

\textsuperscript{33} \textit{See} Anisman v. Lake, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (critiquing \textit{Brzonkala} trial court's "broad characterizations of rape").


\textsuperscript{35} \textit{See}, \textit{e.g.}, \textit{David Lisak, Interview with a Rapist: Transcript from a Study of Acquaintance Rapists} (n.d.) (on file with NOW Legal Defense and Education Fund) (documenting "techniques" used by unincarcerated rapists to target women for invitations to fraternity parties at which they would ply the women with alcoholic beverages, take them to pre-designated rooms, and have sexual relations notwithstanding the women's objections).
“slut,” or “whore” in the course of committing a violent act. A defendant may have made derogatory comments about a woman's physiology or may have mutilated her genitals during an assault. A defendant may have committed serial rapes or participated in gang rapes. In acquaintance-rape cases a defendant who disregards a woman’s protests may be reflecting the stereotypic “no means yes” view that underlies much violence against women.36

Similar evidence may reflect gender bias in domestic violence cases. The coercion and control that typify domestic violence frequently reflect men’s attempts to ensure that their partners conform to traditional women’s roles, regardless of the women’s preferences. Male batterers go to great lengths to control all aspects of their partners’ lives through means that frequently involve insisting on their partners’ conformity to traditional gender roles.37 They may insist that their partners stay home, control their manner of dress, and limit their interactions with others. They may berate their partners if they depart from traditional gender-specific roles such as attending to the household chores of cooking or cleaning. Batterers, in typically interfering with women’s working lives, dramatically inhibit their independence and ensure their conformity to traditional roles.38 Similarly reflecting conduct that focuses on a woman’s “femaleness,” batterers may target a woman with violence when she is pregnant.39

In both sexual assault and domestic violence cases, defendants may have engaged in patterns of biased conduct similar to those in other bias-crime prosecutions.40 For example, in one case involving the prosecution of a serial batterer under Massachusetts’s hate crime law, affidavits submitted by several women who had been battered by the defendant recounted gendered epithets and biased comments about the role the defendant believed women should assume.41 Testi-


40 In other bias-crime cases, courts admitted prior conduct as permissible evidence of discriminatory motive under Federal Rule of Evidence 404(b). See, e.g., United States v. Woodside, 156 F.3d 1399 (10th Cir. 1998); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983).

mony from former wives, girlfriends, partners, or family members similarly may provide evidence of antifemale comments in other cases. In some instances a defendant may belong to a group that espouses antifemale or sex-stereotyped views. Practitioners undoubtedly will discover other similar evidence as they investigate and prosecute women’s claims.

III. Analogous Case Law Analyzing Bias Motivation

Practitioners can draw from federal and state civil rights cases to support claims about the types of evidence that signal bias motivation.

A. Federal Bias-Crime Enforcement

The civil rights remedy builds on a long history of federal legislative interventions to redress bias-motivated violence. Most of those laws target bias crimes based on race, color, religion, national origin, and ethnicity, and sometimes sexual orientation or disability. However, most do not address gender. Specifically, aside from the VAWA civil rights remedy, the only federal bias-crime law to include gender is a provision of the 1994 crime bill that directs the U.S. Sentencing Commission to enhance sentences for bias-motivated crimes, including those based on gender.42 Unfortunately, while gender is enumerated in the statute, courts have not yet adequately articulated the standards under which gender-motivated bias crimes will be assessed.43

Nevertheless, federal bias-crime statutes provide useful analogies for analyzing gender-motivated crimes. These laws include the Hate Crime Statistics Act of 1990, a data collection tool that resulted in the creation of Federal Bureau of Investigation guidelines for identifying bias crimes, federal civil rights laws that provide civil and criminal penalties for bias crimes, and sexual harassment laws.44

1. Hate Crimes Statistics Act

The Hate Crimes Statistics Act requires the Justice Department to acquire and publish data on bias crimes that “manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity.”45 In the course of training its staff to implement the Hate Crimes Statistics Act, the Federal Bureau of Investigation developed guidelines for identifying bias-motivated crimes. These guidelines direct investigators to consider the following factors in assessing bias motivation:

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43 In the only reported decision in which a court considered applying the guideline to a gender-related crime, the judge declined to do so and instead analyzed gender motivation in a manner contrary to U.S. Supreme Court precedent. In United States v. Boylan a municipal court judge was alleged to have coached single, poor, Hispanic, or light-skinned black, female municipal court defendants charged with traffic violations to lie about their offenses in order to get reduced fines and penalties in return for sexual favors. 5 F. Supp. 2d 274 (D.N.J. 1998). The court declined to treat his crime as a hate crime for sentencing purposes because it was not persuaded that “the primary motivation for the offense was a hatred of the municipal court defendants.” Id. at 282. That reasoning is incorrect, however, because the court did not analyze the role the municipal court defendants’ race or gender played in Boylan’s actions; it merely concluded, without making any reference to their gender or racial identity, that the judge did not harbor “hated” of the defendants. Moreover, the court erroneously confused “hated” with the discriminatory motive about which the sentencing guidelines are concerned. See, e.g., Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 270 (1993) (distinguishing malicious motivation from bias or discriminatory motivation).


whether the offender and victim were of different racial, religious, ethnic/national origin, or sexual orientation groups;

- whether the offender made bias-related comments, written statements, or gestures indicating bias;

- whether bias-related drawings, markings, symbols, or graffiti (e.g., a swastika) were left at the crime scene;

- whether objects, items, or things indicating bias were used (e.g., wearing white sheets with hoods, burning a cross on the lawn);

- whether the victim was visiting a neighborhood where previous hate crimes had been committed;

- whether other incidents occurred in the same locality;

- whether a substantial portion of the community perceives that the incident was motivated by bias;

- whether the victim engaged in activities promoting his or her membership in a protected class;

- whether the incident coincided with a holiday relating to a significant date for protected groups (e.g., Martin Luther King's birthday);

- whether the offender previously was involved in similar hate crimes or was a member of a hate group;

- whether indications existed that a hate group was involved (e.g., such a group claimed responsibility for the act);

- whether historically established animosity exists between the victim's and the offender's group; and

- whether the victim was not a member of a protected class but was a member of an advocacy group supporting the victim group.46

These guidelines are widely recognized as a useful source of guidance in assessing bias motivation, including gender bias motivation.47 Following Congress' direction, courts interpreting the civil rights remedy have relied on these guidelines in assessing gender motivation.48

2. Federal Civil and Criminal Bias-Crime Cases

Several civil and criminal federal bias-crime laws undoubtedly will be useful as practitioners pursue VAWA civil rights remedy claims on behalf of victims of gender-based violence. One of the Reconstruction-era civil rights statutes, 42 U.S.C. § 1985(3), is a close analogy to the civil rights remedy because it provides a remedy for violent acts motivated by bias-related "animus."49 Courts analyzing section 1985(3) claims look to circumstantial evidence of bias. For example, in Griffin v. Breckenridge, which interpreted racial animus under section 1985(3), and to which Congress specifically referred in VAWA's legislative history, the Supreme Court inferred an intent to discriminate on the basis of race from a group of whites' violent attack on a group of African Americans and whites believed to be civil rights workers.50

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48 See supra pt. II and cases cited there.

49 42 U.S.C. § 1985(3) provides a civil remedy for conspiracies to deprive any person "of the equal protection of the laws." To meet this element of proof, the Supreme Court has required "some racial, or perhaps otherwise class-based invidiously discriminatory animus" behind the action. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

Women have used section 1985(3) to vindicate civil rights claims even though the Supreme Court determined in Bray v. Alexandria Women’s Health Clinic that antiabortion protests themselves did not reflect gender-based bias. In Bray the Court reasoned that the antiabortion protesters were motivated by an objection to abortion rather than by discriminatory motivation toward women. Nonetheless, the Court recognized that circumstantial evidence of bias could reflect discriminatory motivation. Most important, the Court specifically distinguished malicious from discriminatory motivation; it made clear that one need not prove that a defendant harbored “hatred” of all women in order to prevail in a claim that a violent act was motivated by “discriminatory animus.”

Since Bray, lower courts have upheld section 1985(3) claims based on acts that deprive women of their civil rights, even in the context of antiabortion protests. Courts also have recognized sexual harassment and workplace discrimination as gender-based conduct that could violate section 1985(3). In section 1985(3) cases involving civil rights violations based on race, religion, and other biases, courts similarly rely on circumstantial evidence such as racial slurs, epithets, symbolic conduct, and patterns of conduct to infer discriminatory bias. On the other hand, courts find that conclusory allegations, or

51 506 U.S. at 270.
52 Id.
53 Id. (Analogizing that a “tax on wearing yarmulkes is a tax on Jews”).
54 Id.
55 See Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) (basing decision on protesters’ gendered epithets, including “lesbians, killers . . . lesbians can’t have babies,” and statements, e.g., that women were ignorant about abortion and needed to be “protected” from their decisions to have abortion).
allegations of a single statement with possible racial connotations, are insufficient to establish class-based animus.58

Cases brought under the federal criminal civil rights statute, 18 U.S.C. § 245 (section 245), also may offer useful analogies. As in section 1985(3) cases, courts deciding cases involving section 245 have cited evidence such as statements reflecting a defendant’s prejudice against people of a particular race, discriminatory epithets, a defendant’s participation in a supremacist group, or a pattern of committing bias crimes.59 Practitioners can cite the same types of circumstantial evidence to establish bias motivation in VAWA civil rights remedy cases.

3. Title VII of the Civil Rights Act of 1964

Cases concerning Title VII in general, and sexual harassment in particular, are useful examples of disparate treatment from which to draw analogies about when violent acts are gender motivated.60 The civil rights remedy’s statutory language requiring proof that the conduct was committed “because of gender or on the basis of sex” tracks nearly exactly Title VII’s prohibition of discrimination “because of sex.”61 As in cases concerning other civil rights laws, courts deciding sexual harassment cases analyze circumstantial evidence to determine whether sufficient evidence of bias motivation warrants a civil rights recovery.62 For example, courts have found gender bias self-evident and concluded that sexual harassment was “because of sex” when presented with

- evidence of sexual assaults at work;63
- direct propositions for sexual favors at work;64

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58 See, e.g., Havestarck Enters. v. Financial Fed. Credit, 32 F.3d 989, 994 (6th Cir. 1994) (no evidence of bias against handicapped alleged); McIntosh v. Arkansas Republican Party–Frank White Election Comm., 766 F.2d 337 (8th Cir. 1985) (no allegations that gubernatorial reelection committee’s refund of plaintiff’s ticket to fund-raiser was racially motivated); Robinson v. Town of Colonie, 878 F. Supp. 387 (N.D.N.Y. 1995) (rejecting claim by African American shoppers who had been requested by police to leave the store absent other indications of discriminatory animus); Thornton v. City of Albany, 831 F. Supp. 970 (N.D.N.Y. 1995) (rejecting claim by surviving family after police shot African American man who came after the police with a knife when they entered his apartment following neighbor’s complaints, when sole evidence of racial animus was statement that the man “had a grin on his face” and “had a full set of teeth which could be weapons too”); Carter v. Cuyler, 415 F. Supp. 852 (E.D. Pa. 1976) (no facts alleged relating to racial motivation).

59 On statements concerning race see, e.g., United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996); United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986). On discriminatory epithets, see, e.g., United States v. Makowski, 120 F.3d 1078 (9th Cir. 1997). On participation in a supremacist group see Dunnaway, 88 F.3d at 618; United States v. Lane, 883 F.2d 1484 (10th Cir. 1989). On a pattern of bias crimes, see, e.g., United States v. Woodlee, 156 F.3d 1399 (10th Cir. 1998); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983).


• repeated lewd or sexually suggestive comments;65
• touching in a sexually suggestive manner;66
• derogatory epithets or nicknames;67
• nonsexual physical conduct (when part of an overall pattern of differential treatment based on the plaintiff’s sex);68
• comments reflecting negative and stereotypical views of women;69 or
• patterns of similar conduct directed toward other women.70

B. State Hate Crime Laws

Like the federal bias-crime laws described above, state hate crime laws, both criminal and civil, exemplify how courts analyze circumstantial evidence to determine whether violent acts are bias motivated. As of 1998, 41 states had enacted some form of bias-crime law, 19 address gender-based bias crimes.71 While few reported decisions analyze prosecutions of gender-based bias crimes, those cases provide useful analogies for practitioners arguing that crimes such as domestic violence and sexual assault are gender motivated.

For example, in Massachusetts v. Aboulez, a Massachusetts court found that a pattern of domestic violence was gender motivated and issued an injunction under that state’s antibias law.72 While there was no written opinion in that case, affidavits submitted by the defendant’s wife and various partners reflected a pattern of repeated violence committed against them, along with evidence of misogynist epithets and other statements evincing stereotypical views of women.73 In another case, a California court found sexual harassment and denied a defendant’s motion to dismiss a woman’s claims of gender bias under the civil component of California’s hate crime law when she alleged that her apartment building’s resident manager made suggestive remarks and touched her breasts after she pushed him away.74 The

68 See, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); Beardsley v. Webb, 30 F.3d 524, 528 (4th Cir. 1994); Hall, 842 F.2d at 1012–14. See also King v. Hillen, 21 F.3d 1572, 1583 (Fed. Cir. 1994).
70 See, e.g., Paroline, 879 F.2d at 103; Andrews v. City of Phila., 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).
72 Massachusetts v. Aboulez, No. 94-0984H (Mass. Sup. Ct. Mar. 14, 1994) (issuing injunction prohibiting batterer from taking various actions against “any other woman who is a resident of or visitor to the Commonwealth”); (pleadings on file with NOW Legal Defense and Education Fund).
73 Along with physical abuse, the complaint alleged that the defendant called both the women he was involved with and women in general “whores,” “bitches,” “sluts,” and “no good” and said things such as “you’re not as smart as me” and “you’ll never be as smart as me.” He told one of the women that she was “just like all the rest of them, cheap and easy” and said that women in general were weaker and not as smart as men. In several of his relationships he threatened to kill his partner if she ever left him, saw anyone else, or sought a restraining order against him. He refused to allow the women to leave the apartment alone and dictated how they should dress. He stated that he had the right to beat a woman because she was his wife and regularly forced his partners to engage in sexual intercourse against their will. Complaint at 3, 5, 7–9, Aboulez, No. 94-0984H.
high court of Massachusetts similarly refused to dismiss a woman's sexual harassment claim under that state's civil bias-crime law where the harassment included threats, intimidation, and coercion.75

State bias-crime cases addressing racial or ethnic motivation mirror the federal cases discussed previously in that courts infer bias motivation from the same types of circumstantial evidence.76 For example, epithets; derogatory comments based on class membership; statements or symbols indicating racial prejudice, such as cross burnings, swastikas, or membership in skinhead organizations; a lack of provocation or other alternative motivation; or a combination of these various factors have been probative for courts.77

IV. Anticipating Frequently Raised Questions

Objections raised during debate over the civil rights remedy's enactment as well as issues identified in the litigation of initial cases suggest arguments that may pose challenges for practitioners bringing claims under this law.

A. The Meaning of “Gender Animus”

The civil rights remedy's use of the term “animus” may lead to questions about whether the standard for proving gender motivation in civil rights remedy cases is different from the standard that used to establish discriminatory motivation in other contexts. As discussed above, in order to establish the statute's gender-motivation element, a plaintiff must prove (1) that the act was committed “because of gender or on the basis of gender” and (2) that it was “due, at least in part, to an animus based on the victim's gender.”78 While the statute enumerates this two-part analysis for proving gender motivation, the legislative history indicates that the statutory element was drafted with the singular goal of ensuring that only gender-motivated violent acts, rather than “random” acts of violence, would form the basis for a VAWA recovery.79

The inclusion of the term “animus” does not change the nature or quantum of evidence required to establish gender motivation. Congress used the term “animus” to mean “purpose” as in “an animating force,” and it used the words “animus,” “purpose” and “motivation” interchangeably, dispelling any notion that disparate impact (i.e., proof that a violent act disproportionately affects women) alone would be

76 See generally Lynn Parseghian et al., A Survey and Analysis of State Hate-Crime Statutes and the “Animus” Requirement (n.d.) unpublished manuscript, on file with NOW Legal Defense and Education Fund.
Supreme Court precedent confirms that gender-based “animus” does not require proof of malice or hatred.

disparate-impact as well as treatment cases.81 However, the “animus” language eliminates any question about whether disparate-impact cases may be covered.

In the first cases interpreting the civil rights remedy, courts have ruled in a manner consistent with Congress’ direction and have treated the gender-motivation element as a single inquiry.82 That approach also comports with other bias

crime law, which treats circumstantial evidence the same way under a range of statutory formulations. For example, cases litigated under 42 U.S.C. § 1985(3) require proof that the conduct was motivated by “racial, or perhaps otherwise class-based, invidiously discriminatory animus” in order to prevail.83 Yet, even under that arguably higher standard, the same evidence establishes bias regardless of whether the standard for assessing animus is articulated as “because of” a protected category, as based on “animus,” or as driven by “invidiously discriminatory animus.”84 Supreme Court precedent confirms that gender-based “animus” does not require proof of malice or hatred.85 The essential inquiry is whether the crime was committed because of bias rather than solely for random or nondiscriminatory reasons.

B. How Much Proof Is Needed

In assessing whether violent acts are gender motivated, courts inevitably will grapple with the question whether an allegation of domestic violence or sexual assault alone supplies enough evidence from which to infer a bias motivation. An act of rape, sexual assault, or domestic violence that is not in part fueled by the tradition of gender-motivated violence in this country is difficult to imagine. Given that history, acts of rape or domestic violence could be analogized to lynching or cross burning and viewed as a symbolic act that alone reflects gender-motivated bias.86 Indeed, any reluctance to recognize sexual assault or domestic violence as inherently bias-driven stands in stark contrast to the ease with which we recognize symbolic acts such as lynching or cross burning as discriminatory.

Nonetheless, the civil rights remedy’s legislative history indicates that allegations of domestic violence, rape, or sexual assault may not presumably be considered to be gender motivated for purposes of bringing a VAWA civil rights reme-

80 Id.; see also Victoria F. Nourse, Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy, 11 WIS. WOMEN’S L.J. 1, 30 (Summer 1996) (documenting legislative history).


82 See supra pt. II.


84 Significantly the VAWA civil rights remedy requires proof only of “animus” rather than of “invidiously discriminatory animus.”


86 Following that analogy, one author suggested amending the civil rights remedy to include a rebuttable presumption that all rapes are gender motivated. See Jennifer Gaffney, Note, Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases, 6 J.L. & Pol’y 247 (1997). While such an approach might more accurately reflect the prevalence of gender bias that underlies rapes and sexual assaults, circumstantial evidence is required under the law’s current construction.
Based on that history, women will be most successful when they present circumstantial evidence of bias beyond an allegation of violence, or sexual violence alone, to support their claim. The civil rights remedy therefore may cover a subset of all violent acts that truly are gender biased.

As the Brzonkala trial decision suggests, some may point to acquaintance rape as a circumstance in which discerning those crimes based on “bias” from those based on “lust,” “passion,” or “personality” is difficult. For example, a brief submitted to the Fourth Circuit in that case sets forth the position that acts of rape and domestic violence are motivated by general aggression and psychological factors rather than by gender bias. These arguments ignore the well-settled notion that a particular violent act can be motivated by both bias and “neutral” psychological factors. In the context of other bias crimes and in some areas of antidiscrimination law, courts do not inquire whether psychological factors neutralize a bias motivation. To the contrary, psychology undoubtedly plays a role in all actions, and psychological factors may drive violent perpetrators in other bias-crime contexts as well. Whether a perpetrator’s conduct was driven by psychological factors in addition to bias should not matter as long as the factual allegations satisfy the statutory framework for establishing discriminatory conduct. The same should be the case in assessing bias motivation based on gender.

V. Conclusion

Federal civil rights treatment of gender-based bias crimes marks a historic and crucial recognition of the particular harm these bias crimes inflict. As the Supreme Court has recognized, bias crimes and other civil rights violations exact a special toll and impose a unique harm, which is deserving of particular attention and consideration. In addition to providing needed remedies for women, these laws and the resulting judicial analysis of gender motivation should help advance our common understanding of the nature of gender-based violence. As such, the civil

87 See S. REP. No. 102-197 (1991) (statement of Sen. Joseph Biden that the law would not cover “ordinary” domestic violence). See also Nourse, supra note 80, at 7 (describing original draft of the civil rights remedy, S.15, 101st Cong. § 301(d)(1) (1990), which defined “a crime of violence motivated by the victim’s gender” as “including rape, sexual abuse, abusive sexual contact, or any other crime of violence committed because of gender or on the basis of gender”); accord Sally Goldfarb, Remarks at Symposium, “The Violence Against Women Act of 1994: A Promise Waiting to Be Fulfilled” (1996), in 4 J.L. & POL’Y 391, 399 (1996) (recognizing that the civil rights remedy’s final version does not contain presumption that rape and sexual assault always are gender motivated).


91 E.g., in Wisconsin v. Mitchell the Supreme Court upheld the constitutionality of Wisconsin’s bias-crime statute, it approved of the state’s goal of imposing greater sanctions for bias-motivated conduct because it “inflicts greater individual and societal harm.” 508 U.S. 476, 487–88 (1993). Specifically the Court recognized that these crimes were “more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” Id., cf. City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (recognizing that civil rights plaintiffs vindicate important civil and constitutional rights that cannot be valued solely in monetary terms).
rights remedy will advance our "publicly shared ideal of equality" and will help bring redress for more women who suffer harm as a result of violent, gender-based crimes.  

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