A TROUBLED INHERITANCE: AN EXAMINATION OF TITLE III OF THE VIOLENCE AGAINST WOMEN ACT IN LIGHT OF CURRENT CRITIQUES OF CIVIL RIGHTS LAW†

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INTRODUCTION

The United States Congress is currently considering the Violence Against Women Act (the VAWA or the Act).[1] The VAWA would set up a series of programs and initiatives to decrease violent crime against women. The Third Title of the Act would create a civil rights cause of action for women who, through violence, "are reduced to symbols of group hatred."[2] Title III was created to establish a cause of action for female victims of violence analogous to civil rights causes of action for injury motivated by race. Accordingly, Title III will provide a remedy for women victims of violent crime "motivated by gender."[3]

Title III has the potential to become an innovative and powerful

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† In the fall of 1992, I participated in Professor Kimberlé Crenshaw's Intersectionalities: Race & Gender seminar at the Columbia Law School. At Professor Crenshaw's suggestion, I set out to apply an intersectionalities critique to the Violence Against Women Act for our class paper. That paper has evolved into this article. I am greatly indebted to Professor Crenshaw for her insight and guidance and especially for her remarkable ability to notice points of view that are being conveniently ignored. I also want to thank Dean Lance Liebman; Sally Goldfarb of the NOW Legal Defense & Education Fund; and my editors Michael Bochenek and Julie Dinnerstein for their invaluable input. Finally, thanks to everyone in the Intersectionalities seminar for some fascinating ideas, some passionate conversations, and some hard lessons.

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[1] S. 15, 102d Cong., 1st Sess. (1991). Senator Joseph Biden (D-DE) introduced a similar bill in 1990 that did not come to the floor before the close of the one hundred and first Congress. S. 2745, 101st Cong., 1st. Sess. (1990). On March 18, 1994, as this issue went to press, Representative Jack Brooks (D-TX) introduced the proposed Violent Crime Control and Law Enforcement Act of 1994. H.R. 4092, 103d Cong. 2d Sess. (1994). Title XVI of the crime bill is the current House of Representatives version of the Violence Against Women Act. Id. §§ 1600–1666.

[2] S. Rep. No. 197, 102d Cong., 1st Sess. 43 (1991).

[3] Id. at 28.

weapon against gender subordination, and it appropriately makes a problem of immense proportions a national priority. In its current form, however, Title III will be hampered by some of the same limitations that have undermined the effectiveness of existing civil rights laws.

In this article, I will examine the Third Title of the Violence Against Women Act and the problem that it seeks to address. I will argue that a single-axis,[4] conscious-intentionality[5] requirement, like the gender motivation requirement, is likely to be underinclusive and will particularly disadvantage minority women. I will then suggest an alternative framework for a civil rights cause of action that I believe would be more responsive to the real issues in the lives of women subjugated by violence.

In part I, I will look at the structure and history of Title III and the Violence Against Women Act as a whole. I will then discuss the possible impact of Title III in light of the strengths and weaknesses of existing civil rights laws and introduce three critiques of existing civil rights laws that are relevant to the VAWA. In parts II through IV, I will look at the consequences of these three critiques for the VAWA. I will begin part II by introducing the argument that existing civil rights laws do not adequately address the problems of plaintiffs who fall into more than one category that the law protects from discrimination. I will then address the reasons that courts have framed and interpreted existing laws in such an inflexible manner and conclude that cases under Title III, as it is currently drafted, will follow the same pattern. In part III, I will conclude that a conscious-intentionality requirement would sharply limit the effectiveness of the VAWA. In part IV, I will conclude that a judicial remedy is appropriate in the context of an act addressing violence against women. In part V, I will examine the close connection between racism and sexualized violence and argue that this tradition will further limit access to VAWA remedies for minority women. In part VI, I will discuss the aims of the VAWA and argue that the gender motivation requirement of Title III is inadequate to achieve those aims. Finally, in part VII, I will suggest a stereotyping test as an alternative to the gender motivation requirement of Title III.

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[4] Professor Kimberlé Crenshaw created this term. It describes laws and theories that tend "to treat race and gender as mutually exclusive categories of experience and analysis." Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. Chi. Legal F. 139, 139 (footnote omitted). For a discussion of single-axis civil rights laws, see infra part II.

[5] This term describes the sort of intentionality that a plaintiff must show to prevail against the state under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment as construed in Washington v. Davis, 426 U.S. 229 (1976). See discussion infra part III.

PART I

Senator Joseph Biden (D-DE) introduced the Violence Against Women Act to the Senate on January 14, 1991,[6] and Representative Barbara Boxer (D-CA) introduced the VAWA's companion bill in the House of Representatives on March 20, 1991.[7] On May 27, 1993, after several hearings, the Senate Judiciary Committee adopted an amended version of the bill by unanimous vote and reported the bill out of committee.[8] The bill is now ready to go to the Senate floor; with growing support in the Senate and the House, it should soon become law.[9]

The five titles of the Violence Against Women Act[10] will establish a number of programs designed to improve the safety of American women.[11] Although the Title III civil rights remedy is the most innovative (and controversial) proposal, the bill is especially promising precisely because of the wide variety of programs and policies it sets forth. Since most of these programs and policies are preventative rather than punitive, they should powerfully complement the legal remedy in Title III.

Title III of the Act will establish a civil rights cause of action for a woman who is the victim of a violent crime "motivated by gender."[12]

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[6] S. 15, supra note 1.

[7] H.R. 1502, 102d Cong., 1st Sess. (1991).

[8] S. Rep. No. 197, supra note 2, at 36. For further information on the introduction of the Violence Against Women Act, see generally Wendy R. Willis, Note, The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act, 80 Geo. L.J. 2197 (1992).

[9] As of the beginning of February, 1994, the VAWA bill had attracted 67 co-sponsors in the Senate and 224 co-sponsors in the House. Editorial, Women and Violence: Congress Must Approve Help This Year, Dallas Morning News, Feb. 4, 1994, at A26.

[10] S. Rep. No. 197, supra note 2, at 40. The first title of the VAWA is entitled Safe Streets for Women. It sets out federal penalties for sex crimes; appropriates money to improve law enforcement and prosecution to reduce violent crimes against women; provides for safety for women in public transit and public parks; establishes a National Commission on Violent Crime Against Women; sets out new evidentiary rules and provides for assistance to victims of sexual assault.

The second title, Safe Homes for Women, provides for interstate enforcement and arrest in spousal abuse cases, provides for new funding for shelters and amends the Family Violence Prevention and Services Act.

Title IV, Safe Campuses for Women, provides money for campus rape education. Title V, Equal Justice for Women in the Courts Act of 1990, provides education and training for judges and court personnel in state courts.

[11] The current House bill includes a provision that would protect aliens as well as American citizens who are victims of gender violence, but the Senate bill, as currently drafted, has no such provision. H.R. 4092, supra note 1, §§ 1626–1628.

[12] S. Rep. No. 197, supra note 2, at 43.

Section 301(c) of Title III sets out the cause of action as follows:

> 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 rights, privileges or immunities secured by the Constitution or laws as enumerated 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 the court may deem appropriate.[13]

Section 301(b) affirms each citizen's right and privilege to "be free from crimes of violence motivated by the victim's gender."[14]

Section 301(c) is based on the proposition that some violence against women not only injures the woman raped or battered, but also functions to subordinate women as a class. The bill's creators modeled it after existing civil rights legislation[15] with the intent to supplement, not supplant, other

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[13] Id. at 28.

[14] Id.

[15] To a large extent, Title III follows in the tradition of all American anti-discrimination jurisprudence. It draws on the history of judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and the Civil Rights Acts of the Reconstruction. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (current version at 42 U.S.C. § 1982 (1988)); Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (current version at 42 U.S.C. § 1981 (1988 & Supp. III 1991)); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (current version at 42 U.S.C. §§ 1983, 1985 (1988)); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (current version at 42 U.S.C. § 2000a–2000a-6 (1988 & Supp. III 1991)). It also draws on the Civil Rights Acts of the twentieth century. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (current version at 42 U.S.C. § 1975–1975e (1988 & Supp. III 1991)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (current version at 42 U.S.C. §§ 1971, 1974–1974e, 1975d (1988 & Supp. III 1991)), and in scattered sections of 18 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1988 & Supp. III 1991) and 42 U.S.C. §§ 1975a–1975d, 2000a–2000h (1988 & Supp. III 1991)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1988)); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 93 (current version at 42 U.S.C. § 1973 (1988), §§ 3533, 3535, 3601–3619, 3631 (1988 & Supp. III 1991), and in scattered sections of 15, 16, 18, 25, and 28 U.S.C.); and Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 2, 16, 29, and 42 U.S.C.). See, e.g., S. Rep. No. 197, supra note 2, at 50–52, explaining that terms from VAWA like "gender" and "under color of law" should be interpreted consistently with past civil rights law. In this article, I focus on critiques of civil rights cases brought under the Equal Protection Clause, the Reconstruction civil rights provisions found at 42 U.S.C. §§ 1981, 1983, and 1985(3), and Title VII of the Civil Rights Act of 1964. I am focusing on these provisions because these are provisions upon which the VAWA draws heavily, because they are most closely analogous to the VAWA, and because I believe that the criticisms discussed are likely to be highly relevant to the functioning of Title III.

civil rights remedies.[16]

Title III inherits much that is positive from the legislation that is its model. Most important, by assuming the form of a civil rights cause of action, Title III imbues the struggle for gender parity with a prominence and priority that our government appropriately accords to only a few issues. By identifying subordination of women through violence as a federal civil rights violation, Congress would take an important step toward improving conditions for women in the United States. Federalizing this issue would send a powerful message that the violent enforcement of a gender caste system will not be tolerated.

In addition, a civil cause of action would enable the victim of gender violence actively to enforce her own rights. This cause of action would counteract the negative effects of a criminal justice system that can be patronizing and insensitive to the needs of women who have been victimized by violence.[17] By letting the survivor of gender violence, rather than the state, control the course of her case, the Title III civil rights cause of action could empower those disempowered through violence; the case itself would become part of the remedy that functions to restore equality.

The VAWA stands to inherit the strengths of civil rights legislation because it so closely resembles existing civil rights laws. The framers of the Act, however, may have followed their model too closely. Cases brought under existing civil rights laws have not changed the United States as dramatically as legal theorists once believed they would.[18] In this article, I will look at three critiques that attempt to explain the limitations of current civil rights laws. Although the legislative history of the VAWA does not mention these critiques, I believe that they are highly relevant to Title III and deserving of attention from both scholars and Congress.

First, it has been argued that existing civil rights law does not effectively respond to discrimination that is aimed at an individual who falls into more than one protected category.[19] This problem stems from an

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[16] The committee report states: "This legislation is in no way intended to undermine existing civil rights protections under 42 U.S.C. 1981, 1983, or 1985(3) (1981) or under title VII, 42 U.S.C. 2000e (1981). It should be read in harmony with, not in derogation of, those provisions." S. Rep. No. 197, supra note 2, at 51.

[17] See, e.g., S. Rep. No., 197, supra 2, at 43–44; see also Jennifer Wriggins, Rape, Racism, and the Law, 6 Harv. Women's L.J. 103, 134–139 (1983).

[18] See, e.g., Cass R. Sunstein, Three Civil Rights Fallacies, 79 Cal. L. Rev. 751, 765 & n.44 (1991) ("Judicial decisions are of limited efficacy in bringing about social change. Study after study has confirmed this basic conclusion.").

[19] For some of the most effective statements of this theory as it relates to civil rights laws, see Peggie R. Smith, Separate Identities: Black Women, Work, and Title VII, 14 Harv. Women's L.J. 21, 27–30, 49, 50 (1991); Judith A. Winston, Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender

inflexibility within existing civil rights law. For example, in order to prevail under current law, a woman of color seeking to prove that she was discriminated against as a woman of color must prove her cases of gender and race discrimination separately. Often this will involve proving that the defendant also discriminated against other women and other minorities in the same way.[20] Although this is sometimes possible, more typically a perpetrator precisely tailors discrimination to an individual's characteristics.[21] Black women report that more often than not they are discriminated against as Black women; not as Blacks who happen to be female, nor as women who are incidentally Black.[22] To resolve this

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in the Civil Rights Act of 1990, 79 Cal. L. Rev. 775, 796–801 (1991); Crenshaw, supra note 4, at 141–52; Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's Rts. L. Rep. 7, 8–9 (1989).

[20] See discussion infra part II of Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (although harassment of plaintiff has both racial and sexual elements, it does not fall neatly into either category; as a result, her section 1981 claims were dismissed); Love v. Alamance County Bd. of Educ., 581 F. Supp. 1079 (M.D.N.C. 1984), aff'd, 757 F.2d 1504 (4th Cir. 1985) (rejects Black woman plaintiff's claim of employment discrimination under Title VII on the basis of defendant's showing that there was no statutory evidence that Black men or white women suffered from the effects of discrimination); Logan v. St. Luke's Hosp. Ctr., 428 F.Supp. 127 (S.D.N.Y. 1977) (employer's commitment to hiring minorities defeats Black woman's Title VII employment discrimination claim); DeGraffenreid v. General Motors Corp., 413 F.Supp. 142 (E.D. Mo. 1976), aff'd in part and rev'd in part, 558 F.2d 480 (5th Cir. 1977) (district court held that a Black woman only states a valid Title VII claim if she can prove Black men and white women are also adversely impacted).

[21] Elizabeth Spelman writes: "An additive analysis treats the oppression of a Black woman in a society that is racist as well as sexist as if it were a further burden when, in fact, it is a different burden." Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 123 (1988).

[22] See, e.g., Judith T. Ellis, Sexual Harassment and Race: A Legal Analysis of Discrimination, 8 J. Legis. 30, 42 (1981) (citing a representative of the Working Women's Institute, an independent resource and research center on sexual harassment, as stating that "the majority of black women who come to the Institute with complaints of sexual harassment suspect that they are dealing with instances of sex-race discrimination"); The Combahee River Collective, A Black Feminist Statement, in All the Women are White, All the Blacks are Men, But Some of Us Are Brave: Black Women's Studies 13, 16 (Gloria T. Hull et al. eds., 1982). The Collective states:

> We believe that sexual politics under patriarchy is as pervasive in Black women's lives as are the politics of class and race. We also often find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously. We know that there is such a thing as racial-sexual oppression which is neither solely racial nor solely sexual, e.g., the history of rape of Black women by white men as a weapon of political repression.

Id. See also Spellman, supra note 21, at 131–32; Marlee Kline, Race, Racism, and Feminist Legal Theory, 12 Harv. Women's L.J. 115, 144–47 (1989); Deborah K. King, Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology,

problem scholars have argued that "claimants must be able, at the very least, to bring suits which correspond to their experiences of oppression."[23]

A second critique of existing civil rights law that is relevant to Title III looks at the intentionality that a plaintiff must prove to prevail. This critique argues against requiring proof that the defendant consciously targeted the plaintiff because the plaintiff belonged to a protected group. This sort of conscious-intent requirement is flawed because it unrealistically requires the perpetrator to be aware that he has targeted his victim because of that victim's race and/or gender. In reality, this sort of intentionality is rare and much of the injury of discrimination is caused by people who are not conscious that they are motivated by sexism and/or racism. As a result, laws incorporating the conscious-intention requirement are underinclusive because they do not provide a remedy for discrimination that, although no less effectively furthering class-based subjugation, does not fit this paradigm of conscious discriminatory intent.[24]

A third critique of civil rights jurisprudence relevant to Title III suggests that a legal remedy is an insufficient and even inappropriate response to a systemic problem of class-based discrimination. This argument holds that since the effects of class-based discrimination typically arise out of a series of disadvantages in numerous spheres of life, the judiciary is ill-suited to provide an effective remedy.[25]

To summarize, three critiques of existing civil rights actions are relevant to the Third Title of the Violence Against Women Act. First, current civil rights laws have not provided adequate remedies for people who fall into more than one category that is protected by law against discrimination. Second, a cause of action that focuses on an intent requirement is often inappropriate where discrimination may be unconscious. Finally, judicial remedies can be of limited efficacy when they attempt to address systemic inequities.

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14 Signs 42, 47 (1988).

[23] Smith, supra note 19, at 23.

[24] As Professor Crenshaw puts it, "intentionality — which is the determinative factor under the discrimination model — is but an additional insult to an already established injury." Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 11 (1989); see also Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 320 n.7 (1987).

[25] Cf. Sunstein, supra note 18, at 770 (arguing that because racism is a systemic problem that occurs across a continuum of time, not a single aberrant event, "a large mistake of civil rights policy has been to treat the issue as one of discrimination at all").

PART II

Title III is modeled closely on existing civil rights laws and, as a result, it stands to inherit some of the deficiencies of those laws. One such deficiency is an inability to deal adequately with the claims of plaintiffs who fall into more than one category that the law protects from discrimination.[26] In this section, I examine specific cases that demonstrate this problem and then look more generally at some of the ways in which current civil rights laws disadvantage plaintiffs who fall into more than one protected category. Next I look at the legislative history of Title III to determine the likelihood that the judiciary will interpret it in a manner similar to that of past civil rights laws. Finally, I conclude that the probable interpretation of Title III will disadvantage minority women.

Current civil rights laws assume that forbidding discrimination against x-quality, y-quality and z-quality will protect xyz people. Women of color, however, often encounter racist/sexist discrimination that is not the same as the sum of the racial discrimination against Black men or the gender discrimination against white women. Peggie Smith has called this combined discrimination "interactive discrimination" to emphasize its difference from the discrimination that people who fall into only one protected category encounter.[27] Kimberlé Crenshaw calls the discrimination that current civil rights laws can accommodate "single-axis" discrimination.[28] She distinguishes this discrimination from the sort of discrimination that plaintiffs who embody the "intersectionality" of race and gender face when they fall into more than one protected category.[29] I will use these terms throughout this article.

Intersectional plaintiffs have had difficulty prevailing under single-axis civil rights laws for two reasons. The first is a phenomenon that Adrienne

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[26] A series of extremely compelling articles have been written about this problem in current civil rights law and its tendency to undermine the cases of plaintiffs who fall into more than one protected category. See, e.g., Smith, supra note 19, at 27–30, 49, 50; Winston, supra note 19, 796–801; Crenshaw, supra note 4, at 141–50; Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539, 539.

For writings discussing this problem and its implications for the feminist and civil rights communities, see Spelman, supra note 21, at 140; Kline, supra note 22, at 144–50; Matsuda, supra note 19, at 10; King, supra note 22, at 52.

[27] Smith, supra note 19, at 27–28 (distinguishing "interactive discrimination, or racism and sexism combined" from "double discrimination" which exists when the same person makes "two individual allegations of discrimination and, consequently, proof of one does not depend on proof of the other").

[28] See Crenshaw, supra note 4, at 139 (describing as "single-axis" antidiscrimination laws, theories and politics that tend "to treat race and gender as mutually exclusive categories of experience and analysis").

[29] Id. at 149–50.

Rich has referred to as "white solipsism," "the tendency 'to think, imagine, and speak as if whiteness described the world.'"[30] This comes coupled, especially in the older laws addressing race discrimination, with a corresponding male solipsism, as well as an able-bodied solipsism, a heterosexual solipsism and so on. In essence, one important reason legislators and judges do not accommodate certain disempowered groups is a lack of familiarity with, and on some level, even a lack of awareness of, the differing experiences of these groups.

The second reason that the judiciary has not framed and interpreted civil rights laws to meet the needs of diverse victims is more fundamental. Civil rights jurisprudence does not accommodate interactive discrimination because it has yet to acknowledge the simple reality that discrimination can discriminate. Current law assumes that all women will be discriminated against in the same way, that the expected plaintiff's experience is every plaintiff's experience. For example, current law tends to assume that a Black woman will be subject to the same sorts of disadvantages that plague a white woman, only more so.[31] The existence of interactive discrimination means that this is often untrue. More often than not, women of color are discriminated against as women of color, not as "generic women," since in our society the "generic woman" is frequently shorthand for "white woman."[32]

The case of Helen Brooms demonstrates the problems inherent in laws that assume all women encounter identical discrimination. In her article on cases brought by Black women under various civil rights statutes,[33] Judith Winston discusses the compelling case of *Brooms v. Regal Tube Company*.[34] The Brooms case is a racial/sexual harassment case brought under Title VII and 42 U.S.C. § 1981 (1988). It has special relevance for

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[30] Spelman, supra note 21, at 116 (quoting Adrienne Rich, Disloyal to Civilization: Feminism, Racism, Gynephobia, in On Lies, Secrets, and Silence: Selected Prose 1966–1978, at 275, 299 (1979)).

[31] Professor Crenshaw describes how this works:

> Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics. Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.

Crenshaw, supra note 4, at 151.

[32] See Spelman, supra note 21, at 114–15, 128–30.

[33] Winston, supra note 19, at 783–84.

[34] 881 F.2d 412 (7th Cir. 1989).

the VAWA because it incorporates elements of violence in a racial/sexual harassment context. The plaintiff in this case was a thirty-six-year-old Black woman named Helen Brooms who worked for the Regal Tube Company as an industrial nurse. During her sixteen months at Regal, Helen Brooms' supervisor made numerous explicit sexual and racist remarks to her. On one such occasion he showed her "a pornographic photograph depicting an interracial act of sodomy and told her that the photograph showed the 'talent' of a Black woman" and "stated that she was hired for the purposes indicated in the photograph." Later he showed her "a racist pornographic picture involving bestiality."[35] Ultimately, he grabbed her arm and threatened to kill her if she moved. Helen Brooms fell down a flight of stairs as she fled.

The supervisor's actions in *Brooms* provide an example of oppressive behavior that combines racist and sexist elements, while falling neatly into neither category. Although it is impossible fully to appreciate the significance of the supervisor's actions without an understanding of the history of Black women's oppression in America, the *Brooms* jury dismissed the plaintiff's Section 1981 racial harassment claim because it differed too markedly from the paradigmatic case of race discrimination (targeted at men).

Other courts have reacted similarly when asked to consider discrimination against Black women. For example, in *Love v. Alamance County Board of Education*,[36] a district court rejected a Black woman plaintiff's claim of employment discrimination under Title VII because the defendant was able to show that no Black men or white women suffered from the effects of discrimination. Under this holding there can be no (remediable) discrimination against a Black woman absent discrimination against white women and Black men. Similarly, in *Logan v. St. Luke's Hospital Center*,[37] a court found that an employer's commitment to hiring minorities defeated a Black woman's Title VII employment discrimination claim.[38]

More generally, the problems that plaintiffs encounter when they fall

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[35] Id. at 417.

[36] 581 F. Supp. 1079 (M.D.N.C. 1984), aff'd, 757 F.2d 1504 (4th Cir. 1985).

[37] 428 F. Supp. 127 (S.D.N.Y. 1977).

[38] The implications of *Love* and *Logan* for plaintiffs who fall into more than one category that is protected by law from discrimination are discussed more fully in Smith, supra note 19. *DeGraffenreid* was the first case in which a court considered whether a Black woman plaintiff could state a case under Title VII for discrimination against her as a Black woman. DeGraffenreid v. General Motors Corp., 413 F. Supp. 142, 143 (E.D. Mo. 1976), aff'd in part and rev'd in part, 558 F.2d 480 (5th Cir. 1977). For a discussion of this case, see Crenshaw, supra note 4, at 141–43.

into more than one category that the law protects from discrimination tend to follow certain patterns. One example is the plaintiff who brings a cause of action that relies on statistics. A plaintiff who brings a Title VII disparate impact case, for example, must demonstrate that her employer habitually discriminates against her type of person. She must show through statistical data that other members of her protected category have been disadvantaged. The expected plaintiff in this case, the single-axis plaintiff, is one of many at a given workplace. The unexpected plaintiff, the intersectional plaintiff, has too few other members of her group at her workplace to provide a statistically relevant sample. Although intuitively this unique plaintiff will be the most likely victim of discrimination, disparate impact jurisprudence bars her from stating this sort of case.[39]

Plaintiffs who differ from the paradigmatic plaintiff also encounter another problem: the multiple statute conundrum. If Congress has tailored no single statute to fit a plaintiff's claim, the nature of civil rights litigation forces her to patch together a cause of action from various pieces of statutes that conceptually should apply to her case. In practice, this causes numerous problems and greatly increases complexity, forcing a plaintiff to juggle procedural and substantive requirements that are often incompatible.[40]

In addition, some statutes by their terms are simply unable to adapt to the cases of unanticipated plaintiffs who should logically fall within their ambit. For example, 42 U.S.C. § 1985(3) is a Reconstruction Era statute that litigators have used to counter racist violence. Because § 1985(3) incorporates a conspiracy requirement, § 1985(3) cases are often brought to prosecute lynch mob violence against Black men. However, this same conspiracy requirement that has made § 1985(3) responsive to the paradigmatic case of racial violence against Black men (a case involving more than one perpetrator), effectively forecloses access to the statute for

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[39] For a discussion of such a case, see Crenshaw, supra note 4, at 143–46 (discussing Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983)).

[40] For an example of the problems faced by plaintiffs who straddle incompatible statutes, see Peggie Smith's description of *Richardson v. Steak 'N Shake, Inc.*, 43 Empl. Prac. Dec. (CCH) ¶ 36,990 (E.D. Mo. Feb. 4, 1987), in which a Black woman plaintiff attempted to recover damages for racial discrimination under section 1981 and for race and sex discrimination under Title VII. (The plaintiff brought a cause of action under both statutes because damages are recoverable under Section 1981, while Title VII is limited to equitable relief; but only Title VII can accommodate a combined race/sex claim). Smith explains: "Before the resolution of the Title VII race and sex charge, a jury entered a verdict against the plaintiff on the Section 1981 race claim. The court concluded that, because the burdens of proof were the same under both statutes, it was bound by the jury's section 1981 decision to rule automatically against the plaintiff on her Title VII charge of racial discrimination. This ruling left only the Title VII allegation of sex discrimination open for consideration." Smith, supra note 19, at 39.

women of color for whom the paradigmatic case of violence involves a single perpetrator.[41]

Unfortunately, courts that have attempted to adapt existing statutes to accommodate unanticipated plaintiffs have met with only limited success and tend to be least responsive to those plaintiffs most vulnerable to discrimination. For example, in *Phillips v. Martin Marietta Corp.*,[42] the Supreme Court established the "Sex Plus" doctrine to accommodate women discriminated against in an employment setting because they had young children. The Court recognized that it should not immunize from suit under Title VII an employer who discriminated on the basis of sex but offered a non-prohibited factor as a pretext. Subsequently, in *Judge v. Marsh*,[43] the district court limited the Sex Plus doctrine to "one plus." Cathy Scarborough describes the effect of this limitation as follows:

> On a practical level, the requirement of constraining 'subgroups' to one plus factor is detrimental to Black women, who must use their race as the plus factor. Forcing Black women to use their single plus factor on race prevents them from fairly addressing other issues that may contribute to their discrimination. For example, if a Black woman wanted to allege another plus factor under Title VII, such as being pregnant, married, or single with children, she would have already exhausted her plus 'allowance' with her race allegation. By contrast, a white woman could seek a remedy for discrimination on the basis of any of these characteristics, since her race, unlike that of a Black woman, is generally not considered to be a plus factor because of society's tendency to value 'whites' over 'Blacks.' The more someone deviates from the norm, the more likely s/he is to be the target of discrimination. Ironically, those who need Title VII's protection the most get it least under *Judge*'s limitation.[44]

In sum, the inflexible, single-axis structure of current civil rights law is ill-adapted to provide remedies for plaintiffs who fall into more than one protected category. Moreover, judicial interpretation has not significantly expanded the reach of these statutes.

It is impossible to foretell whether courts will interpret Title III as inflexibly as they have interpreted existing civil rights laws. Conceivably, courts will interpret the gender motivation requirement broadly to include gender discrimination as experienced by minority women. If courts interpret

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[41] S. Rep. No. 197, supra note 2, at 42.

[42] 400 U.S. 542 (1971).

[43] 649 F. Supp. 770 (D.D.C. 1986).

[44] Cathy Scarborough, Conceptualizing Black Women's Employment Experiences, 98 Yale L.J. 1457, 1472 (1989) (citations omitted).

gender motivation flexibly and incorporate the idea that different people experience an anti-gender animus differently, Title III might well be able to serve a broad spectrum of plaintiffs. Clearly, this sort of broad interpretation would be in the interests of public policy. It would both improve access to the VAWA for minority women and expand the popular understanding of violent subjugation of women.

It is also possible, however, that courts will interpret the gender motivation requirement narrowly. Perhaps courts interpreting the VAWA will rely on the definitions of gender discrimination that the judiciary has developed under existing civil rights causes of action. These are the very definitions that have largely excluded the experiences of plaintiffs who fall into more than one category that the law protects from discrimination. As a result, this narrow interpretation of the Title III gender motivation requirement would perpetuate the inflexibility that undermines the civil rights cases of minority women.

The legislative history of Title III does not conclusively establish whether Congress intends for courts to interpret the gender motivation requirement broadly or narrowly. While one reading supports a broad interpretation that would accommodate the experiences of minority plaintiffs, another supports a narrow interpretation that would only recognize the sort of gender animus that past civil rights laws have recognized (that is, gender bias as experienced by white women). Unfortunately, the balance overall seems to tilt in favor of a narrow interpretation.

The best argument in the legislative history for a broad interpretation of the gender motivation requirement comes from the 101st Congress' elimination of the word "overwhelmingly." As originally presented to the Congress, Title III required that violence be "overwhelmingly" motivated by gender. The Committee Report states: "Testimony before the Committee made clear that inclusion of the term 'overwhelmingly' would pose an unnecessary and harmful burden on women . . . . Accordingly, the Committee eliminated the language from the legislation during the one hundred second Congress."[45] The rejection of the word "overwhelmingly" suggests that Congress may have intended to include within the ambit of Title III both "traditional" cases of gender motivation and cases involving "gender motivation" experienced in conjunction with another sort of animus (race, for example).

Other legislative history supports a narrow interpretation. On February 4th, 1994, in a speech to the American Bar Association, Chief Justice Rehnquist argued against the VAWA, contending that it would "unnecessarily expand" the jurisdiction of the federal courts. He suggested

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[45] S. Rep. No. 197, supra note 2, at 51.

that the bill was "so sweeping that it could involve the federal courts in a whole host of domestic relations disputes."[46] To respond to such criticism by the Chief Justice and others,[47] the framers of the VAWA stressed the narrow scope of the gender motivation requirement. For example, in his answers to questions submitted by Senator Grassley, Senator Biden stated, "Title III does not cover everyday domestic violence cases, nor does it cover random muggings . . . . Indeed, Title III expressly bars any cause of action for a random crime, including crimes motivated by personal animosity."[48] One could argue that these statements are too vague to limit the gender motivation requirement. Effectively, it seems that by "random crime" Senator Biden means "not gender motivated." Hence his answer is circular. The general tenor of the comment, however, suggests that the VAWA's framers intended to limit the gender motivation requirement substantially, although the basis for that limitation is left ambiguous.

Another indication that the Act's creators intended a narrow interpretation comes from the listing of "Generally accepted guidelines for identifying hate crimes" that the Senate Report from the Committee on the Judiciary ("the Committee Report") suggests "may be useful" for construing the gender motivation requirement. In addition to "language used by the perpetrator; the severity of the attack; the lack of provocation; previous history of similar incidents" and "common sense" these guidelines include "the absence of any other apparent motive." The courts could interpret this language to indicate that the Committee did not intend to allow cases in which gender and race animus intermingled. On the other hand, a definition of gender animus broad enough to include the sort of violence experienced by women of color would not necessarily be incompatible with these guidelines.

The most powerful argument for a narrow interpretation of the gender motivation requirement probably comes from the lack of any clearly defined limiting factor. Because it is indisputable that Congress does not intend the VAWA to create a federal tort law for all violence against women, it seems logical that its framers expected that courts would interpret the gender motivation requirement as they have interpreted past civil rights laws that dealt with gender. Although certainly Congress did not affirmatively embrace the white solipsism of past civil rights law, the legislative scheme

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[46] Jack Sirica, Federal Protection of Women at Issue, Newsday, Feb. 16, 1992, at 17.

[47] The Office of Judicial Impact Assessments of the Administrative Office of the United States Courts "states that title III alone will generate as many as 53,800 civil tort cases, of which 13,450 would reach Federal courts . . . . [and] that the annual cost of title III will be $43.6 million and 450 staff years." S. Rep. No. 197, supra note 2, at 69.

[48] Id.

effectively leaves courts to interpret the VAWA in the tradition of civil rights laws that have not been responsive to minority women. As a result, the VAWA may be inaccessible to any minority woman who does not experience precisely the sort of discrimination that would confront a white woman.

In sum, facially Title III suggests that courts will interpret it in the tradition of single-axis civil rights laws, since Congress has limited the scope of the coverage to violence that is motivated "by gender" and since the courts traditionally have not been successful at expanding single-axis civil rights laws to meet the needs of plaintiffs who fall into more than one protected category. Additionally, although it is somewhat ambiguous, the legislative history tends to support a single-axis interpretation of Title III that will severely limit minority women's access to VAWA remedies.

PART III

The second critique of existing civil rights laws that is relevant to Title III concerns the intentionality that the plaintiff must prove to prevail. This critique takes issue with causes of action that require the plaintiff to prove discriminatory purpose. In effect, the plaintiff must prove that the defendant consciously intended to discriminate against the plaintiff as a member of a protected class.[49] This is the sort of intentionality required in racial discrimination actions against the United States under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment.[50] This conscious-intention requirement has been criticized for being unresponsive to the real workings of discrimination.[51] In *The Id, the*

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[49] See Lawrence, supra note 24, at 319; David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 960–62 (1989); Henri Tajfel, Human Groups and Social Categories (1981).

[50] This test was established in *Washington v. Davis*, 426 U.S. 229 (1976).

[51] Writing about the equal protection doctrine of discriminatory purpose established in *Washington v. Davis,* which required a plaintiff challenging a facially neutral law to prove conscious intent to discriminate on the basis of race, Professor Lawrence comments, "the Court thinks of facially neutral actions as either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory." He continues:

> I argue that this is a false dichotomy. Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional — in the sense that certain outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

Lawrence, supra note 24, at 332 (footnote omitted). Professor Lawrence's article presents a compelling and sophisticated description of the real workings of

Ego, and Equal Protection: Reckoning with Unconscious Racism,[52] Professor Charles Lawrence argues that conscious-intention requirements are unnecessarily difficult to prove, since intent is ultimately known only to the actor, and is easy to hide. He also contends that conscious-intention requirements are severely underinclusive, since they only respond to acts of subjugation committed by defendants who are aware of their own biases. Although this sort of self-conscious bias does exist, it is no longer common. More typically, the thought process behind modern prejudice is more complex.[53] Lawrence argues that civil rights laws should grapple with this complexity in order more effectively to counter discrimination.[54]

Not all existing civil rights laws have conscious-intent requirements.[55] In a Title VII disparate treatment case, for example, the plaintiff can prove intentional discrimination by showing that the defendant intended to perform the discriminatory act and that the defendant made the choice to perform that act for impermissible reasons. The plaintiff does not have to prove that the defendant wanted to subjugate the plaintiff because of the plaintiff's membership in a protected class.[56] This two-step, intentional

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discrimination in our society where racism is widely sublimated while at the same time functioning as a crucial ordering principle. It is supported by a growing body of literature that questions the utility of a motivation requirement that assumes consciousness of a desire to subjugate. Id. at 319 & n.3.

[52] Lawrence, supra note 24.

[53] For an analysis of modern racism that discusses how racism can function as a major ordering principle in a society that claims to reject it, see Robert L. Hayman, Jr. & Nancy Levit, The Constitutional Ghetto, 1993 Wis. L. Rev. 627, 668 & n.188, describing modern racism as "those attitudes and behaviors that correlate first, with a positive belief in racial inferiority or racial deviance and second, with a normative belief in 'race-neutral' policies and practices that result in the perpetuation of racial hierarchy." See also John F. Dovidio & Samuel L. Gaertner, Changes in the Expression and Assessment of Racial Prejudice, in Opening Doors: Perspectives on Race Relations in Contemporary America 119, 131–43 (1991) (for the proposition that modern racism is expressed "in more subtle, indirect and rationalizable ways"); Thomas F. Pettigrew, The Nature of Modern Racism in the United States, 2 Revue Internationale de Psychologie Sociale 291 (1989) (finding that modern racism is characterized by (1) rejection of gross stereotypes and blatant discrimination; (2) opposition to racial change for ostensibly nonracial reasons; (3) group-based self-interest and subjective threat; (4) normative compliance without complete internalization; and (5) indirect micro-aggressions and avoidance).

[54] Lawrence, supra note 24, at 323–24.

[55] For example, § 1985(3) does not require the plaintiff to demonstrate a malicious animus in order to prevail. See Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 759 (1993) ("We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women.")

[56] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). For a discussion of this case, see infra text accompanying note 62.

discrimination model is more sensitive to the actual workings of modern prejudice than are laws that require the plaintiff to prove a conscious intention to discriminate.

It is not clear from the legislative history of the VAWA whether the framers of Title III intend for the courts to interpret the gender motivation requirement consistently with the equal protection discriminatory purpose test or with the Title VII intentional discrimination requirement. As currently explained in the legislative history, the gender motivation requirement is susceptible to two possible interpretations. Several paragraphs in the Committee Report that set out examples of circumstantial evidence cases under Title III suggest one interpretation. The Report states:

> Consider the case of a serial rapist who violates his victims as he hurls misogynist slurs. The victim's lawyers would prove . . . that the victim was of one sex (female) and the attacker a different sex (male); that the attacker did not kidnap and rape men, but had a long history of attacking women; and that the attacker shouted antiwoman epithets during the assault.[57]

The Report goes on to recommend that courts determine whether a crime reflects a gender motivation by using the same techniques courts have traditionally used to determine whether a crime was racially motivated.

This example evokes a perpetrator who is aware that his purpose is to subjugate women as a class. It is reminiscent of the mass murder of women engineering students in December 1989 in Montreal.[58] Clearly, this type of violence against women does occur, but like the *Washington v. Davis* discriminatory purpose rule, if the gender animus were to require proof of a conscious intent to subordinate, it would be vastly underinclusive. The VAWA was created to counter violence that "degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated."[59] It should counter violence that reduces its victims "to symbols of group hatred they have no individual power to change or escape."[60] Violence, however, does not have to be committed by someone who is conscious of his hatred of women in order to subjugate women as a class. Interpreting the act consistently with this example would seriously undermine the ability of the VAWA to achieve its intended purpose.

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[57] S. Rep. No. 197, supra note 2, at 50.

[58] I refer to the case of Marc Lepine, a 25-year-old who murdered 14 women engineering students in Montreal on December 6, 1989. As he fired at his victims with a semi-automatic rifle he shouted "You're all a bunch of feminists! I hate feminists!" "Feminists" Ruined Life, Gunman Wrote, St. Louis Post-Dispatch, Dec. 8, 1989, at A1.

[59] S. Rep. No. 197, supra note 2, at 43.

[60] Id.

By contrast, several paragraphs later the Committee Report states, "The definition of gender-motivated crime is based on Title VII [of the 1964 Civil Rights Act, as amended] . . . . [Title VII] case law will provide substantial guidance to the trier of fact in assessing whether the requisite discrimination was present."[61] This suggests a second possible interpretation: a gender motivation requirement that does not require a showing of a conscious intention to subjugate women as a class. This sort of interpretation would be consistent with the Title VII intentional discrimination test.

To understand how this would work, consider the proof of intent in *Price Waterhouse*, the leading Title VII disparate treatment case. In *Price Waterhouse*, the Supreme Court found for the plaintiff because she successfully demonstrated that gender played a motivating part in an employment decision. The plaintiff was not required to demonstrate that her employer denied her promotion because of a belief that women should be relegated to positions of limited power. Indeed, several other women had already joined the Price Waterhouse partnership when Price Waterhouse rejected the plaintiff's promotion. Instead, the plaintiff demonstrated that her employer denied her promotion because her employer was relying impermissibly on a stereotyped notion of the sort of behavior that was proper for a woman like the plaintiff. Plaintiff's candidacy was placed on hold because, in a now infamous phrase, the Policy Board believed that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[62]

Price Waterhouse presents an extremely promising model for interpretation of the Title III motivation requirement. As under Title VII, a Title III plaintiff could meet the intentionality requirement by demonstrating that the defendant intended to commit the relevant act and that he formed that intent by relying on impermissible considerations. Specifically, a Title III plaintiff would be required to show first that the defendant intended to commit the act of violence and second that he formed that intent by reasoning from the impermissible gender animus.[63]

If the Title III gender motivation requirement is interpreted consistently with the Title VII interpretation of intentionality, it will be able to undermine attitudes that nurture violence against women, because it will be responding to the subtle realities of class-based subjugation. If Title III is interpreted consistently with the conscious-intention, discriminatory purpose requirement of the Equal Protection Clause, the VAWA will not be able to

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[61] Id. at 50–51.

[62] Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989). *Price Waterhouse* was the first Supreme Court case explicitly to discuss gender stereotyping. Id. at 250–51.

[63] See infra part VII.

achieve its aims, because it will be responding only to gender based violence in its most blatant and unsophisticated forms.

PART IV

A third critique of civil rights law questions whether a legal remedy can ever effectively counter problems that pervade an entire social system. Professor Cass Sunstein describes how systemic disadvantage compounds, and in some cases preordains, the effects of race, sex and disability discrimination as follows:

> When combined with social practices, difference has the effect of systematically subordinating the relevant group and of doing so in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, and so forth. That is the caste system to which the legal system should respond . . . . [A]mong the many problems created by such a system are adverse effects on human capital and on preference formation, and general demoralization of group members.[64]

Professor Sunstein argues that the disadvantage existing civil rights legislation seeks to undermine cannot be countered by a cause of action that focuses on one discrete moment in time and on one particular injury. He explains that racial and gender discrimination tend to build on a cumulative injury that results in an effective ban on access to power and goods. No single act causes the bulk of the damage. For example, which is the greatest injury: denial of a decent education, of a decent job or of decent health care? Which one would be more effectively remedied by punishing an individual?

Of the three critiques of existing civil rights law discussed in this article, the VAWA comes closest to answering the concerns raised by this critique. Although the VAWA would draw heavily on existing civil rights law, it would also be unique in several respects. First, the VAWA is unlike existing civil rights laws because it is limited to gender crimes. Second, the VAWA is unique in its exclusive concern with acts of violent subjugation. Finally, the VAWA is unusual because it does not rely on a legal remedy alone. These differences may make a judicial remedy more appropriate and effective than it has been under past civil rights law.

A judicial remedy makes special sense in the context of the VAWA because Title III is limited to acts of violence. An act of violence against a woman, although undoubtedly functioning to support numerous systems

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[64] See Sunstein, supra note 18, at 751.

of subjugation, is a clearly relevant point of injury.[65] It is an identifiable action that functions predictably and potently to instill fear and limit choices. It is also typically an injury that a single individual perpetrates and hence more amenable to a judicial remedy.

Moreover, the VAWA as a whole backs up the Title III civil rights provision with other initiatives that attack the problem of violence against women in a variety of different ways. In the words of the Senate Report from the Committee on the Judiciary: "The bill uses several different complementary strategies, attacking the problem on a number of different fronts."[66] Implicit in the structure of the VAWA is an acknowledgement of systemic problems that contribute to the subjugation of women as a class but are not easily resolved by a judicial remedy. The VAWA as a whole will respond to these systemic problems more effectively than could any civil rights provision standing alone.[67]

PART V

No matter what form Title III takes, the societal prejudices of judges and juries will disadvantage minority plaintiffs. In the context of a statute that deals with gender violence, that prejudice will be especially potent. American culture has long linked sexuality and racism,[68] and one result of this linkage has been the tragic tendency of American jurisprudence and popular culture to turn a blind eye of unconcern toward non-white rape victims. This tradition will parallel and reinforce the trends in civil rights law that undermine the claims of minority women who fall into more than one protected category.

Professor Lawrence points out that psychoanalytic theory provides an explanation for the linkage between sexuality and race in American culture. He describes the extent to which racially prejudiced people are preoccupied

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[65] See, e.g., Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1302 (1991) (arguing that "[s]exual violation symbolizes and actualizes women's subordinate social status to men").

[66] S. Rep. No. 197, supra note 2, at 34.

[67] For an overview of Titles I, II, IV and V of the VAWA, see supra note 10.

[68] My reference to a link between sexuality and racism is not intended to imply that sexism and racism are one and the same, nor that one stems from the other, nor that one is greater than the other. Instead, I am arguing that the racist history of enforcement of laws against sexual violence must be acknowledged and addressed by any law that seeks to provide all women with a remedy against gender based violence. On the historical and cultural interconnection between racism and sexual exploitation, see generally Valerie Smith, Split Affinities: The Case of Interracial Rape, in Conflicts in Feminism 271, 271–78 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

"with sexual matters in race relations."[69] Lawrence offers several examples, including "[t]aboos against interracial sexual relations, myths concerning the sexual prowess of blacks, and obsession with racial purity . . . ."[70] The explanation "[a]ccording to Freud, [is that] one's sexual identity plays a crucial role in the unending effort to come to terms with oneself. Thus, the prominence of racism's sexual component supports the theory that racial antagonism grows in large part out of an unstable sense of identity."[71]

The effects of this link are manifold. One has been the creation of a sexual stereotype for virtually all identifiable minority groups in American society.[72] Another has been the use of rape law as a weapon of racial power.[73] A third is the extent to which racial identity is associated with sexual exploitation of another racial group's women.[74] (Notice, in this regard, the extent to which media coverage and successful prosecution of rape cases center disproportionately on cases of interracial rape.)[75]

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[69] Lawrence, supra note 24, at 334.

[70] Id. (footnote omitted).

[71] Id. (footnotes omitted).

[72] See, e.g., Catharine A. MacKinnon, From Practice to Theory, or What is a White Woman Anyway?, 4 Yale J.L. & Feminism 13, 20–21 (1991) (describing the various stereotypical presentations of women of different races in pornography); Winston, supra note 19, at 784–788 (describing the racial/gendered stereotyping of women of color in the United States, the historical sources of these stereotypes and the resulting harassment in an employment context); Kink-Kok Cheung, The Woman Warrior Versus The Chinaman Pacific: Must a Chinese American Critic Choose between Feminism and Heroism?, in Conflicts in Feminism, supra note 64, at 234, 234 (describing the "historically enforced 'feminization' of Chinese American men"); Lawrence, supra note 23, at 333–34 (describing the sexual or asexual stereotyping of Black and Jewish men).

[73] See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 598–601 (1990); Crenshaw, supra note 4, at 157–59; see also Jack Greenberg, Capital Punishment as a System, 91 Yale L.J. 908, 912 (1982) (almost 90% of those executed for rape from 1930 to 1977 were Black men convicted for the rape of white women).

[74] See, e.g., Crenshaw, supra note 4, at 159 (pointing out that "white male power was reinforced by a judicial system in which the successful conviction of a white man for raping a Black woman was virtually unthinkable" (footnote omitted)); Jennifer Wriggins, Race and Gender in Civil Rights, 79 Cal. L. Rev. 775, 785 (1991) ("[b]oth during and after the era of slavery, white men brutally assaulted and raped black women, with black men powerless to intercede often risking death if they did" (footnote omitted)); Harris, supra note 73, at 599; The Rape of Black Women as a Weapon of Terror, in Black Women in White America: A Documentary History 172, 172–93 (Gerda Lerner ed., Vintage Books 1973) (1972).

[75] Although only one-fifth of rapes are interracial, Jennifer Wriggins points out that the rape of a white woman by a Black man continues to be the priority of the criminal justice system. Wriggins, supra note 17, at 122. Professor Crenshaw notes during the same week that a flurry of publicity surrounded the interracial rape of the Central Park

These effects interact in various ways to undermine the cases of non-white rape victims. Consider, for example, the position of a Black woman rape survivor who must decide whether to press charges. First, the traditional application of rape law as a means to justify the terrorism of Black men may influence her not to bring any case at all.[76] If, as in the vast majority of cases, she is the victim of an intra-racial rape, she may feel that by bringing a rape case she will be supporting societal stereotypes that disempower Black men.[77] If she is raped by a white man, she will realize that the legal system is biased against non-white rape victims.[78] If she nevertheless decides to cooperate with prosecutors to bring the case, she will face a judge and jury who may well be influenced against her by sexist/racist stereotypes, including myths of Black female promiscuity,[79] and the sexist tradition of devaluing women thought to be promiscuous.

In this way, the racist history of the law of gender violence and the stereotypes that sustain the racist enforcement of rape laws today combine to undermine the cases of minority women.[80] The VAWA will be a part

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jogger, 28 other women were raped in and around New York City. She describes how "one black woman was also gang raped and thrown down an elevator shaft and left to die in Brooklyn. Yet she received no outpouring of public concern." Kimberlé Crenshaw, Address to the NOW-LDEF (Oct. 23, 1992) (transcript on file with author).

[76] Cf. Kimberlé Crenshaw, Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill, in Race-ing Justice, En-Gendering Power: Essay on Anita Hill, Clarence Thomas, and the Construction of Social Reality 402, 415 (Toni Morrison ed., 1992) (discussing how "many black women fear that their stories might be used to reinforce stereotypes of black men as sexually threatening").

[77] See, e.g., Harris, supra note 73, at 600 (describes case of Joanne Little as "testimony to the continuing sensitivity of black women to this [history of racist prosecution] of rape," and points out that "Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men").

[78] On the tendency of Black women to underreport rape cases, see, e.g., Wriggins, supra note 17, at 122–23.

[79] See, e.g., id. at 122 (A 1968 study concluded that "the differential in [the Philadelphia] police decisions to charge for rape 'resulted primarily from a lack of confidence in the veracity of Black complainants and a belief in the myth of Black promiscuity.'").

[80] The effects of this racist history and the stereotyping that sustains it are especially pronounced in cases heard by white judges before white jurors. Such cases are, of course, overwhelmingly in the majority. See id. According to Professor Crenshaw, one study found that "10% of rapes involving white victims end in conviction, compared with 4.2% for rapes involving non-white victims (and 2.3% for the less-inclusive group of Black rape victims)." Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1251 n.35 (1991). A different study in Dallas "showed that the average prison term for a man convicted of raping a Black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of an Anglo

of the same judicial system, and must take special care to counter these forces in order to be effective.

Addressing the forces that bias juries and judges against minorities in cases of gender violence is beyond the scope of this article. However, it is clear that the deck is already stacked against minority plaintiffs in gender violence cases. For this reason, it is crucial that any statute that seeks to provide a cause of action for *all* women who are subjugated through violence be carefully tailored to respond to the needs of minority women.

PART VI

The VAWA was created to undermine the violence that enforces women's subordinate status in society. The framers made their purpose very clear in the Committee Report, stating:

> The victims of [gender motivated] violence are reduced to symbols of group hatred they have no individual power to change or escape. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.[81]

The Report explains that the Act as a whole "takes aim at the attitudes that nurture violence against women" and Title III "sends a powerful message condemning crimes that not only ravage individuals but [also] systematically deprive women of equal rights under the law." Senator Biden envisioned Title III as a step in the direction of "a national consensus that this society will not tolerate this kind of violence and the terror it spawns."[82]

To determine which acts of violence function to subordinate women, Title III relies on the gender motivation requirement. As discussed above, in its present form, the scope of the gender motivation requirement is not clear.[83] The definition of "gender motivation" in the VAWA itself is circular.[84] The Committee Report and Congressional debates address the requirement several times, but their conclusions are often vague and

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woman." Id. at 1269 (footnotes omitted).

[81] S. Rep. No. 197, supra note 2, at 43.

[82] Id. at 35.

[83] See discussion supra part III.

[84] According to proposed section 301(d), "the term 'crime of violence motivated by the victim's gender' means any crime of violence . . . including rape, sexual assault, sexual abuse, abusive sexual contact, or any other violence committed because of gender or on the basis of gender." S. Rep. No. 197, supra note 2, at 28.

occasionally contradictory. For example, the Report suggests that gender motivation should be interpreted consistently with Title VII sex discrimination case law,[85] but also emphasizes that rape is not necessarily "gender motivated" for purposes of the VAWA.[86] These two descriptions will be hard to reconcile since it is difficult to imagine the Title VII case that could find rape to be inadequate evidence of sexual harassment or disparate treatment.

I fear that the VAWA will be unable to achieve its worthy goals as a result of this ill-defined motivation requirement. In its current form, "gender motivation" does not adequately capture the sort of animus that inspires the violent subjugation of women as a class. Although theoretically the creation of a civil rights cause of action could be an immensely effective weapon against violence that enforces gender subjugation, as discussed above, I believe that there are three serious problems with Title III as it is currently drafted. First, since it relies heavily on standards used in earlier civil rights actions, Title III seems likely to inherit the inflexibility of single-axis antidiscrimination law that has failed minority plaintiffs in the past. This danger is especially acute since the legislative history suggests that Title III should probably be narrowly construed to exclude unexpected plaintiffs. Second, Title III fails to specify the intent it requires, and therefore it may be interpreted to require a conscious intent to subordinate women. Finally, since Title III does not explicitly include intersectional plaintiffs, it cannot help but succumb to the same forces that have undermined the cases of non-white rape victims in a culture that has traditionally sexualized racial hatred. If all of this comes to pass, the VAWA will be vastly underinclusive and its impact in changing societal attitudes that condone the subjugation of women through violence will be minimized. In order for the VAWA to effect real change, it will have to be sensitive to the realities of violence against all women and it will have to accommodate the cases of diverse plaintiffs.

PART VII

Under the Title III gender motivation requirement as it is currently drafted, a defendant might argue that the VAWA does not apply to his case because his victim's race and not her gender inspired his act of violence.

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[85] Id. at 50.

[86] Answering questions about the bill, Senator Biden explained that "not all [rape] cases may fall within the ambit of a 'gender-bias' crime." Id. at 70.

This sort of defense could effectively limit VAWA plaintiffs to white women who do not fall into any other historically disadvantaged classes. If the VAWA leaves an opening for this sort of defense, it will be defining gender violence in terms of a white norm and it will perpetuate the shameful practice of restricting access to a judicial remedy for minority women. As a result, it will fail to undermine attitudes that nurture violence against women. Instead of sending a "message condemning crimes that . . . systematically deprive women of equal rights,"[87] it will send a message that only violence against white women matters.

The "race-not-gender" defense is absurd if bias is understood to be tailored to its victim. It becomes plausible and even persuasive when prejudice is divided into rigid categories as under single-axis civil rights laws. If the VAWA continues in the legal tradition of discrete categories of discrimination, it will exclude many of the plaintiffs who should fall within its ambit.

Similarly, if a plaintiff can prevail by proving intention in two steps, as under Title VII, she will find it easier to convince judges and juries to reject a "race-not-gender" defense because she will be able to describe the bias as it actually occurred. However, the "race-not-gender" defense will be dispositive if courts interpret Title III to require the defendant both to be aware and to leave evidence of the fact that hatred of minority women inspired his violence.

The central insight of the VAWA recognizes that violence against women can function as a gender-based civil rights violation. The framers take the position that violence against a woman can have implications beyond the injuries inflicted on the immediate victim. It may express a hatred of all women. This is a fairly radical idea. Although I believe that this proposition is true, I also believe that many of the people who commit acts of violence against women would not agree with it. If the VAWA incorporates a conscious-intention requirement like that of *Washington v. Davis*, a plaintiff will have a cause of action under the VAWA only against a defendant who shares this radical view.

I believe that the animus that inspires violent violations of women's civil rights can be described with more subtlety than "a hatred of women." The violence that serves most potently to curtail women's choices sends a message about rules that women must follow to avoid attack. Those rules are generally known and understood because they are implied in stereotypes. In effect, stereotypes about women indicate desirable traits and undesirable traits. These traits can be translated into rules, telling women what they should do and what they should not do. When violence against a woman

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[87] Id. at 35.

is inspired by a stereotyped notion of the behavior that is appropriate or desirable for that woman, that violence serves as an enforcement mechanism for the rules that are implied by the stereotype. This is how violence can function to limit women's choices and autonomy. This is how violence against women becomes a crime against women's civil rights.

Consider, for example, the serial killer who murdered fourteen women engineering students shouting "You're all a bunch of feminists! I hate feminists!"[88] This is the quintessential crime "motivated by gender." It would clearly fall within the gender motivation test as it is currently drafted. But now consider how this crime really functions to limit women's choices. On its face, the crime is very random. No one will choose not to enroll in engineering school for fear that such an incident will occur again. It conjures up a stereotype, however, about women who are feminists. Part of that stereotype holds that feminists act like men and that men do not like feminists. The stereotype implies a set of rules: do not be a feminist; do not act the way that feminists act. The punishment for transgression is to inspire the rage of men.

Almost every stereotype can be linked to such a rule. For example, there is a familiar but fairly old stereotype that stigmatizes women who dress in a manner that men find suggestive of sexual availability. This stereotype is linked to the rule that women should not sexually excite men to whom they are not married. To the extent that this rule still exists, it shapes women's behavior by encouraging them to dress conservatively. Similarly, another set of stereotypes describe certain women as domineering, or as nags. These stereotypes correspond to a rule that tells women not to assert their own opinions or desires. It shapes women's actions by encouraging them to defer to the opinions and desires of men in order to escape this stereotype and the reprobation that it implies. There is another stereotype that ridicules women who are overweight. It labels such women as troubled, lazy, or lacking in self-discipline. This stereotype corresponds to rules about how women should look, rules that say women should be small and non-threatening. Notice that these rules are not necessarily logical or even consistent. Part of the potency in this process of enforcing women's behavior depends on a structure of fear and uncertainty.

Notice also the function this system serves for the person holding the stereotype. The stereotype holder relies on the stereotype to give order to the world, to explain the unknown, and frequently to increase his own self-esteem. To some extent, this is natural and inevitable. It becomes problematic in the extreme, however, when the person holding the stereotype resorts to violence to enforce it.

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[88] See supra note 58.

The problem is compounded because violence is not the only way society enforces stereotypes and the rules that they imply. For example, if this violence becomes the subject of a trial, the same stereotype that inspired the act of violence may convince a judge or jury that the violence was justified. Men on a jury who hear that a woman accompanied a man to his hotel room may assume that the woman was promiscuous, since she broke the rule implied in stereotypes about promiscuous women. As a result, they may find for the defendant. These men may choose to enforce the stereotype and its rules because it gives order to their world. It may help them to understand the way different women behave or it may reassure them because they believe that the women they know and love would follow these rules and escape injury. Women may choose to enforce the same rules, because they want to believe that order exists and that there are rules that can keep them safe from violence. They may try to ignore the contradictions and the randomness inherent in these rules because to acknowledge these things that they cannot change would be to give up hope.

Because of the link between stereotypes, the rules they imply, and the violence that serves to enforce them, I believe that a stereotyping test would best map the process of gender subordination through violence. In order to prevail under such a test, a plaintiff would have to prove two elements. First, she would show that the defendant intended to commit an act of violence. Second, she would demonstrate that an analysis of the totality of the surrounding circumstances proves that the defendant's stereotyped notion of the appropriate behavior, desires, or place of the plaintiff inspired the defendant's act of violence. Specifically, the plaintiff would show that an apparently irrational act of violence makes sense if the perpetrator had been reasoning from stereotypical assumptions. The plaintiff would define the stereotype by reference to the work of social scientists, by images in popular culture and consciousness, and by common sense.[89] A defendant could then counter her argument by presenting proof that his actions did not follow logically from a stereotype, that there is no such stereotype, that his actions followed logically from something else, or that he did not act in the manner alleged.

In the context of this cause of action, courts could define stereotype as follows: any generalization about a group of women, that inspires an act of violence against a woman or women, and that has the effect of enforcing generally understood rules and norms of behavior

By "any generalization," I mean to include negative generalizations, of

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[89] For an analysis of a number of cases analyzing stereotypes and an examination of the ways to use social science data in a court setting, see Lawrence, supra note 24, at 358–62 & nn.187–208.

which "women who dress like that are whores," is an example. But I am also including superficially positive stereotypes, for example, "Asian women are smart." I mean to include generalizations that are true for the most part, for example, "women bear children"; generalizations that are true for cultural but not for biological reasons, such as "women are not employed as managers"; and generalizations that are false, like "women are generally not as intelligent as men." In other words, this definition could conceivably include any generalization, so long as that generalization can be proven to have inspired an act of violence.

By "a group of women," I mean to incorporate the idea that different stereotypes confront different groups of women. This element makes the stereotyping test flexible enough to encompass bias as intersectional plaintiffs encounter it. Every plaintiff must prove a stereotype, but each plaintiff can tailor her claim to fit her experience. A test based on stereotyping would be able to accommodate difference, since it is clear that different groups of women are stereotyped differently.[90] Consider, for example, how markedly many of the stereotypes confronting Black women differ from those associated with white women. While society stereotypes white women as "effete, pampered, privileged, protected, flighty, . . . self-indulgent,"[91] passive, subordinated,[92] and sexually repressed;[93] Black women are stereotyped as "matriarchs,"[94] promiscuous,[95] "Sapphires,"[96] or un-wed (and therefore inadequate) mothers[97] but are typically not

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[90] See supra notes 19–23 and accompanying text.

[91] MacKinnon, supra note 72, at 18–19.

[92] For a discussion of measures designed to enforce the traditional stereotyping of white women as passive and subordinated, see bell hooks, Ain't I a Woman: Black Women and Feminism 29–30 (1981).

[93] For examples of this stereotype in action, see id. at 31–32.

[94] For a discussion of this stereotype, see id. at 70. For an example of this stereotype at work, see, e.g., Office of Policy Planning & Research, U.S. Dept. of Labor, The Negro Family: The Case for National Action (1965), reprinted in The Moynihan Report and the Politics of Controversy 39 (Lee Rainwater & William L. Yancey eds., 1967). In this government report, Senator Daniel P. Moynihan (D-NY) linked matriarchy, "the often reversed roles of husband and wife," to family instability, low earning power for Black men, and "the failure of [Black] youth." Id. at 76–78, 80–81. The Moynihan Report fueled an acerbic public and academic controversy. See, e.g., Herbert G. Gutman, The Black Family in Slavery and Freedom, 1750–1925, at xvii (1976). For critiques of this stereotype that demonstrate how it has functioned to foster discriminatory theory and policy, see Smith, supra note 19, at 63; Crenshaw, supra note 4, at 155–56.

[95] hooks, supra note 92, at 33, 55.

[96] See, e.g., Austin, supra note 26, at 539–40 (discussing Sapphire, a Black woman character on the radio and television show Amos'n'Andy, who was depicted as "tough, domineering, emasculating, strident and shrill").

[97] See generally Maxine Baxa Zinn, Viewpoint, Family, Race, and Poverty in the

stereotyped as fragile or weak.[98] Sometimes Black and white women are stereotyped in the same way; sometimes a Black woman's stereotype has a white counterpart;[99] sometimes the stereotypes are unique; and sometimes they are opposites.

I believe that a test that focuses on stereotypes rather than on gender would make it easier for judges and juries to visualize and accommodate the different types of prejudice that different women encounter. In addition, this sort of test would make it easier for an intersectional plaintiff to state a case because she could make reference to the considerable body of legal and social science research that addresses the various stereotypes that confront different groups.[100] As such, the VAWA would not limit intersectional plaintiffs to stating cases with the sorts of bias that courts have previously recognized.

By a generalization "that has the effect of enforcing generally understood rules and norms of behavior," I am referring to the link between the process of stereotyping and the process by which violence curtails women's lives and choices. A court would not require the plaintiff to prove this element. It is a description of the process through which stereotyping, violence and unwritten rules interact to enforce gender subordination.

Some hypothetical cases may help to illustrate how Title III would work under a stereotyping test. Consider, for example, an act of violence that is directed against a woman because she has stolen a car and contrast an act of violence that is directed against a woman because she is wearing a short skirt. The first act of violence does not make any identifiable statement about women in particular, because society attributes no special

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Eighties, 14 Signs 856, 857 (1989) (on theories that demonize female headed households as deviant and a source of community weakness).

[98] See, e.g., Spelman, supra note 21, at 97–100.

[99] For example, there are some similarities between the jezebel/mammy and the madonna/whore stereotypes.

[100] There are many good articles discussing the stereotypes associated with various groups in American society. See, e.g., Morrison Torrey, We Get the Message — Pornography in the Workplace, 22 Sw. U. L. Rev. 53, 72–81 (1992) (describing sex-role stereotypes); Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills, 77 Cornell L. Rev. 1258 (1992) (describing the various changing stereotypes associated with different minority groups in American society); Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471 (1990) (examining the extent to which stereotyping prevents women from attaining positions of power in professions that until recently have been occupied almost exclusively by men); Austin, supra note 26, at 549–52 (describing how stereotypes about Black women, Black mothers, and un-wed Black mothers interact to convince an employer — and a circuit court judge — that an employed, self-sufficient, unmarried, Black mother is a detrimental role model for young girls, that she should be fired, and that if she is not fired her very presence will encourage teenage pregnancy.)

significance to women car thieves. The victim in this case could state no cause of action under the Act. The second act of violence may well have a larger significance. It conjures up notions of the way women stereotypically are supposed to behave, and evokes an illogical but familiar theory linking clothing and sexual availability. Crucially, it may also enforce a certain type of behavior among others similar to the plaintiff. Here, that might mean that other women who hear of the incident will consider dressing down to avoid attracting attention.

By itself, however, the fact that someone attacks a woman wearing a short skirt does not mean that the woman will have a case under the proposed stereotyping test. To make a case, she would have to analyze the totality of the surrounding circumstances to see whether reliance on stereotyped notions of the sort of treatment that she deserved or desired inspired the perpetrator to violence.

The analysis of the surrounding circumstances should examine every element of the crime that provides an insight into the motivations of the defendant. As an example of such an element, consider the infamous "water buffalo" comment. In a well publicized incident at the University of Pennsylvania, a male freshman, Eden Jacobowitz, shouted at a group of Black women calling them water buffaloes.[101] The women raised (and subsequently dropped) racial harassment charges. This incident would not come within the ambit of the VAWA because the insult was not uttered in the context of a violent attack. However, if the insult had been accompanied by violence, under the stereotyping test, the issue would be handled as follows: the plaintiffs could argue quite plausibly that the slur was an attempt to enforce stereotypes that degrade women, Blacks and Black women as less than human. The defendant might have countered with a strong defense by explaining that he was directly translating a Hebrew expression that did not have gendered or racist implications.[102] He would attempt to prove that his comment lacked the stereotype animus and that he was not trying to enforce rules that the stereotype implies.

Under the stereotyping test there is no cause of action unless both the victim(s) and the perpetrator(s) understand that there is a message underlying the violence. This way the cause of action is fair to the defendant without privileging his perception over that of the plaintiff. It is crucial that the stereotyping test take notice of the plaintiff's perspective because it is the effect of the violent act on the plaintiff and on others similarly situated that can make the act a civil rights crime. It is equally

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[101] See, e.g., Richard Bernstein, Play Penn: Sheldon Hackney's Dismal Record, The New Republic, Aug. 2, 1993, at 16.

[102] The term "water buffalo" is "a common insult normally used by one Hebrew-speaking Jew to deride another [with] no known racial connotations." Id.

important to consider the defendant's perceptions because, like many other civil rights laws, Title III would impose a special, additional penalty on the defendant for acts that will also be dealt with through the criminal justice system. Title III should therefore correspond to a special, additional crime.

Two elements justify this special penalty. First, the defendant's invidious animus creates an *additional injury*. Second, because of the invidious animus, the perpetrator is *more culpable*. In a traditional civil rights case brought under a Reconstruction Era statute, an act of violence that is inflicted with a racial animus creates additional injury because it terrorizes and degrades an entire community not just the individual injured. The perpetrator is more culpable because she is consciously relying on an unjust advantage. Because of her skin privilege, she knows that an element of her community will support her no matter what she does. She knows that many will assume her actions were justified, and she knows that she will have less of a chance of being punished. In sum, she knows that societal racism will support her. With her racist action she can summon up all the support systems that buttress racism generally.

If Title III were adopted with a stereotyping test, it would differ slightly from this model. Since the stereotyping test would rely on a Title VII style, two-step proof of intention, the defendant's invidious animus would take a different form. Under the Equal Protection Clause, the state actor must be fully conscious that she is acting out a racist hatred. Under the stereotyping test, the plaintiff would prove that the defendant intended to commit the act of violence, and that he did so to enforce stereotyping rules. Under this test, the perpetrator may *not* be aware that he is acting out a hatred of women. The perpetrator might believe that he is punishing a woman for being a nag, for example. He will be fully aware, however, that he is using violence to force this woman to follow his rules. He will be aware that he is limiting her freedom, her choices and her autonomy; and he will be aware that he is preserving his own position of privilege through violence.

An act of violence that fulfills the stereotyping test merits special punishment because it will create additional injury and additional culpability. It will cause additional injury because it will have implications beyond the initial victim. Specifically, it will encourage other women to conform to stereotyped rules in order to avoid attack. The perpetrator will be more culpable because he will be taking advantage of unjust prejudices to enforce the subordination of women and to protect his own elevated status. His crime is not merely an act of physical violence; it is also an attempt to force another to follow his rules in order to preserve his position of privilege. It is this additional element that Title III would punish.

The stereotyping test would be superior to the gender motivation requirement for several reasons. First, the stereotyping test would give

intersectional plaintiffs greater access to VAWA remedies. While a defendant could put forth a race, not gender, defense under the gender motivation requirement, the stereotyping test by its terms demands that the trier of fact confront the complexities of bias. The stereotyping test would highlight the idea that different women are treated differently. This will make juries more receptive to bias in its various forms. Few people have a sophisticated understanding of the way that bias works against others, but almost everyone knows something about stereotypes. It is precisely because stereotypes are so much a part of our cultural inheritance that they can function to publicize the tacit rules that confine behavior.

Second, the stereotyping test would consider the perspectives of both the plaintiff and the defendant so that the perpetrator's perspective would not be privileged. The gender motivation requirement focuses exclusively on the perspective of the defendant and only seeks to reveal his thought process. Under the gender motivation requirement there is no consideration of the implications of the act of violence to the victim or to women in general. By contrast, the stereotyping test considers the perspectives of both parties. It is crucial to the test that the violent act enforces gender rules for the victim and others similarly situated. It is equally crucial that the defendant relied on the objectionable assumptions targeted by the stereotyping test.

Finally, the stereotyping test would demonstrate how violence functions to enforce women's subordination. The gender motivation requirement draws heavily on past case law and follows the pattern of existing civil rights laws. By contrast, the stereotyping test would permit new analyses of the process of subjugation as it is experienced by different women. Moreover, to some extent, this educational process would serve to undermine the system that enforces women's subordination by debunking and demystifying the stereotypes through which that subordination occurs.

CONCLUSION

A civil rights cause of action could help foster a national consensus against the violence that robs women of their autonomy. It could help empower women disempowered by violence. It could send a message to the entire nation that violence against women is important enough to merit federal action. However, if Title III is to be effective, Congress must draft it with care. Congress must take into account the racist history of laws addressing sexual violence, and take pains not to follow in that tradition.

Title III must reflect the realities of all women's experience by recognizing that society victimizes different women in different ways. Title III must be sensitive to the subtle reasons women are victimized and the real effects of that victimization on all women.