Notes

Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation

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> If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus.
>
> —U.S. Senator Orrin Hatch (R-Utah), VAWA cosponsor[1]

> Theoretically, I guess, a rape could take place that was not driven by gender animus . . . . But I can't think of what it would be.
>
> —U.S. Senator Joseph R. Biden, Jr. (D-Del.), VAWA chief sponsor[2]

I. INTRODUCTION

On September 13, 1994, President Clinton signed into law a major crime bill that included a powerful new federal weapon to combat civil rights abuses against women. This crime bill contained the Violence Against Women Act (VAWA),[3] a historic measure taken by Congress to address the national problem of violence against women.[4]

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1. Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12, 14.
2. *Id.*
3. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).
4. The Senate Judiciary Committee first held hearings on Senate Bill 2754 in 1990 and 1991. *See* S. REP. NO. 102-197, at 33-48 (1991); S. REP. NO. 101-545, at 29-34 (1990) (summarizing

The Act[5] created the first civil rights remedy aimed at violent gender-based discrimination against female citizens.[6] The provision permitted victims of gender-motivated violence to bring a civil rights suit in federal court for compensatory or punitive damages, declaratory or injunctive relief, and legal costs. Its aim was to replace a patchwork of inconsistent, inadequate, and underenforced state civil and criminal laws with a consistent and uniform national standard under which to evaluate and prosecute such civil rights violations.[7] Equally important was the symbolic value of recognizing the political aspects of gender-based crimes of violence: More than random violence, this type of bias crime served to reinforce discriminatory social hierarchies, thereby harming targeted citizens' civil rights. For the first time in our nation's history, victims of these crimes would not have to rely on local criminal prosecutions for relief; instead, they could sue and seek significant damages in federal court on their own behalf.[8]

The VAWA civil rights remedy defined a "crime of violence motivated by gender" as a felony-grade "crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[9] The key animus requirement was added to

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hearings detailing the legal and practical barriers to justice faced by victims of rape and domestic violence).

5. I also refer to the statute's civil remedy provisions as the "VAWA civil rights remedy," "civil rights remedy," or "§ 13981" throughout this Note.

6. 42 U.S.C. § 13981(c)-(d) (1994).

7. S. REP. NO. 102-197, at 48, 53; *see also* S. REP. NO. 103-138, at 42 (1993) (noting congressional findings that "[a] few States still fail to recognize rape of a spouse as a criminal act; other States do not prosecute husbands for rape unless a wife suffers 'additional degrees of violence like kidnapping or being threatened with a weapon'; others classify rape of a spouse as a less serious crime with lesser penalties" (citation omitted)); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2163 & n.163 (1996) (noting that in nine states spouses are barred from claims of intentional torts, either in whole or in part, by the doctrine of interspousal tort immunity); Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 682 & n.35 (1996) (listing Arizona, California, Connecticut, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maryland, Nevada, Tennessee, Washington, and West Virginia as states offering either partial or no relief for rape victims in cases where the defendant is the victim's spouse). For example, Idaho allows a wife to prosecute her husband for rape only where he uses force, violence, or a threat of harm, but not where he rapes her while she is unconscious or otherwise incapable of consenting. IDAHO CODE § 18-6101, -6107 (Michie 1997).

8. *See* E-mail from Joseph R. Biden, Jr., United States Senator, to author (Jan. 4, 2002) (on file with author). Senator Biden wrote:

> I am deeply disappointed by the Supreme Court's decision in *U.S. v. Morrison*, but I remain very proud of the Violence Against Women Act. The civil rights remedy empowered a victim with the ability to seek remedies that were not dependent on the state, a particularly important right for many women who lived in places that had no or inadequate state recourses.

Id. The author is a former member of Senator Biden's staff and continues to work on behalf of several of his policy initiatives. The views expressed in this Note are entirely her own and do not necessarily reflect the views and positions of Senator Biden.

9. 42 U.S.C. § 13981(d).

satisfy early opponents of the bill, who feared that § 13981 might impinge on traditional areas of state legislative authority and might be used to provide relief in federal court for women who had been victims of mere "random acts of violence unrelated to gender" that did not manifest invidiously discriminatory intent.[10]

In May 2000, the Supreme Court reviewed a challenge to VAWA's constitutional legitimacy and, in *United States v. Morrison*, struck down § 13981 as violative of the Constitution's federalism principles.[11] Yet soon after the Supreme Court's initial grant of certiorari in *Morrison* in 1999, a handful of individual states anticipated the Court's final decision and responded with the introduction of their own versions of VAWA civil rights legislation, closely tracking the language of the doomed federal VAWA.[12] After the grant of certiorari, the New York State Senate's Committee on Rules marked up a new civil rights law.[13] Current versions of this bill establish a cause of action covering acts committed "because of gender, or on the basis of gender, or on the basis of gender and due at least in part to an animus based on the victim's gender."[14] On February 4, 2000, the Illinois state legislature introduced the Gender Violence Act, which would provide a civil remedy for those who have suffered from "sex discrimination" in the form of gender-related violence.[15] On January 29,

10. *Id.* § 13981(e)(1); *see* E-mail from Joseph R. Biden, Jr., to author, *supra* note 8 ("Although 'animus' was a component of the original Violence Against Women Act that I drafted in 1990, the specific language of 'animus based on the victim's gender' was shaped in 1993 in negotiations with Senator Orrin Hatch. To secure necessary support from initial opponents, we had to narrow the scope of the bill and preserve traditional state spheres of authority—adding the language of 'animus based on gender' accomplished those goals. . . . [W]e did not want to supplant existing state tort law, or create a general federal tort law.").

11. 529 U.S. 598 (2000).

12. There has been action at the municipal level as well: In December 2000, the New York City Council passed an ordinance amending the city's administrative code to include a private right of action for victims of crimes of violence "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." NEW YORK CITY, N.Y., ADMIN. CODE §§ 8-901 to -905 (2000); *see also* Judith Resnik, Editorial, *In the Eye of the Beholder: States' Rights, Federalism*, L.A. TIMES, Dec. 13, 2000, at B9.

13. S.B. 7903, 223d Ann. Leg. Sess. (N.Y. 1999).

14. A.B. 6223, 224th Ann. Leg. Sess. (N.Y. 2001); A.B. 5682, 224th Ann. Leg. Sess. (N.Y. 2001); S.B. 681, 224th Ann. Leg. Sess. (N.Y. 2001).

15. H.B. 4407, 91st Gen. Assem. (Ill. 2000), *amended and reintroduced as* H.B. 3279, 92d Gen. Assem. (Ill. 2001). The original statutory language defined "gender-motivated violence" as "acts of violence or physical aggression on the basis of sex, gender, or sexuality." H.B. 4407. The current Illinois state bill is stalled over the broad scope of the statutory text, including the so-called Matthew Shepard clause (which extends explicit protection to people who are targets of violence motivated by sexual orientation) and the absence of a narrowing animus requirement. *See* Cassandra West, *Bridging the Gaps Between People, Parties, Passions*, CHI. TRIB., Sept. 27, 2000, at C3. This article quoted Judy Gold, Chairman of the Illinois Commission on the Status of Women, who noted that the threat of an active and broadened antirape remedy has mobilized conservatives in the state legislature to stall the bill:

> What it says is you can go to court and sue for money damages [if you've been brutalized on the basis of your gender]. You may not know this, but in Illinois there really isn't a civil remedy for rape. Technically there is, but it's never been applied. The

2001, the Arizona state legislature introduced a bill creating a private cause of action for victims of "act[s] of violence motivated by gender" that were "due in whole or in any part to an animus based on the victim's gender."[16] Now that the federal VAWA civil rights remedy has been declared unconstitutional, it is likely that other states will join Arizona, Illinois, and New York in introducing similar legislation creating a state-based civil right to be free from gender-motivated violence.[17] Unfortunately, however, these states now find themselves caught in a political dilemma: The very ambiguity of an animus term, the inclusion of which makes passage of these state VAWAs possible, could eventually result in an interpretive struggle in the courts similar to the struggle in the federal courts after passage of the federal VAWA.

The absence of federalism concerns at the state level would appear to make it easier for state legislators to add creative alternative definitions of animus to these statutes, or even to drop this difficult term from their drafts altogether. Yet political realities seem to dictate that animus be included in any successful state bill. Indeed, the Arizona and New York statutes are virtual clones of the federal VAWA, and these legislatures have embraced the coalition-building pragmatism in the federal VAWA's textual ambiguities to shelve political arguments concerning the bill's scope and legislative reach.[18] These bills are proceeding steadily through hearings and markups. (At the same time, Illinois's most current draft drops the original animus language of the federal VAWA and contains alternative language to broaden the scope of the bill.[19] These moves have led to political problems in getting the Illinois VAWA bill passed, and that legislation now appears to be stalled.[20]) The likely adoption of animus language in state-level

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governor supported this act and the mayor supported it, but the Republicans in the Illinois legislature did not support it because it protects people based on their sexual orientation. Many of those legislators said, "If you would just take the sexual orientation piece out, we'll vote for it."

Id. (alteration in original).

16. S.B. 1550, 45th Leg., 1st Reg. Sess. (Ariz. 2001).

17. In addition, three states—California, Michigan, and Vermont—have passed hate crime statutes that include civil penalties for gender-motivated violence. *See* CTR. FOR WOMEN POLICY STUDIES, VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME 15-17 (1991).

18. *See* E-mail from Joseph R. Biden, Jr., to author, *supra* note 8 ("[I]t made sense legally to model the civil rights remedy on the language used in other statutes that protect civil rights. Relying on the existing civil rights language also reinforced one of the fundamental messages in the Violence Against Women Act, that is, violence against women is not a private, familial matter, but rather, it is systematic discrimination against women that requires federal action, just like any other kind of discrimination."); *see also* Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 26-33 (1996) (noting the plurality of meanings ascribed to the animus term by various members of Congress during the legislative debate).

19. *See supra* note 15 and accompanying text.

20. *See* West, *supra* note 15.

VAWA statutes ensures that the struggle over the definition of animus has not ended with the death of the federal VAWA.

This Note examines the constructions of animus available from existing jurisprudential and legislative sources in an effort to define an innovative legal meaning and role for this undefined statutory term within states' new VAWA legislation. The purpose of the Note is twofold: first, to analyze available sources of meanings to discover current constructions of the meaning of animus; and second, to engage in a reconstruction of these meanings in order to develop the proper future definition for this element within the context of the post-VAWA civil rights remedies now emerging in the wake of the federal remedy's demise.

In Part II, I turn to the heated congressional debate over the federal VAWA in order to examine the competing notions of animus that vied for adoption in the new Act but that ultimately produced the politically necessary cloud of ambiguity surrounding this statutory requirement. Parts III-V examine the scope and limitations of current constructions of animus under three jurisprudential traditions—civil rights law, Title VII antidiscrimination case law, and hate crimes legislation—each intended by VAWA's drafters to be a source of guidance for federal courts' interpretations of VAWA's animus requirement. As we shall see, each of the existing legal categories had something to offer to (and something to take away from) the original goals and eventual scope of the federal VAWA civil rights remedy. In Part VI, I examine the body of available federal VAWA jurisprudence for additional insights into potential animus meanings.

Finally, Part VII reconceptualizes the role of animus under the new state versions of VAWA, considering what would be the most appropriate meaning for this statutory term given political realities and the original vision of the law. Animus is the linchpin term that will determine the ultimate scope and effectiveness of the states' future VAWA remedies in realizing the federal law's promise for equal citizenship within a society free of gender-based violence. As seen at the federal level, unguided courts chose to read animus restrictively or inconsistently. Continuing ambiguity of animus promises to limit severely the scope and effectiveness of the state VAWA statutes.

As courts applied the federal VAWA in individual cases, inconsistent jurisprudential treatment of rape claims resulted in some courts holding that some rapes satisfied the animus element while other rapes were denied relief. The Note reveals that this inconsistent jurisprudential treatment of rape claims at the federal level is not analytically defensible. All rapes necessarily contain an inherent gender animus; the minimum level of civil rights coverage for a truly transformative state VAWA statute therefore requires relief for all claims involving gender-motivated rape. To that end, I

offer a definition of animus that would make these new state VAWAs responsive to all future claimants who have survived a rape. Although a few states do provide civil remedies for the specific crime of rape, these are often underenforced, in part due to their secondary status as the "damages counterpart law" to an existing and primary criminal rape statute. Even where these civil rape statutes are applied, they fail to capture fully the harm the victim experiences, and suffer from underinclusion in failing to address a broad range of nonrape violence that takes place due to victims' gender. Civil rape statutes fail to recognize the political harms caused by rape.

For these reasons, states seeking to create societies marked by gender equality among their citizens must provide civil rights remedies that recognize that gender-motivated violence is a civil rights issue as well as a criminal one. By explicit legislative language or through judicially discoverable expressions of legislative intent, states should adopt a construction of animus as "[a]n attitude that informs one's actions" or one's "disposition"[21] in order to ensure that these fledgling civil rights remedies most effectively advance the goal of a society free from violent acts of discrimination within existing political realities.

II. LEGISLATIVE INTENT-BASED CONSTRUCTIONS OF ANIMUS UNDER VAWA

VAWA took many different forms in both the House and the Senate: All tolled, there were at least fourteen versions of VAWA, with additional changes made during final consideration of the bill on the floor of the Senate. Senate Bill 2754, the first version of VAWA, was introduced in the Senate by Senator Joseph Biden on June 19, 1990. As originally drafted, Title III of Senate Bill 2754 created a new private cause of action for individual victims of gender-motivated violence, with a "crime of violence motivated by the victim's gender" defined as "any rape, sexual assault, or abusive sexual contact motivated by gender-based animus."[22] At first, Title III covered only sex-related crimes; however, new language incorporated before markup broadened the remedy to include all crimes of violence motivated by gender, not just an enumerated list of sex-related violence.[23]

21. AMERICAN HERITAGE COLLEGE DICTIONARY 54 (3d ed. 2000).

22. S. 2754, 101st Cong. § 301(d), 136 CONG. REC. 14,564, 14,569 (1990); *see also* Nourse, *supra* note 18, at 7 & n.31.

23. S. 2754, 101st Cong. § 301(b)-(d) (1990), *reprinted in* S. REP. NO. 101-545, at 23 (1990) (creating a cause of action covering crimes of violence "overwhelmingly motivated by the victim's gender[,] . . . including any rape, sexual assault, or abusive conduct, motivated by gender"); *see also* Nourse, *supra* note 18, at 12 & n.62. The requirement that the violence be "overwhelmingly" motivated by gender was later removed. *See id.* at 12 & n.66.

This version no longer included an "animus" requirement. The new VAWA, Senate Bill 15, was reintroduced in 1991.[24]

Soon, however, opposition to the newly expanded VAWA civil rights remedy began to grow. On January 31, 1991, two weeks after the bill was introduced in the 102d Congress, the Conference of Chief Justices of State Supreme Courts voted to oppose Senate Bill 15's civil rights remedy.[25] Two months later, Chief Justice Rehnquist warned that "the bill's new private right of action . . . could involve the federal courts in a whole host of domestic relations disputes" and flood the already overburdened federal judiciary with new claims.[26]

In May 1993, Senator Orrin Hatch (R-Utah), then the ranking minority member of the Judiciary Committee, agreed with the then-Chairman of the Judiciary Committee, Senator Joseph Biden (D-Del.), to address these and other concerns of VAWA's opponents by negotiating a mutually acceptable draft VAWA legislation. At the time of the agreement, there also remained a significant risk that the bill would be stalled if it were turned into a legislative vehicle for unrelated, deeply controversial "poison pill" amendments.[27] Anticipating that bipartisan support would forestall attachment of hostile floor amendments, Senators Biden and Hatch agreed to draft new compromise VAWA language based on Biden's original and on several provisions of Senate Bill 8, Hatch's domestic violence bill.[28]

Still, opponents remained concerned that without further clarifying language, courts and activist judges would construe the remedy broadly to the point that "every crime against a woman" would be considered a "civil rights violation."[29] As drafted in Senate Bill 11 and the final Senate Bill 15, the substitute language required that the crime be sufficiently substantial to be eligible for federal felony-level prosecution. In addition, Biden and Hatch's agreement led to compromise language that would both clarify the kind of proof required and address critics' arguments that every crime

24. S. 15, 102d Cong. § 301(d) (1991).

25. *See Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 314-17 (1991) (stating the official position of the Conference of Chief Justices).

26. 138 CONG. REC. 581, 583 (1992) (reprinting a report on the state of the federal judiciary by Chief Justice Rehnquist, in which he specifically identified Senate Bill 15 as an unnecessary additional burden on the federal judiciary). Although supportive of VAWA's overall goals, Chief Justice Rehnquist stated quite clearly that he opposed VAWA's new criminal and civil rights provisions, stating that the Act's "definition of a new crime is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes." *Id.*; *see* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 272-73 (2000) (detailing the judiciary's opposition to VAWA).

27. *See* Nourse, *supra* note 18, at 27 ("Supporters feared that VAWA would become a vehicle for unrelated, and extremely controversial, crime amendments such as the federal death penalty, habeas corpus reform, or gun control legislation.").

28. *See* E-mail from Joseph R. Biden, Jr., to author, *supra* note 8.

29. Nourse, *supra* note 18, at 29 & n.156 (citing a Department of Justice position paper).

against a woman would become a civil rights violation. The new language in Senate Bill 11 and Senate Bill 15 required that the acts be "committed because of gender or on the basis of gender" but added the requirement that the acts must be "due, at least in part, to an animus based on the victim's gender."[30]

This political compromise among members of the judiciary, as well as between Democrats and Republicans in Congress, on VAWA's statutory animus language did not appear to be significantly different from that contained in the original 1990 Senate draft, Senate Bill 2354, which had originally required that the crime be "motivated by gender-based animus." In fact, however, the reformulation marked the culmination of a four-year tug of war—a middle-ground position between two very different definitions and standards of animus proof that previously had been espoused by the two political parties.

A. *Conservatives: Animus as "Malice" or "Hatred"*

The first position, favored by Republicans, was the "malice/animosity" standard.[31] Under this approach, VAWA would have contained a standard of animus proof requiring that the defendant "hated" all members of the opposite gender or consciously intended to use violence as an expression and message of gender hatred. Had this standard prevailed, it would have created a higher burden on VAWA plaintiffs than that required of plaintiffs in other civil rights or hate crimes litigation: Section 1985(3) does not require a showing of "malicious," rather than benign, discrimination; Title VII does not require the plaintiff to prove that the defendant "hated" all women to show that the defendant sexually harassed an individual plaintiff; and hate crime laws do not require a showing of hatred of all members of the victim class.[32] Indeed, the conservatives' proposed definition for VAWA's animus requirement threatened to impose the most onerous and restrictive standard of proof in all of civil rights law.

B. *Liberals: Animus as Reflected in "Disparate Impact"*

The second position, enjoying informal liberal support, was the "disparate impact" standard embodied in Title VII law, which the drafters

30. S. 11, 103d Cong. § 301(d)(1) (1993), *quoted in* Nourse, *supra* note 18, at 29 & n.157.

31. *See, e.g.*, 137 CONG. REC. 17,459 (1991) (statement of Sen. Dole) (proposing an amendment providing a damage remedy only for crimes of violence "committed because of animosity or bias based on gender").

32. *See* Nourse, *supra* note 18, at 29-30 (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (§ 1985(3)); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (Title VII); and Wisconsin v. Mitchell, 508 U.S. 476 (1993) (hate crimes)).

had indicated should be one source of interpretive guidance for courts evaluating future VAWA claims.[33] Under such a standard, a VAWA plaintiff would only need to show that the particular act of violence had resulted in a disproportionately greater impact on the plaintiff's gender class, with no inquiry into the motivation of the defendant. Opponents of the bill seized the possibility of this interpretation to charge that the scope of § 13981 would become too broad,[34] covering all kinds of violence as long as it had a disparate impact on women. However, the drafters of the VAWA civil rights remedy had long appeared to intend an additional requirement—inquiry into the defendant's motivation—that would have seemed to preclude use of the animus term as a proxy for deployment of a statistics-based disproportionate impact standard.[35]

C. *Political Compromise: Animus as "Purpose" or "Animating Force"*

The compromise meaning given to the animus element of the federal VAWA ultimately settled around a definition akin to "purpose" or "animating force." Under these interpretations, animus would still focus the inquiry on the defendant's decision to commit the crime. But while the standard raised the burden of proof above a showing of disparate impact, it defined that standard well below terms of "hatred" or "malice."

It is worth noting that with this new intermediate animus standard, the possibility still existed that a VAWA defendant need not have been conscious of the motive of bias in committing the violence: The civil rights remedy could have been read to permit the use of circumstantial evidence of implicit bias motivation rather than requiring explicit indicia of intent. Under this potential interpretation, a VAWA plaintiff might only have to show that the crime or the victim was purposely chosen because of the victim's gender. This would therefore seem to provide redress for any violent act used to enforce gender roles and that would prevent (or sanction) the victim's exercise of her civil rights and liberties. Indeed, all rapes may be seen as a weapon of degradation and subjugation, and the new state-based VAWA remedies now have an opportunity to select an animus meaning commensurate with the recognition of the political ends effectuated by means of rape. However, in the absence of clear legislative intent, interpretive language, and political consensus as to the meaning of animus, such an expansive view of animus would not likely be adopted widely in the federal courts.

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33. *See, e.g.*, S. REP. NO. 103-138, at 52-53 (1993).

34. *See* Resnik, *supra* note 26 (cataloguing the sources and nature of opposition to VAWA based on concerns of the scope of redress).

35. *See* S. REP. NO. 102-197, at 49 (1991) ("Discriminatory motivation is clearly required by title III of the Violence Against Women Act . . . .").

D. *The Resulting Ambiguity of Animus*

As noted previously, VAWA's requirement of animus was necessary to respond to federalism concerns that the new federal legislation not preempt, but merely supplement, the traditionally recognized prerogative of individual states to legislate within the areas of tort and criminal law.[36] The animus element operated to ensure that random acts of violence could not satisfy the gender-motive requirement and therefore would not support a successful civil cause of action under the statute.[37] By adding the requirement that the violence be motivated by discriminatory "animus based, in part, on the victim's gender," Senators Biden and Hatch sought to reassure opponents that § 13981 would only reach violent discriminatory conduct that transcended state tort and criminal law.[38]

Yet the limits imposed by the filter term were left vague by VAWA's pragmatic proponents, who had little incentive to clarify the meaning of animus in the extremely contentious political climate surrounding the legislative debate. Intentionally patterned after language used in prior civil rights legislation,[39] this language allowed for the political compromises necessary to pass the bill. At the same time, however, the indeterminate and amorphous concept of gender animus ensured that there would be future difficulty in determining the meaning of this element of VAWA's civil rights remedy.[40] The lack of concrete meaning left little guidance for the federal courts, which struggled mightily, both as a semantic matter and in the face of perceived Commerce Clause problems, to apply the ambiguous concept of animus with only a handful of VAWA § 13981 precedents and imperfectly analogous civil rights laws to guide them.

In short, the compromise's drafters agreed to imbue animus with a meaning equated more closely with "purpose" or "intent."[41] Of course, the

36. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that "states historically have been sovereign" in the areas of criminal law, family law, and education). *But see* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (rebutting the basis for the legal tradition of reserving these areas of legislative power to the states and noting that this division of legislative labor does not have a constitutional or historically justifiable foundation); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 644-53 (2001) (pointing out that the federal government has a history of regulating family life).

37. *See* 42 U.S.C. § 13981(e)(1) (1994); *see also* S. REP. NO. 103-138, at 49 ("The committee is not asserting that all crimes against women are gender-motivated.").

38. S. REP. NO. 103-138, at 49. Accordingly, they would later ground VAWA's claim of legislative authority in both the Commerce Clause, a traditional power used to justify civil rights legislation, and the Fourteenth Amendment.

39. *See* E-mail from Joseph R. Biden, Jr., to author, *supra* note 8.

40. *See* Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2074 (1994) (questioning how courts would determine whether crimes were motivated by gender when intent is difficult to determine in the most obvious criminal cases).

41. *See* S. REP. NO. 103-138, at 64 ("The defendant must have had a specific intent or purpose, based on the victim's gender, to injure the victim.").

meanings of these words were far from settled themselves. Were these words to be synonymous with "motivation"? Or were they analogues of their counterparts within the criminal law, where "intent" generally means desire to commit an act and "purpose" requires something akin to conscious object to engage in the particular conduct in question?[42] Drafters left quite unclear the ways in which these terms were to be interpreted by courts. In any event, the legislative history did explicitly direct courts to look to civil rights, Title VII, and hate crimes case law when applying VAWA's civil rights remedy.[43]

III. ANIMUS MEANINGS AS DEVELOPED IN CIVIL RIGHTS CASE LAW

It is no coincidence that the language of VAWA's civil rights remedy came to resemble closely the language found in Reconstruction-era civil rights statutes permitting federal prosecution of bias-related violence directed at citizens on the basis of race.[44] By invoking an existing civil rights tradition, VAWA's proponents could gain political cover from the enormously successful and now largely unassailable black civil rights laws and other antidiscrimination legislation.[45] Mimicking the language used in these lines of jurisprudence would serve to rally support for the new civil rights remedy and make it more difficult for opponents to work actively against the bill. This Part explores and considers the existing legal and political etymology of the term "animus" from its origins in 42 U.S.C. § 1985(3), the modern version of section 2 of the Civil Rights Act of 1871.[46] It will also consider the dangers of importing the § 1985(3) view of animus into the state VAWAs: the potential rejection of claims involving nonstranger rapes, mixed-motive rapes, rapes committed by spouses and domestic partners—indeed, any rape that fails to include a conscious, class-based, singular and obvious "I hate women" gender motive on the part of the defendant.

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42. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 137 (2d ed. 1999).

43. S. REP. NO. 103-138, at 52-53.

44. *Id.* at 64 ("Like the statutes on which it is modelled—title VII, and 42 U.S.C. 1981, 1983, and 1985(3)—[VAWA's civil rights remedy] reaches gender-based discrimination by private persons and by persons acting under color of State law.").

45. S. REP. NO. 102-197, at 49-50 (1991).

46. 42 U.S.C. § 1985(3) (1994). Section 1985(3) encompasses conduct of private persons where there is some racial or other class-based, invidiously discriminatory animus behind the conspirators' action. Although the text of this law does not include the animus term, the Supreme Court made it clear in *Griffin v. Breckinridge* that § 1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others," but only to those that were founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U.S. 101, 101-02 (1971). Animus is now a required element for § 1985(3) redress.

A. *Animus as Conscious, Group-Based, Obvious, and Singular Bias Motivation*

As a political matter, it proved advantageous for the drafters of VAWA's civil rights remedy to base the remedy on 42 U.S.C. §§ 1981, 1982, and 1985(3) and to incorporate some of the language used by courts in adjudicating claims brought under these provisions. Indeed, the legislative record chronicling the enactment of VAWA's civil rights remedy specifically states that § 13981 was "[m]odeled on existing civil rights laws"[47] and that "[p]roof of 'gender-motivation' under [VAWA's] title III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws."[48]

The most closely analogous Reconstruction-era civil rights statute to VAWA's civil rights remedy is § 1985(3), which addresses violent conduct and has been construed by the Court to require proof of "invidiously discriminatory animus."[49] The key notion of § 1985(3) is the idea of a harm aimed at a group as opposed to an individual—the idea that a harm can transcend the personal in that it punishes possession of a trait that is inherently characteristic of a class identity, in particular, race. As VAWA's proponents noted, § 1985(3) acknowledges that there is a difference between private violence and the kind of collective violence proscribed by the cause of action. The essence of this distinction is believed to be located in the mind of the perpetrator; that is, the motivation, or animus, for the two kinds of violence appear to differ. Private violence, for example, is often undertaken for gain or as an angry response to a particular situation, injury, or threat, making the choice of victim a personal one. Collective violence bypasses such personal motivation: The motives for collective violence are considered to be impersonal, encompassing such motivations as allegiance to the dominant group and service to the interests of that group or the beliefs and ideals of that group.[50] The legal and social innovation of VAWA's civil rights remedy was to analogize to a civil rights jurisprudence that focuses on discriminatory collective violence in providing for redress from rape and other gender-motivated violence that had long been considered merely private violence.[51]

47. S. REP. NO. 103-138, at 64.

48. *Id.* at 52.

49. *Griffin*, 403 U.S. at 101-02.

50. John Ladd, *The Idea of Collective Violence*, *in* JUSTICE, LAW, AND VIOLENCE 19, 22 (James B. Brady & Newton Garver eds., 1991).

51. *Id.* Note the irony in Ladd's use of rape as a specific example of private, not collective, violence. *Id.*

B. *Limits of Employing a § 1985(3)-Style Animus in Future State VAWAs*

Despite the close analogy, it is important to note that while VAWA's legislative history did direct courts to look toward § 1985(3) when analyzing gender-motivated animus under the civil rights remedy, the two statutes differed in a slight but critical way: Although § 1985(3) requires proof of "invidious," conscious discrimination, § 13981 does not. This critical difference counsels against importing a § 1985(3)-style animus tradition into future state VAWA remedies.

Courts analyzing § 1985(3) claims have looked to circumstantial evidence of bias to establish the presence of an animus based upon the race of the victim,[52] and *Griffin v. Breckenridge* was explicitly cited in VAWA's legislative history[53] as requiring "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" as part of a conspiracy to deprive a person of his rights of citizenship.[54] However, the *Griffin* Court made a distinction between this class-based animus[55] and the "specific intent to deprive a person of a federal right,"[56] but only class-based violence satisfies the Civil Rights Act's requirement of discriminatory animus.

Furthermore, the *Griffin* opinion comments on *Collins v. Hardyman*, which construed the language of § 1985(3) as reaching conspiracies under color of state law, but not private conspiracies, to interfere with plaintiffs' rights.[57] Although *Griffin* takes care to distinguish *Collins* on its facts, holding instead that § 1985(3) clearly and constitutionally was intended to reach private as well as public conspiracies,[58] the public-private distinction in *Collins* and the class-based conspiracy requirement in *Griffin* raise questions about the applicability of § 1985(3) animus case law to cases of gender-motivated rape.

Importing distinctions identical to those drawn by *Griffin* or *Collins* into the VAWA context could be dangerous. For instance, *Collins*'s firm distinction between personal and public conspiracies might cause courts to limit VAWA civil rights relief to cases involving police officer defendants committing rapes while within their role as state actors. More relevant to the animus inquiry, the *Griffin* requirement of class-based collective and

52. The Court in *Griffin* inferred a discriminatory intent based on race from the fact that a group of whites violently attacked a group of blacks and whites thought to be civil rights workers. *Griffin*, 403 U.S. at 103.

53. S. REP. NO. 103-138, at 51 n.59; S. REP. NO. 102-197, at 49 n.69 (1991).

54. *Griffin*, 403 U.S. at 102.

55. *Id.*

56. *Id.* at 102 n.10 (citing Screws v. United States, 325 U.S. 91 (1945)).

57. *Id.* at 93 ("'The complaint makes no claim that the conspiracy or the overt acts involved any action by state officials, or that defendants even pretended to act under color of state law.'" (quoting Collins v. Hardyman, 341 U.S. 651, 655 (1951))).

58. *Id.* at 95-103.

public violence could create space for courts to narrow the remedy only to cases involving gang rapes or to exclude rape crimes that take place in intimate social spaces at the hands of a single defendant. After all, VAWA's crimes of rape, including interspousal or interpartner rape, often assail the most private of personal space and still tend to be viewed overwhelmingly as private acts rather than class-based acts that might also affect women as a group.[59] Without a more expansive reading of animus that would cover these classes of rape, such a cabined *Griffin*-style animus could cause entire categories of rape to be denied VAWA redress.

A second danger to borrowing from existing civil rights animus jurisprudence can be found in the Supreme Court's sole decision related to the meaning of gender-motivated violence in the context of § 1985(3) cases. In *Bray v. Alexandria Women's Health Clinic*, the Court held that acts opposing abortion did not reflect "invidiously discriminatory animus" directed at women as a class.[60] The Court held that since the appellant antiabortion protesters might have been motivated in their protests by factors other than discriminatory animus toward women (such as opposition to abortion), the § 1985(3) claim of discriminatory animus was insufficient.[61] The Court did not consider that there might have been additional, unstated reasons for the protesters' opposition, including an underlying "discriminatory animus" toward women, or that opposition to abortion affects not only individuals seeking abortions but also women as a class.[62]

Clearly, direct application of *Bray*'s § 1985(3) to VAWA civil rights cases involving rape would be problematic. Were future VAWA jurisprudence to follow *Bray*'s conceptualization of the term animus, rape could not be seen as indicative of gender animus as long as plausible alternative motives also existed. *Bray* neglects the possibility of mixed-motive and partial-motive rapes, requiring instead that § 1985(3) animus violence be clear and obvious, without alternative purposes.[63]

Of course, in cases of rape, the gender-discriminatory motivation may not always be so distinct and obvious. Using a narrow § 1985(3)-like interpretation of animus in future state VAWA cases would be inconsistent with the purposes of these statutes, as those patterned after § 13981 require

59. *See* Siegel, *supra* note 7 (discussing how the notion of family privacy historically has been invoked to preclude law enforcement officials from protecting the survivors of domestic violence from their spouses).

60. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269-74 (1993).

61. *Id.* at 270.

62. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1318-20 (1991). MacKinnon posits that the criminalization of abortion violates equal protection, since "only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion." *Id.* at 1320.

63. *Bray*, 506 U.S. at 270.

only that a gender-motivated crime be "due, at least in part, to an animus based on the victim's gender."[64] In contrast, interpretations of animus as articulated by the Court in *Bray* would constrict the scope of these civil rights remedies to exclude claims where violence was motivated by more than a single factor, as is often argued in all but a very narrow class of stranger rapes.[65] A *Bray*-style animus requirement would therefore result in dangerously underinclusive state VAWA statutes.[66]

Taken together, the *Griffin* and *Bray* animus inquiries raise concerns that militate against a blind cloning of § 1985(3)'s conscious, class-based, singular and obvious animus for future state VAWA remedies.

IV. ANIMUS MEANINGS FROM TITLE VII CASE LAW

VAWA's legislative history clearly indicates that the language of the civil rights remedy was patterned after Title VII[67] as well as § 1985(3): "The definition of gender-motivated crime is based on title VII . . . . This body of [Title VII] case law will provide substantial guidance to the trier of fact in assessing whether the requisite discrimination was present."[68] While Title VII itself does not include the term animus and is not concerned solely with violent conduct, this line of jurisprudence often articulates an animus inquiry that is roughly equated with the statute's "based on" causation language.[69] The courts should therefore expect to find guidance for applying VAWA's civil rights remedy by looking to existing Title VII antidiscrimination case law. This Part examines the potential applicability of Title VII animus analysis to gender violence.

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64. 42 U.S.C. § 13981(d)(1) (1994).

65. *See generally* SUSAN ESTRICH, REAL RAPE (1987) (addressing the many different contexts of rape and noting that only violent stranger rapes are consistently deemed to be "pure-motive" rapes that do not raise questions as to the victim's possible provocation of the rapist to commit the crime out of greed, jealousy, revenge, frustrated passion, and so on).

66. Some courts considering § 1985(3) cases have routinely used circumstantial evidence to infer bias-based motivation. *See, e.g.*, Hawk v. Perillo, 642 F. Supp. 380, 392 (N.D. Ill. 1985). Several other trial courts have held that some allegations of discrimination resting on circumstantial evidence do not sufficiently establish gender-motivated violence for purposes of satisfying § 1985(3). *See, e.g.*, Valanzuela v. Snider, 889 F. Supp. 1409, 1420 (D. Colo. 1995). For this reason, the appropriate non-*Bray* standard for § 1985(3)-style circumstantial evidence analysis as applied to gender animus remains too unclear to be considered here in detail.

67. Civil Rights Act of 1964, tit. VII, § 703, 42 U.S.C. § 2000e-2 (1994).

68. S. REP. NO. 103-138, at 52-53 (1993); *see also* E-mail from Joseph R. Biden, Jr., to author, *supra* note 8 ("It was our aim to provide critical civil rights remedies for women after being subjected to gender-motivated violence, just as women have civil rights remedies after being subjected to gender bias in the workplace or in the classroom.").

69. S. REP. NO. 103-138, at 52-53 ("The phraseology 'motivated by,' 'because of,' 'on the basis of' or 'based on' sex or gender is used interchangeably in case law discussions of title VII.").

A. *Animus as "I-Know-It-When-I-See-It"*

Title VII of the Civil Rights Act of 1964 was enacted to promote discrimination-free working environments by forbidding employers from discriminating in making hiring and other employment decisions "because of . . . sex."[70] The law condemns employment decisions based on a mixture of legitimate and illegitimate considerations. Therefore, when an employer considers both gender and legitimate factors when making a decision, that decision was "because of" both sex and the other, legitimate considerations.

The plaintiff's prima facie burden in Title VII cases is "not onerous," requiring only sufficient evidence to support an inference that the employer acted with a discriminatory motivation.[71] If the employer articulates a legitimate, nondiscriminatory reason for its decision, however, the presumption of bias vanishes, and the burden of production shifts back to the plaintiff. The plaintiff must then introduce sufficient evidence to prove that the legitimate reasons offered by the defendant were not true reasons but were a pretext for discrimination.[72] The circumstantial evidence must be sufficient for a reasonable trier of fact to infer that the employer's decision shows disparate treatment and was motivated by discriminatory animus.[73]

Equating "discriminatory animus" with sufficient circumstantial evidence of bias does little to clarify a proper objective meaning for animus in state VAWA statutes, however. The federal VAWA's legislative history suggested that Title VII law would provide procedural guidance for determining the presence of animus, not necessarily a clear definition of the term itself. Recent Title VII case law typically employs a "totality of the circumstances" approach to determine whether an employer's actions were, at least in part, "tied directly to the alleged discriminatory animus."[74]

Yet applying such an "I-know-it-when-I-see-it" Title VII approach to VAWA violence would likely result in contested, arbitrary standards for ambiguous state animus requirements. Indeed, there has been significant confusion over when and how to apply mixed-motive discriminatory intent

70. 42 U.S.C. § 2000e-2(a) (1994). Title VII does allow for one circumstance in which an employer may take gender into account in making an employment decision; namely, when gender is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. *Id.* § 2000e-2(e).

71. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

72. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

73. *Id.*

74. Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992). The ambiguity surrounding the animus element has led some courts to adopt a strict definition of direct evidence, while others have adopted a definition that includes circumstantial evidence. *See* Joseph J. Ward, Note, *A Call for* Price Waterhouse II*: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627 (1997).

analysis in Title VII claims.[75] Are explicit discriminatory statements required during commission of the violence? Could the method of violence chosen be sufficient evidence to indicate the presence of animus toward the victim? Title VII-style animus leaves these issues and standards unclear. For this reason, Title VII's circumstantial approach toward finding animus in the attendant contexts of various VAWA rapes would fail to lift civil rights redress above the societal myths and inequalities that the states' VAWA remedies seek to eradicate. Worse yet, it could lead to distinctions among various kinds of rape, reflective of existing societal biases, that would likely result in less than universal state VAWA coverage for all rapes, particularly mixed-motive rapes.

B. *Perils with Promise: From Title VII Animus as Defendant-Centered "Intent" Toward Harm-Based Approaches*

Even for paradigmatic cases of rape, the Title VII approach to animus gives rise to another difficult problem for those seeking to import a Title VII-like animus inquiry into new VAWA statutes. As animus under Title VII drifted over time toward a presumption of inherent "intent" for certain kinds of unwelcome sexual behavior,[76] the animus analysis centered the critical inquiry upon the defendant's intent rather than the harm to the survivor. If animus is present, this body of jurisprudence would seem to say, then it will be found in the thoughts and actions of the defendant rather than in the experience of the victim. Following this reasoning in states' VAWA civil rights remedies would be troubling: Arguably, an act intending to redress harms resulting from existing power inequities should center the critical inquiry upon the nature of the harm inflicted by the gender-motivated violence.

Despite this operational inadequacy, however, one of the promising contributions of Title VII jurisprudence to universal VAWA rape coverage is that sex and gender came to be regarded as equivalent concepts for purposes of all sex discrimination cases. Successful Title VII cases *Oncale v. Sundowner Offshore Services, Inc.*[77] and *Price Waterhouse v. Hopkins*[78]

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75. *See* Ward, *supra* note 74.

76. *See, e.g.*, Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467 (8th Cir. 1996) (explaining that unwelcome sexual advances could constitute part of a hostile environment sexual harassment claim and that these acts could constitute prima facie proof of intent for Title IX purposes). Note that courts have found that the standards for proving sex discrimination under Title IX and Title VII are the same. *See, e.g.*, Lipsett v. Univ. of P.R., 864 F.2d 881, 896 (1st Cir. 1988).

77. 523 U.S. 75 (1998). In *Oncale*, the Supreme Court held that Title VII protects men from sex discrimination and harassment regardless of the gender of the discriminating supervisor. *Id.* at 79-80.

78. 490 U.S. 228, 258 (1989) (holding that sexual stereotyping occurred when a promotion was denied to a woman on the basis of a partner's comment that the woman was too aggressive for a woman, was macho, and needed to be more feminine in appearance). Under *Price*

held that discriminatory animus included gender identity and sexual identity bias. This development opened up the possibility for successful VAWA claims for men raped by other men. *Schwenk v. Hartford* found VAWA's discriminatory animus requirement satisfied in a case where the defendant had attacked a member of his own sex.[79] Taken together, these cases illustrate a shifting focus under animus inquiries away from circumstantial evidence of defendant motive and toward the harm itself.[80] Gradually, courts have begun to accept the theory that whether a given case satisfies the animus requirement depends less on the identity of the victim or the circumstantial evidence of motive and more on the effect of violence upon the plaintiff. Consider the case of a male prisoner raping a fellow inmate in an attempt to "feminize" and subordinate his victim.[81] Under such a

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Waterhouse, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—and gender, the individual's sexual identity or socially constructed characteristics. *Id.* at 240-43; *see also* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (reading Title VII in light of *Price Waterhouse* as encompassing both sex and gender).

79. 204 F.3d 1187. The court stated:

> [The] question is whether [VAWA] applies to males. . . . In Mitchell's view, a sexual attack by one man against another cannot be "gender-motivated" under the Act. However, Mitchell's interpretation of the statute as a "domestic violence law" that protects only women is plainly wrong.
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> . . . .
>
> . . . [T]he evidence offered by Schwenk tends to show that Mitchell's actions were motivated, at least in part, by Schwenk's gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor. Accordingly, we conclude that Schwenk's assertion that the attack occurred because of gender easily survives summary judgment.

Id. at 1199-202. Note, however, that although the plaintiff's VAWA claim survived summary judgment on behalf of the defendant, his claim was rejected on procedural grounds. *Id.* at 1205.

80. Indeed, *Schwenk*, building upon Title VII case law, went so far as to reject attempts to categorize types of harms, instead focusing on the effect of the offending act. The court stated:

> The fact that in this case the alleged crime was a sexual assault is sufficient in and of itself to support the existence of gender-based animus for purposes of the GMVA. Rape (or attempted rape) is sui generis. As several courts have noted, rape *by definition* occurs at least in part because of gender-based animus. The psychological factors that underlie a particular rape or the conduct of a particular rapist are often complex as well as extremely difficult to determine. It would be both an impossible and an unnecessary task to fashion a judicial test to determine whether particular rapes are due in part to gender-based animus. With respect to rape and attempted rape, at least, the nature of the crime dictates a uniform, affirmative answer to the inquiry.

Id. at 1203.

81. The *Schwenk* court cited a prison study focusing on male-on-male rapes:

> It is well-documented in both scholarly literature and reported judicial opinions that young, slight, physically weak male inmates, particularly those with "feminine" physical characteristics, are routinely raped, often by groups of men. Once raped, an inmate is marked as a victim and is subsequently vulnerable to repeated violation. The victims of these attacks are frequently called female names and terms indicative of gender animus like "pussy" and "bitch" during the assaults and thereafter. After they are raped, victims are consigned to "passive" female sexual and social roles within the prison. In contrast, prison rapists commit assaults in part to establish and maintain a masculine gender. . . . They conceive their sexual partners as female members of the prison social order. Thus, as with rape in general, all prison rape occurs "because of" gender—both that of the rapist and that of his victim.

conceptualization, Title VII discriminatory animus could potentially be present in state VAWA cases against defendants who raped either men or women. This trend in Title VII law reveals the positive influences that Title VII might have for future state VAWA remedies, both for an empowering civil right properly centered upon the harm experienced by the plaintiff as well as for universal rape coverage.

C. *Title VII's Disappearing Mixed-Motive "Disparate Impact" Standard*

Title VII jurisprudence does offer some guidance and promise for future state VAWA statutes. However, it would be a mistake for state legislators to refrain from articulating a meaning for their VAWA statutes' animus requirements, deciding instead merely to direct state courts to follow Title VII case law with regard to discriminatory animus analysis. Although Title VII is the area of law where the Court has provided its most extensive critique of gender discrimination and stereotyping, the doctrine that has emerged treats evidence of stereotyping primarily as a method of proving discriminatory intent in a relatively narrow class of mixed-motivation cases. It is far from clear that Title VII's line of reasoning would find discriminatory animus as liberally in cases involving unconscious class-based animus toward a stereotyped group.[82] Imagine, then, the difficulty of VAWA plaintiffs proving and prevailing upon a gender animus claim in, say, gang rape cases where their rapists' only purported conscious motivation may have been a desire to escape rejection from a social group. In short, borrowing too much from Title VII animus inquiries could potentially deny VAWA redress for rapes resulting from unconscious animus motivated by the victim's gender.

Furthermore, over the past decade or so the promise and power of Title VII intentional disparate treatment theory have been seriously undermined.[83] The courts also have "been reluctant to extend disparate impact too far beyond its 'home' in Title VII" jurisprudence.[84] They have already ruled that this effects-based standard of liability is not available under the Reconstruction-era civil rights statutes.[85] In its simplest formulation, the disparate treatment proscription requires that different

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Id. at 1203 n.14 (citations omitted).

82. *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748-51 (2001).

83. *Id.* at 751 n.19, 752 n.20 (citing non-Title VII rulings that a Title VII-type effects-based standard of liability is not available outside of Title VII law, including under the Reconstruction-era civil rights statutes).

84. *Id.* at 751.

85. *Id.* at 751 n.19, 752 n.20 (citing the 42 U.S.C. § 1981 case *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), and the § 1983 decision in *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979)).

social groups be subject to the same rules and standards, at least in circumstances in which the individuals or groups can be held to be similarly situated.[86] But in cases coming after *Washington v. Davis*,[87] which demanded proof of intent for a race-based Equal Protection Clause claim, the Court has demanded rigorous proof of discriminatory intent in related bodies of law, thereby precluding many potential civil-rights-related claims in which unequal treatment stems from indifference, neglect, or structural inequities[88] (as would be the case in VAWA rapes motivated by gender biases, which reflect existing societal and institutional structural inequities).

Even within Title VII's own case law, disparate impact cases are discouraged by the substantial burden that courts now tend to place on plaintiffs.[89] Often, courts also insist that there be a showing that the disparate treatment is the product of deliberate decisionmaking on the part of the defendant (to satisfy the requirement that the discrimination was "intentional"), and there is currently a serious debate as to whether unconscious disparate treatment is actionable under Title VII.[90]

In sum, then, currently available Title VII legal doctrines remain inadequate to handle contemporary manifestations of bias against women, particularly those reflective of the most invidious of existing biases—unconscious biases so deeply embedded in defendants' worldviews that they no longer form a conscious component of their decision to rape.

V. ANIMUS IN HATE CRIMES LAW

Over the past decade, much state legislative activity has centered upon the enactment or revision of a wide variety of statutes criminalizing bias-motivated violence.[91] These statutes generally follow one of three approaches to defining the defendant's state of mind in committing the crime: the "racial animus" approach, which requires proof that the defendant's bias toward or hatred of the victim's characteristics was the motivation for committing the crime; the "discriminatory selection" approach, in which proof that victim selection was based on certain characteristics is the central issue, rather than defendant motivation; and the much broader "because of" approach, which contains elements of both

86. The classic case of Title VII-style disparate treatment is *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

87. 426 U.S. 229 (1976).

88. *See* Chamallas, *supra* note 82, at 748-49 & n.7.

89. *See id.* at 749-52. Chamallas notes that "courts now tend to impose on plaintiffs [a burden] to provide refined statistical proof of group adverse impact as part of the prima facie case." *Id.* at 752 (citing technical barriers to establishing successful disparate impact claims).

90. *Id.* at 749 & n.8.

91. *See generally* LU-IN WANG, HATE CRIMES LAW § 10:1, at 10-1 to -5 (2001) (discussing the recent explosion of states' legislative efforts in this area).

racial animus and discriminatory selection in requiring proof that the defendant was motivated to commit the crime due to the victim's characteristics.[92] Almost all of the state statutes including gender as a protected category follow this liberal third approach to establishing the defendant's motivation by gender bias.[93]

As with Title VII, although hate crime statutes typically do not employ the term animus, hate crimes jurisprudence often articulates an animus inquiry set roughly equivalent to the state statutes' "because of" motivation requirement.[94] For this reason, when preparing the VAWA civil rights remedy for passage, Congress's legislative record stated that, along with civil rights and Title VII law, "accepted guidelines for identifying hate crimes may also be useful" in helping courts assess whether given crimes had in fact been motivated by gender animus.[95] Following this legislative guidance, courts applying the civil rights remedy in early federal VAWA cases relied upon traditional hate crime approaches to assessing gender-motivated animus.[96] For this reason, it makes sense to consider whether understandings of animus borrowed from hate crimes law might contribute to future state VAWA civil rights remedies.

A. *Animus as Conscious or Subconscious "Prejudice"*

A promising feature of hate crimes jurisprudence that could prove useful to future constructions of animus in post-VAWA legislation is that courts applying hate crime statutes have considered both conscious and subconscious prejudice relevant to the bias inquiry.[97] Almost all successful hate crime prosecutions include circumstantial or direct evidence of concrete, conscious, and outwardly manifested prejudice. However, most bias attacks are mixed-motive crimes. In these cases, it can be difficult to

92. *Id.* § 10:1 & n.4, at 10-3 (citing 57 AM. JUR. 3D *Proof of Facts* § 1 (2000)).

93. *See* CTR. FOR WOMEN POLICY STUDIES, *supra* note 17, at 14-18.

94. WANG, *supra* note 91, § 10:1, at 10-3.

95. S. REP. NO. 103-138, at 52 n.61 (1993); S. REP. NO. 102-197, at 50 n.72 (1991) (using the same language).

96. Congress cited generally accepted guidelines used by courts for identifying prejudice or animus in hate crimes: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive, . . . [and] common sense." S. REP. NO. 103-138, at 52 n.61 (citing CTR. FOR WOMEN POLICY STUDIES, *supra* note 17, at 9). Examples of federal hate crime statutes include the Hate Crime Statistics Act, 28 U.S.C. § 534 (1994), the Church Arsons Prevention Act, 18 U.S.C. § 247 (1994), and the Hate Crimes Prevention Act (HCPA), 18 U.S.C. § 245. The HCPA may be used to combat violence motivated by race, religion, or national origin. The statute does not cover violence motivated by gender or sexual orientation. 18 U.S.C. § 245.

97. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (noting that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. . . . At the same time most of us are unaware of our racism. . . . [A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation").

separate crimes partially motivated by prejudicial animus toward the victim's group from random, nondiscriminatory crimes of violence.

Nevertheless, the value of borrowing from hate crime approaches to prejudicial motivation is that this jurisprudence acknowledges that the basis for the bias attack almost always has less to do with tangible gain and more to do with the sense of superiority and dominance that offenders gain from the violent and personal violation of a member of a subordinated group. The crime has the effect of establishing and enforcing a social hierarchy that places the victim, and by extension the entire group to which that victim belongs, in a subordinated class.[98] The class-based violence is used to dehumanize victims by stripping them of their individual identities and treating them as a stereotype, a projected image of the prejudice that resides within the offender.[99] Under this tradition, defendants in hate crime prosecutions may potentially be found guilty regardless of the degree to which they expressed conscious prejudice or animus toward the victim's group in committing the crime.

Such a construction of prejudicial motivation as applied to VAWA gender animus rapes creates the potential for the argument that all rapes automatically satisfy these statutes' biased-motive requirement, as rapes can be understood to be inherently reflective of subconscious gender prejudice.[100]

B. *Methods and Standards of Proof: Limits to Borrowing from Hate Crimes Law by Future VAWA Gender Claims*

At first blush, borrowing from hate crime approaches to animus for future state VAWA remedies providing redress for violent, gender-motivated crimes would appear to make sense. However, there are important constraints to this analogy that argue against wholesale adoption of this area of law's approach to animus inquiry.

First, and perhaps most obvious, VAWA proposes to create a civil rights remedy, not criminal liability.[101] Rather than having the state act as the prosecuting plaintiff on behalf of the victim, as in the case of criminal prosecutions, VAWA seeks to empower the plaintiff to sue on her or his

98. *See* Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 23 (1994).

99. *See id.* at 25.

100. *See generally* DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE (1990) (discussing the wide range of conscious and subconscious motives of rapists).

101. Indeed, the underlying acts of violence giving rise to federal VAWA violations were already crimes. 42 U.S.C. § 13981 (1994) (requiring the commission of a "crime of violence" in addition to gender-based animus). If anything, state VAWA statutes seek to provide remedial potential, including damages, for all violent behavior motivated by gender animus, regardless of whether that conduct is a crime.

own behalf. Within the context of a new civil right, which is meant to empower the harmed party, placing too much emphasis upon the defendant's motivations may not be as appropriate as focusing on the effects of the harm to be redressed.

Second, courts in mixed-motive hate crime cases are forced to draw inferences of motivation and intent through "totality of the circumstances" analyses. Gender hate crimes often differ from other kinds of hate crimes in that a majority of female victims of violent crimes are intimately acquainted with their attackers. This fact necessarily gives rise to highly complicated mixed-motive inquiries that are largely absent from typical hate crimes directed against blacks, Jews, or other targeted groups where the attacker is often unknown to the defendant. While the recent inclusion of a gender category within state hate crime statutes is a welcome development, the factors for determining the presence of prejudicial motivation within the context of sex crimes are highly uneven and their elaboration in the courts remains unclear.

The dangerous result of applying such a "totality of the circumstances" approach to claims by future state VAWA plaintiffs would be creation of a hierarchy of rapes, with some acts of rape seen as "worse" than others and thus deserving of redress, and other rapes emerging as lacking sufficiently probative indicia of gender bias. Paradigmatic "stranger rape" VAWA claims might well succeed, but cases involving interspousal, same-sex, or "provocation" rapes could well fail. For these reasons, no matter what evidentiary factors will eventually be held most probative of the presence or absence of gender prejudice in future hate crimes, relying upon traditional hate crime tests to determine the presence of animus in individual rape cases is an inadequate approach for state VAWA civil rights remedies seeking a notion of animus that will provide remedial potential for all claims of rape.

VI. VAWA JURISPRUDENCE OF ANIMUS—MUDDIED CONSTRUCTIONS, FROM "HATRED" TO "TOTALITY OF THE CIRCUMSTANCES"

One final source of guidance for state legislators considering the possible meanings of animus for future state VAWA statutes is the federal VAWA jurisprudence created before the Supreme Court's 2000 decision that terminated the civil rights remedy.

When the federal courts in 1995 began to apply VAWA's imprecise animus language to actual § 13981 claims, the resulting interpretations were confused and muddied, illustrating the dangers of drawing meanings from civil rights, Title VII, and hate crime law in the absence of a clearly defined animus element. Most courts turned to congressional history and these analogous bodies of law in the hope that they would illuminate the meaning

of this ambiguous term. Others, perhaps more sensitive to charges of judicial activism in the face of unclear congressional motives, construed the civil rights remedy as tentatively and restrictively as possible.

Soon, however, three distinct categories of interpretation concerning standards required for a successful animus claim emerged: one set of ideas employing a "totality of the circumstances" analysis, including the intent of the perpetrator, finding animus as a matter of fact on a case-by-case basis; another set of ideas based upon the levels of aggression shown in any given VAWA claim's context; and, finally, a third set of ideas advancing tentative notions that certain violent acts indicate inherent discriminatory bias as a matter of law.[102]

A. *"Rape-Plus": Intent Determined by the Totality of the Circumstances*

Prior to the Supreme Court's decision striking down VAWA's civil rights remedy as unconstitutional, only a handful of district court decisions addressed the meaning of the term "animus."[103] Perhaps, in retrospect, it was reasonable to expect that developing case law under VAWA would reflect traditional gender biases, rape myths, and gender stereotypes prevailing over the view suggested by Senator Biden that some acts of violence against women may be inherently gender-motivated.[104]

Congress indicated in VAWA's legislative history that the determination of whether a crime was gender-motivated was to be a question of fact.[105] This was, in part, due to the "totality of the circumstances" analysis employed by the related, albeit not identical, jurisprudence of Title VII, hate crimes, and § 1985(3) civil rights claims, which also made use of this type of animus inquiry. The result was a case-by-case evaluation of the act of violence in context, rather than an approach that found § 13981 satisfied for certain crimes as a matter of law. However,

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102. For her helpful commentary on earlier versions of these arguments, I am indebted to Professor Judith Resnik at Yale Law School.

103. *See* Jugmohan v. Zola, No. 98 Civ. 1509, 2000 WL 222186 (S.D.N.Y. Feb. 25, 2000); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Wesley v. Don Stein Buick, Inc., 42 F. Supp. 2d 1192 (D. Kan. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Kuhn v. Kuhn, No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998); McCann v. Rosquist, 998 F. Supp. 1246 (D. Utah 1998); Mattison v. Click Corp., No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996).

104. *See* Shalit, *supra* note 1, at 14.

105. *See* S. REP. NO. 103-138, at 49-50 (1993) ("[T]itle III requires subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender. Whether a particular crime is, in fact, gender-motivated will be a question of fact for the court or jury to decide.").

due to the confusion over the meaning of this particular term, courts were often divided over whether a given fact pattern provided sufficient evidence to meet the animus requirement necessary to state a claim.

The earliest example of this category of VAWA case law was the district court's decision in *Brzonkala v. Virginia Polytechnic & State University*.[106] The case offered a confused analytic treatment of what crimes, under which circumstances, might be covered by the civil rights remedy. The opinion framed the case by initially noting that "[j]udges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event."[107] " 'Bias, in short, can be proven by circumstantial as well as indirect evidence.' "[108]

The *Brzonkala* court then invoked the hate crimes calculus, as previously suggested by Congress, in order to determine whether the circumstances of the case showed gender motivation. The court appeared to focus particularly heavily on the hate crimes jurisprudence's consideration of the absence of any other apparent motive to determine the presence of animus by a process of elimination.

Ultimately, the *Brzonkala* court decided that a rape of a female college student showed sufficient gender animus, because, "by process of elimination, an inference of gender animus is more reasonable in this situation than in some other rapes."[109] The court described the characteristics of various types of rape and proceeded to explain which types of rape it viewed as the most egregious, expressing the view that "stranger rape generally more likely than date rape involves gender animus"[110]—a "rape-plus" standard that requires proof of animus above and beyond the act of rape.

The *Brzonkala* court opined that not all rapes are the same—that, in fact, some rapes are worse than others and that not all rapes contain an element of gender animus. The court asserted that, in the case of rape, the presence of an animus based on gender is more likely when there is no personal relationship between the rapist and the victim. In short, it said that stranger rapes have fewer alternative explanations to an animus motivation. Thus it is harder to make a successful claim when a rape occurs in the context of an intimate relationship, where other motivations for the rape may also exist. The court further asserted that date rapes are less likely to contain an element of gender animus because a "man's sexual passion" may "decreas[e] the man's control."[111]

106. 935 F. Supp. 779.
107. *Id.* at 784 (quoting S. REP. NO. 102-197, at 50 (1991)).
108. *Id.* (quoting S. REP. NO. 103-138, at 52).
109. *Id.* at 785.
110. *Id.* at 784-85.
111. *Id.*

In sum, *Brzonkala* sought to categorize rapes into those that likely contained a gender animus and those that did not, based on the characteristics of the rape and any other evidence that might assist in a process-of-elimination hate-crimes-based analysis. This necessitated proof of animus above and beyond the sexual violence—bias explicitly stated by the defendant during commission of the rape, or some other tangible or observable indication that could be offered into evidence—in effect resulting in a "rape-plus" threshold. In *Crisonino v. New York City Housing Authority*,[112] the court would later mark the beginning of a broader embrace of the "totality of the circumstances" calculus, but despite the broadening of fact patterns eligible for § 13981 relief, *Crisonino* preserved the "plus" requirement for successful VAWA claims.[113]

Brzonkala and others' "totality of the circumstances" for § 13981 animus were limited to ad hoc examinations of each claim in context. Yet under this approach, a deeper question concerning the VAWA civil right remained unresolved: Does a "rape-plus" totality-of-the-circumstances approach really imbue the VAWA civil right with the kind of transformative power to promote sex equality that its drafters envisioned, or would it become a mere reflection and perpetuation of existing structural inequities?[114] The danger in a *Brzonkala*-like rape categorization is that some motivations for rape may be seen as eligible for § 13981 relief while others may not be. Gang rape performed under peer pressure to impress other men would not be actionable. Rape due to desire for sex would not be eligible. Rape of prostitutes, combined with a commodified view of sex that minimizes the harm to the unwilling woman, would not be covered.[115] In this way, a *Brzonkala* approach would merely reflect and perpetuate the existing structural social inequities that the VAWA civil right was intended to transform.[116]

B. *Levels-of-Aggression Approaches*

Following *Brzonkala*, *Anisimov v. Lake* began by stating that Congress "did not intend to designate rape as a per se 'crime of violence motivated by gender,'"[117] thereby following *Brzonkala*'s characterization that "[a]ll

112. 985 F. Supp. 385 (S.D.N.Y. 1997).

113. *Id.* at 391.

114. *See* CATHARINE A. MACKINNON, SEX EQUALITY 888-94 (2001) (advancing the notion that sex inequality under law is a reflection and reinforcement of structural sex inequality within the state).

115. *See* SCULLY, *supra* note 100 (citing numerous studies on the multiple motivations of rapists).

116. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (discussing persisting structural gender inequities); Siegel, *supra* note 7 (discussing historical structural gender inequalities).

117. Anisimov v. Lake, 982 F. Supp. 531, 541 (N.D. Ill. 1997).

rapes are not the same."[118] While not completely abandoning *Brzonkala*'s concern with intent,[119] *Anisimov* disagreed with the broad characterizations and categorizations of rape made in *Brzonkala*. The court created a new category of interpretation that found gender animus in cases where there had been sufficiently severe inappropriate sexual advances.[120] In other words, the court engaged in levels-of-aggression analysis.

Liu v. Striuli[121] represented a further elaboration of an animus interpretation based upon levels of aggression. In *Liu*, the court cited *Kinman v. Omaha Public School District*[122] in noting that previous courts interpreting the requirement of gender-motivated conduct for purposes of Title VII liability had held that proof of unwelcome sexual advances is sufficient to meet the intent element of that statute.[123] It also referenced the hate crime guidelines. Yet in *Liu*, forced sexual intercourse was not the only ground upon which the court found the animus requirement of § 13981 satisfied. The court also held that the alleged pattern of physical and emotional abuse, including the rapes, the lewd comments, and the threats of deportation, along with the lack of any other apparent motive, was sufficient to warrant the conclusion that Striuli's conduct was gender-motivated.[124]

Other cases began pushing on a related front—that of lowering the definition and the bar of severity of violence that would be required for a successful § 13981 animus claim. In *Culberson v. Doan*, for example, the court noted that an attempted assault, although unsuccessful, combined with a threat to the plaintiff to "stay away from other men," was sufficient to constitute gender animus.[125] Yet again, despite the increasing inclusiveness of these cases, this construction of the animus element as applied to the civil rights context suffered from a significant conceptual and operational

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118. *Id.* at 540 (quoting Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779, 783 (W.D. Va. 1996)).

119. The court stated:

> During the hearings, Congress renounced "the widespread belief that people who are raped precipitate in some way." . . . In light of the language and stated purpose of the VAWA, whether Anisimov voluntarily entered Lake's car or office is no more relevant to her civil rights claim than if an African-American family voluntarily moved into a "white neighborhood" and found a burning cross on their lawn. Neither victim "asked for it," and the focus of the Court should not be diverted from the actions of the defendant to those of the victim.

Id. at 541 (citation omitted).

120. In *Anisimov*, this included "fondling [the plaintiff], attempting to remove her clothing, grabbing her breasts, assaulting and attempting to rape her, and ultimately luring her to a deserted office site and raping her." *Id.*

121. 36 F. Supp. 2d 452 (D.R.I. 1999).

122. 94 F.3d 463 (8th Cir. 1996).

123. *Liu*, 36 F. Supp. 2d at 474 (explaining that unwelcome sexual advances may constitute part of a hostile environment sexual harassment claim).

124. *Id.* at 474-76.

125. 65 F. Supp. 2d 701, 706 (S.D. Ohio 1999).

flaw. As with the "totality of the circumstances/intent" approach, the cases relying upon "level of aggression" centered the relevant animus analysis on the perpetrator and his acts, thereby largely failing to address the survivor and the inflicted harm, as felt by both the individual and the broader gender class. Moreover, the jurisprudence following this path began to create artificial distinctions between types of rapes (as did *Brzonkala*), this time seeking to distinguish between "real rape"[126] of a highly violent nature and "nontraditional rape," involving less force than "real rape."[127] Inevitably, the line demarcating the threshold level of aggression needed to support a successful § 13981 claim was inconsistent, fuzzy at best, and arbitrary almost by definition. Most seriously, however, a threshold tied to a level-of-aggression approach precluded claims by women who had not been sufficiently coerced into rape in the view of the court.

C. *Fledgling Notions of "Inherent Animus"*

Soon, however, a third set of ideas emerged in the jurisprudence of animus: that certain acts, in and of themselves, were inherently discriminatory against women because their effect was to degrade women or symbolize women's inferiority. Building off of a blend of the first two approaches, *Doe v. Hartz*[128] was one of the earliest cases to move toward finding certain sexual assault crimes inherently indicative of gender animus.

Making the point that animus should not be equated with "dislike," the plaintiff's brief in *Hartz* argued that "forcing physical intimacy on a woman, whether with a kiss or through rape, illustrated lack of respect and therefore ongoing gender-motivated animus against women."[129] The court then held that allegations of unwanted or unwelcome sexual advances are sufficient to meet the requirement to allege that the defendant "targeted [the victim] on the basis of his or her gender" and "had a specific intent or purpose, based on the victim's gender, to injure the victim."[130] Such unwanted conduct suggested that the actor relegated women as a group to an inferior status without regard to their individual qualities.[131] Finally, the *Hartz* court drew on Title VII case law, invoking the idea that motive does not matter, but that effect—the nature of the harm—does:

> Again, because unwelcome sexual advances may be demeaning and belittling, and may reasonably be inferred to be intended to have

126. *See generally* ESTRICH, *supra* note 65, at 3-4 (charging that society considers only violent stranger rape to be "real rape").

127. *Cf. id.* (discussing society's traditional distinctions among rapes).

128. 970 F. Supp. 1375 (N.D. Iowa 1997).

129. *Id.* at 1406.

130. *Id.* at 1408 (citing S. REP. NO. 103-138, at 64 (1993)).

131. *Id.*

> that purpose or to relegate another to an inferior status, even if the advances were also intended to satisfy the actor's sexual desires, the allegations of the "animus" element here are sufficient.[132]

In essence, the court was revealing its intuition that, independent of the actor's motives, the acts contained in the *Hartz* fact pattern inherently indicated animus as a matter of law under § 13981, although the *Hartz* court stopped short of holding animus to be inherent in all sexual abuse.[133]

McCann v. Rosquist[134] went a step further, stating that the legislative history made it clear that the animus required by the statute is "something akin to a 'gender bias'" and then opined that all nonconsensual sexually mandated conduct is invidiously discriminatory toward the victimized class.[135] The court held that whether the actor's motivations were amorous or not was irrelevant when considering whether inappropriate liberties had been taken, as mixed-motive acts need only contain partial animus motive to violate § 13981. *McCann* thus came to stand for the proposition that all nonconsensual expressions of affection were inherently laden with disrespect for women. On appeal, the Tenth Circuit stated more explicitly that "it is a bizarre view of equality indeed to suggest that some abstract principle of sex equality requires legislatures and courts to ignore the degree to which sexual violence is overwhelmingly and specifically directed against women"[136]—suggesting that it might be appropriate to consider a form of strict liability for purposes of gender animus in the case of sexual violence. Again, however, both the trial and appeals courts declined to hold that these disrespectful sexual acts disproportionately directed at women were per se sufficient to prove § 13981 gender animus.

Meanwhile, *Kuhn v. Kuhn*,[137] a case involving sexual violence within marriage, revealed a lingering blind spot in the tentative new approaches of *Hartz* and *McCann*. The *Kuhn* court appeared to demarcate the limits of inherent animus: Within domestic relations, acts that otherwise indicate animus per se would become subject to a tougher standard more closely

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132. *Id.*
133. *Id.*
134. 998 F. Supp. 1246 (D. Utah 1998).
135. *Id.* at 1252. The court stated:
> The notion that non-consensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong. The legislative history makes clear that the animus required is something akin to a "gender bias." . . . Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women.

Id. at 1252-53.
136. McCann v. Rosquist, 185 F.3d 1113, 1119 n.9 (10th Cir. 1999).
137. No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998).

resembling a "totality of the circumstances" test akin to that in *Brzonkala*.[138]

Such is hardly the stuff of which successful per se claims based on demeaning nonconsensual sexual activities might be made. But other cases soon followed to challenge this interpretation. *Mattison v. Click Corp.*[139] followed *Hartz* in intimating that sexual assault crimes might be crimes committed "'because of' or 'on the basis of' the victim's gender."[140] In *Mattison*, the defendant maintained that the "longstanding sexual relationship" between the actor and the survivor disproved animus toward the plaintiff.[141] The court disagreed, saying that the degrading behavior, exclusive of the eventual rape, showed that the defendant had been "consumed by a desire to subordinate, demean, humiliate and intimidate."[142] While *Mattison* used a blend of "intent" analysis and "inherent animus" assertions, the case advanced the notion that certain behaviors might be considered inherently violative of the VAWA civil right. The court, however, declined to enumerate exactly which violent crimes might fall into this category. Indeed, only one federal court case, *Schwenk v. Hartford*, appeared to adduce a per se animus standard when considering the case of a sexual assault of a transsexual man. Ultimately, however, the plaintiff's VAWA claim failed on qualified immunity grounds and thus the case did not establish strong precedent.[143]

Ziegler v. Ziegler[144] enumerated the most specific list of acts considered to show gender animus: rape; gender-specific epithets; acts that perpetuated the stereotype of submissive roles for the plaintiff within a marriage; severe physical attacks, particularly during pregnancy; and violence without provocation, when the plaintiff attempted to assert her independence.[145] Significantly, *Ziegler* was a spousal abuse case as well. As courageous as *Ziegler* was in planting a stake even deeper into the territory of inherent

138. *Id.* at *6 ("The interplay between plaintiff's gender and her status as a wife . . . require[s] a greater evidentiary exposition.").

139. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. 1998).

140. *Id.* at *6 (quoting Doe v. Hartz, 970 F. Supp. 1375, 1406 (N.D. Iowa 1997)).

141. *Id.* at *7 n.18.

142. *Id.* at *7.

143. Schwenk v. Hartford, 204 F.3d 1187, 1203 (9th Cir. 2000) ("The fact that in this case the alleged crime was a sexual assault is sufficient in and of itself to support the existence of gender-based animus for purposes of the GMVA."). Despite the opinion's clear support for a per se animus standard in certain cases, the court held that the defendant (a state prison guard) was entitled to qualified immunity because the applicability of the GMVA to the defendant's conduct was not clearly established at the time of the assault. *Id.* at 1205 ("Thus, although we now hold that a violation of state laws regarding rape or sexual assault necessarily constitutes a violation of the GMVA regardless of the actor's motivation, state of mind or emotions, we also hold that the law regarding gender motivation and animus was not clearly established at the time of the assault.").

144. 28 F. Supp. 2d 601 (E.D. Wash. 1998).

145. *Id.* at 606-07.

animus, the case buttressed these "per se" assertions with Title VII and hate crime approaches, in addition to "level of aggression" analysis.[146]

By the time of *Braden v. Piggly Wiggly*,[147] a court was prepared to note in dicta that "it can be reasonably argued that an allegation of sexual violence . . . is itself indicative of gender animus and is therefore sufficient to show gender motivation and gender animus, as required by the VAWA."[148] The court then went on to express its puzzlement at the artificial distinctions between supposedly different categories of rape perceived by *Brzonkala* and concluded by remarking that "rape is rape" and that no legal or sociological authority would support a finding of "inherent animus" in some rapes but not others.[149] Unfortunately, the court ultimately held that the plaintiff's claim could not proceed unless she amended her complaint to include allegations of gender animus beyond the fact that the defendant had "sexually assaulted" her.[150]

However, these district courts did not succeed in providing a strong jurisprudential interpretation for animus. Struggling to determine those crimes for which an inherent inference of gender animus might be reasonable, courts once again attempted to distinguish among different acts of sexual violence against women. From the generic distinctions presented in *Brzonkala*[151] to the attempt to widen the remedy's coverage in *Braden*, opinions splintered over the correct application of the animus element.

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These three broad categories of judicial interpretation—one centered on "rape-plus" intent and context, one centered on threshold levels of aggression, and one seeking to identify acts disclosing "inherent animus"—provide a spectrum of possible modes of analysis for § 13981's animus element. None of the opinions, however, offered a unitary or clear vision of a potentially definitive and transformative meaning of animus. Some observers likely believed that this was for the best, allowing for case-by-case consideration of the violent act, its harm, and the motivation of the perpetrator. But the result was that VAWA was interpreted in a nonuniform

146. The opinion in *Ziegler* noted that "[g]ender motivation is to be determined from the totality of the circumstances." *Id.* at 606 (citing S. REP. NO. 102-197, at 50 (1991)).

147. 4 F. Supp. 2d 1357 (M.D. Ala. 1998).

148. *Id.* at 1362; *see also id.* ("'Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender . . . .'" (quoting MacKinnon, *supra* note 62, at 1301-02)).

149. *Id.* at 1362 n.4.

150. *Id.* at 1362.

151. Recall that the district court in *Brzonkala* attempted to distinguish among different acts of sexual violence against women in an effort to determine the crimes for which an inference of gender animus would be reasonable, going so far as to subcategorize different kinds of rape. Yet the *Brzonkala* opinion cited no sociological or legal authority to support this distinction.

matter, with determinations based largely upon the biases and social views of individual courts. These decisions reflected and further entrenched already existing myths of rape and gender status and therefore did little or nothing to promote the advancement of sex equality.

What are the advantages of adopting part or all of one or more of the available constructions explored in the previous Sections? How would a given meaning and method of searching for animus affect the scope and the operation of new state VAWAs? And which approach would most support VAWA's vision for gender equality?

VII. TOWARD A TRANSFORMATIVE MEANING FOR VAWA ANIMUS

In the wake of the federal VAWA, the scope of contemporary antidiscrimination law is exceedingly narrow. There still exists a large gap between conduct that is formally prohibited by law and conduct that should properly be regarded as racist or sexist. Within this sociolegal context, we now are challenged to turn to state-based approaches for continuing the work of the invalidated federal version of a VAWA civil rights remedy for sexist violent crimes.

Now that the federal civil right is gone, state legislatures are freed from the fetters of precedent, legislative intent, and prior jurisprudential traditions. Ideally, we should seek a meaning that would operate to proscribe violence, including all rapes, that perpetuates existing gender inequalities. We should strive to construct such an animus within state VAWA statutes that will both advance the federal drafters' vision of a remedy that promotes and reflects a social view of gender equality and, at the same time, make possible the successful passage of these bills by the states' legislatures. The former consideration dictates an animus that reflects the nature of both the individual and the collective harms inflicted through rape by deeming all rapes to be per se indicative of such an animus and therefore actionable under the new state VAWA remedies. The latter requires an acknowledgment of political opponents' fears of an unbounded remedy in the hands of activist judges and will require an animus with sufficient meaning to provide concrete guidance to the state courts.

A. *VAWA Civil Rights Remedies as Transformative Legal Instruments*

This Section briefly considers the role that state VAWA civil rights remedies can play within a society committed to gender equality among its citizens.

Some feminist legal scholars have suggested that the law is "male" in that the law sees and treats women as men see and treat women.[152] The federal VAWA, progressive as it was, reflected society's prevailing view of rape, as did other areas of antidiscrimination law:

> [R]ape is a man's act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily.[153]

The old federal VAWA case law resulted in legal blind spots surrounding violence in certain settings, particularly relationship rapes. It focused upon the socially normative minimum required level of force at which coerced sex could be deemed actionable rape (as seen in the level-of-aggression approach). It also defined animus rape in male sexual terms when distinguishing cases of coerced sex from VAWA rape depending upon the (usually male) defendant's conscious discriminatory motivation (as seen in the "rape-plus" approach). None of these past approaches is therefore truly transformative of existing (and legally legitimated) social power inequities, as each falls short of providing redress for all cases of rape.

1. *Scope: Why Universal Coverage for All Rapes?*

The new state-based VAWAs open up possibilities for a statutory animus element free from previous constructs long embedded in other existing areas of federal law. To be successful civil rights remedies, the new state statutes must contain animus terms whose meanings focus upon the choice of crime as presumptively determinative of impermissible gender motivation. The crime of rape manipulates the very identity characteristic—gender—that defines the victim's class as the subordinated, gender-female group; the commission of the crime further reinforces the existing social hierarchy. This is true of all cases of rape, whether committed by a stranger or not, whether a heterosexual rape or not.[154] Contrary to the belief of

152. *See* MACKINNON, *supra* note 116, at 155-251.

153. Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, *in* FEMINISM AND PHILOSOPHY 333, 334 (Mary Vetterling-Braggin et al. eds., 1977); *see also* Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (equating rapability with the female gender in a Title VII case). *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL (1975) (discussing the historical and legal legitimation of forced intercourse on the basis of gender-female status).

154. *See generally* ESTRICH, *supra* note 65 (detailing the harms common to all incidents of rape); MICHAEL SCARCE, MALE ON MALE RAPE 35-36 (1997) (discussing the use of same-sex rape to create an internal power hierarchy within communities of men).

Senator Hatch and others, rape is never caused by mere "lust"[155] or sexual passion.[156] While rape is often a mixed response to a constellation of factors,[157] gender animus is an underlying factor in all rapes.[158] The contention that gender animus is necessarily present in all acts of rape may be argued on two grounds: First, the American socialization process exposes and reinforces a social hierarchy, with "male" defined as dominant and "female" defined as subordinated, and a rapist harbors a conscious or unconscious gender animus that reflects this hierarchy.[159] Second, rape intrinsically is a forced means of asserting power and control over women, which subordinates women, individually and as a class.

America's socialization process with regard to gender roles and sexual behavior has deep historical roots and is reflected in and reproduced by myriad sexual stereotypes in popular culture and the history of the common law.[160] Rape began as a property crime against the man, typically the father or husband,[161] to whom the victim "belonged"; marital rape was considered a legal impossibility for centuries.[162] Sexual stereotypes continue to foster a societal framework conducive to rape, reinforcing social rape myths excusing or minimizing the seriousness of rape.[163] American culture, tainted with a collective subconscious gender animus, reflects and promotes

155. *See* Shalit, *supra* note 1, at 14 (quoting remarks on rape by Senator Hatch suggesting that some rapes are simply natural responses to sexual desire rather than animus).

156. *See* UNDERSTANDING VIOLENCE AGAINST WOMEN 49-62 (Nancy A. Crowell & Ann W. Burgess eds., 1996) (debunking the myth that rape is an expression of excess romantic passion or sexual desire).

157. *Id.* at 52-58 (noting, among other things, that sexual offenders have been diagnosed with a wide variety of psychiatric and personality disorders).

158. This Note defines rape as "unwanted sexual contact obtained without consent through the use of coercion or force or misrepresentation. Sexual contact can be intercourse, oral sex, anal sex, or vaginal and/or anal penetration with objects." Brande Stellings, Note, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 185 n.1 (1993). This Note maintains that all of these rapes contain an element of gender animus. A small set of legally defined rape, therefore, might not be actionable. Left open by the remarks by Senator Biden, *supra* text accompanying note 2, is the possibility that this definition would not cover some individual cases of statutory rape where a rape is held to have legally occurred only due to the age of the parties rather than due to any "coercion, force or misrepresentation." Stellings, *supra*, at 185 n.1.

159. *See* SCULLY, *supra* note 100, at 166 (reporting on an interview with a rapist who said: "Rape is a man's right. If a woman doesn't want to give it, a man should take it. Women have no right to say no. Women are made to have sex. It's all they are good for"); *see also* BROWNMILLER, *supra* note 153, at 389 ("The theory of aggressive male domination over women as a natural right is so deeply embedded in our cultural value system that all recent attempts to expose it . . . have barely managed to scratch the surface.").

160. UNDERSTANDING VIOLENCE AGAINST WOMEN, *supra* note 156, at 62-69.

161. BROWNMILLER, *supra* note 153, at 18.

162. ESTRICH, *supra* note 65, at 72 ("[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband." (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Prof'l Books 1971) (1736))).

163. *See generally* Susan Griffin, *Rape: The All-American Crime*, RAMPARTS, Sept. 1971, at 26, *reprinted in* FEMINISM AND PHILOSOPHY, *supra* note 153, at 313 (discussing various rape myths embedded in American society).

violence against women as a way to enhance social status at the expense of the victim.[164] Thus every rape may be seen as an expression of gender animus that exists at a broad societal level.

Gender animus is expressed in the feminization of the victim, who becomes subordinated to the offender's dominance through manipulation of the victim's gender status. This manipulation compromises the victim's role as a political citizen. This Note therefore argues that all rape must be considered a per se display of gender animus toward women as a group.

2. *Operation: How Should the States' New VAWA Animus Function?*

As a true transformative civil right that aims to restore power equality, the new statutory regime must operate in a way that returns the focus from the defendant and his or her mental state to the effect of the harm upon both the victim and society.[165]

Rape, like many other crimes, requires that the accused possess a criminal intent, or mens rea. The defendant's mental state refers to what he actually understood at the time or to what the "reasonable man" should have known under the circumstances. This is a problematic approach in the case of rape, where the true harm lies in the meaning of the act to its victim, but the standard for the act's criminality lies in its meaning to the assailant. Doctrinally, this has meant that the man's perceptions of the woman's desires determine whether she is deemed legally violated.[166] An analysis that determines the presence of animus in this way is fated both (1) to fail to redistribute power by centering on the defendant's motives rather than on the harm; and (2) to engage in an evidentiary inquiry, applying the totality of the circumstances test or some other consideration of additional contextual factors that reduces the presence of animus to a matter of fact and thus merely reflects existing societal gender animus. This is the result of defining animus as "hatred," "intent," or "purpose."

For the new animus term properly to capture and resolve this difficulty within the context of a civil rights remedy, animus must be reconceptualized as an inherent byproduct of the choice of a defendant to commit a rape that reflects and reinforces existing societal gender inequalities. Animus should be evidenced neither by the defendant's motive nor by a disparate impact calculus, but by the defendant's choice of rape as

164. *See generally id.* (discussing the subconscious notions of gender inequality that pervade American society).

165. Some have proposed that the defendants' prejudice in cases of sexual violence should be presumed and that the burden of proving lack of animus should be shifted to the defendant. *See, e.g.*, Jennifer Gaffney, Note, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247 (1997).

166. *See, e.g.*, MACKINNON, *supra* note 114, at 817-33 (discussing the doctrinal standards for asserting victim "consent" or insufficient resistance to sex in rape prosecutions).

a method of using the victim's class-based gender characteristic to effect the victim's sexual and social subjugation. In short, the defendant's choice of a particular crime of violence—here, rape—should be considered a per se showing of animus for purposes of an effective future state-based VAWA remedy.

The remainder of this Note takes into account the aforementioned considerations in creating the proposed new meaning for state VAWAs' animus and also considers some political realities surrounding successful passage of these civil rights remedies.

B. *Guidance to Courts: A Transformative Legal Meaning for Animus*

Concerned with deeply embedded political inequities in existing state laws, those engaging in legal experiments designed to transform the status of women through the law have questioned whether the law should in fact be the primary tool for this work, or whether law should be rejected as a dangerously and irreparably flawed tool of the biased authority of the state.[167] This Note posits that it is possible both to reject existing biased legal frameworks and to recognize the transformative value of the law: Creating a civil right as an expression of legally supported gender equality requires a public discussion and collective decision that ultimately advances creation of new public norms supportive of equal citizenship. Within the context of an epidemic of gender violence, the pragmatist's cooptation of the system promises faster remedial results than the purist's abdication of the struggle. To that end, I now propose a new legal definition of animus to be applied by state courts in future VAWA claims.

1. *Animus as "Attitude Informing One's Actions"*

To reconceptualize a new meaning for animus, we must consider the appropriate elements of typical past VAWA rape claims, which raised, among other things, the following four issues:

(1) the motive(s) or intent(s) of the defendant;

(2) the type of violent crime committed;

(3) whether the defendant's actions implicated the gender identity of the victim; and

(4) the impact or result of the crime upon the victim.

167. *See generally* MACKINNON, *supra* note 116.

I have noted that approaches to animus in the § 13981 rape case law focused primarily on one or another of these four basic issues. Each of these approaches left us short of universal coverage for all rapes. Each of the evidentiary inquiries therefore undermined the transformative potential of the federal remedy.

This Note proposes a reconceptualized definition of animus in which animus does not equal hate. Animus should not be imbued with a requirement of "intent" or "purpose"—words that inappropriately invoke criminal law, center the analysis on the defendant rather than the victim, and insinuate a requirement of conscious motive. Nor should animus focus exclusively on the impact on the victim, particularly since disparate impact is not enough under a weakened antidiscrimination jurisprudence. The solution proposed by this Note is that animus should simply mean that the defendant in a VAWA rape claim was motivated by gender status to select a crime in which existing social gender hierarchies are manipulated in order to effect the harm upon the plaintiff.

Such an animus would do several critical things. It would allow the new VAWA remedy to capture both conscious and unconscious motivations. It would center the inquiry on the nature of the harm and on what is done to both the individual and the individual's group when an act of violence implicating sexuality occurs. It would reflect the systemic nature of the harm by recognizing the unconscious ways in which societal attitude—toward women, status, and violence—works upon the citizenry's conceptions and distributions of power. Finally, it would make possible a robust civil right that provides for relief, both in damages and in political recognition of society's goal of gender equality. All rapes would be covered under this approach.

To effect this migration of meanings from a single-element approach to one that blends all four holistically, state-based VAWAs must embrace an animus defined as "[a]n attitude that informs one's actions; disposition."[168] An elaborate intent inquiry would be eliminated; burdens of proof would be claimant-centered and would be relieved of evidentiary inquiries that merely reflect existing inequities. No artificial distinction would be made among factual backdrops. This definition would be more sensitive to the particularities of gender inequality; gender animus in rape cases would become a question of law, reflecting our collective subconscious disposition, rather than a case-by-case factual inquiry. The proof of the defendant's gender-motivated "disposition" would rest within the nature of the act itself and its effects on both the individual and the individual's social group. In short, the new animus would lift out our deeply embedded notions of the feminine as a subordinate gender and hold them to a legal

168. AMERICAN HERITAGE COLLEGE DICTIONARY 54 (3d ed. 2000).

light of zero tolerance of violence as a tool for reinforcing structural gender inequalities.

2. *A Brief Consideration of Political and Legal Realities Facing State VAWA Proponents*

Ironically, the demise of the federal VAWA has created opportunities for state legislatures to reopen the debate over the proper meaning of animus in state statutes and to amplify the remedial potential for future state-level VAWA remedies. However, we must remember that VAWA's drafters borrowed the term for political reasons as well: Not only did its invocation cloak the fragile new civil rights statute in the now politically unassailable rhetoric of previous civil rights legislation, but it dampened opposition through the use of an inherently ambiguous term that created critical space within which to build consensus among the various liberal and conservative forces in Congress.[169] For similar reasons of political necessity and symbolic value, animus is the term that most likely will be employed by the currently emerging state statutes as well.[170]

Clearly, a statutory word can come to mean many things, as was the case for animus in various bodies of federal law. It is a "familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.'"[171] And as noted by the Court in *Morissette v. United States*, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind unless otherwise instructed."[172] The danger for state VAWA statutes, of course, is that states will fail to reconceptualize existing notions of animus as elaborated in the available bodies of Title VII, civil rights, and hate crimes law. As this Note has illustrated, such borrowings from imperfect legal analogues would prove as problematic as the inconsistent body of case law produced by the federal VAWA in federal courts. Absent a clearly defined meaning for "animus," state courts would

169. In this respect, VAWA's legislative history, which was marked by a wide variety of rhetoric reflecting legislators' various opinions on the proper meaning of the animus term, mirrored that of Alice's rhetorical exchanges in Wonderland:

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING-GLASS 124 (Macmillan 1999) (1871).

170. *See supra* Part I (discussing the political advantages attending the deployment of a term laden with content of high political significance).

171. Evans v. United States, 504 U.S. 255, 259 (1992) (quoting Taylor v. United States, 495 U.S. 575, 592 (1990)).

172. 342 U.S. 246, 263 (1952).

similarly be free to apply the remedy more broadly or restrictively than intended by legislatures, creating potential for less-than-universal rape coverage for future VAWA plaintiffs.

These dangers therefore make explicit legislative application of this Note's new animus meaning critical to preserving the optimal remedial potential for future state VAWA statutes. At the same time, however, I recognize that it may not always be possible to incorporate this meaning directly as statutory language into the text of the remedies. (Indeed, as seen in Illinois, use of expressly broad alternative language that fails to invoke the political protections afforded by an animus term could well result in a bill that is not substantially different in operational scope in cases of rape but might never become law.)[173] Nevertheless, as noted by the *Morissette* Court, we should not trust that courts will interpret animus broadly absent clear legislative guidance. Pragmatic considerations with respect to this need for a clear expression of legislative intent therefore dictate the need to incorporate, at a minimum, direction within the legislative record accompanying the statute to adopt this reconceptualized notion of VAWA animus.

VIII. CONCLUSION

While this country's laws have fought discrimination on the basis of race for more than 130 years,[174] we have failed to extend that level of legal protection to victims of gender-motivated violence even while our citizens are being violently victimized at extraordinary rates.[175] Promising an extension of civil rights law to include explicitly the right to be free from gender-motivated violence, § 13981 of the federal VAWA reflected the growing recognition that gender-based violence has the power to affect women as a class and to restrict women's constitutional freedom to exercise their equal rights of citizenship.

At the same time, the foregoing analysis uncovers the ways in which previously available constructions of the federal VAWA have been wholly insufficient to provide the kind of political relief originally envisioned by VAWA's drafters. The Supreme Court's recent decision to declare VAWA's civil rights remedy unconstitutional has created an opportunity for state legislatures to establish an identical § 13981 civil right at the state

173. *See supra* note 15 (discussing the circumstances surrounding the stalled Illinois VAWA remedy).

174. The Fourteenth Amendment to the Constitution, which extended basic civil rights to African Americans, was ratified on July 9, 1868. U.S. CONST. amend. XIV, § 1.

175. *See* NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA 2 (1992); *see also* UNDERSTANDING VIOLENCE AGAINST WOMEN, *supra* note 156, at 1 (providing estimates of the increasing incidence of gender-based violence in the United States).

level. This time, however, the politically necessary statutory element of animus will be free from the constraints of previous federal jurisprudences and statements of legislative intent, offering an opportunity for drafters of state VAWA remedies to create a truly transformative and effective cause of action for victims of gender-motivated violence.

The meaning given to this one elemental term will largely determine the remedial scope and operation of the fledgling state VAWA remedies as applied to all cases of rape. Animus as an "attitude informing one's actions" is the key to reaping the political benefits of deploying a historical statutory term while also ensuring that the states' emerging responses to the federal VAWA's recent demise remain true to its original vision for a society free from rape and other discriminatory gender-motivated violence.