Florida State University Law Review

Volume 34 | Issue 3 Article 2

2007

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FLORIDA STATE UNIVERSITY
LAW REVIEW

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VOLUME 34 SPRING 2007 NUMBER 3

Recommended citation: Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Reform*, 34 FLA. ST U. L. REV. 731 (2007).

ELUSIVE EQUALITY IN DOMESTIC AND SEXUAL VIOLENCE LAW REFORM

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ABSTRACT

This Article evaluates the application of sex equality theory to the harms resulting from domestic and sexual violence. Sex equality theory and related antidiscrimination remedies widely have been heralded as holding the potential both to advance victims' economic recovery and to transform public understanding of the problem. Laws such as the civil rights remedy of the 1994 Violence Against Women Act struck by the U.S. Supreme Court in United States v. Morrison are rooted in this theory. Because Morrison rested on questions of federalism, the decision neither resolved nor addressed a large category of concerns that led to the enactment of that and similar laws.

To reinvigorate discussion of those important issues, this Article reconsiders the value of framing the harm that flows from domestic and sexual violence as a civil rights violation. I argue that civil rights remedies are important legal tools for victims of domestic and sexual violence. Nevertheless, their practical appeal necessarily will be bounded by realities inherent in the nature of the remedy and in the nature and experience of abuse. A variety of considerations, including survivors' rational reluctance to reengage with an abuser, will deter victims from invoking civil rights remedies. Civil rights remedies' transformative potential to produce either policy or other forms of social change will be limited unless their enactment and use are closely tied to grassroots organizing efforts. I advocate alternative and complementary approaches to the remedies' dual and laudable goals of expanding avenues for economic recovery and transforming the discriminatory attitudes that allow domestic and sexual violence to persist.

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I. INTRODUCTION

Sex equality has played a pivotal role in law reform and advocacy on behalf of victims of domestic and sexual violence.[1] Arguments exposing domestic and sexual violence as one of many manifestations of sex discrimination have figured centrally in spurring the wide range of reforms in the United States that assist domestic violence and sexual assault survivors. Yet tensions about how to situate an equality-based analysis continue to animate advocates' debates. At the same time that domestic and sexual violence increasingly is equated with sex discrimination in international discourse, public debate within the United States about the link between sex discrimination and domestic and sexual violence is virtually absent from current mainstream policy debate.

Sex discrimination theories have formed the basis for civil remedies that frame domestic and sexual violence as a problem of sex discrimination. These remedies have been powerful tools in reshaping workplace laws and policies where domestic and sexual violence occurs at work.[2] Sex discrimination theories also underlie suits against

1. I use the descriptive term "domestic and sexual violence" rather than the commonly used terminology "violence against women," because the latter term facially excludes intimate partner violence committed in same-sex relationships and implies that men cannot be victims of domestic and sexual violence.

2. *See infra* Part III.A.1.

public officials who commit acts of domestic or sexual violence.[3] They have helped improve law enforcement policies directing police response to domestic and sexual violence calls.[4] Yet sex discrimination theory has had less of an impact in holding accountable the largest category of individuals who commit these acts: private individuals. A legal tool that sought to hold individuals accountable for domestic and sexual violence as sex discrimination, the federal civil rights remedy enacted as part of the 1994 Violence Against Women Act (VAWA),[5] was struck down by the United States Supreme Court in *United States v. Morrison*.[6] That law was modeled after Reconstruction-Era civil rights laws—none of which explicitly addressed gender and none of which authorized private rights of actions against private individuals, who commit most acts of domestic and sexual violence.[7] Although analogous state and local remedies remain on the books, those laws are not used as frequently as some might expect. International human rights instruments explicitly define domestic and sexual violence as a form of sex discrimination, but to date they have not employed the theory to support claims of individual liability against perpetrators.[8]

The *Morrison* decision rested on principles of federalism and the Court's view of Congress' authority to enact the VAWA civil rights remedy. As a result, it did not address the question of the relative benefits and limitations of using civil rights remedies premised on sex equality theories to provide redress for victims. This Article returns to that discussion and assesses the remedy's promise of advancing two important goals: the practical goal of more effectively redressing the economic harms resulting from abuse and the transformational goal of reshaping public perceptions of the problem. I conclude that proponents were correct that gaps in previously existing civil rights laws often leave victims without a remedy. However, laws such as the VAWA civil rights remedy struck down in *United States v. Morrison* necessarily will have limited effect based on realities associated with the experience of abuse and the limits of civil rights claims alone to transform cultural norms. Civil rights remedy

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3. *See infra* notes 73-80.

4. *See infra* notes 81-88.

5. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941-42 (codified as amended at 42 U.S.C. § 13981 (2000)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

6. 529 U.S. 598 (2000).

7. *See, e.g.*, 42 U.S.C. § 1981 (prohibiting racially discriminatory contracts); 42 U.S.C. § 1983 (creating a civil rights remedy for violations of federal law by state actors); 42 U.S.C. § 1985(3) (forbidding conspiracies to deny civil rights).

8. For a discussion of the role of equality-based remedies in international domestic and sexual violence reform, see Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 378-84 (2006).

proponents' aspiration to increase victims' access to practical relief, in the form of financial compensation, is laudable. The economic harms resulting from abuse are substantial and often create barriers to victims' safety.[9] Nevertheless, many victims will not commence civil damages claims due to a host of concerns, some of which are common to civil claims generally and some of which are unique to domestic and sexual violence. Although civil rights claims against the perpetrators of abuse should be available and used whenever possible, alternative approaches to financial compensation, such as victim compensation programs, should be enhanced in order to meaningfully expand survivors' ability to recover the financial losses that violence produces.

From a transformative perspective, civil rights remedies reflect a vision that framing domestic and sexual violence as gender discrimination would shift our collective understanding of the problem. The importance of that vision cannot be underestimated. However, it is overly optimistic to imagine that a civil remedy, divorced from other social and political organizing initiatives, could substantially advance so dramatic a result. The equation of domestic and sexual violence with gender inequality holds most power instrumentally, as a rhetorical tool. In the United States it was particularly catalytic in the 1960's and 1970's, as it produced a new lens that bridged legal, political and community organizing initiatives. That moment has passed. Domestic and sexual violence now is widely recognized in the United States, but responses to it increasingly are neutralized and bureaucratized. A renewed focus on the social conditions—including gender bias—that inform domestic and sexual violence, can galvanize organizing and policy initiatives that re-center the role of discrimination in the persistence of abuse.

This Article elaborates the history and impact of civil rights remedies as tools to address domestic and sexual violence. Part II begins by reviewing the theoretical foundations for equating domestic and sexual violence with sex discrimination and the critiques of that theory. It then outlines how equality theory supported the development of civil rights remedies to redress domestic and sexual violence.

Part III evaluates the practical and transformative potential of civil rights remedies. It tests the claim that gaps in existing civil rights laws limit redress by identifying both the reach and the limitations of caselaw holding institutions and individuals accountable for domestic and sexual violence as a form of sex discrimination. This analysis demonstrates the doctrinal barriers to both individual and institutional accountability under current laws, and discusses the importance of addressing those doctrinal gaps.

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9. *See infra* notes 184-86 and accompanying text.

Part III next explores the transformative potential of civil rights remedies from several perspectives: the impact on public and other policies, the potential to change discriminatory attitudes, and the role civil rights claims play as part of a larger social movement. It shows how claims against individuals hold less potential to engender policy changes than do claims against institutional actors. It draws on scholarship in other areas showing that claims to enforce "rights" are useful points of leverage as part of broader social movements, but on their own are limited in their ability to change discriminatory attitudes or public perceptions. Similarly, civil rights claims for domestic and sexual violence today are constrained because they are not as closely connected to a social movement seeking gender and other forms of equality as were similar claims during earlier periods in history. The combination of these factors limit the extent to which civil rights remedies can produce transformative change.

Part IV offers suggestions for future reform. To the extent that a civil rights remedy offers practical solutions to the economic imbalances that domestic and sexual violence produce, it is but one of several possible strategies to reach that end. This Part discusses the limits of civil rights claims framed against individuals and identifies alternative approaches to enhancing victims' ability to recover for the resulting economic losses. Expanded victim compensation programs exemplify one potential alternative; law reform that enhances meaningful institutional accountability is another. With respect to the transformative claim, efforts that are grounded in victims' experience hold the potential to generate new approaches to services and policy. Enhanced collaborations between lawyers, organizers, activists and survivors are key to meaningfully changing social norms. Public discourse should be refocused on challenging the enduring connections between gender and other forms of inequality, and the persistence of violence and abuse.

II. THEORETICAL GROUNDINGS

A. Domestic and Sexual Violence as Sex Discrimination

Feminist analyses exposing domestic and sexual violence as a form of sex discrimination figured centrally in the wave of reform that began in the 1960s. The anti-domestic violence and rape reform movements that emerged at that time, in tandem with the rebirth of feminism, marked a new generation of advocacy and reform.[10] The sex discrimination framework offered an explicitly political analysis, in contrast to the traditional perspective in which domestic and sex-

10. For sources and a brief summary of the emergence of the domestic and sexual violence movements, see Goldscheid, *supra* note 8, at 358-62.

ual violence, when identified as a problem, was addressed in terms of psychological pathologies and individual personality disorders.[11] The political framework was grounded in a philosophical commitment to basing reform in women's lived experiences.[12] Arguments rooted in analyses of sex discrimination were instrumental in shifting public perception of the problem from a private matter to one warranting public attention and response.[13]

Many feminist theorists thus adopted what I will call a "categorical" definition of domestic and sexual violence as a form of sex discrimination. In reaction to the traditional approaches (in which domestic and sexual violence was privatized, pathologized, and depoliticized) and in an effort to emphasize the sociopolitical forces that inform the problem, domestic violence instead was termed "gender violence" or "violence against women." Catherine MacKinnon's writings most explicitly articulate the theory underlying this shift. For example, she argued that "[w]omen 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."[14] Drawing on statistics showing that women are overwhelmingly the victims of sexual assault at the hands of men, she continued,

> Sexual violation symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men. . . . Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.[15]

MacKinnon analogized sexual assault to lynching and argued that sexual assault is a civil rights violation that violently humiliates its victims, that is hardly ever committed against members of powerful

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11. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 12-13 (2000); *see also* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 46-47 (2000) (discussing traditional treatment of domestic and sexual violence as " 'miscommunication' " or a " 'family' " or " 'private matter' ") (quoting S. REP. NO. 101-545, at 36 (1990)).

12. For a more detailed discussion of this feminist method as applied to lawmaking, see SCHNEIDER, *supra* note 11, at 34-38; Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 688-89, 691 (2000); *accord* Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L. J. 331, 372 n.173 and accompanying text (2005) (discussing and citing approaches to strategies that theorize "from the facts on the ground").

13. *See, e.g.*, SCHNEIDER, *supra* note 11, at 12-28; Goldfarb, *supra* note 11, at 57, 85.

14. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991).

15. *Id.* at 1302.

groups, and that terrorizes the entire class of women.[16] Although scholars have differed in their views about how this equality, or anti-discrimination, theory applies in varying contexts, the notion that domestic and sexual violence are heavily gendered has been widely accepted.[17] The statistics consistently showing that women overwhelmingly are the victims of domestic and sexual violence are continual reminders that gender bias remains.[18]

On the other hand, the rhetorical linking of domestic and sexual violence and its foregrounding of the social context has led to a flat equation that is inadequately nuanced. A categorical equation of domestic and sexual violence with sex discrimination fails to take into account the complex ways in which other social factors—such as race, national origin, class, and sexual orientation—interact with gender to inform women's experiences. As many scholars have elaborated, although violence is a common issue among women, it occurs within different contexts based on the woman's race, class and other characteristics.[19] A pure gender-based conceptualization also fails accurately to account for violence within lesbian and gay relationships.[20]

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16. *Id.* at 1303.

17. *See, e.g.*, SCHNEIDER, *supra* note 11, at 67-68 (discussing traditional notions of heterosexual battering as "sexism"); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1188-1205 (1998) (discussing accounts of the equality or antisubordination principle in sexual harassment law).

18. *See, e.g.*, CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf (concluding that 85% of all victimizations by intimate partners in 2001 were against women).

19. For discussions of the complex interactions between gender, race, class, nationality, and sexuality, see SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 235-38, 267-81 (1982); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1277 (1991); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994). *See generally* DOMESTIC VIOLENCE AT THE MARGINS (Natalie J. Sokoloff & Christina Pratt eds., 2005) (discussing the interactions between race, class, and gender). For additional sources, see SCHNEIDER, *supra* note 11, at 63 n.10 (citing articles).

20. Although empirical evidence is sparse, researchers consistently report that domestic violence occurs in approximately 25% of lesbian and gay relationships, approximately the same frequency as in heterosexual relationships. *See* Knauer, *supra* note 19, at 328 nn.15-29 and accompanying text (citing and describing studies); *see also* CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-99, at 9 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipva99.pdf (reporting 10% of intimate partner victimizations against men and 2% of intimate partner victimizations against women were committed in same-sex relationships); NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER DOMESTIC VIOLENCE: 2003 SUPPLEMENT, *available at* http://www.mincava.umn.edu/documents/glbtdv/2003NCAVPdvrpt.pdf. For discussion of domestic violence in lesbian and gay relationships, see generally NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS (1992); SAME-SEX

Although this insight is no longer novel, it is worthy of repeating in any discussion equating domestic and sexual violence with gender-discrimination. As a result, although deeming domestic and sexual violence unequivocally "gender-based" is important rhetorically, placing the problem in a social, rather than personal, context, it inadequately reflects the full realities of women's experiences with abuse.

Others have critiqued the discrimination connection through arguments that there are different types of sexual violence, not all of which are informed by sex-based inequality. For example, Michael Johnson and Kathleen Ferraro have identified four patterns of partner violence: common couple violence, intimate terrorism, violent resistance, and mutual violent control.[21] Under this framework, the category "intimate terrorism" most directly recognizes the role of sex discrimination.[22] Johnson's research offers a framework for recognizing the link between domestic and sexual violence and sex discrimination while also contemplating that some individual instances of domestic and sexual violence may not fit the sex discrimination paradigm. This approach leaves room for battered women's reports of their experiences, which often describe the violence in their lives as a problem of personality, or relationship, rather than as a problem of discrimination.[23]

Some principles central to feminist law reform support viewing the generalization skeptically. For example, feminists long have fought against restrictive stereotypes, which presumably would include stereotypes that women are passive and incapable of, or at

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DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE (Beth Leventhal & Sandra E. Lundy, eds., 1999); VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS (Claire M. Renzetti & Charles Harvey Miley eds., 1996); Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

21. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & THE FAM. 948, 949-50 (2000). Under this framework, "common couple violence" arises in the context of a specific argument that leads one or both partners to lash out at the other. *Id.* at 949. "Intimate terrorism" is characterized by one partner's efforts to exert control over the other. *Id.* This type of violence tends "to escalate over time, is less likely to be mutual, and is more likely to involve serious injury." *Id.* "Violent resistance" refers to violence committed in self defense. *Id.* "Mutual violent control" involves rare situations "in which both husband and wife are controlling and violent." *Id.* at 950. This account is not inconsistent with the framework advanced by Dempsey, who, drawing on sociological literature, defines domestic violence in terms of three elements: violence, domesticity and structural inequality. *See* Michelle M. Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 307 (2006).

22. According to Johnson and Ferraro's research, intimate terrorism is almost entirely a male pattern of behavior. Johnson & Ferraro, *supra* note 21, at 952.

23. *See infra* Part IV.B (discussing studies examining victims' experience of abuse).

least not likely to commit, violence.[24] Constitutional sex discrimination jurisprudence has helped dismantle stereotypes by recognizing the equality rights of those that defy stereotypes, suggesting that we take the "exceptional" cases seriously as well.[25]

Critics from a different perspective argue that men, rather than women, are the invisible victims of intimate partner violence and that their needs are underserved by our current legal and social services responses.[26] Of course, some men are the victims of violence. Some are abused in same-sex relationships.[27] Others may in fact be abused by women.[28] Nevertheless, the data confirm that women, not

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24. *See, e.g.*, Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 196-98 (1991) (criticizing stereotypes of battered women as excluding African-American women); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1070-71 (1995) (arguing that stereotypes of battered women who kill their abusive partners as passive, emotional, and dependent create problems for battered African-American women who are not seen as fitting that stereotype); Rivera, *supra* note 19, at 240-42 (challenging stereotypes of battered women as inconsistent with stereotypes of Latinas); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 214-15 (1986) (criticizing "battered woman syndrome" as reinforcing stereotypes of women as passive); *see also* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 334 (1995) (discussing stereotype of women as passive). For discussions of the statistics reflecting women's involvement in crime and a review of the theories explaining women's violence, see NAT'L CRIMINAL JUSTICE REFERENCE SERV., U.S. DEP'T OF JUSTICE, WOMEN & GIRLS IN THE CRIMINAL JUSTICE SYSTEM (2006), www.ncjrs.gov/spotlight/wgcjs/summary.html (summarizing statistics); Cheryl Hanna, *Ganging Up on Girls: Young Women and Their Emerging Violence*, 41 ARIZ. L. REV. 93, 104-21 (1999); Monica Pa, *Towards a Feminist Theory of Violence*, 9 U. CHI. L. SCH. ROUNDTABLE 45, 48-62 (2002).

25. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (noting that "[sex] classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (holding that an all-female nursing school violated the equal protection clause by perpetuating stereotyped notions about women's appropriate roles and abilities); Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (criticizing "gross, stereotyped distinctions between the sexes" that limit women's choices).

26. *See, e.g.*, Booth v. Hvass, 302 F.3d 849, 854 (8th Cir. 2002) (dismissing for lack of standing challenge to Minnesota statutes authorizing funds for domestic violence victims as discriminating against men); Blumhorst v. Jewish Family Servs., 24 Cal. Rptr. 3d 474, 482 (Cal. Ct. App. 2005), *review denied,* No. S132188, 2005 Cal. LEXIS 4617 (Cal. Apr. 27, 2005) (dismissing allegation that domestic violence shelter discriminated against alleged battered husband for lack of standing); Hagemann v. Stanek, No. A03-2045, 2004 Minn. App. LEXIS 789 (Minn. Ct. App. July 13, 2004) (same). For a general discussion of claims by fathers' rights groups as they relate to domestic violence law reform and advocacy, see Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1697-1702, 1709-10 (2004).

27. *See supra* note 20 for various studies on domestic violence among same-sex couples.

28. Although some women no doubt are violent, studies indicate that most instances in which a woman is violent in an intimate relationship are cases that do not involve the patterns of coercion and control generally associated with what we call "domestic" or "intimate partner" violence. Johnson & Ferraro, *supra* note 21, at 949-58. Most cases involving violence by women in cases involving that type of coercion and control were cases in which

men, overwhelmingly are the victims of domestic and sexual violence.[29] To account for both the overwhelming majority of cases, as well as the exceptions, a conception of domestic and sexual violence that recognizes the social context that renders it deeply gendered in a general sense, but allows room for individual cases that may fall outside that model, more accurately describes the problem.

B. Addressing Discrimination Through a Civil Rights Approach

The theoretical link between domestic and sexual violence and sex discrimination has expanded civil accountability in a number of contexts.[30] Building on arguments that led to the recognition that sexual harassment in the workplace is a form of sex discrimination,[31] advocates sought to establish domestic and sexual violence as a civil rights violation. After four years of hearings to document the widespread harms of domestic and sexual violence, its impact on the national economy, and states' inability to address the problem without federal assistance, Congress enacted the Violence Against Women Act in 1994.[32] One of that comprehensive law's most significant and controversial provisions was a civil rights remedy that declared that gender-motivated violence violates victims' civil rights. This civil rights remedy entitled a victim to recover compensatory and punitive damages from the perpetrator, to obtain declaratory and injunctive relief, and to recover attorney's fees.[33] The provision was seen as incorporating the antidiscrimination theory urged by many feminists. For example, MacKinnon argued that the civil rights remedy would reflect "ground-up" theory transformed into practice so that a woman's claim of sexual violence would authoritatively be recognized as "inequality on the basis of sex" and a violation of women's human rights.[34]

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the woman used violence in self-defense. *Id.* Thus, while I acknowledge the theoretical possibility that women are violent, the data shows that the type of violence used is different in kind from that associated with the common term "domestic abuse."

29. *See* Johnson & Ferraro, *supra* note 21, at 952.

30. *See infra* Part III.

31. For examples of these arguments, see LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

32. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

33. The 1994 VAWA was comprehensive legislation that contained dozens of provisions designed to enhance legal remedies, improve law enforcement response, enhance victim services, and reduce violence against women. *Id.* VAWA since has been twice reauthorized and enhanced with provisions that would better serve victim needs. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491. The civil rights remedy on which this Article focuses was codified at 42 U.S.C. § 13981 (2000) and was subsequently declared unconstitutional by the Supreme Court. United States v. Morrison, 529 U.S. 598, 601 (2000).

34. MacKinnon, *supra* note 12, at 691.

The civil rights remedy's history has been well documented.[35] During the four-year period preceding its enactment, supporters and opponents debated the appropriate scope of the law, addressing concerns that federal courts should not concern themselves with family law disputes.[36] The remedy's scope has been described as the most controversial aspect of the 1994 VAWA.[37] Through hearings and congressional negotiations, the legislative proposals carefully were amended to exclude traditional family law issues and to be limited to those matters that could be categorized as "civil rights" violations and therefore deemed appropriate for federal court adjudication.[38]

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35. For accounts of VAWA's legislative history, see Sally Goldfarb, Remarks at a Panel Discussion Sponsored by the Association of the Bar of the City of New York (Sept. 14, 1995), *in* 4 J.L. & POL'Y 391, 392-95 (1996); 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, 1-2 (1996).

36. Goldfarb, *supra* note 35, at 393.

37. *See* Goldfarb, *supra* note 11, at 7; *accord* Nourse, *supra* note 35, at 5 (describing the civil rights remedy as "unprecedented" and recounting its attendant controversy). Although much of the controversy derived from objections to expanded federal civil rights legislation and the equation of domestic and sexual violence with discriminatory harms suitable for adjudication in federal court, other critiques were grounded in concerns about the law's efficacy for all women. For example, some argued that it would not be used by women of color, who would be less inclined to commence engagement with the civil or criminal justice system for a variety of reasons. *See* Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 497-501 (1996) (arguing that limited access to the legal system, the diminished expectation among women of color of receiving justice due to historically discriminatory treatment, minimal likelihood of obtaining satisfactory relief due to defendants' limited assets, and lack of attorneys would limit the civil rights remedy's effectiveness for women of color); *see also* Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored,* 11 LAW & INEQ. 1, 106 (1992) (cautioning that VAWA's civil rights remedy "risks creation of images that essentialize gender categories and fail to give weight to differences of race, class, sexual orientation and different preference for sexual pleasures"); David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163, 232 (1993) (arguing that VAWA's civil rights remedy would "disproportionately burden men of color, while providing an inadequate remedy for women of color"); Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535, 539-49 (1993) (critiquing VAWA civil rights remedy's inability to address claims of plaintiffs who fall into more than one category that the law protects from discrimination, such as persons who are both females and persons of color).

38. For example, early drafts of the federal civil rights remedy would have treated all acts of " 'rape, sexual assault, or abusive sexual contact' " as satisfying the statutory standard. Nourse, *supra* note 35, at 7 (quoting S. 2754, 101st Cong. § 301(c)). The language Congress eventually adopted, in combination with statements that constituted part of the Act's legislative history, effectively required plaintiffs to submit proof of circumstantial evidence beyond evidence of an act or acts of domestic or sexual violence alone. *See id*. at 14-15 (describing statutory provision); Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 129-30, 142-48 (1999) (discussing the gender-motivation element and the realities of the application of facts to that element). Some have criticized the statutory formulation for rejecting that definitional equation. *See, e.g.*, Brenneke, *supra* note 37, at 94-97 (urging statutory designation of domestic violence as per se statutory violation); Birgit Schmidt am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Femi-*

Thus, the law as enacted required that plaintiffs establish that an act of violence was a "crime of violence" as defined by federal law[39] and that it was "motivated by gender" under a statutory definition that required that the act be committed "because of or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[40] Accordingly, acts that were, as cosponsor Senator Biden stated, "ordinary" acts of domestic violence would not come within the statute's reach.[41]

The controversy that surrounded the law continued once it was in effect, but on a somewhat different course. Rather than focusing on the meaning and interpretation of the statutory terms, the law became mired in constitutional controversy and ultimately was struck down as unconstitutional in *United States v. Morrison*.[42] Once joined, disputes over the law's constitutionality and the appropriate reach of federal legislative power took center stage in discourse about the remedy. The *Morrison* decision, which announced the Court's current view of the scope of federal power with respect to domestic and sex-

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nist Critique, 6 HASTINGS WOMEN'S L.J. 1, 9-26 (1995) (critiquing the narrow definition of a "crime of violence" and the gender-motivation requirement); Frazee, *supra* note 37, at 242-43 (endorsing statutory enumeration of violations, including rape, sexual assault, and domestic violence as per se gender motivated); Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247, 249 (1997) (arguing that Congress should amend VAWA's civil rights provision to create "a rebuttable presumption of gender animus in all rape cases"); Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 261-69 (2003) (assessing strengths and weaknesses of the discrimination model); Wendy Rae Willis, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2216-22 (1992) (advocating the rebuttable presumption that all sexual assaults are gender-motivated). Nevertheless, the resulting statutory language did not preclude courts from presuming acts of rape or domestic violence to be discriminatory without any further proof, and some federal and state courts did just that. *See* Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 273-83 (2001) (discussing the concept of gender bias in domestic violence and sexual assault cases).

39. Nourse, *supra* note 35, at 14-15, 28, 36.

40. 42 U.S.C. § 13981(b)-(c) (2000).

41. *See* S. REP. NO. 102-197, at 69 (1991) (statement of Senator Biden).

42. 529 U.S. 598 (2000). In many ways, the civil rights remedy's enactment one year before the Supreme Court's historic decision in *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking the Gun-Free School Zones Act as beyond Congress' Commerce Clause authority) determined the law's history. Civil rights remedy litigation became mired in the debates over the scope of federal power that came to define the Rehnquist Court. *See, e.g.*, Ann Althouse*, Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 134-42 (2001) (describing resurgence of federalism theories); Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 146-47 (2001) (same). For discussion of the Court's shifting federalism jurisprudence, see Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 793 (1996); Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219, 1221-25 (1997); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2186-95 (1998).

ual violence, has been widely critiqued.[43] Nevertheless, because the sole issue before the Court was Congress' authority to enact the law, the decision neither resolved nor addressed a large category of concerns that led to the law's enactment: the importance of framing the harm that flows from domestic and sexual violence as a civil rights violation and of ensuring victims a remedy for the resulting harms. Those arguments accordingly bear revisiting and re-evaluation.

The civil rights remedy's goals can be thought of in two categories: practical and symbolic.[44] As a practical matter, the civil rights remedy was designed to fill gaps in existing laws that prevented recovery and to enable victims to obtain financial and other forms of recovery for the harms they suffered as a result of abuse. Although then-existing civil rights laws provided a cause of action against domestic and sexual violence when committed by state actors,[45] committed by two or more individuals,[46] or committed at work,[47] no federal law provided a civil cause of action when the act was committed by a private individual at home or in other non-employment-related locations. Cramped interpretations of those existing statutes further limited recovery.[48] Although numerous states provided civil remedies as part of their bias crime statutes[49] and tort remedies theoretically could provide a means of recovery, many states' interspousal immunity laws barred civil suits between married partners; some limitations

43. For commentary on the civil rights remedy and the impact of the *Morrison* decision, see SCHNEIDER, *supra* note 11, at 181-82 (2000); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 111-15 (2002); Goldfarb, *supra* note 38, at 258; Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 109-24 (2002) [hereinafter Goldfarb, *Use and Abuse*]; Sally F. Goldfarb, *"No Civilized System of Justice": The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 543-45 (2000) [hereinafter Goldfarb, *No Civilized System*]; Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 135-38 (2000); Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 135-37 (2000); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 473-509 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 626-29 (2001).

44. Some questioned the law's utility and reach based on concerns that crossed these categories. For example, some argued that it would not be used by women of color who would be less inclined to commence engagement with the civil or criminal justice system for a variety of reasons. *See, e.g.*, Rivera, *supra* note 37, at 497-501 (arguing that limited access to the legal system, diminished expectation of receiving justice due to historic discriminatory treatment, minimal likelihood of obtaining satisfactory relief due to defendants' limited assets, and lack of attorneys would particularly limit the civil rights remedy's effectiveness for women of color).

45. 42 U.S.C. § 1983 (2000).

46. 42 U.S.C. § 1985(3) (2000).

47. Civil Rights Act of 1964, tit. 7, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

48. *See infra* Part III.A.

49. For discussion of the case law under those state statutes, see Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 165-71 (2005).

applied to suits between unmarried intimate partners as well.[50] In addition to those formal barriers to recovery, informal biases in the civil justice system operated to preclude suits.[51] Even though some progress has been made since the law was introduced in 1990, many of these gaps and biases remain.

In addition to filling gaps in then-existing laws,[52] the civil rights remedy offered practical advantages to traditional tort remedies—such as longer statutes of limitations than what would be provided under other civil recovery theories[53] and access to a federal forum, in which judges presumably were more accustomed to adjudicating discrimination claims.[54] The provision brought claims under the civil rights remedy into the category of claims for which successful plaintiffs could recover attorney's fees, reflecting the goal of facilitating access to counsel for victims who historically have faced formidable barriers in accessing legal representation.[55]

Other of the law's goals can be seen as symbolic. Supporters touted the need for a national standard as a way of recognizing the widespread nature of the problem.[56] As one commentator recently opined, the law "had enormous promise to further equal protection for women."[57] Scholars asserted that it would show how gender-motivated violence violated our " 'commonly shared ideal of equality.' "[58] They also argued that, framed as a civil rights violation, these claims held greater potential to counteract damaging, stereotypical beliefs about women's role in the violence[59] and to change state actors' attitudes and responses to the problem.[60] This argument is con-

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50. *See* S. REP. NO. 103-138, at 42, 47, 55 (1993) (summarizing laws); *see also* Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979) (wife barred from suing husband for personal injury); *In re* Marriage of Lacey, 659 S.W.2d 313, 314 (Mo. Ct. App. 1983) (same).

51. For legislative history recounting these biases, see H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.); S. REP. NO. 103-138, at 44-46, 49 (1993); see also Nourse, *supra* note 35, at 10.

52. *See* MacKinnon, *supra* note 43, at 137.

53. *See* Goldfarb, *No Civilized System*, *supra* note 43, at 539.

54. *Id.* at 507.

55. 42 U.S.C. § 1988(b) (2000) (including the VAWA civil rights remedy, 42 U.S.C. § 13981, as one of the statutes giving rise to recovery of attorney's fees for successful plaintiffs).

56. *See, e.g.*, Goldfarb, *supra* note 11, at 12 (noting that crime against women is widespread); Goldfarb, *Use and Abuse*, *supra* note 43, at 108 (stating that the remedy helped secure women's rights "in the face of widespread discrimination by the states"); Goldfarb, *supra* note 38, at 255 ("VAWA's civil rights remedy emphasized that gender-motivated violence is a systemic, political problem and therefore requires a systemic, political solution.").

57. Kristen Lombardi, *Rape: Now a Matter of Civil Rights, a Crime Against Gender Is a Crime Against Freedom,* VILLAGE VOICE, Jan. 17, 2006, *available at* http://www.villagevoice.com/news/0603,lombardi,71765,5.html (quoting Diane Rosenfeld).

58. Goldfarb, *Use and Abuse*, *supra* note 43, at 82 (quoting S. REP. NO. 103-138, at 38 (1993)); *accord* MacKinnon, *supra* note 12, at 691.

59. Goldfarb, *No Civilized System*, *supra* note 43, at 509.

60. Goldfarb, *Use and Abuse*, *supra* note 43, at 81.

sistent with the norm-setting value generally associated with civil rights claims.[61]

By framing domestic and sexual violence as a form of sex discrimination, the law sought to remedy the various ways sex discrimination manifests in the context of the abuse. By holding individuals accountable for their actions it sought to address sex discrimination by individual perpetrators. By providing an alternative to traditional criminal justice proceedings and a remedy that the victim—rather than a prosecutor—would control, it sought to redress the effects of institutional sex discrimination that tainted victims' experience with law enforcement and criminal prosecutions. By renaming and reframing the problem, the remedy was intended to produce more comprehensive and transformative relief.

III. SEX-BASED CIVIL RIGHTS REMEDIES AND PRACTICAL AND TRANSFORMATIVE CHANGE.

A. Practical Solutions and Theories of Recovery

This Section tests the limits of the claim that existing civil rights laws leave domestic and sexual violence victims without adequate redress. A careful review of the caselaw demonstrates that traditional civil rights statutes have provided some measure of redress for victims bringing claims against institutions but that those laws generally fail to hold individuals accountable for their abuse. However, particularly in the case of institutional accountability, cramped interpretations of available laws limit recovery and render those doctrines worthy of re-examination and reform. The Section also shows that existing remedies holding individuals accountable for gender-motivated violence as a civil rights violation are rarely used as a tool for redress. In Part IV, I discuss what that caselaw, or the lack thereof, indicates about the utility of civil rights claims as a source of redress for victims of gender-motivated violence and abuse.

1. Title VII and Employment Discrimination Laws

Antidiscrimination laws have produced significant inroads in holding institutions liable for domestic and sexual violence. Most notably, arguments that sexual harassment is a form of sex discrimina-

61. This view of civil rights claims is consistent with the ways social movement theorists have categorized the utility of the law in promoting social change. *See* Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 L. & SOC'Y REV. 323, 324 (2003) (categorizing the role of law in social change as instrumental (using law to procure "concrete resources such as jobs, health care, and quality education"); political (advancing empowerment, unity, and political mobilization of marginalized people); and cultural (emphasizing the need to transform society's assumptions about marginalized people)); *see also infra* Part III.B.

tion have had tremendous impact on law and policy.[62] Accordingly, rape or sexual assault in the workplace or at school may violate the victim's equality rights.[63] Sexual harassment laws cover sexual violence regardless of whether the act was committed by a supervisor or agent[64] or by a coworker or a nonemployee such as a customer, provided that the harassment involved the workplace and that the employer knew or should have known of the abuse and failed to take prompt and appropriate remedial action.[65] Because sexual harassment laws apply to all employees, regardless of the relationship between the perpetrator and the victim, these laws apply to sexual violence within intimate relationships as well. As a result, employers may be liable for sexual harassment when an intimate partner abuses his partner at work.[66]

By defining unwanted sexual behavior and other conduct that reinscribes sexual stereotypes as sex discrimination, sexual harass-

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62. For discussions of the history of sexual harassment law, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 698-705 (1997); Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 1-42 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Abrams, *supra* note 17, at 1173-94; Vicki Schultz; *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692-1710 (1998).

63. *See, e.g.*, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (upholding liability for sexual harassment when supervisor sexually assaulted employee). This is true both in the workplace and in schools. *See* Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57, 62 (D. Me. 1999) (school district may be liable for sexual assault in school).

64. *See, e.g.*, Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (single incident of sexual assault would constitute impermissible sexual harassment); Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (stating that "every rape committed in the employment setting is also discrimination based on the employee's sex"); Jones v. U.S. Gypsum, 81 Fair Empl. Prac. Cas. (BNA) 1695 (N.D. Iowa 2000) (upholding sexual harassment claim based on assault in genital area and citing cases).

65. *See, e.g.*, Little v. Windermere Relocation, Inc., 301 F.3d 958, 964, 968 (9th Cir. 2002) (employer may be liable for harassment by failing to act after one of its employees reported being raped by a client); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012, 114-16 (8th Cir. 1988) (sexual harassment laws applied where female employees were subjected to unwanted touching and offensive comments by coworkers); Menchaca v. Rose Records, Inc., 67 Fair Emp. Prac. Cas. (BNA) 1334 (N.D. Ill. 1995) (employer is not shielded from liability where the harasser is a customer "if the employer knew or should have known of the harassment"); Hernandez v. Miranda-Velez, No. 92-2701, 1994 WL 394855, at *6 (D.P.R. July 20, 1994) (acknowledging potential employer liability for sexual harassment by client); Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at *6 (D. Kan. Aug. 24, 1994) (employer may be responsible for alleged harassment by an independent contractor); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1028 (D. Nev. 1992) (hotel employer could be held liable for sexual harassment of employees by customer)*; see also* 29 C.F.R. § 1604.11(d)-(e) (2006) (EEOC guidelines confirming employers' liability for sexual harassment by coworkers and customers).

66. *See, e.g.*, Fuller v. City of Oakland, 47 F.3d 1522, 1525-27, 1529 (9th Cir. 1995) (reversing trial judge's decision and holding city liable for failing to take steps to stop a police officer from harassing another officer after she ended their relationship); *see also* Excel Corp. v. Bosley, 165 F.3d 635, 637, 641 (8th Cir. 1999) (affirming an employee's sexual harassment claim against an employer where employer failed to take action after receiving complaints by employee that her ex-husband, a coworker, was harassing her at work).

ment law both has expanded the range of practical remedies for those subjected to conduct that includes domestic and sexual violence and has gone some distance towards transforming public perceptions of the problem. Although it correctly has been criticized as falling short of the goal of eliminating sexual harassment in the workplace, it has made significant inroads in changing the limits of acceptable conduct at work.[67]

In contrast to the impact antidiscrimination laws have had in holding institutions liable, laws such as Title VII have had limited effect in holding individuals liable for domestic or sexual violence at work. Most courts addressing the question have rejected individual liability for sexual harassment under Title VII, based on interpretations of the statutory language defining "employer" as entities with fifteen or more employees (under Title VII) and those with twenty or more employees (under the Age Discrimination in Employment Act) as indicating congressional intent to preclude individual liability.[68] Although a few courts have ruled that the federal antidiscrimination laws contemplate individual liability,[69] Title VII currently stands as a limited remedy for those seeking to hold individuals, as opposed to institutions, liable for domestic and sexual violence when it affects a survivors' employment.[70]

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67. See *infra* notes 116-31 and accompanying text for a more detailed description of sexual harassment law's impact on workplace policy and behaviors.

68. *See, e.g.*, Wathen v. General Elec. Co., 115 F.3d 400, 406 (6th Cir. 1997) (Title VII precludes individual liability); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996) (same); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995) (same); Williams v. Banning, 72 F.3d 552, 554-55 (7th Cir. 1995) (same); *see also* Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995) (holding that individuals cannot be sued in their individual capacities under Title VII); Lenhardt v. Basic Inst. of Tech. Inc., 55 F.3d 377, 381 (8th Cir. 1995) (same); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (same); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994) (same); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (same).

69. *See* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (upholding individual liability when a supervisor "exercises significant control over the plaintiff's hiring, firing or conditions of employment"), *vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990); Dreisbach v. Cummins Diesel Engines, Inc., 848 F. Supp. 593, 597 (E.D. Pa. 1994) (supervisor can be liable under Title VII as an agent of the employer); *see also* Iacampo v. Hasbro, Inc., 929 F. Supp. 562, 572 (D.R.I. 1996) (supervisors may be individually liable); Douglas v. Coca-Cola Bottling Co. of N. England, 855 F. Supp. 518, 520 (D.N.H. 1994) (finding individual liability for agents of an employer); Weeks v. Maine, 871 F. Supp. 515, 517 (D. Me. 1994) (supervisors may be individually liable). Notably, these last cases are within the First Circuit Court of Appeals, which has declined to rule on the issue. *See* Serapion v. Martinez, 119 F.3d 982, 992-93 (1st Cir. 1997).

70. Victims of domestic or sexual violence may fare better under state antidiscrimination laws. *See generally* Shannon Clark Kief, Annotation, *Individual Liability of Supervisors, Managers, Officers or Co-Employees for Discriminatory Actions Under State Civil Rights Act*, 83 A.L.R. 5th 1 (2000) (discussing cases).

2. 42 U.S.C. § 1983

Section 1 of the Civil Rights Act of 1871 (§ 1983)[71] can provide relief for domestic and sexual violence victims under certain circumstances, such as when sexual assaults are committed by state actors or committed in public institutions such as prisons or schools. The prevalence of abuse in those settings renders this remedy tragically important.[72] Section 1983 also has been the basis for claims holding public institutions accountable for inadequately responding to abuse. Despite the theoretical possibility of recovery, judicial interpretation has rendered relief extremely limited, if not unavailable outright. Claims by victims of sexual assault against perpetrators who are state actors generally rest on substantive due process or cruel and inhuman punishment arguments rather than on claims of sex discrimination. Judicial reliance on those constitutional foundations has led to decisions distinguishing sexual assaults that are deemed sufficiently severe to violate the Fourteenth Amendment's liberty interest in bodily integrity or the Eighth Amendment's prohibition of cruel and unusual punishment from those that do not. Accordingly, perpetrators have been held liable in cases involving fairly egregious assaults—for example, when police officers raped women during traffic

71. 42 U.S.C. § 1983 (2007). That statute provides a remedy for those whose federal rights have been violated by individuals acting under color of state law. *Id.*

72. A recent government study of sexual violence in prisons reported 8210 allegations of sexual violence in 2004. ALLEN J. BECK & TIMOTHY A. HUGHES, U.S. DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 1 tbl.1 (2005), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf. Other studies find higher rates of abuse. *See* CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 61 (1974) (predicting that 10 million of the 46 million Americans who are arrested at some point in their lives will be raped in prison); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 217 (2002) (conducting a study of three midwestern prisons and finding that the inmates in "Facility 1" reported that 27% had been coerced in the state system and 19% in their present facility, while the inmates in "Facility 2" and "Facility 3" reported that 8 to 9% had been coerced in the state system and 6 to 8 % in their present facility). Studies show that the number of women in state and federal prisons increased over 500% between 1980 and the end of 1998. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS 2 (1999), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO/GGD-00-22. Other reports conclude that these statistics likely underestimate the problem because rape in prison is chronically underreported. *See* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS, at pt. 7 (2002), *available at* http://www.hrw.org/reports/2001/prison/report7.html#_1_44. Sexual assault also is commonly committed at school, often by school officials. *See* AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 22-23 figs.11 & 12 (2001) *available at* http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf (reporting that 20% of secondary school boys and 29% of secondary school girls experienced unwanted sexual touching, grabbing, or pinching). Other studies similarly report high level of unwanted sexual violence in schools. *See* NAN STEIN, INCIDENCE AND IMPLICATIONS OF SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN K–12 SCHOOLS (1999), *available at* http://www.sexcriminals.com/library/doc-1082-1.pdf (discussing various surveys).

stops,[73] when a supervisor in a work program for inmates repeatedly subjected a woman to unwanted sexual acts,[74] when a prison guard raped an inmate,[75] or when a teacher sexually assaulted a student.[76] This approach leaves others who may have suffered harm without redress.[77]

Section 1983 also has been the basis for municipal liability claims arising from public institutions' inadequate response to cases of domestic or sexual violence. In cases involving sexual abuse in public facilities, the doctrinally constrained approach to municipal liability often leaves victims without a remedy.[78] Although some institutions have been held liable for their failed response to abuse,[79] judicial def-

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73. *See, e.g.*, Rogers v. City of Little Rock, 152 F.3d 790, 793-94, 797 (8th Cir. 1998) (officer violated substantive due process when he stopped driver who had a broken tail light, called for a tow truck, then cancelled the tow, followed her home, went into her house, and raped her); Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997) (officer violated victim's due process right to bodily integrity where after giving the victim a warning for an alleged traffic defense, the officer raped her before he drove her home); Haberthur v. City of Raymore, 119 F.3d 720, 724 (8th Cir. 1997) (sexual assault by police officer violated plaintiff's substantive due process rights).

74. Smith v. Cochran, 339 F.3d 1205, 1213 (10th Cir. 2003) (finding that sexual abuse of a prisoner by a corrections officer implicates the Eighth Amendment).

75. Schwenk v. Hartford, 204 F.3d 1187, 1192, 1197 (9th Cir. 2000) (holding that rape of transgendered prisoner violated the Eighth Amendment's prohibition of cruel and inhuman punishment).

76. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 (5th Cir. 1994) (student sexually assaulted by high school teacher).

77. *See, e.g.*, Hawkins v. Holloway, 316 F.3d 777, 784-85 (8th Cir. 2003) (sheriff liable for fondling a female employee's breast but not for touching a male employee's "sensitive" areas); Berryhill v. Schriro, 137 F.3d 1073, 1074-76 (8th Cir. 1998) (civilian maintenance workers' sexual touching of male inmate deemed inappropriate "horse play" that did not give rise to a federal cause of action); Boddie v. Schnieder, 105 F.3d 857, 859 (2d Cir. 1997) (affirming lower court's decision that male inmate's vague and minor Eighth Amendment claims for sexual abuse did not raise a cognizable cause of action). Notably, a number of these cases were brought on behalf of male inmates. These cases may well reflect judicial reluctance to recognize the severity of harm resulting from sexual assaults of men.

78. *See* Will A. Smith, *Civil Liability for Sexual Assault in Prison: A Challenge to the "Deliberate Indifference" Standard*, 34 CUMB. L. REV. 289, 305 (2004) (stating that "prisoner assault often goes unnoticed outside prison walls, leaving the victim without remedy, notwithstanding established legal protections").

79. In cases against prisons, for example, prison authorities have been held liable for their failure to address rampant sexual abuse of female prisoners when plaintiffs could establish that the authorities acted with deliberate indifference. *See, e.g.*, Riley v. Olk-Long, 282 F.3d 592, 595 (8th Cir. 2002) (finding that inmate was sexually assaulted and that agent of prison knew of perpetrator's past history of sexual assaults); Daskalea v. District of Columbia, 227 F.3d 433, 441 (D.C. Cir. 2000); Ware v. Jackson County, 150 F.3d 873, 883 (8th Cir. 1998) (finding municipality was deliberately indifferent when prison officials failed adequately to discipline corrections officer for five-month span of sexual misconduct). For a more complete discussion of the history of claims against the D.C. Department of Corrections for its failure to address rampant sexual abuse, see Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 914-15 (D.C. Cir. 1996).

erence to law enforcement dooms claims where courts can point to some minimal disciplinary response.[80]

Municipal liability under § 1983 played a historically important role in improving police responses to domestic violence.[81] Law enforcement policies changed substantially after battered women or their surviving families held police departments accountable for responses such as ignoring calls asking for police intervention or for assuring battered women that the police had the batterer in custody, and the batterer subsequently harmed the woman or her family.[82] These claims have been based on equal protection, substantive due process, and procedural due process theories. Although these claims met with some success when initially brought, they increasingly have become difficult to sustain. For example, facially neutral policies treating domestic violence calls differently than other similar calls, have been found to have a disproportionate impact on women[83] and to violate equal protection when implemented with discriminatory intent.[84] But the stiff burden of establishing discriminatory intent has made recovery under that theory increasingly difficult.[85]

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80. *See* Jones v. Wellham, 104 F.3d 620, 626-27 (4th Cir. 1997) (finding no municipal liability in case alleging sexual assault by officer where police department allowed the officer—who, in previous incident, allegedly had used his badge to gain entry to a citizen's apartment and sexually assault her—to return to street duty); Rogers v. Little Rock, 152 F.3d 790, 800 (8th Cir. 1998) (finding no municipal liability in claim of sexual assault by officer when department temporarily suspended him following previous claim of sexual assault against him).

81. SCHNEIDER, *supra* note 11, at 44; Sack, *supra* note 26, at 1667-69.

82. SCHNEIDER, *supra* note 11, at 44; Sack, *supra* note 26, at 1667-69.

83. For example, a policy that treated domestic violence calls differently than other similar calls may have a disproportionate impact on women given that the vast majority of domestic violence claims concern violence committed by men against women. *See supra* note 18.

84. *See* Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990) (recounting police officer's statement that he " 'did not blame the plaintiff's husband for hitting her, because of the way she was "carrying on" ' "); Watson v. Kansas City, 857 F.2d 690, 696 (10th Cir. 1988) (holding that evidence of "a policy or custom of affording less protection to victims of domestic violence than victims of non-domestic attacks" could reflect discriminatory motive); Smith v. City of Elyria, 857 F. Supp. 1203, 1208 (N.D. Ohio 1994) (allowing equal protection claim to proceed based on evidence, for example, of a written policy urging officers not to arrest a man for domestic violence in *his* home because female complainants are often irrational and because the loss of the arrested man's wages is detrimental to the children); Thurman v. City of Torrington, 595 F. Supp. 1521, 1528-29 (D. Conn. 1984) (holding police policy urging reconciliation rather than arrest reflects outdated stereotypes and denies equal protection of the laws). The Ninth Circuit Court of Appeals has found similar policies to violate even rational basis review. *See* Navarro v. Block, 72 F.3d 712, 717 (9th Cir. 1995).

85. *See, e.g.*, Ricketts v. City of Columbia, 36 F.3d 775, 781-82 (8th Cir. 1994) (finding policy of fewer arrests in domestic abuse cases than nondomestic cases could be rationally explained by "inherent differences" between those cases and rejecting circumstantial evidence of officers' statements about not arresting batterers as "unreliable hearsay" and insufficient to establish discriminatory animus toward women); Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994) (rejecting claim due to lack of evidence beyond statistical evidence of low arrest rates in domestic violence cases); McKee v. City of Rockwall, 877 F.2d 409,

Substantive due process arguments have provided relief in cases in which survivors have established that police policies affirmatively put the victim in a more dangerous position that subsequently led to her or her family being harmed by an abusive partner.[86] But courts have construed this theory narrowly as well, even when presented with facts reflecting tragic law enforcement neglect.[87] Turning to the third available theory, the Supreme Court recently rejected a procedural due process argument that a police department's failure to enforce a protective order denied without due process the property interest that a domestic violence victim held in the enforcement of the order.[88] Together, these cases reflect both the importance of institutional accountability and the difficulty of establishing a claim under current frameworks.

3. 42 U.S.C. § 1985(3)

The Reconstruction-Era statute, 42 U.S.C. § 1985(3), prohibits conspiracies to deprive any person or "class of persons" equal protection of the laws.[89] As a practical matter, this will not impact the vast majority of domestic and sexual violence claims, which overwhelmingly are committed by lone private individuals.[90] After the U.S. Supreme Court's decisions in *Bray v. Alexandria Women's Health*

416 (5th Cir. 1989) (finding insufficient evidence of a police department's policy of treating domestic violence victims differently than other similarly situated victims).

86. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 200-01 (1989) (recognizing that municipalities may be liable under state-created danger theory); *see also* Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (finding that police may be liable if they took affirmative actions that increased the danger of domestic violence beyond what it would be absent state action); Smith v. City of Elyria, 857 F. Supp. 1203, 1210 (N.D. Ohio 1994) (concluding that police increased danger to battered woman when they told her they could not interfere in domestic dispute notwithstanding history of violence and abuse and when her former husband subsequently killed her); Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney*?*, 65 N.Y.U. L. REV. 1280, 1283 (1990) (arguing that a state's failure to enforce protective orders gives rise to a valid cause of action); *cf.* Kennedy v. City of Ridgefield, 440 F.3d 1091, 1093 (9th Cir. 2006) (Tallman, J., dissenting) (disagreeing with the court's decision to uphold the state-created danger theory when a police officer assured the mother of a sexually assaulted girl of their safety and then notified the assailant, who subsequently shot the mother and her husband).

87. Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (finding no due process violation when police officer, in response to a domestic disturbance in which plaintiff claimed her former boyfriend, who had just been released from prison, threatened to kill plaintiff and her children, assured plaintiff that her former boyfriend would by locked up overnight, but instead he was released that night, after which he returned to plaintiff's home and set it on fire, causing the deaths of plaintiff's children).

88. Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

89. 42 U.S.C. § 1985(3) (2000).

90. *Compare, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2003 STATISTICAL TABLES tbl.38 (reporting 169,340 rapes or sexual assaults by single-offenders), *with id.* tbl.49 (reporting 29,500 rapes or sexual assaults by multiple-offenders), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus03.pdf.

Clinic[91] and *Griffin v. Breckenridge*,[92] claimants invoking § 1985(3) must establish that the defendants conspired to deprive a person or class of persons of the equal protection of the laws and that the conspiracy was fueled by some " 'class-based, invidiously discriminatory animus.' "[93] Although the Court in *Bray* concluded that antiabortion protests did not signal class- (that is, gender-) based animus, it did not preclude § 1985(3)'s applicability to attacks directed at women in other circumstances.[94] Subsequent lower court decisions have held that conspiracies directed at a class of women could be actionable under § 1985(3).[95] Other decisions have upheld claims based on allegations of circumstantial evidence, such as the use of gendered epithets.[96] Thus, although theoretically available, § 1985(3) remains of limited use for victims of domestic and sexual violence, whether as a matter of equality or other theories of relief.

4. Bias-Motivated Violence Laws

Antidiscrimination statutes that authorize civil redress for domestic and sexual violence as a form of sex discrimination most explicitly link the violence with historic discrimination. These laws, which I will loosely refer to as "civil rights remedies," can be thought of as part of the category of "bias-motivated violence" laws that have been

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91. 506 U.S. 263 (1993).

92. 403 U.S. 88 (1971).

93. *Bray*, 506 U.S. at 268 (quoting *Griffin*, 403 U.S. at 102).

94. In *Bray*, the Court rejected plaintiffs' claims that antiabortion protesters targeted women seeking abortions because they were women. The Court reasoned that opposition to voluntary abortion cannot be considered "such an irrational surrogate for opposition to (or paternalism towards) women." *Bray*, 507 U.S. at 270. Instead, the Court reasoned that "there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward . . . women as a class." *Id.* The Court contrasted the record before it with other "assertedly benign (though objectively invidious), discrimination" against women that "focuses upon women *by reason of their sex*," for example, "the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law." *Id.*

95. *See, e.g.*, Lyes v. City of Riviera Beach, 166 F.3d 1332, 1338 (11th Cir. 1999) (recognizing women are a protected class under 42 U.S.C. § 1985(3) in claim alleging class-based conspiracy in employment policies failing to promote women and collecting cases).

96. *See, e.g.*, Libertad v. Welch, 53 F.3d 428, 449 (1st Cir. 1995) (evidence that antiabortion protesters directed epithets, such as calling prochoice women " 'lesbians' " and " 'drug addicts,' " reflected discriminatory animus); Jones v. Clinton, 974 F. Supp. 712, 729 (E.D. Ark. 1997) (upholding 42 U.S.C. § 1985(3) claim based on allegations that defendants " 'reached an understanding' " to violate her equal protection rights in case of unwanted sexual harassment). *But see* Andrews v. Fowler, 98 F.3d 1069, 1073, 1079 (8th Cir. 1996) (finding no evidence of discriminatory animus in claim against police officer and other public officials when the officer sexually assaulted a young woman living at a residence to which the police were called); Valanzuela v. Snider, 889 F. Supp. 1409, 1420 (D. Colo. 1995) (recognizing that women can constitute a class protected under § 1985(3) but finding no evidence that defendants selected their actions because of their effect on women, in claim against police officer who abducted and repeatedly sexually assaulted woman after traffic stops).

on the books since at least 1987.[97] The civil rights remedy of the 1994 Violence Against Women Act[98] attracted more public attention than any previous similar enactment.[99] Through the VAWA civil rights remedy, Congress sought to provide a means of redress for victims of gender-motivated crime who otherwise might lack an adequate means of recovering damages.

The law afforded recovery to many of the victims who invoked it while it was in force. Commentators expressed concern that the statutory definitions established a prohibitively high threshold for recovery by requiring proof both that the act constituted a "crime of violence" and that it was "motivated by gender."[100] Nevertheless, courts readily recognized allegations of domestic and sexual violence as gender-motivated in the majority of cases brought under the law during its brief history.[101]

There are several possible explanations for the seeming ease with which courts concluded that allegations of domestic violence and sexual assault would meet the statutory "gender-motivation" requirement. It may reflect federal judges' familiarity with cases requiring consideration of whether allegations of sexual harassment constituted discrimination based on sex.[102] Judges' experience with those cases may have facilitated their ability to draw an inference of

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97. *See* N.C. GEN. STAT. § 99D-1(a) (2004) (enacted in 1987).

98. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941-42 (codified as amended at 42 U.S.C. § 13981 (2000)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

99. *See* Sarah F. Russell, *Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327 (2003) (analyzing media treatment of the civil rights provision before and after the Supreme Court's *Morrison* decision).

100. 42 U.S.C. § 13981(c)-(d).

101. *See* Goldscheid & Kaufman, *supra* note 38, at 273-83 (recounting cases interpreting "gender motivation" requirement); *cf.* J. Rebekka S. Bonner, *Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation*, 111 YALE L.J. 1417, 1452-55 (2002) (recommending framework for analyzing gender-motivation under new civil rights remedies). Notably, the "crime of violence" element proved to be somewhat more problematic, although even that formulation did not bar many claims. *See* Goldscheid & Kaufman, *supra* note 38, at 271 n.27 (summarizing cases interpreting "crime of violence" requirement). *See generally* Renée L. Jarusinsky, *Gender Difference in Perceiving Violence and Its Implication for the VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965, 975-79, 988-94 (2000) (discussing statutory requirement).

102. Federal sexual harassment law and the VAWA civil rights remedy approached proof of gender discrimination differently, although both frameworks engage in essentially similar inquiries. Title VII requires, inter alia, that the conduct be committed "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2000). By contrast, the VAWA civil rights remedy by statute required proof both that the conduct was committed "because of . . . or on the basis of gender" *and* that the conduct was committed "due . . . to an *animus* based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). The facial difference in the formulations could have been interpreted to require more exacting proof of "gender-motivation" in VAWA civil rights remedy cases. However, courts evaluating VAWA civil rights remedy claims relied on the same type of circumstantial evidence used in other discrimination cases to evaluate the statutory element.

discrimination from allegations of domestic or sexual violence, even lacking additional circumstantial evidence of bias. It also may reflect the logical inference that underlies the feminist equation of domestic and sexual violence with sex discrimination. It may reflect the transformative potential of laws like the civil rights remedy by requiring judges to consider and classify violence in the context of discrimination.[103] On the other hand, it is entirely possible that judges would exact more careful scrutiny of the statutory language as the body of caselaw grew and as litigation centered more on the satisfaction of statutory elements than on the constitutionality of the federal law.[104]

In the aftermath of the *Morrison* opinion striking the law as unconstitutional, California, Illinois, New York City, and Westchester County, New York, enacted civil rights remedies that were modeled after the federal law.[105] Other than the jurisdictional restriction of a state versus a federal forum, these laws provide virtually identical substantive relief, with similar elements of proof, to that provided in the now-unavailable federal law.[106] As such, at least as a theoretical matter, these laws should serve as a rough substitute for the VAWA civil rights remedy in the jurisdictions in which they have been enacted. Yet these statutes have received little public attention and do not yet appear to be widely used. To date, only one reported decision reflects a survivor's attempt to use any of these new laws, and that

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103. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2206 (1996) (observing that the "very struggle" over the civil rights remedy's interpretation will "modernize gender status discourse").

104. Litigation under the federal civil rights remedy while it was in force focused on the law's constitutionality rather than on the meaning of the statutory elements. *See generally* Goldscheid & Kaufman, *supra* note 38, at 273 n.36 (reviewing cases).

105. *See* CAL. CIV. CODE § 52.4 (West 2004); 740 ILL. COMP. STAT. ANN. 82/10 (West 2004); N.Y.C. ADMIN. CODE § 8-901 (2000); WESTCHESTER COUNTY, N.Y., LAWS OF WESTCHESTER COUNTY ch. 701 (2001). New York City's City Council referenced the *Morrison* decision in its legislative findings and stated that it enacted this law "[i]n light of the void left by the Supreme Court's decision" to ensure that victims had an "officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence." N.Y.C. ADMIN. CODE § 8-902 (2000). Other states have introduced, but have not yet enacted, similar proposals. *See*, *e.g.*, S.B. 1535, 44th Leg., 2d Reg. Sess. (Ariz. 2000) (establishing civil liability for "crime of violence motivated by gender"); H.B. 1691, 83rd Gen. Assem., Reg. Sess. (Ark. 2001) (proposing civil cause of action for " 'act of violence motivated by gender' "); A.B. 6636, 2003-04 Leg., Reg. Sess. (N.Y. 2003-04); A.B. 6380, 2003-04 Leg., Reg. Sess. (N.Y. 2003-04) (proposing civil cause of action for victims of gender violence); H.B. 141, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (proposing civil cause of action for victims of criminal offenses committed at least in part based on the victim's gender, including offenses that cause harm to the person's "unborn"); H.B. 2057, 2003 Leg. (Pa. 2003) (proposing civil cause of action for "crime of violence motivated by gender"); S.B. 403, 2003 Leg. (Pa. 2003) (same).

106. For a discussion of the differences between federal and state fora, see Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799-800 (1995) (discussing advantages of federal versus state fora).

decision addressed a procedural rather than substantive interpretation of the statute.[107]

State and local civil rights laws authorizing analogous causes of action for gender-based bias crimes also appear to be used rarely. Many states had, and continue to have, laws on the books providing civil as well as criminal remedies for bias-motivated violence.[108] Currently, eleven states and the District of Columbia include "sex" or "gender" as one of the categories that can give rise to civil recovery under those bias crime laws.[109] Although these laws offer only a patchwork of protection nationwide, as a substantive matter, they authorize relief that is similar to (and often broader than) that provided by the VAWA civil rights remedy and the analogous state civil rights laws modeled after it.[110] Yet, not unlike the sole decision interpreting a post-*Morrison* civil rights statute, the reported decisions in cases involving these laws all adjudicate procedural issues; none of the reported decisions analyze the merits of the claim of gender-motivated harm.[111]

The relative infrequency with which these laws are invoked raises difficult questions about the efficacy of the approach. The apparent under-use could signal a variety of issues. It could reflect a lack of public awareness and knowledge about the law, which could be redressed through education campaigns. To some extent, this is likely the case. The federal law, which was more widely publicized than state analogues, was used more frequently than the state enactments. But the federal law was not as widely invoked as some had anticipated. Of course, this could reflect the constitutional controversy that surrounded the law since the first claims were com-

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107. In *Cadiz-Jones v. Zambetti*, a domestic violence survivor brought a claim against her former fiance under New York City's then-recently enacted law after her VAWA civil rights claim was dismissed in response to the *Morrison* decision. N.Y.L.J., Apr. 29, 2002, at 21. The court rejected the defendant's arguments that the local law would not apply retroactively, but it did not address the merits of the plaintiff's claims. *Id.*; *see also* Goldscheid, *supra* note 49, at 166.

108. Many of these laws are part of their states' bias crime statutes. *See* ANTI-DEFAMATION LEAGUE, STATE HATE CRIME STATUTORY PROVISIONS, *available at* http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf (last visited Mar. 28, 2007) (listing statutory provisions); LU-IN WANG, HATE CRIMES LAW (1994) (listing and discussing statutory provisions).

109. CAL. CIV. CODE § 52.4 (West 2004); D.C. CODE ANN. § 22-3704 (LexisNexis 2004); 720 ILL. COMP. STAT. ANN. 5/12-7.1(a), -(c) (West 2004); IOWA CODE ANN. §§ 729A.2, 729A.5 (West 2004); MASS. GEN. LAWS ANN. ch.12, §§ 11H, I (West 2004); MICH. COMP. LAWS ANN. § 750.147b (West 2004); MINN. STAT. ANN. § 611A.79 (West 2004); NEB. REV. STAT. § 28-113 (2004); N.J. STAT. ANN. § 2A:53A-21 (West 2004); N.C. GEN. STAT. § 99D-1(b) (West 2004); R.I. GEN. LAWS § 9-1-2 (West 2004); VT. STAT. ANN. tit. 13, §§ 1455(a), 1457 (West 2004); WASH. REV CODE ANN. § 9A.36.083 (West 2004).

110. These statutes generally are drafted with a broader statutory formulation and authorize comparable types of relief within similar limitations periods. *See* Goldscheid, *supra* note 49, at 165-71 (detailing the structure of these statutes).

111. *See id.* (detailing decisions).

menced. However, practical concerns associated with abuse and the limitation of litigation-based approaches to transform public perceptions may outweigh, or at least mitigate, the conceptual appeal of holding individuals accountable for their behavior as a civil rights violation.[112] These issues combine to limit victims' use of these remedies and, therefore, render the approach less likely to deliver its promise of expanded redress.

B. The Transformational Power of Civil Rights Remedies

Commentators widely, and often reflexively, assert that civil rights remedies hold greater potential than other approaches to transform the discriminatory attitudes that underlie acts such as domestic and sexual violence. For example, in debates preceding the enactment of the civil rights remedy of the 1994 Violence Against Women Act, proponents summarily lauded those remedies' superior value.[113] This reflexive embrace of a civil rights claim for damages is not unique to violence against women. Commentators in other contexts also presume that civil rights claims hold symbolic and political advantage over traditional remedies such as those based in contract or tort.[114] But the nature of this transformative power and civil rights laws' ability to realize this potential is not always clear. This Section begins to unpack this transformative claim.[115] I posit that there are at least three axis on which civil rights claims' transformative power can be assessed: (1) prompting policy and behavioral changes; (2) changing discriminatory attitudes; and (3) advancing broader social movements. This Section analyzes each in turn.

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112. This argument is elaborated more fully in Part IV.A.1, *infra*.

113. *See, e.g.*, Goldfarb, *supra* note 11, at 55 (describing legislative history); Nourse, *supra* note 35, at 5-36 (same).

114. *See, e.g.*, Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421, 1434 (2005) ("Civil rights law, [in contrast to tort law], confers legitimacy. Causes are noble, victims deserving, and violators vile."); Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1, 38-39 (1996) (discussing symbolic value of civil rights violation in environmental racism claims).

115. While considering a related question, Donna Coker draws on Ruth Morris' work and advances the concept of "transformative justice" for domestic violence victims. *See* Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 143-50 (Heather Strang & John Braithwaite eds., 2002). She uses the term to discuss justice system processes that address the sources of battered women's inequality and the subordinating systems that may operate in the batterer's life. *Id.* at 144. My reference to the "transformative" power of civil rights remedies similarly looks to the social and cultural context in which domestic and sexual violence persist. However, I use the term to discuss the impact of a particular form of legal intervention whereas she addresses the impact on the justice system on survivors more generally.

1. Prompting Policy and Behavioral Changes

One way in which the transformation of societal attitudes can be manifested is through changes in public policy. Although public policies are expressed and reflected in many ways, one tangible and important expression of public policy can be found in workplace policies. Antidiscrimination laws have dramatically reshaped hiring and promotional practices.[116] Public awareness generated by the cases litigated in the 1970s and 1980s culminating in the Supreme Court's recognition that sexual harassment (including sexual assault) was a form of discrimination led some companies to implement anti-sexual harassment policies.[117] Although some responded on their own to the changing law and social climate, others were mandated to devise and implement policies and to train their employees accordingly as part of court-ordered injunctive relief in successful claims.[118] The 1991 Civil Rights Act's[119] increase in potential recoverable damages, including punitive damages, heightened employers' motivations to enact policies that might reduce the prevalence of claims.[120] At least one study indicates that by 1998, ninety-seven percent of companies responding to a survey conducted by the Society for Human Resource Management already had policies defining and prohibiting sexual harassment as unlawful and a violation of workplace rules.[121]

The 1998 Supreme Court decisions of *Faraghar v. City of Boca Raton*[122] and *Burlington Industries, Inc. v. Ellerth*[123] enhanced the role of employer anti-sexual harassment policies by insulating employers from liability for harassment by supervisors if the employer could demonstrate that it "exercised reasonable care to prevent and correct promptly" sexually harassing behavior and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[124] These cases widely

116. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 334 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 467 (2001).

117. *See* Melissa Hart, *Litigation Narratives: Why* Jensen v. Ellerth *Didn't Change Sexual Harassment Law, but Still Has a Story Worth Telling*, 18 BERKELEY WOMEN'S L.J. 282, 291-92 (2003) .

118. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (determining that defendant employer should be ordered to establish, disseminate, and implement policy and sexual harassment complaint procedure).

119. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981 (2000)).

120. Ann M. Anderson, Note, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 826-27 (2000).

121. Hart, *supra* note 117, at 292 (citing SOCIETY FOR HUMAN RESOURCE MANAGEMENT, SEXUAL HARASSMENT SURVEY 7 (1999)).

122. 524 U.S. 775 (1998).

123. 524 U.S. 742 (1998).

124. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Although an anti-sexual harassment policy alone would not automatically insulate an employer from liability, the exis-

are credited as providing employers an incentive to implement sexual harassment policies.[125] Some analyses suggest that an employer's implementation of an antiharassment policy can have tremendous impact on that company's potential liability, perhaps even determining the outcome of a case.[126] Whether due to the recent decisions, to shifts in public opinion, or to the type of coaching employers receive from law firms and consultants concerned with avoiding liability, anti-sexual harassment policies now are widespread and commonplace components of employment policies.

Despite these advances, it would be incorrect to presume that working conditions have dramatically changed or that sex discrimination or harassment has been eliminated just because an employer has implemented an antiharassment policy. To the contrary, workplace discrimination persists in perhaps more insidious forms notwithstanding the development of legal rules and workplace policies proscribing overt discrimination.[127] In the context of sexual harassment, some argue that fear of liability based on a lack of understanding of the law has led to overbroad policies that punish sexual conduct without addressing the underlying gender inequality sexual harassment law is intended to redress.[128] These critiques suggest that antiharassment policies may be unsuccessful either in curbing a wide range of harassing behavior or in changing the discriminatory attitudes that allow the harassment to flourish.[129] Antiharassment policies may also have limited effects due to constraints associated with their implementation. Some have demonstrated that supervi-

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tence of such a policy, with a suitable complaint procedure, would be relevant to the question of liability. *Id.*

125. *See, e.g.*, Estlund, *supra* note 116, at 337; Sturm, *supra* note 116, at 482; Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 174 (2002).

126. *See, e.g.*, Hart, *supra* note 117, at 291-92 (reviewing surveys demonstrating that plaintiffs prevailed in 71% of cases in which the employer had no formal sexual harassment program or generalized grievance process, while plaintiffs only prevailed in approximately one-third of cases in which employers had some anti-sexual harassment policy in place).

127. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 3, 5-6 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993); Sturm, *supra* note 116, at 458; *cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-28 (1987) (addressing persistence of workplace discrimination notwithstanding prohibition of intentional discrimination).

128. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2067 (2003); Zalesne, *supra* note 131, at 178; *see also, e.g.*, Susan Bison-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKLEY J. EMP. & LAB. L. 1 (2001) (discussing impact of training programs implemented to reduce risks of liability).

129. *See* Schultz, *supra* note 128, at 2131.

sors use antiharassment policies in a way that discourages complaints and elicits complaints about only the most egregious forms of harassment rather than prompting cultural changes within an organization.[130] In addition, increased public and media focus on sexual harassment has produced a backlash in which many believe that the law has tipped too far in favor of employees.[131]

Nevertheless, the expansion of antiharassment policies has succeeded in naming the problem, bringing public attention to it (even if in the form of debate criticizing the evolution in the doctrine) and offering some modicum of protection and an avenue of redress to employees who are subjected to unwanted harassment. Notwithstanding the limitations of workplace antiharassment policies, they can shape workplace behavior through their disciplining function, even if they operate only to modify conduct at the margins (that is, extreme rather than subtle forms of harassment). Workplace policies may be ineffective in changing behaviors or attitudes outside the workplace, but they may have some impact in changing the range of acceptable behaviors at work even if they fall short of prompting all the changes in the workplace that are needed.

The history of litigation against police departments for failing to respond appropriately to domestic violence claims similarly reflects both the power and the limitations of civil rights lawsuits to produce meaningful change. As discussed earlier, these claims played a substantial role in spurring police and local law enforcement to develop and implement policies requiring police to take domestic violence claims seriously.[132] Yet despite changes in formal policies, victims and advocates still struggle to obtain consistently effective law enforcement responses.

Claims against individuals lack the same capacity to produce policy change. Although there is some sense in which civil rights law is connected to social norms that influence and perhaps shape individuals' behavior, it is unlikely that a civil rights remedy would have greater power to change individuals' behavior than would other sources of civil liability such as tort law or provisions authorizing orders of protection.[133] The home offers no easy analogy to a workplace

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130. *See* Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC'Y REV. 83, 114-20 (2005).

131. Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351, 352-53 (1999).

132. *See supra* notes 81-88 and accompanying text.

133. The argument that a civil rights claim holds greater transformative power than other legal claims because it holds greater normative value is difficult to test. While there is some merit to the possibility that a defendant may view his conduct differently once it is challenged through litigation, it is difficult to imagine that the precise nature of the claim, e.g., civil rights versus tort, would substantially impact his reactions. I have uncovered no empirical studies that address the question.

policy that articulates the governing norms of conduct. Other legal provisions such as those that authorize orders of protection may hold as much potential, at least as a theoretical matter, for establishing norms of behavior that govern conduct in the home. It is difficult to imagine how civil rights redress would add to the norm-shaping behavior available through that type of remedy, which can be tailored specifically to an individual's predictions of how violence is expressed.[134] In that sense, civil rights claims against institutions, with their attendant ability to shape explicit norm-stating policies in the institutional setting, may be more effective tools for prompting policy or behavioral change than claims brought against individuals. This bolsters the importance of reforming laws governing institutional liability.[135]

2. Changing Discriminatory Attitudes

Another way civil rights laws hold a promise of transformational change is by challenging the underlying biases that allow discrimination to persist. This issue has been examined in the workplace context. One of Title VII's goals is to reach the "entire spectrum" of discrimination, including both intentional and unintentional conduct, that perpetuates exclusionary policies and practices.[136] Yet laws such as Title VII have proved to be inadequate to reach the more unconscious biases that define the "second generation" antidiscrimination claims that more commonly arise today.[137]

Recent scholarship has advanced several alternative approaches through which the law might more effectively challenge underlying discriminatory biases. Charles Lawrence critiques the intentional discrimination framework governing equal protection claims and advocates inquiry into the cultural meaning of the allegedly discrimina-

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134. *See* FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 4-6 to 4-7 (2005) (discussing civil protection orders); Catherine F. Klein & Leslye E. Orloff, *Civil Protection Orders*, *in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK § 4-1 (2d ed. 2004); *see also* Nat'l Council of Juvenile and Family Court Judges, Domestic Violence Statute Search, http://www.ncjfcj.org/content/blogcategory/255/300 (last visited Mar. 28, 2007) (search engine for state-specific domestic violence statutes).

135. The nature of specific proposals for reform is beyond the scope of this Article.

136. City of Los Angeles v. Manhart, 435 U.S. 702, 707 n.13 (1978) (citing Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)); *accord* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under [Title VII], practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

137. Krieger, *supra* note 127, at 1164 (recognizing inadequacy of Title VII in addressing "subtle, often unconscious forms of bias" Congress intended Title VII to remedy); Sturm, *supra* note 116, at 460 (defining "second generation" employment discrimination claims and recognizing that "[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality").

tory actions.[138] In the context of statutory discrimination claims, Susan Sturm recommends adopting a structural approach that encourages the development of institutions and processes that advance antidiscrimination norms through internal problem-solving systems.[139] David Oppenheimer endorses adoption of a "negligent discrimination" standard to root out unconscious discrimination.[140]

Others draw on insights from cognitive psychology.[141] For example, Linda Krieger's analysis of cognition theory demonstrates that discriminatory acts may not reflect biased motive or intent as much as they reflect perceptive, interpretive, and memorial processes that may be both unconscious and unintentional.[142] Under that view, cognitive biases are unwelcome byproducts of otherwise adaptive cognitive processes.[143] Krieger would direct Title VII's attention away from inquiries about intentionality to an inquiry into causation.[144] She argues that antidiscrimination laws would be more effective in reducing intergroup bias if they were understood as a fulfilling "prescriptive duty to identify and control" for inevitable cognition errors that underlie discriminatory acts.[145] However, she calls for more research about how biases can be reduced or controlled before elaborating a more detailed proscriptive approach.[146]

Other similar theories posit that unconscious bias may be reduced by promoting counterstereotypes or eliminating negative stereotypes in physical or sensory surroundings, or by increasing opportunities for intergroup contact.[147] Current antidiscrimination law models could address underlying bias, for example, through doctrines that promote a diverse supervisory workforce[148] or that require elimi-

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138. *See* Lawrence, *supra* note 127, at 344-45.

139. Sturm, *supra* note 116, at 491-92.

140. Oppenheimer, *supra* note 127, at 899.

141. For a summary of recent scholarship, see, e.g., Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1003 n. 21 (2006).

142. *See id*. at 1211.

143. Accordingly, the law can support interventions that aim to unearth the biases and prevent them from influencing behavior. *Id.* at 1216-17.

144. *Id*. at 1242.

145. *Id*. at 1245 (emphasis omitted).

146. *Id*. at 1245-47.

147. *See, e.g.*, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 23-25, 28-29 (2000) (reviewing social science data on whether contact with another group (e.g., of people of other races) decreases bias); Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 963-65 (2006) (recounting studies showing that implicit biases may be modified by exposure to counter-stereotypic imagery).

148. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978 (2006).

nation of negative stereotypes and promote counterstereotypes in the workplace.[149]

These analyses of workplace antidiscrimination laws have interesting implications for the use of civil rights laws to address the gender bias that underlies domestic and sexual violence. First, consider the argument that current antidiscrimination doctrine can reduce incorrect biases by eliminating stereotypical imagery in the workplace. To some extent, the debiasing that would occur should also reduce domestic and sexual violence because (1) some domestic and sexual violence takes place at work and (2) to the extent that perpetrators of domestic and sexual violence are employed at workplaces in which stereotypical imagery was eliminated and replaced by "positive" imagery, any resulting reductions in biased behavior might have the effect of reducing biased behavior (such as domestic and sexual violence) outside the workplace. Of course, that projection would have to be tested through further examination and empirical study.

The applicability of the argument that workplace diversity rules could reduce the degree of racial or other group-based bias to domestic and sexual violence is more complex. The social science studies underlying that argument are premised on findings that the presence of role models or authority figures in historically marginalized groups (for example, African Americans) reduces manifestations of unconscious racial bias by white study participants.[150] The study results may reflect at least in part the extent to which we continue to live in a race-segregated society in which there is limited contact between the races. By contrast, sex discrimination persists despite the fact that we live in a highly sex-integrated society. If the debiasing that occurs is premised on increasing otherwise limited or nonexisting contact between the races, debiasing through diversity enhancement may not translate to efforts to reduce domestic and sexual violence, since men and women typically have a good deal of contact with one another.

On the other hand, if what underlies the debiasing that occurs through intergroup contact is the reversal of traditional power dynamics and the introduction of counter-stereotypical imagery (for example, the situating of African Americans in positions of relative power, authority, and status), the studies could be useful in crafting law and policy reform that addresses the gender biases that underlie domestic and sexual violence. To the extent that such violence is informed and supported by media and cultural imagery condoning subjugation of (primarily) women through violence, it may be that broad-based shifts in media and cultural imagery can impact domestic and

149. *Id.* at 982-83.
150. *Id.* at 981 (referencing studies).

sexual violence as well. [151] At the very least, these studies offer fruitful suggestions for potential ways to address the underlying biases that are the target of civil rights-based approaches to domestic and sexual violence.

Another way that workplaces address discriminatory attitudes is through training and education programs. These programs may be undertaken voluntarily or can be a required part of a court order following a discrimination suit.[152] Although these programs cannot mandate changed attitudes, they can foster or promote changed norms and accompanying behavioral changes and may affect attitudes as well.[153] Programs involving face-to-face exchanges between members of diverse groups and small group discussions of controversial issues have been found to be successful in helping employers and employees understand the injury that antidiscrimination law is intended to prevent and in creating an awareness of and sensitivity to divergent viewpoints.[154] This suggests that initiatives in which program participants explicitly discuss the role of discriminatory attitudes in perpetuating domestic and sexual violence could be useful in curbing abuse. Further research would be helpful in assessing whether that approach would be effective.[155]

3. Advancing Social Movements/Equality as Rhetoric

Recent scholarship on the interaction of law and social change has been widely critical of the ability of law, and specifically of the notion of rights, to produce meaningful social change.[156] Theoretical and

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151. *See, e.g.*, Krieger, *supra* note 127, at 1246 (calling for "broad-based" cultural change in order effectively to address workplace discrimination).

152. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1217 (1989); Bison-Rapp, *supra* note 128, at 15-25 (describing use of training programs); *see also* notes 116-31 and accompanying text (describing workplace anti-sexual harassment policies).

153. *See* Abrams, *supra* note 152, at 1219 (advocating holding supervisors and managers responsible for setting and enforcing antidiscrimination standards); *but see* Bison-Rapp, *supra* note 128, at 29, 31-38 (cautioning that training programs also may reinforce stereotypes and produce attitude polarization).

154. Abrams, *supra* note 152.

155. Some batterer's intervention programs incorporate an explicitly "feminist" curriculum in which participants discuss the ways in which domestic violence is rooted in traditionally discriminatory attitudes about gender. *See, e.g.*, U.S. Dep't of Justice, OJP, NIJ, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998), *available at* http://www.ncjrs.org/txtfiles/168638.txt (describing varying approaches to batterer intervention programs). The few studies evaluating the success of these programs, however, indicates that they may have a limited impact in producing attitudinal change. *See* U.S. Dep't of Justice, *Batterer Intervention Programs: Where Do We Go from Here?* (June 2003), *available at* www.ncjrs.org/pdffiles1/nij/195079.pdf; Daniel J. Saunders & Richard M. Hamill, NIJ, *Violence Against Women: Synthesis of Research on Offender Interventions* (2003), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/201222.pdf.

156. For a summary of critical legal studies' critiques of antidiscrimination law and an argument refocusing the law to account for entrenched discrimination, see, e.g., Kimberlé

empirical scholarship in this area has challenged the "myth of rights" and argues that litigation is a necessarily limited tool in producing social change.[157] As Kathy Abrams has observed about the power of litigation to eliminate discrimination in the workplace, "[l]itigation . . . can be too crude a tool for achieving the often subtle changes in understanding that produce equal treatment or regard for women."[158]

Instead, some have urged a view of "rights"-based reform in which assertions of rights are seen as instrumental in political mobilization rather than as ends in and of themselves.[159] As Liz Schneider has argued, rights-based advocacy can be a catalyst for organizing and catalyzing political action.[160] Kimberlé Crenshaw similarly has observed that law reform has served an important cultural role by eliminating symbolic manifestations of racial oppression, even though it has not achieved material equality.[161] Litigation accordingly is most powerful when it complements social activism movements addressing the same issues.[162]

W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For additional sources enumerating the limitations of law in producing social change, see Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 20-39 (1985) (discussing limitations and utility of litigation in ending race discrimination); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984) (arguing that a rights-based approach leads people to focus on legal rights discourse instead of the real objectives antidiscrimination laws seek to effect)*;* see also JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 39-40, 212-22 (1978); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 4-12, 48-91 (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 107-56, 202-27 (1991); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 151-98 (2d ed. Univ. of Mich. Press 2004).

157. SCHEINGOLD, *supra* note 156, at 13-79; *accord* Bell, *supra* note 156; Zalesne, *supra* note 125, at 184 (discussing normative arguments). For other arguments that "rights-based" construction of antidiscrimination norms entrench, rather than reduce, discrimination, see KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 19-22 (1988).

158. Abrams, *supra* note 152, at 1196.

159. *See* HANDLER, *supra* note 156, at 39-40, 212-22; MCCANN, *supra* note 156, at 4-12, 48-91; ROSENBERG, *supra* note 156, at 107-56; SCHEINGOLD, *supra* note 156, at 83-96; Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328, 328-55 (David Kairys ed., 1998).

160. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 650 (1986).

161. Crenshaw, *supra* note 156, at 1331; *accord* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 159-65 (1991) (arguing that the notion of "rights" represents important markers of citizenship and should be expanded rather than discarded).

162. Several scholars have examined this theory at length. For example, Michael McCann's study of the pay equity movement demonstrated how legal tactics positively affected the movement by, for example, enhancing visibility, engendering participation, compelling formal policy concessions, and increasing confidence and sophistication among those advancing claims. MCCANN, *supra* note 156, at 278-88. Gerald Rosenberg's study of the civil rights, abortion and women's rights, environment, reapportionment, and criminal law reform movements similarly concludes that litigation plays an important role in social movements but that the nature of the role will change depending on, among other things,

Civil rights claims to redress domestic and sexual violence readily can be seen in this context. For example, even though the VAWA civil rights remedy was struck down as unconstitutional by the Supreme Court, it played a critical role as part of a broader social movement to enhance legal protections and social services for domestic and sexual violence victims. Specifically, the civil rights remedy was instrumental in the enactment of the 1994 Violence Against Women Act. That law was the first comprehensive federal legislation to address domestic and sexual violence. It subsequently has been reauthorized and expanded to more effectively address victims' needs and gaps in legal protections and services.[163] The legislation addressed a wide range of issues—including support for social service programs, initiatives that would improve law enforcement responses to the problem, requirements for interstate recognition of domestic violence protective orders, and provisions enabling battered immigrant women to obtain legal status without having to rely on abusive partners.[164] These provisions have been critical in transforming the scope and breadth of resources and services available to victims. Notably, in debates preceding VAWA's enactment, controversy centered around the civil rights remedy rather than around any of those other provisions.[165] In some sense, the civil rights remedy is a classic example of the instrumental use of a civil rights law to advance other substantive political gains.

In addition to this instrumental role, it may well be that the public debate occasioned by the litigation surrounding the civil rights remedy also helped advance its transformative goals. In this sense, the law can be seen as serving an expressive function, in which it helped shape social norms even if it didn't itself produce tangible benefits.[166] Even though the VAWA civil rights remedy ultimately was struck down, it attracted much public attention, during both the debates over its enactment and the subsequent litigation concerning its constitutionality. The occurrence of these debates themselves raised public awareness of the issue and may well have affected indi-

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the extent of political support and the extent to which legal efforts are visible and generally endorsed by the public. ROSENBERG, *supra* note 156, at 343.

163. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491.

164. For a summary of the provisions in the 1994 enactment, see Goldscheid, *supra* note 43, at 110-16; see also Family Violence Prevention Fund, History of the Violence Against Women Act, http://www.endabuse.org/vawa/display.php?DocID=34005 (last visited Mar. 28, 2007) (summarizing provisions).

165. *See* Russell, *supra* note 99, at 331.

166. For a discussion of the symbolic and norm-shaping value of criminal hate crime laws, see, e.g., Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1247-72 (2000) (reviewing scholarship).

viduals' views of the problem. As someone who litigated a number of these cases, including the *Morrison* case that progressed to the Supreme Court, I was struck by the reactions of laypeople, who often expressed disbelief that Congress might not have the power to enact a civil rights law providing redress for gender-based violence. The constitutional scope of the litigation undoubtedly raised the profile of and media attention paid to the issue in a way that tort claims ordinarily do not. On the other hand, the public nature of the debate over the federal civil rights remedy also produced backlash against the law in the form of commentary by those convinced the matter should be only of local concern and those opposed to new civil rights protections.[167] Although the net result is difficult if not impossible to measure, the high profile of the civil rights litigation at a minimum increased public debate about and importantly drew attention to the problem.

International human rights law provides another example of the instrumental power of claims that domestic and sexual violence are a form of sex discrimination. Some international human rights instruments directly equate domestic and sexual violence as a form of sex discrimination.[168] The rhetorical linking of the two issues has formed a powerful foundation for advocacy in support of a wide range of legal

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167. *See* Russell, *supra* note 99, at 334-88 (tracing media coverage and opinion about the law's constitutionality).

168. Declaration on the Elimination of Violence Against Women, U.N.G.A. Res. 48/104, intro., Art. 4 U.N. Doc. A/RES/48/104, *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument (last visited Mar. 28, 2007) (including efforts to eliminate violence against women as part of directives to eliminate sex discrimination); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 ("CEDAW") (entered into force Sept. 3, 1981), *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro; Committee on the Elimination of Discrimination Against Women, Gen. Rec. No. 19: Violence Against Women (11th session, 1992), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#top (defining "gender-based violence" as a form of discrimination); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem do Para"), *opened for signature* June 9, 1994, 33 I.L.M. 1534, available at http://www.oas.org/CIM/english/Laws.Rat.Belem.HTM (determining states' sex equality obligations require initiatives to address domestic and sexual violence); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 8, *opened for signature* July 11-Aug. 13, 2003, *available at* http://www.africa-union.org/Official_documents/Treaties_%20Convention_%Protocols/Protocol%20the%20Rights%20of%20Women.pdf (same); *see also* United Nations, International Covenant on Civil and Political Rights, Human Rights Committee, General Comment No. 28: Equality of Rights Between Men and Women, art. 3 CCPR/C/21/Rev.1/Add.10 (2000) (providing protection from gender-based violence during armed conflict); 11 (calling for information on state laws prohibiting domestic violence, including rape, and female genital mutilation); 12 (calling for information from states on efforts to prohibit trafficking); 14 (calling for information on laws or practices condoning confinement of women); 16 (calling for information on laws that restrict of women's movement); 24 (supporting marriage as a free choice by, inter alia, proscribing attitudes that marginalize women victims of rape); 31 (declaring that "honour crimes" violate Convention).

and policy initiatives, even though many of those initiatives do not directly address sex discrimination.[169]

This interaction between law reform and related social movements may also explain the success of reform efforts to address domestic violence in the most recent generation of reforms beginning in the 1970s. Those efforts were born out of a social movement in which domestic violence victims played a central role by helping to define its goals, strategies, and objectives.[170] One of the limitations of the more recent use of civil rights remedies to redress domestic and sexual violence may lie in a disconnect between those promoting civil rights remedies and the grassroots movements advocating legal and policy reform on behalf of domestic and sexual violence victims. Although the civil rights remedy was effective as part of a legislative agenda to broaden federal protections and funding sources, it was less directly connected to victims' concerns and demands. In contrast to the reforms that began in the 1970s, the civil rights remedy does not directly respond to a need that victims frequently voice. Domestic and sexual violence victims more likely articulate needs for concrete resources—such as funding, assistance with custody or other family law matters, immigration issues, employment, or housing—than a need for a civil remedy. Of course, this may reflect a lack of awareness of civil legal remedies and their potential or, perhaps, a failure to organize a political movement that would make the remedy's value more readily apparent. Indeed, the current system of service provision has been criticized as increasingly neutralized and devoid of political or social content.[171] But it may also be true that one of the civil rights remedy's limitations is that it is not reflective of victims' perceptions of the problem or their legal needs. To that end, future reform efforts should be grounded in victims' experiences, views of the problems, and desired solutions and linked to organizing efforts to advance those goals.[172]

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169. *See* Goldscheid, *supra* note 8, at 386-91 (recounting range of policy advances spurred by international legal instrument's prohibition of domestic and sexual violence as a form of sex discrimination).

170. *See supra* Part II.

171. *See* Goldscheid, *supra* note 8, at 373-78; *accord* Martha McMahon & Ellen Pence, *Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47, 70 (2003) (noting that "increasing numbers of advocacy programs are using gender-neutral language to describe their services").

172. *See infra* Part IV.

IV. RECONCEPTUALIZING EQUALITY

A. Expanding Compensatory Relief

One of the primary goals of civil rights remedies was to expand the avenues for recovery for the practical—that is, financial—losses that result from abuse. This section analyzes the ways that civil rights claims fashioned as causes of action against individual perpetrators are inherently limited. It also suggests alternative approaches to expanding victims' ability to recover.

1. Limits of Civil Rights Recovery from Individuals

Civil rights claims against individual perpetrators generally are less frequently made than claims against institutions. Some of the reasons are familiar. From a practical perspective, civil rights claims against individuals may be less advantageous because individuals generally can support less generous financial awards than can institutions. This argument applies to all civil claims against individuals, regardless of the underlying factual basis (for example, domestic violence as opposed to other forms of bias crimes) and regardless of the claim's underlying theory (for example, civil rights as opposed to torts).

Civil claims against individuals who have committed domestic or sexual violence present unique challenges regardless of whether the claim is brought under tort, civil rights, or some other theory. Scholars including Sarah Buel, Clare Dalton, and Jennifer Wriggins have noted the dearth of tort claims arising from domestic violence.[173] Sarah Buel posits that the lack of tort claims stems in part from factors such as the lack of awareness of the ability to bring tort claims, attorneys' failure to identify or clients' failure to disclose domestic violence issues, misconceptions that batterers lack sufficient assets to make a tort claim "worthwhile," attorney distaste for handling domestic violence claims, and racial and cultural factors that deter engagement with the legal system.[174] Many women would not choose to engage with a justice system they distrust, whether due to previous experiences with bias or to fear of retaliation due to a victim's immigration status.[175] Civil remedies contain an inherent class bias,

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173. *See, e.g.*, Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 949-55 (2004); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 350-53, 366-68 (1997); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 133-51 (2001).

174. Buel, *supra* note 173, at 950-54 (arguing also that doctrinal limitations unnecessarily preclude claims).

175. For women of color in particular, experience with law enforcement's racial bias may at least in part explain their reluctance to engage with the civil or criminal justice systems. *See, e.g.*, Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World,* 79 TUL. L. REV. 167, 193 n.137 (2004) (citing sources). Although immigration laws increas-

since they are useful only to the extent perpetrators have sufficient assets to justify litigation. Of course, this does not negate the power of civil remedies to recover or at least assign whatever assets the perpetrator does have to the survivor.

These considerations could also explain the scarcity of civil rights claims brought against individuals under both the VAWA civil rights remedy, while it was in effect, and under the analogous state and local laws still in effect.[176] With respect to the VAWA civil rights remedy, commentators posited various explanations for the relatively few cases brought while the law was in effect. Some argued that any underutilization may have been based on potential litigants' lack of awareness of what the law would offer or on the fact that the law was embroiled in constitutional controversy since its enactment.[177] Others pointed to the narrow crafting of its statutory terms.[178]

There is no doubt that lack of awareness of legal claims, by both victims and practitioners, limits the extent to which new laws will be invoked. However, the apparently limited use of the more broadly crafted state civil bias crime laws suggests that the utility of a civil remedy in this context is limited by structural factors. For example, a domestic violence victim rationally may choose not to reengage with the batterer through tort or other civil litigation out of a desire to limit, rather than increase, her contact with him. She may reasonably fear that the batterer would use the civil litigation context as a further device for perpetuating a pattern of coercion and control over her.[179] The difficulties of collection may deter many from commencing civil claims even when defendants have assets. The prospect of additional litigation with an abuser over collection may render civil suits sufficiently unappealing to deter the use of civil remedies. On a more symbolic level, the nature of the claim, framed as a problem between two individuals, reinscribes it as private in nature.

The laws may be underutilized as well due to the difficulty victims of domestic and sexual violence continue to face in obtaining counsel notwithstanding fee-shifting provisions in most of the civil rights

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ingly allow domestic and sexual violence victims who rely on their abusers for immigration status to independently apply for legal status, victims nevertheless fear reprisals, particularly if they are unaware of the reforms that could offer relief. *Id.*

176. *See generally* Goldscheid, *supra* note 49, at 165-71 (reviewing cases). Of course, it is possible that these claims are raised in cases, including matrimonial and support actions, that do not result in reported decisions. However, with few exceptions, there is no indication from the literature or from practitioner reports that these claims are routinely invoked.

177. SCHNEIDER, *supra* note 11, at 193.

178. *See* Goldfarb, *supra* note 38, at 260-69.

179. For example, she may fear that he will retaliate against her or that he might jeopardize her custody of her children; *see also* Goldscheid, *supra* note 175, at 222-23; Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 417, 422-23 (2003).

laws.[180] Victims in civil claims continue to have their private lives and personal histories subjected to scrutiny notwithstanding rape shield laws.[181] In addition, these laws may not offer the remedies most victims of domestic and sexual violence seek, such as financial assistance (from sources other than the batterer), jobs, childcare, immigration assistance, and legal representation.[182] To the extent that that is the case, remedies that address those unmet legal needs would be most useful.[183]

2. Alternative Approaches to Restoring Economic Imbalances

Given the limitations of civil rights remedies, other approaches to compensating victims for the economic harms associated with domestic and sexual violence should be considered. The economic impact of domestic and sexual violence is increasingly well-documented. A recent study concluded that intimate partner rape, physical assault, and stalking cost the United States over $5.8 billion each year for expenses such as medical and mental health care services, lost productivity from paid work and household chores, and losses in lifetime savings.[184] Another study that measured the costs of interpersonal violence (a somewhat larger category than intimate partner violence) concluded that interpersonal violence cost the United States economy $12.6 billion annually.[185] Domestic and sexual assault survivors fre-

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180. *See* INST. FOR LAW & JUSTICE & NAT'L CTR. FOR VICTIMS OF CRIME, NATIONAL EVALUATION OF THE LEGAL ASSISTANCE FOR VICTIMS PROGRAM 11-17 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/208612.pdf (detailing continuing unmet needs for legal services notwithstanding federal funding civil legal assistance programs). To the extent that civil legal services attorneys assist victims, their scarce resources generally are devoted to issues such as custody, child protection and visitation issues. *See also, e.g.*, Goldscheid, *supra* note 175, at 222 nn.278-79 (describing challenges domestic and sexual violence victims face in obtaining legal counsel); Wriggins, *supra* note 173, at 135-37 (explaining how lack of insurance coverage for domestic violence reduces availability of legal counsel for domestic violence victims seeking to bring tort claims).

181. *See, e.g.*, Michelle J. Anderson*, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH L. REV. 51, 94-141 (2002) (detailing cases in which rape shield laws failed to exclude evidence of women's sexual history from trial); *see also, e.g.*, NBCSports.com News Servs., *Rape Case Against Bryant Dismissed*, Sept. 2, 2004, http://www.msnbc.msn.com/id/5861379 (reporting trial judge's decision to admit evidence about accuser's sex life in the days surrounding alleged sexual assault by Kobe Bryant).

182. Goldscheid, *supra* note 179, at 418.

183. For example, the 2005 VAWA Reauthorization authorized significant funding for civil legal assistance in a range of legal claims. *See* Violence Against Women and Department of Justice Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 2978-79, §§ 103-04 (2006).

184. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2, 27-33 (2003).

185. WORLD HEALTH ORG., THE ECONOMIC DIMENSIONS OF INTERPERSONAL VIOLENCE 20-22 (2004), *available at* http://whqlibdoc.who.int/publications/2004/9241591609.pdf (estimated costs of intimate partner violence range from $3.5 to $12.6 billion per year and estimated costs of rape range from $159 million to $6.5 billion per year).

quently face difficulty keeping their jobs due to their experiences of abuse, either because their abuser harassed them on the job or because the circumstances associated with the abuse prevented them from keeping their jobs.[186]

Increased publicity about the civil rights remedies that remain on the books may increase claims that compensate victims for their losses. Law reform directed at institutional accountability also may redress the economic inequalities resulting from abuse. In addition, alternative frameworks for compensation should be explored. For example, crime victim compensation funds are available in every state and can provide recovery for the out-of-pocket expenses associated with domestic and sexual violence.[187] These programs currently are underresourced, underutilized, and underpublicized.[188] Claimants generally cannot recover damages for pain and suffering or emotional distress.[189] As currently constituted, they receive virtually no public funding or support. Yet they represent a powerful distributive justice approach through which defendants' fines and fees are pooled and made available to victims. If domestic and sexual violence is understood as a problem for which society shares responsibility, it should warrant allocation of public funds to assist victims. With relatively minimal public support and greater publicity about available benefits, these compensation programs could become a far more useful tool through which victims of domestic and sexual violence can recover for their resulting economic losses.[190]

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186. *See* Goldscheid, *supra* note 49, at 228 (discussing congressional finding that 50% of victims of sexual assault lose their jobs afterward). For studies detailing the ways in which domestic and sexual violence causes and maintains victims' poverty, see *id.* at 226-28 (reviewing and citing studies); see also, e.g., Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121 (2003); Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275 (2006); Jill C. Robertson, *Addressing Domestic Violence in the Workplace: An Employer's Responsibility*, 16 L. & INEQ. 633 (1998); Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, Illinois Pub. L. & Legal Theory Research Paper No. 07-01, Jan. 18, 2007, *available at* http://ssrn.com/abstract=958077; Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH. L. REV. 139 (2000). For a summary of publications addressing this issue, see, e.g., http://www.ncdsv.org/publications_workplace.html.

187. Goldscheid, *supra* note 49, at 179.

188. *Id.* at 190-91.

189. LISA NEWMARK ET AL., URBAN INST., THE NATIONAL EVALUATION OF STATE VICTIMS OF CRIME ACT ASSISTANCE AND COMPENSATION PROGRAMS: TRENDS AND STRATEGIES FOR THE FUTURE, at xiii (Apr. 2003), *available at* http://www.urban.org/url.cfm?ID=410924 (noting that only three states allow some recovery for emotional distress damages).

190. In order to be most useful to victims, however, unduly restrictive requirements that currently limit programs' effectiveness should be removed. Goldscheid, *supra* note 49, at 190-95.

Other alternative approaches to compensation could open avenues to recovery as well. For example, more rigorous enforcement of restitution provisions could afford recovery to victims. Restitution programs require the defendant in criminal actions to compensate victims for losses resulting from the crime.[191] Every state and the federal government have provisions authorizing restitution, although the scope of coverage and enforcement varies widely.[192] Although restitution necessarily is limited to cases in which there is a successful criminal prosecution, it exemplifies an alternative approach to economic compensation that could prove valuable to victims without exacting the toll of civil litigation.

B. Transforming Underlying Biases

While the factors described above limit civil rights remedies' ability to deliver their promise of practical relief, other factors limit their power to reframe the discriminatory attitudes that underlie domestic and sexual violence. This Section discusses several of these factors: the ways in which sex discrimination is both an over- and underinclusive lens through which to frame the problem of domestic and sexual violence; the importance of reincorporating victims' voices into reform strategies that address the social conditions that allow domestic and sexual violence to persist; and the need to reincorporate debate about social factors, which include but are not limited to sex discrimination, as a central part of policy discourse about the problem.

1. Sex Discrimination as Over- and Underinclusive

A conceptual limitation in redressing domestic and sexual violence as a problem of sex discrimination is that sex discrimination is both an over- and underinclusive lens through which to describe the problem. Making the link between domestic and sexual violence and sex discrimination was a critical insight that transformed the way the problem came to be addressed. Since the 1970s, the expansion of legal protections, policy responses, and social services addressing domestic and sexual violence has dramatically expanded in the United States.[193] Although few of the policy responses themselves address sex equality, arguments about sex equality played a critical role in the rhetoric and advocacy that led to those important reforms.[194] The connection between violence and sex equality was integrally connected to the women's rights movement that tapped the emotions of the times and sparked unprecedented activism. Rhetorical descrip-

191. For a general discussion of restitution programs, see *id.* at 177-81.
192. *Id.*
193. *See* Goldscheid, *supra* note 8, at 362-73.
194. *Id.* at 363.

tions equating domestic and sexual violence with sex discrimination resonated with women's experience of the problem and gave voice to a previously silenced understanding of its complexity.

Domestic and sexual violence still reflects and perpetuates sex discrimination. This can be seen in myriad ways. Domestic and sexual violence continues to be committed disproportionately by men against women.[195] The nature of the violence itself continues to reflect perpetrators' biased attitudes.[196] The justice system's response, despite its improvements, serves as a constant reminder that sex-based stereotypes continue to pervade the justice system.[197] For example, in one recent case, a judge presiding over domestic violence cases was accused of likening three women who sought protective orders to "buses that come along every 10 minutes."[198]

But domestic and sexual violence is more complex than a unitary sex-based lens implies.[199] Legal reforms that focus on sex discrimination to the exclusion of other social forces will not accurately capture

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195. *See supra* note 18.

196. Cases litigated under the VAWA civil rights remedy and analogous state laws reflected the gender bias that continues to animate domestic and sexual violence. *See, e.g.*, Ziegler v. Ziegler, 28 F. Supp. 2d 601, 607 (E.D. Wash. 1998) (noting that defendant's use of gender-specific epithets, control over the family's finances and wife's passport, refusing to allow wife a role in family decisionmaking, and escalated attacks during her pregnancy and when she asserted her independence were evidence of gender animus); Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779, 785 (W.D. Va. 1996), *aff'd*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000) (noting that defendant's statements that victim " 'better not have any fucking diseases' " and that he " 'like[d] to get girls drunk and fuck the shit out of them' " were evidence of gender animus); Kuhn v. Kuhn, No. 98 C 2395, 1998 WL 673629 at *5-6 (N.D. Ill. Sept. 16, 1998) (concluding that sexual assault by husband reflects gender bias).

197. For examples of bias by law enforcement officials, see Buel, *supra* note 173, at 963-69 (describing examples of victim blaming by judges); Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALA. L. REV. 1063, 1063-64 (1995) (describing case in which a Baltimore County judge sentenced a man who killed his wife with a hunting rifle after finding her in bed with another man to eighteen months to be served on work release time plus fifty hours of community service in a domestic violence program, stating, " 'I seriously wonder how many married men, married five years or four years would have the strength to walk away, but without inflicting some corporal punishment . . . . I shudder to think what I would do."); see also GENDER BIAS TASK FORCES, NAT'L JUDICIAL EDUC. PROJECT, LEGAL MOMENTUM, FINDINGS & RECOMMENDATIONS, *available at* http://legalmomentum.org/legalmomentum/programs/njep/2006/04/findings_recommendations.php (last visited Mar. 28, 2007) (observing that "[i]nstead of focusing on why men batter and what can be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence, subject them to demeaning and sexist comments, shuttle them from court to court, and issue mutual orders of protection when the respondent has not filed a cross-petition and there is no evidence that the petitioner was violent"); *cf.* Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1 (1996) (reviewing gender bias task forces).

198. Ruben Castaneda, *Embattled Judge Rejects Charges of Misconduct*, WASH. POST, June 1, 2006, at B07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/31/AR2006053102005.html?nav=rss_metro/md.

199. *See infra* notes 19 and 20 and accompanying text.

the nature of the experience for many victims. This is particularly problematic to the extent that rights-based reform efforts can serve as a catalyst to a broader social movement. If remedies premised on the harm of sex discrimination do not fully describe the problem for victims, they will have less appeal as a practical matter and will be less effective as a catalyst for broader social change.

Sex-discrimination-based arguments have held tremendous rhetorical power in the United States and increasingly fuel international reform.[200] The more nuanced our understanding of the problem becomes, however, the more important it is to credit the range of social and economic factors that define domestic and sexual violence, rather than rely on the single lens of gender. Renewed efforts to ground reform in the complex social and economic contexts that define victims' experiences may ultimately be more effective in addressing the problem. Some important programs are doing just that.[201]

2. Reincorporating Victims' Voices

Advocacy and reform efforts that link domestic and sexual violence with sex discrimination will be most powerful when they are tied to a broader social movement. This occurred in the wave of activism that began in the 1970s, where sex discrimination arguments coincided with the rising women's movement and helped advance this most recent wave of advocacy to combat domestic and sexual violence.

Given the advances of the last thirty years and the shifting legal and political backdrop, we should now revisit first principles. Feminist advocacy has been premised on the fundamental tenet that reform should be driven by women's voices and experiences.[202] In evaluating the use of civil rights remedies, we should ask whether that lens continues to describe women's experiences of the problem accurately.[203]

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200. *See* Goldscheid, *supra* note 8, at 362-73 (citing sources).

201. *See, e.g.*, *Building Comprehensive Solutions to Domestic Violence: Increasing Economic Opportunity for Battered Women* (Nat'l Res. Ctr. on Domestic Violence), *available at* http://www.vawnet.org/vnl/library/general/bcs_apub.htm (last visited Mar. 28, 2007), Janet Carter & Jill Davies, *Domestic Violence and Poverty: Organizing an Advocacy Voice* (Neighborhood Funders Group Fall 2000), *available at* http://www.nfg.org/reports/73domestic.htm; CONNECT: Safe Families, Peaceful Communities, at *http://www.connectnyc.org/index.html*; Close 2 Home, *available at* http://www.c2home.org/ (last visited Mar. 28, 2007).

202. *See supra* note 12 and accompanying text.

203. To the extent that victims describe the problem as one of relationship or personality rather than sex or other forms of discrimination, some might argue that those responses reflect false consciousness. For discussions of false consciousness, see Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 119-20 (1996); Mari Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777-80 (1990).

At least one recent study of domestic violence victims[204] confirms what antiessentialist scholars have argued: that when asked about social and structural aspects of domestic and sexual violence, women of color tend to define domestic violence in terms of interlocking economic political and social realities rather than in terms of gender alone.[205] This result is consistent with commentators' observations that the emphasis on gender to the neglect of class and race skewed the "movement" to focus on middle-class, white women.[206]

These studies also confirm the importance of concrete and economic remedies and the disconnect between current criminal and civil justice responses and victims' stated needs and concerns. For example, studies confirm women's concern for shelter and financial support.[207] For some, financial need is a "life-defining" circumstance that informed their response to the abuse.[208] Another group of women believed that safety and community validation were more important than punishing or hurting the perpetrator.[209] Other studies confirm the centrality of concrete resources in improving victims' quality of life and in reducing their vulnerability to future abuse.[210]

A renewed commitment to grounding theory and strategy in victims' experience may usefully shift the focus of reform. Further inquiry and dialog with victims could go a long way toward informing the nature of future initiatives. Promising organizing initiatives base advocacy and policy initiatives on survivors' perspectives and priori-

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204. Only a few empirical studies appear to have addressed this question. *See* Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 579 (2005) (interviewing twenty-two victims of violent crime); Robin L. Nabi & Jennifer R. Horner, *Victims with Voices: How Abused Women Conceptualize the Problem of Spousal Abuse and Implications for Intervention and Prevention*, 16 J. FAM. VIOLENCE 237, 239-42 (2001) (conducting telephone survey of Philadelphia adults comparing views of abuse compared to nonabused women); Laura Nichols & Kathryn M. Feltey, *"The Woman Is Not Always the Bad Guy": Dominant Discourse and Resistance in the Lives of Battered Women*, 9 VIOLENCE AGAINST WOMEN 784, 788 (2003) (surveying women living in a battered women's shelter in a midwest urban area).

205. Nichols & Feltey, *supra* note 204, at 800-01. For example, women of color in that study cited the lack of shelters and services, inadequate legal protections, and misplaced funding priorities that favored military spending as opposed to social problems such as homelessness and domestic violence. *Id.* at 799-801. By contrast, the woman in that study who focused exclusively on gender oppression was a woman of European descent. *See id.* at 799.

206. McMahon & Pence, *supra* note 171, at 55.

207. Nichols & Feltey, *supra* note 204, at 790.

208. *Id.* at 794.

209. Herman, *supra* note 204, at 585-97.

210. *See* Chris M. Sullivan & Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners*, 67 J. CONSULTING & CLINICAL PSYCHOL. 43, 43-44, 49-53 (1999). For a general discussion of the centrality of concrete services and materials resources to domestic violence victims' well being and safety, see Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, *in* DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER AND CULTURE 369 (Natalie J. Sokoloff & Christina Pratt eds., 2005).

ties.[211] Accordingly, in addition to civil litigation strategies, reforms that address the economic harms and that directly challenge the interlocking social realities that shape victims' experiences may be more responsive to victims' needs.

3. Recentering Debate About Discrimination

To the extent that laws such as the civil rights remedy seek to shift underlying discriminatory attitudes, there is no substitute for exposing and addressing those attitudes directly. Increased awareness and visibility of domestic and sexual violence may erroneously fuel perceptions that the problem is adequately being addressed and that law enforcement officers and judges adequately have been trained how best to address the problem. Yet discrimination continues to infuse both the circumstances under which violence is committed and society's responses to those seeking help.[212] These examples should continue to be publicized and those responsible must be held accountable for their acts.

If the modification of popular culture's images of women can help shift discriminatory attitudes, such shifts should be supported and encouraged. Promising initiatives involve violence prevention programs that target both men and women.[213] Other programs are engaging men in the project of challenging discriminatory attitudes and social norms that treat domestic and sexual violence as acceptable responses.[214]

Moreover, much may be gained from reincorporating debate about the social context in which domestic and sexual violence occurs into the mainstream discourse about the problem. This debate should include, but not be limited to, gender bias. The growth of the domestic and sexual violence service networks and the expanded range of legislative reform has shifted the tenor of reform from social context to social services. Interventions that address social context can lead to creative advocacy. For example, victims might support programs with youth that identify and challenge the ways that domestic and sexual violence is rooted in sex-based stereotypes. Other programs might challenge ongoing gender bias in law enforcement responses.

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211. *See* Rhea V. Almeida & Judith Lockard, *The Cultural Context Model: A New Paradigm for Accountability, Empowerment, and the Development of Critical Consciousness against Domestic Violence*, *in* DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER AND CULTURE, *supra* note 210, at 301 (describing cultural context model for addressing domestic violence); *see also supra* note 201 (citing sources).

212. *See supra* notes 195-201 and accompanying text.

213. *See, e.g.*, CDC, *Intimate Partner Violence: Prevention Strategies*, *available at* http://www.cdc.gov/ncipc/factsheets/ipvprevention.htm (last visited Mar. 28, 2007) (discussing approaches and listing resources).

214. *See, e.g.*, JACKSON KATZ, THE MACHO PARADOX: WHY SOME MEN HURT WOMEN AND HOW ALL MEN CAN HELP (2006).

Still others might challenge the economic inequalities that limit women's choices through initiatives such as living wage campaigns or other community organizing initiatives. Throughout, renewed discussion about the enduring role of gender and other forms of bias and how that bias informs the perpetuation of and systemic responses to domestic and sexual violence can produce useful new dialog and advocacy initiatives.

V. CONCLUSION

Civil rights remedies are an important component of the range of legal tools available to victims of domestic and sexual violence. Like other remedies, however, they are constrained by limitations inherent in the nature of the remedy and the nature of the problem they are intended to address. This Article has analyzed the extent to which civil rights remedies meet two of their intended goals: increasing access to compensation for the losses resulting from abuse and transforming public awareness of the problem. A variety of considerations—including survivors' rational reluctance to reengage with an abuser—will deter victims from invoking civil rights remedies in many cases. The transformative potential of civil rights remedies is constrained by the limited reach of such cases to produce policy changes and the inability of rights-based claims, divorced from broader social and grassroots organizing efforts, to bring about broader social change.

Alternative approaches effectively can complement civil remedies in increasing avenues for recovery from the financial losses resulting from abuse. Initiatives that directly address the economic inequalities that domestic and sexual violence produce, such as enhanced victim compensation programs and more rigorous enforcement of restitution provisions, can increase victims' access to financial compensation without requiring reengagement with an abuser. Efforts to address doctrinal gaps that allow institutions to escape liability for inadequately addressing the problem also can enhance victims' recovery and promote institutional accountability.

The most compelling arguments in support of the civil rights remedy surrounded its promise to help transform public opinion and attitudes about the problem. While the civil rights remedies still in effect may advance that goal, other approaches to eliminating the gender bias and other biases that continue to inform domestic and sexual violence warrant attention. Advocacy grounded in survivors' experiences and initiatives that directly challenge those enduring biases hold promise to shift social norms and help us move another step toward advancing safety and equality.