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# The Civil Rights Provision of the Violence against Women Act: Its Legacy and Future

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# COMMENTS

## THE CIVIL RIGHTS PROVISION OF THE VIOLENCE AGAINST WOMEN ACT: ITS LEGACY AND FUTURE

## I. VIOLENCE AGAINST WOMEN IN AMERICA

Violence against women is a systemic, pervasive problem affecting all facets of society. "Globally, violence against women is manifested through persecution, torture, rape and violence by intimate partners."[1] "Many countries encourage or support violence against women through their legal systems, policies and cultural practices."[2] This practice has been institutionalized and legitimized in America, especially in the legal system. Violence against women is the most perverse and destructive form of gender inequality.[3] "Massive efforts ha[ve] been made in the 1970s and 1980s to ensure equal opportunity for women: equal opportunity in employment, in education, in the application of family and criminal law."[4] The question becomes, however, what is the benefit of these advances if women cannot enjoy them because they are victimized in their own homes. "In a sense, violence against women [is] the ultimate weapon against gender equality—it [can] wipe out in a single blow any and every advance . . . [and] opportunity created by over twenty years of law reform."[5] To that end, the Violence Against Women Act ("VAWA") was passed in 1994 as part of President Clinton's crime bill.[6]

VAWA provided federal grant money for community efforts to fight violence against women (*e.g.*, domestic violence shelters,[7] state databases to track reporting of rape and domestic violence,[8] a national study on campus sexual assault,[9] and reports on battered women's syndrome[10]). Additionally, it provided for increased lighting on public transportation and money for emergency phones,[11] a national domestic violence hotline,[12] and a host of educational training programs for state and federal judges to raise awareness about violence against women.[13] The most controversial aspect of the bill was the civil rights remedy, 42 U.S.C. § 13981, for victims who could prove crimes committed against them were gender-motivated.[14]

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1. Jenny Rivera, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy, A Panel Discussion Sponsored by the Association of the Bar of the City of New York, Sept. 14, 1995*, 4 J.L. & POL'Y 409, 410 (1996).

2. *Id.* at 410-11.

3. *See generally* Elizabeth M. Schneider, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy, A Panel Discussion Sponsored by the Association of the Bar of the City of New York, Sept. 14, 1995*, 4 J.L. & POL'Y 427, 427 (1996).

4. 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, 5 (1996).

5. *Id.* at 5 (citation omitted).

6. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)). VAWA is encompassed as part of the Violent Crime Control and Law Enforcement Act of 1994 in Title IV, 108 Stat. 1941 (codified as amended in scattered sections of 8, 18, and 42 U.S.C. (1994)).

7. *See* 42 U.S.C. § 10402(a)(1) (1994).

8. *See id.* § 13962 (1994).

9. *See id.* § 14012 (1994).

10. *See id.* § 14013 (1994).

11. *See id.* § 13931(b)(1)(A), (C) (1994).

12. *See id.* § 10416(d) (1994).

13. *See* 42 U.S.C. §§ 10417(a), 10418(a), 13992, 14036 (1994).

14. *See id.* § 13981 (1994).

Section § 13981 was considered an appropriate use of congressional power granted by the Commerce Clause. This traditionally expansive congressional authority was called into question with the recent Supreme Court decision in *United States v. Lopez*.[15] As a result of *Lopez*, questions have been raised regarding the constitutionality of legislation regulating non-economic activities passed under the Commerce Clause prior to *Lopez*.

Section I provides an overview of state attempts to address the issue of violence against women, specifically rape and domestic violence. Section II provides a legislative history of the Violence Against Women Act focusing on the controversy sparked by the civil rights remedy (§ 13981). Additionally, Section II considers the constitutional underpinnings of § 13981, its roots in modern day Commerce Clause authority and its possible usurpation posed by the Supreme Court's decision in *United States v. Lopez*. Section III highlights two district court cases, *Brzonkala v. Virginia Polytechnic Institute and State University*[16] and *Doe v. Doe*,[17] and their conflicting decisions regarding the constitutionality of § 13981, post-*Lopez*.[18] Section IV critiques the *Brzonkala* court's rationale in declaring § 13981 unconstitutional and addresses the scope of *Lopez*. Courts interpreting *Lopez* as a prohibition of congressional authority to regulate non-economic activities under the Commerce Clause clearly misconstrue the case. *Lopez* merely stands for the proposition that where Congress wishes to regulate local or intrastate activities that are non-economic in nature, it must do so only in cases that substantially affect interstate commerce. Because § 13981 does not infringe on traditional state powers and because violence against women has a substantial impact on interstate commerce, § 13981 will survive any constitutional challenges.

## *A. Rape*

### 1. The Problem of Rape in America

While rape is an international problem, "[i]n 1990 the United States led the world with its number and rate of reported rapes."[19] In America, it is estimated that

15. 514 U.S. 549 (1995).
16. 935 F. Supp. 779 (W.D. Va. 1996).
17. 929 F. Supp. 608 (Conn. 1996).
18. The 1995 Supreme Court decision in *Lopez* called into question Congress's broad authority under the Commerce Clause. The 60-year expansion of Commerce Clause power is discussed *infra* Part II.C. The *Lopez* decision provided the rationale for at least one district court to declare VAWA's civil rights remedy unconstitutional. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996).
19. *Violence Against Women: Victims of the System: Hearings on S.15 Before the Senate Comm. on the Judiciary*, 102d Cong. 193 (1991) [hereinafter *Victims of the System Hearings 102-369*] (citing United States Department of Justice Statistics Special Report, *International Crime Rates*, May 1988). Additionally, "in 1990 the rape rate in the United States was 20 times higher than it was in Portugal, 26 times higher than in Japan, 15 times higher than in England, . . . and 46 times higher than in Greece." *Id.*

a woman is raped every six minutes and usually by someone she knows.[20] One study reported that 84% of rape victims "knew their attacker;"[21] further "[a] study of 2,291 adult working women found that 39 percent of rapes were committed by husbands, partners, or relatives." [22] Almost exclusively, rapes are committed by men against women.[23] Rape has risen "four times as fast as the total national crime rate over the past 10 years."[24] A Department of Justice ("DOJ") survey concluded that "in total, women aged twelve and older annually sustain almost five million violent victimizations; approximately five hundred thousand of these... are rapes and sexual assaults."[25]

In 1988, the "Surgeon General of the United States found domestic violence to be the number one public health risk to adult women in the United States."[26] Almost ten years later, violence against women still poses the "leading cause of injuries to women .... ages 15 through 44 years."[27] Violence causes more injuries to women than "automobile accidents, muggings, and cancer deaths *combined.*"[28] Some experts estimate that women have "between a 1-in-5 and a 1-in-8 chance of being raped in [their] lifetime" resulting in "at least 12.1 million women" being victims of rape.[29] Finally, rape and the threat of rape cross all socioeconomic, racial, and ethnic lines.

While the individual impact of rape can be long-term,[30] rape does not just affect

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20. *See* Congressional Caucus for Women's Issues, *Violence Against Women* (Jan. 1992) [hereinafter *Violence Against Women Factsheet*] (citing Uniform Crime Report 1989; National Crime Survey 1989) (unpublished factsheet, on file with author).

21. *See Victims of the System Hearings 102-369*, *supra* note 19, at 259 (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women's Policy Studies).

22. *Id.*

23. *See Violence Against Women Factsheet*, *supra* note 20.

24. S. REP. NO. 101-545, at 30 (1990).

25. Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1849 (1997) (citing Ronet Bachman & Linda E. Saltzman, U.S. Dep't of Justice, *Violence Against Women: Estimates from the Redesigned Survey* 2 (1995)).

26. Ruth Jenny & Kelly Gaines Stoner, *Domestic Violence and the North Dakota Best Interests Statute*, 72 N.D. L. REV 1011, 1014 (1996).

27. Surgeon General Antonio Novell, "From the Surgeon General, U.S. Public Health Service, Journal of the American Medical Association," 267 JAMA 3132, 3132 (1992).

28. *Id.* (emphasis added).

29. *Id.*

30. *See* Andrea Parrot, *Medical Community Response to Acquaintance Rape—Recommendations*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 310 (Andrea Parrot & Laurie Bechhofer eds., 1991). Rape victims generally suffer from rape trauma syndrome which involves among other things nervousness, fear of being alone, nightmares, and loss of appetite. *See* Christine A. Gidycz & Mary P. Koss, *The Effects of Acquaintance Rape on the Female Victim*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 272, 278, 310 (Andrea Parrot & Laurie Bechhofer eds., 1991). Rape trauma syndrome results in absenteeism from work, loss of productivity, depression (suicidal tendencies in some), and prevents women from leading productive and fulfilling lives. *See id.* at 272-77. Other symptoms can include: "helplessness, shock and disbelief, guilt, humiliation and embarrassment, anger, self-blame, flashbacks of the rape, avoidance of previously pleasurable activities, avoidance of the place or circumstance in which the rape occurred, depression, sexual dysfunction, insomnia, and impaired memory." American Medical Association, *Sexual Assault in America* (visited Oct. 7, 1998) <http://www.-ama-assn.org/public/releases/assault/action.htm>. Additionally, studies have shown that rape victims are more likely to consider themselves "less healthy, visited a physician nearly twice as often, and incurred medical costs over *twice as high* as women" who had not been raped. *Id.* (emphasis added). Finally, "[t]he level of violence experienced during the assault was found to be a powerful predictor of future use of medical services." *Id.*

its specific victims.[31] Rape and the threat of rape have a severe psychological and economic impact on all women evidenced by women restricting where and when they work, with whom and how they socialize, and generally by limiting the ability of women to lead happy and productive lives.

2. Inadequacy of the State Response to Rape

Ironically, even with the high frequency of rape, rape myths are still prevalent in American society, ultimately discouraging the reportage of rape, and more importantly impeding the prosecution and conviction of rapists.[32] One of the biggest obstacles to effective prosecution and conviction of rapists is the inadequate definition of rape by most state statutes. The first definition of rape was articulated by Lord Chief Justice Matthew Hale in which he stated that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent."[33] The inherent message from such a definition is that a rape victim's testimony should be viewed with suspicion, and this suspicion is still evident in the contemporary definition of rape.

*a. Definitional Problems*

Lord Hale's definition eventually evolved into the common law definition of

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31. *See* American Medical Association, *Sexual Assault in America* (visited Oct. 7, 1998) <http://www.ama-assn.org/public/releases/assault/action.htm>. "Following sexual assault, victims often pull away from intimate relationships or, alternatively, become regressively fearful, clinging, and needy. Family members can find themselves dealing not only with their own reactions to the assault on their loved one, but also with the psychological, medical, and behavioral changes they see in the victim." *Id.*

32. Rape myths come in many forms, but following are the most common. (1) *Myth*: Most rapes are stranger rapes; *Reality*: Most rapes are committed by someone the victim knows. *See* Laurie Bechhofer & Andrea Parrot, *What Is Acquaintance Rape, in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 10 (Andrea Parrot & Laurie Bechhofer eds., 1991). In recent years, date rape or acquaintance rape has increased where a woman is raped by a friend or acquaintance in the home or workplace. *See Victims of the System Hearings, supra* note 19, at 259-60. Women are conditioned to fear "strangers", but the reality is women are more at risk with those they intuitively trust. (2) *Myth*: Marital rape is not as harmful; *Reality*: Rape, especially marital rape, is destructive. *See* Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 689-91 (1996). It is a common misconception that if the victim and perpetrator are involved the rape is not hurtful when in fact it may be even more so. *See id.* Victims who are raped by someone they know experience not just a violation of their body but a violation of trust with someone they love. (3) *Myth*: Rape is just forceful sex by men who cannot control themselves; *Reality*: Rape is not about sex; it is about power and control. *See* Martha R. Burt, *Rape Myths and Acquaintance Rape, in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 32 (Andrea Parrot & Laurie Bechhofer eds., 1991). Similar to domestic violence abusers, rapists seek to control, humiliate, and dominate their victims typically because they feel they cannot control their own lives. *See id.* (4) *Myth*: Women secretly wish to be raped; *Reality*: Women do not ask to be raped either by the clothes they wear or the behavior in which they engage. *See id.* While some women may enjoy more intense forms of sex, they do not desire to be victimized and tortured. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1976); SEDELLE KATZ, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS (1979); LEROY G. SCHULTZ, RAPE VICTIMOLOGY (1975).

33. Ricki L. Tannen, Reporter, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 5, 875-76 (1990) (citing M. HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 635-36 (1st Am. ed. 1837)).

rape: intercourse "with a woman not his wife; by force or threat of force; against her will and without her consent."[34] This definition continues to serve as the "essence" of most rape statutes even in the "most radical reform statutes."[35] Under the Model Penal Code ("MPC") rape is defined as intercourse "compel[led] . . . by force or by threat of imminent death, serious bodily injury, extreme pain or kidnaping"; most states use some version of the MPC definition.[36] The problem with rape continues to be the definition and scope. The closer the relationship between the victim and perpetrator, the less likely the crime is viewed as rape. This is vividly evident in the concept of marital rape.

Today it is a crime for husbands to rape their wives; however, this is the result of statutory reform occurring only in the last twenty years.[37] Prior to 1976, a husband could not be charged with raping his wife because of the Marital Rape Exemption.[38] While most states have reformed their marital rape statutes, "only 17 states and the District of Columbia have completely abolished the marital rape exemption."[39] Despite this, the overall effect of the exemption continues in states imposing strict reporting guidelines or requiring that victims report the rape within a short amount of time.[40] Other states only "reduce[d] the grade of the offense to a lower level than that which applies in the case of a stranger rape."[41] Even in states that statutorily abolished the marital rape exception, there is still a presumption if the victim and perpetrator were involved a rape cannot have occurred. For example, some states have statutes exempting cohabitants and dating companions as well as spouses from sexual assault laws, thus precluding women from reporting their significant others.[42] "[C]ohabitation is an affirmative defense to rape in Connecticut,

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34. SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 8 (1987).

35. *Id.* (citations omitted).

36. WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES COMMENTS AND QUESTIONS 866 (2d ed. 1988) (citing Model Penal Code § 213.1 (Official Draft 1962)).

37. *See* Sexual Harassment and Rape Prevention Program [hereinafter SHARPP], *The Wife Rape Information Page* (last modified Jan. 22, 1998) <http://www.unh.edu/student-life/sharpp/marital.html>. "In 1981, ten states barred prosecutions of husbands for marital rape." Eskow, *supra* note 32, at 681 (1996). "By 1990, no state retained an absolute marital rape exemption, although thirty-five states placed limits on the prosecution of marital rapists," which "included non-cohabitation or aggravated force requirements, ceilings on punishment, specifications on when—and to whom—marital rape must be reported, and the creation of alternative, frequently misdemeanor, sexual assault statutes that applied when criminal behavior otherwise classifiable as felony rape happened to be perpetrated by a spouse." *Id.* at 681-82 (footnotes omitted). "By 1994, twenty-four states had abolished any form of [the] marital rape exemption"; however, "at least thirteen states still offer preferential or disparate treatment to perpetrators of spousal sexual assault." *Id.* (footnotes omitted).

38. *See* SHARPP, *supra* note 37.

39. *Id.*

40. *See, e.g.*, CAL. PENAL CODE § 262(b) (West Supp. 1999) (spouse must report rape within one year to prosecute).

41. Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1887 (1996). *See, e.g.*, TENN. CODE ANN. §§ 39-13-503, 507 (Supp. 1998) (marital rape is class C felony and rape is class B felony); VA. CODE ANN. § 18.2-67.2:1 (West 1996) (different sentencing guidelines for rape (five years to life) and marital rape (one year to twenty years)).

42. *See, e.g.*, KAN. STAT ANN. § 21-3501(3) (Furse 1995) (parties must be living apart, legally separated, or seeking divorce before charges may be filed); MD. ANN. CODE art. 27, § 464D (Michie 1996) (parties must have legal separation document or be living apart three months prior to the rape); MISS. CODE ANN. § 97-3-99 (1994) (affirmative defense to spousal rape if parties are living together); VA. CODE ANN. § 18.2-61 (spouses must be living apart to prosecute marital rape). *See also* NOW Legal Defense and Education Fund, Inc., *The Violence Against Women Act of 1991*

*regardless* of the legal status of the relationship between the victim and the defendant."[43] Additionally, in Delaware men are "shielded" from prosecution if the "'victim . . . is in the defendant's company on the occasion of the offense as a result of the victim's exercise of rational intellect and free will'" and "has engaged in consensual sex with the defendant within the past year."[44]

Beyond inadequate definitions of the crime of rape, proving the elements of rape presents victims with a second obstacle to overcome. Reliance on the level of force used and corroboration make the possibility of a successful rape prosecution very weak. Most rapists use as their weapons, in addition to sexual intercourse, intimidation and threats; this coupled with the fact that most victims are assaulted by someone they know diminishes the likelihood of excessive force.[45] Additionally, while these tactics may have long-lasting psychological effects,[46] they rarely have measurable physical effects thereby increasing the difficulty in satisfying the element of force.[47]

The element of corroboration is likewise flawed. "[C]orroborative evidence of rape is more difficult to secure than for many other crimes."[48] Many times there are no witnesses, "no contraband,"[49] sometimes little or no signs of force, and no medical evidence.[50] These definitional hurdles place too much burden on victims. In effect, these definitions create a proportional relationship between the level of brutality a victim suffers and the credibility she receives as a victim from law enforcement and the legal system.

### *b. Misperceptions of Rape Victims*

Despite and possibly because of the difficulty in proving the elements of rape, rape victims are faced with skepticism when they report rape to law enforcement.[51] In particular, many victims are accused of falsely reporting rape, when in reality "[e]stimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes."[52] "[F]alse reports are no more

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*(S.15/H.R. 1502): Facts On the Civil Rights Provision* 3 (1991) (unpublished factsheet, on file with author).

43. Eskow, *supra* note 32, at 683 (citing CONN. GEN. STAT. ANN. § 53a-67(b) (West 1994)) (emphasis added).
44. *Id.* (citing DEL. CODE ANN. tit. 11, §§ 761(h), 775(a)(2) (1987 & Supp. 1994)).
45. *See generally* ESTRICH, *supra* note 34, at 58-71.
46. *See generally* Parrot, *supra* note 30 and accompanying text.
47. *See* ESTRICH, *supra* note 34, at 21, 71.
48. *Id.* at 21.
49. *Id.*
50. *See id.*; *Violence Against Women Factsheet*, *supra* note 20.
51. *See* Tannen, *supra* note 33, at 886 (citing *Tactics, Verdict in Rape Case Stir Outrage*, MIAMI HERALD, Oct. 6, 1989, at 3B). Consider a Florida woman who was raped, but her perpetrator was not convicted because the jury believed she "asked for it" by wearing a lace miniskirt and tank top. *Id.* She said after the trial she felt "more victimized by the system" than the rapist. *Id.* According to the victim, the "police badgered her, interrogat[ed] her like a criminal, and . . . prosecutors . . . displayed indifference toward her." *Id.*
52. S. REP. NO. 102-197, at 45 n.48 (1991) (quoting M. Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991)); *see also* Laurie Bechhofer and Andrea Parrot, *What Is Acquaintance Rape?*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 11 (Andrea Parrot & Laurie

likely for rape than they are for other serious crimes."[53] This skepticism is indicative of a societal distrust of rape victims.[54] Disbelief of victims contributes to low arrest rates, low prosecution rates, and even lower conviction rates.[55] Further, the idea that sexual assault victims are not credible impacts victims at all levels and stages of the legal system. The direct impact of these societal attitudes can be seen in jury attitudes toward victims. A study conducted by two jury consultants, Harry Kalven and Hans Ziesel, found that many juries in rape cases are prejudiced against the prosecution and empathize with the defendant, especially if there is evidence of "contributory behavior" on the part of the victim.[56] "Contributory behavior" included "hitchhiking, dating, and talking with men at parties."[57] The results of these societal attitudes speak for themselves: "[s]tudies of individual jurisdictions have found that only 20 percent (Washington, D.C.) or 25 percent (New York City) or 34 percent (California) or 32 percent (Indiana) of felony arrests for rape result in convictions."[58] Compare this with the 61% conviction rate for robbery and the 69% conviction rate for murder and it is evident that states are failing miserably in the prosecution of rape.[59] Alice Vachss, former Special Victims Bureau prosecutor in the district attorney's office in Manhattan, summed up the inadequacy of prosecuting rapes this

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Bechhofer eds., 1991) ("[T]he number of acquaintance rapes falsely reported to the police is negligible." (New York City Police Department 1972)). "[L]ess than 1% of reported rapes in Los Angeles County have been found to be false reports (a lower false report rate than for either robbery or homicide)." University of Wisconsin, (visited Oct. 7, 1998) <http://cwis.usc.edu/00/Campus_Life/Women/Women%27s_-Resource_Guide/assault/myths>.

53. *See* Martha R. Burt, *Rape Myths and Acquaintance Rape, in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 28 (Andrea Parrot & Laurie Bechhofer eds., 1991).

54. This distrust of women is not just relegated to violent circumstances. Many men, especially those in law enforcement, continue to hold patriarchal and archaic views concerning women. *See* ESTRICH, *supra* note 34, at 15 (citations omitted). Consider the following statement by a superior law enforcement officer: "women, like Kotex, should be used once and thrown away." Tannen, *supra* note 33, at 888, (quoting Unidentified Witness, remarks to the Florida Supreme Court Gender Bias Study Comm'n (1988)). These kinds of misogynistic comments reflect our society's deeper suspicion of women. The distrust of rape victims in particular begins at an early age. *See* American Medical Association, *Facts About Sexual Assault*, (visited Oct. 7, 1998) <http://www.ama-assn.org/public/releases/assault/facts.htm>.

A survey of 11-to-14 year olds found:

- 51% of the boys and 41% of the girls said forced sex was acceptable if the boy, "spent a lot of money" on the girl;
- 31% of the boys and 32% of the girls said it was acceptable for a man to rape a woman with past sexual experience;
- 87% of the boys and 79% of girls said sexual assault was acceptable if the man and the woman were married;
- 65% of the boys and 47% of the girls said it was acceptable for a boy to rape a girl if they had been dating for more than six months.

*Id.* (citing Jacqueline W. White & John A. Humphrey, *Young People's Attitudes Toward Acquaintance Rape, in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 43-56 (Andrea Parrot & Laurie Bechhofer eds., 1991)). "In a survey of high school students, 56% of the girls and 76% of the boys believed forced sex was acceptable under some circumstances." *Id.*

55. In Florida, a state with one of the highest rates of sexual assault, 6,524 rapes were reported in 1988. *See* Tannen, *supra* note 33, at 889. Less than one-third of these rapes ended in arrest. *See id.* Less than 50% of those arrested for rape are convicted. *See* S. REP. NO. 103-138, at 42 (1993) (citations omitted). The high conviction rates for murder (69%) and robbery (61%) is evidence of the low priority rape cases are given both by law enforcement and prosecutors. *See id.*

56. ESTRICH, *supra* note 34, at 19.

57. *Id.*

58. *Id.* at 17 (footnotes and citations omitted).

59. *See* S. REP. NO. 103-138, at 42 (1993).

way:

> There is a large, more or less hidden population of what I later came to call collaborators within the criminal justice system. Whether it comes from a police officer or a defense attorney, a judge or a court clerk or a prosecutor, there seems to be a residuum of empathy for rapists that crosses all gender, class, and professional barriers. It gets expressed in different ways, from victim-bashing to jokes in poor taste, and too often it results in giving the rapist a break.[60]

The problem, however, does not end with the inequity of rape prosecutions. Domestic violence, which also disproportionately affects women, has received even less attention in the legal system. While some contend the national consciousness was raised by the O.J. Simpson trial, the focus on violence against women was supplanted by the focus on race.[61] The reality is that domestic violence is still grossly under reported and under prosecuted.[62]

### *B. Domestic Violence*

#### 1. The Problem of Domestic Violence

Domestic violence is a systematic infliction of physical, emotional, and economic terror resulting in the erosion of a woman's self-esteem and her ability to lead a productive life.[63] David Adams, who works at a domestic violence program

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60. ALICE S. VACHSS, SEX CRIMES: TEN YEARS ON THE FRONT LINES PROSECUTING RAPISTS AND CONFRONTING THEIR COLLABORATORS 30 (1993). Vachss goes on to assert there are only three defenses to rape: "[i]t never happened; . . . [s]he consented; . . . [i]t wasn't me." *Id.* at 110. Vachss describes the challenges she faced not only in prosecuting crimes many found "losers," but also her experiences as a female attorney in a traditionally male profession. *See generally id.*

61. *See generally* JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON (1996), for a realistic overview of the O.J. Simpson trial.

62. *See generally* RAOUL FELDER & BARBARA VICTOR, GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE (1996); ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT (1994) for a comprehensive overview of domestic violence, including prevalent myths and the inadequacies of state criminal statutes.

63. *See* Arlington Co. Victims of Violence, Volunteer Training Manual (Fall 1993) (unpublished material, on file with author). There are generally three phases of domestic violence: (1) the tension-building phase; (2) the battery phase; and (3) the honeymoon phase. *See id.* During the tension-building phase, the abuser finds excessive fault with everything the victim does. *See id.* Initially, the victim tries to rectify whatever is upsetting the abuser. *See id.* Ultimately realizing that nothing will satisfy the abuser, the victim usually retreats to avoid upsetting the abuser. *See id.* This retreat only serves to increase the abuser's antipathy toward the victim; the tension increases until it results in battery. *See id.* The battery phase can last a few seconds up to 24 hours. *See id.* It can include anything from a single slap, prolonged beatings with hands and blunt instruments, to death. *See id.* During the honeymoon phase, the abuser is usually apologetic and remorseful; he may promise never to hit the victim again or even agree to seek counseling. *See id.* Typically, however, the battery continues. Over time the tension-building and battery phases increase in frequency and severity and the honeymoon phase decreases. *See id.* When the victim decides to leave the abuser, the victim is in the greatest danger because the abuser feels as if he has lost all control over his life and may use lethal force to control the victim. *See id.* Domestic violence is about power and control—the abuser controls and dominates the victim's life because he feels inadequate in his own. *See id.* One woman serving a life sentence for killing her abuser in self-defense commented, after being asked if serving time was worth killing her abuser, that she had more freedom

in Boston, defines domestic violence as: "any act that causes the victim to do something she does not want to do, prevents her from doing something she does want to do, or causes her in either case to be fearful of her partner."[64] Domestic violence historically has been viewed as a "private matter" and ultimately as a "normal" consequence of marriage.[65] In America, the roots of the battle against domestic violence date back to the Temperance Movement initiated by middle-class women to stop men from coming home intoxicated and subsequently beating their wives.[66] Until the turn of the century, many states sanctioned husbands beating their wives, provided they used sticks no thicker than the width of their thumbs.[67] With such laws, the colloquial phrase "rule of thumb" was born.[68] Jack Greenberg, former Director of the NAACP, said that domestic violence in marriage is as "American as apple pie."[69] Even the term "domestic violence" diminishes the lethality and brutality of the crime and the belief that it is in fact a crime.[70] "So well does the phrase 'domestic violence' obscure the real events behind it that when a Domestic Violence Act (to provide money for battered women's services) was first proposed to Congress . . . many thought it was a bill to combat political terrorism within the United States."[71] Similarly the phrase "crime of passion," which is often used to refer to domestic violence, is confusing because it lends credence to the myth that domestic violence is merely an "argument" between intimates.[72] Finally, so little consideration is given to domestic violence that there are more shelters for abused animals than for abused women and children.[73] In the United States in 1993, there were approximately 3,800 animal shelters, compared with approximately 1,500 shelters for domestic violence victims and their families.[74]

A common misconception is that domestic violence only involves an occasional push, shove, or slap. In reality it is much more violent.[75] In fact, domestic violence

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in prison than she did living with her abuser. *See* DEFENDING OUR LIVES (Cambridge Documentary Films, Inc. 1993). Incidentally, it won the Academy Award for Best Documentary in 1993.

64. FELDER & VICTOR, *supra* note 62, at 237.

65. *See* JONES, *supra* note 62, at 19-20.

66. *See* SARA M. EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 126-27 (1989).

67. *See* Tannen, *supra* note 33, at 850 (citing Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony?*, 39 MERCER L. REV. 545, 548 n.16 and accompanying text (1988)).

68. *See id.*

69. Naftali Bendavid, *The Surprising Volatility of the Violence Against Women Act*, LEGAL TIMES, June 20, 1994, at 16.

70. *See* Nourse, *supra* note 4, at 1 (citing S. REP. NO. 102-197, at 37 (1991)).

71. JONES, *supra* note 62, at 82. *See generally id.* at 81-87. Some criticize terms like "spousal abuse" for "defin[ing] [the] crime 'by relationship.'" Nourse, *supra* note 4, at 1.

72. *See* GAVIN DE BECKER, THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE 184 (1997). "That phrase is not the description of a crime—*it is the description of an excuse*, a defense. Since 75 percent of spousal murders happen after the woman leaves, it is estrangement, not argument, that begets the worst violence." *Id.*

73. *See Violence Against Women Factsheet*, *supra* note 20, at 7 (citing Senate Judiciary Comm., 1990).

74. *See* Arlington Co. Victims of Violence, *supra* note 63.

75. *See* S. REP. NO. 102-118, at 6 (1992). A study conducted by the Senate Judiciary Committee found that many instances of domestic violence involve a high level of brutality. *See id.* Consider the following results:

- A 26-year-old Connecticut woman is attacked by her boyfriend of 5 years; he breaks her right arm with a hammer.
- A Texas woman is threatened with a gun by her husband of 18 years. After slapping her, he tells her to load the gun. Threatening to kill her, he hits her with the butt of the gun,

abusers use many of the same tactics which Amnesty International identified as tactics employed by terrorists against hostages including, "isolation, monopolization, . . . threats, . . . demonstration of omnipotence, degradation, and enforcement of trivial demands."[76] Domestic violence is a "chronic" and frequent problem; "[i]t is persistent intimidation and repeated physical injury" that increases with frequency and severity over time.[77] It is estimated that a woman is beaten every seven seconds.[78] "Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners."[79] Additionally, "[a]s many as 20 percent of hospital emergency room cases are related"[80] to domestic violence, yet only half of medical school curriculums include information on domestic violence.[81] This lack of education is just one practical example of society's unwillingness to deal with domestic violence. The legal system has contributed to the misunderstanding about domestic violence by refusing to offer substantive civil and criminal remedies to victims of domestic violence.

2. The Inadequacy of State Response to Domestic Violence

*a. Misperceptions of Domestic Violence Victims*

Because domestic violence has long been considered a "family problem," many victims face a multitude of challenges in filing, processing, and prosecuting a domestic violence charge. The "majority of domestic violence incidents are classified only as misdemeanors" despite the fact that had they been committed by a stranger they would be classified as felonies.[82] "As a result, the system tends to justify its nonintervention by reason of quantity, the number of those at potential risk, rather

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drawing blood and rendering her unconscious.

- A 21-year-old Florida woman is beaten in the head by her father with a pipe 3 inches in diameter.
- A 15-year-old Connecticut girl is stabbed by her ex-boyfriend, shortly after he has been released from jail for abusing her.
- A 27-year-old New Mexico woman, 8 months pregnant, is pinned up against a wall of her home by her husband of 5 years. He beats her with a broomstick and threatens to kill her.
- A Colorado woman is abused by her husband in their home. To frighten her, he breaks the legs of their dog and, to prevent her from leaving, he disables her car.

*Id.*

76. FELDER & VICTOR, *supra* note 62, at 45.

77. S. REP. NO. 101-545, at 36 (1990). Additionally, the Centers for Disease Control ("CDC") "have identified a direct link between battering and the spread of HIV and AIDS among women." JONES, *supra* note 62, at 87 (citing Sally Jacobs, *In Hub and Beyond, HIV Seen as Latest Whip for Batterers*, BOSTON GLOBE, Jan. 24, 1993, at 21, 24).

78. *See* FELDER & VICTOR, *supra* note 62, at 21.

79. S. REP. NO. 101-545, at 37 (1990). *See also* Anne Stein, *Will Health Care Reform Protect Victims of Abuse? Treating Domestic Violence as a Public Health Issue*, 21 HUM. RTS. 16 (1994). For a discussion of the discrimination domestic violence victims face from insurance companies, see generally Julie Goldscheid & Pamela Coukos, *Insurance Discrimination Against Victims of Domestic Violence*, 30 CLEARINGHOUSE REV. 206-08 (1996).

80. S. REP. NO. 101-545, at 37 (1990).

81. *See* FELDER & VICTOR, *supra* note 62, at 56.

82. Maloney, *supra* note 41, at 1886-87.

than quality, the seriousness of the crime committed."[83]

Additionally, "[d]omestic violence calls are the largest single category of calls to which police respond."[84] Most officers dislike responding to domestic disturbance calls for fear of being assaulted and injured.[85] However, reports of officers being injured in the line of duty have been overstated and serve only to deter officers from granting domestic violence the attention it deserves.[86] Even when officers do respond to domestic calls, many times these responses do not end in the arrest of the abuser, despite women having injuries requiring hospitalization or medical attention.[87] Consider the horrific experience of Tracey Thurman who was attacked by her knife-wielding husband in her home.[88] She was knocked down, kicked in the face, stabbed twelve times, and had her neck broken by her husband, all *in the presence of a police officer watching from his vehicle.*[89] Her husband succeeded in attacking her three times in the presence of police officers *before* he was arrested.[90] These instances are the norm, not the exception.[91]

### *b. Enforcement Issues—Mandatory Arrest Laws*

To address the burgeoning problem of domestic violence, some states have adopted mandatory arrest laws which require a responding officer to arrest an abuser if there is evidence of domestic violence.[92] A National Crime Survey reported that "calling the police, however good or bad their response, did, in fact, deter repeated

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83. FELDER & VICTOR, *supra* note 62, at 28.

84. Tannen, *supra* note 33, at 853.

85. *See id.* at 853-54. Despite empirical studies discounting this myth, police training manuals have not been revised to accurately reflect the "threat" in responding to domestic disturbance calls. *See id.* Florida's Gender Bias study found that "law enforcement agencies place a low priority on educating their officers on domestic violence issues." *Id.* (citing Gender Bias Study Comm'n, Florida's Criminal Justice System's Response to Domestic Violence 6 (1988) (unpublished manuscript, on file with the Florida State Archives, R.A. Gray Building, Tallahassee, FL. 32399-0250)).

86. *See id.*

87. *See* FELDER & VICTOR, *supra* note 62, at 24-25.

88. *See id.* at 15-17.

89. *See id.* at 15.

90. *See id.* at 15-16. Tracey Thurman was ultimately awarded $2.3 million in compensatory damages in a civil suit against 24 officers of the Torrington County Police Department in Torrington, Connecticut. *See id.* at 26. This award was not without a hefty price. Thurman is permanently disfigured and partially paralyzed. *See id.* at 17. Thurman was terrorized by her husband prior to the incident for months and notified all appropriate family services and law enforcement agencies to no avail. *See id.* She suffered her most damaging injuries under the watchful eye of the police. *See id.*

91. *See, e.g.*, TOOBIN, *supra* note 61, at 51-67. Florida's Gender Bias Study found a statewide problem with police "insensitivity to physical injury" resulting in "the failure to arrest or report domestic violence." Tannen, *supra* note 33, at 855. One officer's solution to domestic violence victims was to "give him some [sex] and he won't *need* to beat you"; another's solution was to "take five". Others insist on persuading victims *not* to pursue charges. *See id.*; *see also* JONES, *supra* note 62, at 40-41. In a period of ten days, three women in New York, each with a protection order, were killed by their abusers despite the women's reporting abusers' activities to the police. *See id.* at 18-48.

92. Sometimes referred to as "discretionary" and "non-discretionary" arrest laws respectfully. *See* FELDER & VICTOR, *supra* note 62, at 137.

violence."[93] The survey, conducted over a five-year period, estimated that 2.1 million women were victims of spousal abuse.[94] "Of those, 1.1 million, [contacted] the police themselves" or had a person witnessing the violence contact police.[95] In these cases, no further incidences of violence were reported to the police for six months following the original complaint.[96] Despite these results, fewer than half of states have embraced mandatory arrest laws.[97] Even in states that have implemented such policies, typically they are poorly enforced if at all.[98] A study of the Phoenix Police Department revealed that only 18% of battering incidents resulted in arrest even though officers were required to follow a mandatory arrest policy.[99]

### *c. Enforcement Issues—Protective Orders*

Protective orders likewise have failed to protect women from abusers because of enforcement problems. "In several well-publicized cases, women who had obtained civil protection orders in court were then murdered by the same men who had been ordered to stay away from them, because of inadequate police enforcement and judges' unwillingness to jail men for violating such orders."[100] The criteria and frequency of issuing protective orders has often proved burdensome for women, especially those who are economically disadvantaged or illiterate. Critics against issuing protective orders argue they only increase the potential for violence rather

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93. *Id.* at 136. The findings further indicated that "calling the police in itself acts as a deterrent to repeated abuse." *Id.* at 137. Some opponents of mandatory arrest laws claim that innocent men will be arrested because women will lie to have their husbands arrested. *See id.* at 137-38. Arrests are not always listed on a perpetrator's permanent record so this risk is low; additionally, there are already measures in place to penalize persons from filing false claims. *See id.* at 138. Some opponents fear that women will suffer more if the abuser is arrested and advocate more empowering measures. *See id.* at 135. Women rarely lie to get their significant others arrested. *See id.* at 138. In fact they usually oppose it for fear of being beaten worse later. *See id.*

94. *See* FELDER & VICTOR, *supra* note 62, at 136-37.

95. *Id.* at 137.

96. *See id.*

97. *See* Neal Miller, *Domestic Violence Legislation Affecting Police and Prosecutor Responsibilities in the United States: Inferences from a 50-State Review of State Statutory Codes* and *Exhibit 2: Police Warrantless Arrest Authority: Domestic Violence and Order Violations* (last modified June 30, 1997, updated August 1998) <http://www.ilj.org/dv/DVVAW.html>.

98. Consider California's mandatory arrest law that was in effect when Nicole Brown Simpson called the police and was found "wearing only sweat pants and a bra, with bruises all over her face and hand prints on her neck." FELDER & VICTOR, *supra* note 62, at 139-40; TOOBIN, *supra* note 61, at 52. The police did not arrest O.J. Simpson. *See id.* at 263; *see also* FELDER & VICTOR, *supra* note 62, at 139-40. Washington, D.C. has a mandatory arrest policy, but the D.C. Coalition Against Domestic Violence reported that "arrests were made in only 5% of all cases, and less than 15% of cases" in which victims sustained wounds requiring medical attention. S. REP. NO. 101-545, at 38-39 (1990). Of 19,000 domestic violence calls received by the District of Columbia Police Department in 1986, "42 of these incidents resulted in a written police report, and possibly even fewer resulted in the arrest" of an offender. *Violence Against Women, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Judiciary Comm.*, 102d Cong. 98 (1992) (testimony of Sandra Sands citing report of District of Columbia Coalition Against Domestic Violence).

99. *See* Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police, and the Law*, *in* LEGAL RESPONSES TO WIFE ASSAULT, at 109-10 (1993).

100. *Women and Violence Part I, Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 66 (1990) [hereinafter *Senate Hearings Part I, 101-939*] (statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund).

than curb it.[101] In a DOJ study, "researchers concluded that restraining orders were 'ineffective in stopping physical violence'"; however, they noted that protective orders were "helpful in cases in which there was no history of violen[ce]."[102] Another DOJ study found that women who sought protective orders continued to have problems and reported both physical and psychological abuse within six months of the protective order being issued.[103] Regardless until the passage of VAWA, protective orders generally were not honored outside the state from which they were issued.[104] Even if protection orders were issued, problems arose because many times they conflicted with visitation and custody orders.[105]

*d. Unequal Sentencing Guidelines*

Ironically, while law enforcement and the judiciary have been unable to successfully arrest, prosecute, and convict abusers, they have had no difficulty in vehemently prosecuting women who kill their abusers (usually in self defense).[106] Women who kill their abusers receive an average prison sentence between 12 and 16 years; men who kill their significant others typically receive an average prison sentence between 2 and 6 years.[107] While several law review articles and books have been dedicated solely to this topic, it is mentioned here to further illustrate the inequity women face in the legal system, thus crystallizing the need for § 13981.

State efforts to eradicate domestic violence and rape have proven to be completely ineffective and costly both in human life and dollars. What has escaped national notice is the pervasive impact violence against women has economically and socially on the United States as a whole. This economic drain was in part the impetus for the ultimate passage of VAWA.

*C. The Economic Impact of Violence Against Women*

The economic effects of violence against women go beyond impacting individual

101. *See* DE BECKER, *supra* note 72, at 186.
102. *Id.* at 187.
103. *See id.* at 188. This has lead to the conclusion among some that "the short-term benefits of restraining orders are greater than the long-term benefits." *Id.*
104. *See* Catherine F. Klein & Leslye E. Orloff, *Symposium on Domestic Violence: Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 1099 (1993). Prior to VAWA, only "[s]ix states ha[d] provisions in their civil protection order statutes . . . authoriz[ing] their courts to give full faith and credit to the laws and orders of other state courts." *Id.*
105. *See generally id.*
106. *See generally* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987); ANN JONES, WOMEN WHO KILL (1980); Phyliss L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).
107. *See* Arlington Co. Victims of Violence, *supra* note 63; *see also* National Clearinghouse for the Defense of Battered Women, *Statistics Packet* 15 (3d ed. 1994) (on file with author); FELDER & VICTOR, *supra* note 62, at 175-76.

women to include businesses and governments at all levels. The effects of violence on the nation are apparent in productivity, consumption, and the overall health of the economy. The Senate Judiciary Committee concluded: "Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."[108] Estimates reveal violence against women costs the United States three billion dollars a year.[109]

Violence against women significantly affects the bottom line in businesses. "The U.S. Justice Department estimates that, in 60,000 incidents of on-the-job violence each year, the victims know their attackers intimately."[110] According to a recent U.S. Department of Labor study, homicide is "the most frequent manner in which women workers are fatally injured at work;" additionally, the "study showed that in 17% of these homicides, the alleged assailants were current or former husbands or boyfriends."[111] Statistically women who are abused or suffer sexual assault are more likely to be less productive in the work place and have a higher rate of absenteeism.[112] These costs can be directly attributed to increased medical and insurance expenditures for companies.[113] According to a 1994 study of Fortune 1,000 executives, 44% of those surveyed reported that "domestic violence . . . increase[d] insurance and medical costs."[114] Because domestic violence is a cyclical problem, these expenses continue to accrue over the long term. A *National Family Violence* survey found that women who are abused have "twice as many headaches, four times the rate of depression, and five and a half times more suicide attempts"[115] than women who are not abused. Domestic violence alone "has been estimated to cost employers between 3 to 5 billion dollars annually due to absenteeism in the workplace."[116] This does not include medical costs which have been estimated at

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108. S. REP. NO. 102-197, at 53 (1991).

109. *See* S. REP. NO. 101-545, at 33 (1990).

110. Esta Solar, *Domestic Violence: A Pressing Workplace Issue* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/workplace/wrkplacesta.html>.

111. Family Violence Prevention Fund, *The Impact of Domestic Violence on the Workplace Fact Sheet* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/the_facts/factsht.html> [hereinafter Family Violence Prevention Fund, *The Impact of Domestic Violence*] (citing U.S. Dep't of Labor, Women's Bureau, "Domestic Violence: A Workplace Issue," *in Facts on Working Women*, No. 96-3, Oct. 1996, citing "Fatal Workplace Injuries in 1994: A Collection of Data and Analysis," Report 908, Bureau of Labor Statistics, U.S. Dep't. of Labor, July 1996).

112. *See* Family Violence Prevention Fund, *57 Percent of Corporate Leaders Believe Domestic Violence Is a Major Social Problem According to Survey by Liz Claiborne, Inc.*, (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/the_facts/claiborne.html> [hereinafter Family Violence Prevention Fund, *Liz Claiborne Survey*]. A survey of Fortune 1,000 company corporate executives reported that "domestic violence has had a harmful effect on their company's 'productivity (49%),' 'attendance' (47%) and 'health care costs (44%).'" *Id.* Further "[i]n a New York study of 50 battered women, 75% said they had been harassed by the batterer while they were at work, 54% reported missing an average of three days per month, and 44% lost at least one job for reasons directly related to the abuse." Family Violence Prevention Fund, *The Impact of Domestic Violence*, *supra* note 111 (citing Lucy Friedman & Sarah Cooper, *The Cost of Domestic Violence*, Victim Services Research Department, 1987).

113. *See* Family Violence Prevention Fund, *The Impact of Domestic Violence*, *supra* note 111 (citing Women's Work Program, Liz Claiborne, Inc., *Survey Conducted by Roper Starch Worldwide*, New York, Liz Claiborne, Inc., July 18-Aug. 5, 1994).

114. *Id.*

115. S. REP. NO. 102-369, at 240 (1991).

116. *Id.*

close to $100 million dollars annually.[117] Additionally, victims of domestic violence are often harassed in their work place, "prevented from arriving to work on time, and kept from attending work altogether because of serious injuries."[118]

Finally, "violence against women also has a negative effect on levels of commercial consumption."[119] The idea is simple: "Women who cannot traverse public streets without fear will also not use places of public accommodation, purchase goods, or conduct business in such areas."[120] "Fear of gender-motivated violence restricts the hours during which women can engage in a variety of activities and seriously curtails their participation in the commerce of our nation."[121] With women representing such a large part of the American workforce and of American consumers and producers, the effect violence against women has on the national economy cannot be ignored.[122]

## II. VIOLENCE AGAINST WOMEN ACT

### A. *Legislative History of the Act*

The Violence Against Women Act was "enacted as part of the 1994 omnibus

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117. *See id.*

118. Shargel, *supra* note 25, at 1854.

119. *Id.* at 1855.

120. *Id.* (quoting statement of James P. Turner, Acting Assistant Attorney General of the Department of Justice's Civil Rights Division at the *Crimes of Violence Motivated by Gender: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 109 (1993)).

121. *Id.*

122. *See id.* In recognizing the economic drain of violence against women in both dollars and human lives, several companies are proactively seeking to curb violence by implementing large-scale public awareness programs. To that end, "19 corporations, trade associations, and unions collaborated to establish the National Workplace Resource Center on Domestic Violence." Family Violence Prevention Fund, *About the National Workplace Resource Center on Domestic Violence* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/workplace-about.html>. Entities involved in the Center include: "Aetna Inc., American Council of Life Insurance, American Federation of State, County and Municipal Employees, Bank of America, Bechtel, Food Marketing Institute, Kaiser Permanente, Levi Strauss Foundation, Liz Claiborne, Marshalls, Mintz, Levin, National Association of Manufacturers, Polaroid, Reebok, Service Employees International Union, The Body Shop, The Gap, and Wells Fargo Bank." *Id.* Liz Claiborne and Marshalls are pioneers in bringing corporate responsibility to this issue. In addition to creating Public Service Announcements ("PSAs") geared to educate men about violence issues, Liz Claiborne, Inc. contracted with Roper Starch Worldwide to conduct an extensive survey among Fortune 1,000 executives to ascertain the effect of domestic violence in corporate America. *See* Family Violence Prevention Fund, *Liz Claiborne Develops New PSAs That Target Men* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/- materials/speakup/LizNewPsa.htm>; *see also* Family Violence Prevention Fund, *New Liz Claiborne PSA Campaign Uses High Profile College Football Student Atheletes to Reposition Relationship Violence as a Men's Issue* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/men/sports2.html>; Family Violence Prevention Fund, *Liz Claiborne Survey*, *supra* note 112. Additionally, Marshalls president, Jerome R. Rossi, has been vocal in his desire to eradicate domestic violence. *See* Family Violence Prevention Fund, *Creating a Workplace Response to Domestic Violence* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/workplace/intro.html>. Rossi stated, "Families in America are in trouble . . . We [Marshalls] want to lend our name and our leadership to this cause—to bring an end to this national epidemic." *Id.* To that end, Marshalls and the Family Violence Prevention Fund created the Domestic Peace Prize program to recognize domestic violence prevention programs. *See* Family Violence Prevention Fund, *How One Company Has Responded: Marshalls, Inc. Creates Awards Program* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/- workplace/marshalls.html>; *see also* Family Violence Prevention Fund, *Violence At Home Has Effect on the Workplace* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/workplace/home.html>; Family Violence Prevention Fund, *'Oprah' Looks at the Impact of Domestic Violence at the Workplace* (visited Oct. 7, 1998) <http://www.igc.apc.org/fund/celebrity/oprah.html>.

crime bill, which authorized $1.67 billion in funding over six years for a variety of programs that included women's shelters, a domestic abuse hotline, rape education and prevention programs, and training for federal judges" to be executed through the Department of Justice ("DOJ") and Health and Human Services ("HHS").[123] Senator Joseph Biden (D-DE) introduced the Violence Against Women Act (S. 2754) on June 19, 1990.[124] Originally, VAWA included three main titles: prosecution and law enforcement (Title I); battering and the criminalization of interstate battery (Title II); and a new civil rights remedy (Title III).[125] While the entire Act went through many changes during its legislative ride to enactment, this comment focuses exclusively on the legislative history pertaining to the civil rights provision. The civil rights remedy, Title III of S. 2754, incorporated language of and was fashioned with respect to other civil rights remedies.[126] Title III defined substantive rights to be protected as the right "to be free from crimes of violence overwhelmingly motivated by the victim's gender" which included "any rape, sexual assault, or abusive contact motivated by gender."[127]

Congressional hearings and committees found that Title III was justified under three rationales. First, gender-motivated crimes violated the equal protection clause of the Fourteenth Amendment and the victim's right to be free from "discrimination on the basis of gender."[128] Second, Congress recognized that current civil rights remedies only provided relief for "gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home."[129] Finally, Congress found that state and federal laws "d[id] not adequately protect against the bias element of gender crimes, which separate[d] these crimes from acts of random violence, nor d[id] they adequately provide victims the opportunity to vindicate their interests."[130]

Title III was initially modeled after contemporary civil rights remedies using similar language and statutory construction like that found in 42 U.S.C. §§ 1981, 1983, and 1985(3).[131] "Although existing civil rights remedies appear to be the templates from which drafters copied the formal 'cause of action' under Title III, those remedies provide no analogue for the substantive right created by Title III 'to be free' from gender-motivated violence."[132] The civil rights remedies outlined in §§ 1981, 1983 and 1985 do not specifically address the question of violence against women, but rather were created to address racially-motivated violence.[133] Section 1981 is expressly directed toward non-whites to ensure equal protection and the benefit of the law in terms of enforcing contracts, the ability to sue and be sued, and

123. Patricia Schroeder, *Stopping Violence Against Women Still Takes a Fight: If In Doubt, Just Look at the 104th Congress*, 4 J.L. & POL'Y 377-98 (1996) (footnotes omitted).
124. *See* Nourse, *supra* note 4, at 7.
125. *See id.*
126. *See* S. REP. NO. 101-545, at 51 (1990).
127. S. 2754, § 301(b) and (d), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
128. *Id.* § 301(a), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
129. *Id.* § 301(a)(2), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
130. *Id.* § 301(a)(3), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
131. *See id.* § 301(a)(3), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
132. Nourse, *supra* note 4, at 8.
133. *See* Allen v. McCurry, 449 U.S. 90, 98 (1980) (stating that the main goal of § 1983 "was to override the corrupting influence of the Ku Klux Klan").

to give evidence.[134] Section 1983 provides federal redress for any violations involving federal constitutional or statutory rights.[135] Finally, § 1985 addresses violent actions, but only allows redress for perpetrators who have conspired to deprive a victim of equal protection under the law.[136] Hence, the civil rights remedies (prior to § 13981) were inadequate in addressing gender-motivated crimes. More importantly, none of these statutes allowed redress for violence committed in the home.[137]

Though the obvious foundational requirements existed to warrant the creation of a civil rights remedy, the Violence Against Women Act did not have an easy passage through Congress. After Sen. Biden introduced S. 2754 in 1990, three hearings were held during the 101st Congress.[138] The hearings provided a forum for victims, policy makers, social service workers, politicians, and law enforcement to detail the acute need for the Violence Against Women Act and in particular the civil rights remedy for victims of gender-motivated crimes. The hearings crystallized the deficiency of the legal mechanisms in place for victims of gender violence.

Following the hearings, the Senate Judiciary Committee met in October to discuss VAWA.[139] It was at this time that Sen. Biden offered a new version of VAWA with substantive changes to Title III.[140] In particular the updated version expanded Title III to include any crime of violence; initially it covered only sex crimes.[141] Another major change was the incorporation of language that required the crime to be "overwhelmingly" gender motivated.[142] Following these changes, no more action was taken in reference to S. 2754 during the 101st Congress.

At the beginning of the 102d Congress, Sen. Biden reintroduced VAWA as S. 15 with co-sponsor Rep. Barbara Boxer (D-CA) introducing it in the House.[143] With its reintroduction, a massive battle was waged against the civil rights provision of VAWA calling into question its constitutional foundation.[144] Despite its opposition, the civil rights provision and VAWA survived the 102d Congress essentially intact. However, Sen. Biden made three changes to Title III: (1) he added additional findings of the Senate hearings to buttress the constitutional foundation of the remedy;[145] (2) he deleted the "presumption that sexual crimes were gender-motivated crimes" from

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134. *See* 42 U.S.C. § 1981(a) (1994).
135. *See id.* § 1983.
136. *See id.* § 1985.
137. *See id.* §§ 1981, 1983, 1985.
138. *See* S. REP. NO. 102-197, at 35 (1991). *See generally Senate Hearings Part I, 101-939*, *supra* note 100; *Women and Violence Part 2, Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1990) [hereinafter *Senate Hearings Part 2, 101-939*].
139. *See* S. REP. NO. 101-545, at 29-30 (1990).
140. *See id.*
141. *See* S. 2754, § 301(d), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
142. *Id.* § 301(b), *reprinted in* S. REP. NO. 101-545, at 23 (1990).
143. *See* S. REP. NO. 102-197, at 35 (1991).
144. Several groups, including prominent administrators in the Bush administration, contended that the civil rights provision was unconstitutional and launched a massive negative campaign to strike the measure entirely. *See* Nourse, *supra* note 4, at 16, 18 ("Chief Justice Rehnquist gave a widely publicized 1991 year-end report, in which he urged 'self-restraint in adding new federal causes of action '", *reprinted in* 138 CONG. REC. S443-44 (daily ed. Jan. 27, 1992)). Additionally, "the Bush Justice Department had opined that the bill was unconstitutional for a number of reasons." *Id.* at 18. The specifics of this controversy are discussed *infra* Part II.B.
145. *See* Nourse, *supra* note 4, at 25.

the bill;[146] and (3) he deleted the requirement that a "defendant's conduct" must be "'overwhelmingly' motivated by gender."[147]

During the 103d Congress, VAWA was reintroduced by Senators Biden and Boxer as S. 11, and a companion bill was introduced in the House by Rep. Patricia Schroeder (D-CO) as H.R. 1133.[148] S. 11 was faced with competition when Sen. Hatch (R-PA) introduced S. 6 which incorporated some of Sen. Dole's (R-KS) *Sexual Assault Violence Prevention Act.*[149] In May 1993, Senators Hatch and Biden agreed to construct a compromise piece of legislation.[150] Three important changes were made to VAWA by the Senate in late 1993. The first was procedural in nature; Title III was amended to specifically set forth concurrent jurisdiction of federal and state courts and limited removal jurisdiction.[151] Additionally, Title III was amended to restrict the federal court's exercise of supplemental jurisdiction over claims dealing with divorce, child custody, alimony, and property settlements.[152] The second change limited the kinds of claims that could be heard under § 13981 to felonies that included a risk of personal injury.[153] The final change sought to clarify the statutory meaning of "motivated by gender."[154] After much discussion, the language was amended to require a showing that the act was committed because of gender and due in part to an "animus based on the victim's gender."[155] After these changes, VAWA was passed by Congress and signed into law by President Clinton on September 13, 1994 as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.[156]

### *B. Opponents of § 13981*

From its inception, § 13981 (formerly Title III) faced deep resistance and suspicion. Two weeks after its introduction into the 102d Congress, the Conference of Chief Justices of State Supreme Courts expressed its opposition to Title III on the grounds that it would flood the federal docket with domestic disputes.[157] Vincent L. McKusick, Chief Justice of Maine's Supreme Judicial Court, "questioned the need for 'direct federal intervention into the tangled and tragic cases involving family breakdown and violence.'"[158] In addition, other Chief Justices expressed "concern" over women using the provision as a bargaining chip in divorce proceedings:

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146. *Id.*
147. S. REP. NO. 102-197, at 51 (1991).
148. *See* Nourse, *supra* note 4, at 26.
149. *See id.* at n.141.
150. *See id.* at 26.
151. *See* S. 11, § 302(e)(3), (5), *reprinted in* S. REP. NO. 101-138, at 30 (1990).
152. *See id.* § 302(e)(4), *reprinted in* S. REP. NO. 101-138, at 30 (1990).
153. *See id.* § 302(d)(2)(A), *reprinted in* S. REP. NO. 101-138, at 30 (1990). A felony is generally defined as an offense that carries a sentence of death or imprisonment of one year or more. *See* LAFAVE, *supra* note 36, at 818.
154. S. REP. NO. 101-138, at 50 (1990).
155. S. 11, § 302(d)(1), *reprinted in* S. REP. NO. 101-138, at 30 (1990).
156. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)).
157. *See Victims of the System Hearings 102-369*, *supra* note 19, at 314-17.
158. Rorie Sherman, *Fears Expressed On Proposed Bill To Aid Women*, THE NAT'L L.J., June 3, 1991, at 16.

> Because the provision on gender-based violence appears to permit civil suits *against husbands*, the state judges warn, "this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is."[159]

United States Supreme Court Justice William Rehnquist was also a vocal opponent of the provision fearing it would flood an already bulging federal docket.[160] Chief Justice Rehnquist opposed the provision because its "definition of a new crime [was] so open-ended and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic disputes."[161] These concerns were ultimately addressed in § 13981 procedural provisions specifically restricting federal courts' supplemental jurisdiction over any claim seeking the "establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."[162]

Judicial opponents justified their criticisms under the guise of protecting the federal judiciary and maintaining deference to state sovereignty. However, the reluctance stemmed most likely from the federal judiciary's sense that such matters were below them.[163] "This view of domestic relations as trivial and local translates into related contexts involving women, such as gender-based violence."[164] The opposition to § 13981 is derived from an inability to acknowledge that gender-motivated crimes (e.g., rape and domestic violence) are systemic problems deserving of federal relief. "This is problematic because it fails to recognize that such issues can and often do implicate national concerns regulable under the federal government's enumerated powers."[165] With such a response, the judiciary is essentially restricting a woman's "access to federal court solely . . . on the ground that her assailant is not a stranger to her."[166]

In addition to judicial adversaries, the American Bar Association ("ABA") and the DOJ were staunch opponents of § 13981. In particular, the constitutionality was hotly debated, especially by the DOJ. In a letter to Sen. Biden, Deputy Assistant Attorney General Bruce Navarro wrote:

> [W]e cannot support the creation of a duplicative federal damage remedy, particularly without a showing that current state remedies are inadequate. We also have serious concerns about the open-ended draftsmanship of the section and the doubtful constitutional basis for the bill's cause of action insofar as it covers

159. Ann Pelnam & Gary Sturgess, *Domestic Relations in Federal Court?*, LEGAL TIMES, Oct. 2, 1991, at 7 (emphasis added).
160. *See id.*
161. 138 CONG. REC. S443, 444 (daily ed. Jan. 27, 1992).
162. 42 U.S.C. § 13981(e)(4) (1994).
163. *See* Maloney, *supra* note 41, at 1899 (footnote omitted).
164. *Id.*
165. *Id.* (footnote omitted).
166. National Task Force on the Elimination of Violence Against Women (1992) (unpublished fact sheet, on file with author).

underlying acts that were not taken under color of state law.[167]

Considering the dearth of information solicited by the Senate hearings and committees, Navarro's comments are almost comical. Clearly from the evidence adduced at the hearings, state laws were proven insufficient in prosecuting and curbing gender-motivated violence.[168] The color of law violation Navarro suggested was also moot. Section 13981 does not allow any claim against a governmental entity that did not already exist under § 1983.[169] Section 13981 "permits claims against governmental entities only where a governmental entity could be sued under § 1983."[170]

Navarro's constitutional concerns were hollow as well, but in lieu of *Lopez* they have been called into question. In order to understand the impact of *Lopez* on the contemporary view of the Commerce Clause, it is necessary to consider the Court's treatment of the Commerce Clause over the last sixty years. The following section provides a brief historical overview of the Commerce Clause leading up to *Lopez*.

### *C. History of the Modern Commerce Clause View*

Section 13981 was passed under the Commerce Clause and the Fourteenth Amendment. The constitutionality of § 13981 was addressed in detail in the Senate hearings.[171] Consistently, constitutional scholars upheld Congress's authority to pass § 13981 under the Commerce Clause and the Fourteenth Amendment.[172] Historically, the Supreme Court had upheld Congress's authority to enact civil rights remedies as well as a host of other general welfare statutes on the basis of the Commerce Clause.[173]

For over sixty years, the Court has endorsed congressional power to pass legislation that had even a *minimum* effect on the Commerce Clause.[174] The Commerce Clause grants Congress three broad categories of activity which it has the power to regulate: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce";

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167. Letter from Bruce Navarro, Deputy Assistant Attorney General, to Sen. Joseph S. Biden (Oct. 1990) (on file with author).

168. For an overview, see *supra* Part I.

169. *See* S. REP. No. 102-197, at 51-52 (1991).

170. *Id.*

171. *See Victims of the System Hearings 102-369*, *supra* note 19, at 84-134 (statements of Prof. Burt Neubourne and Prof. Cass Sustein testifying on the constitutionality of Title III).

172. *See id.*

173. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The *Lopez* Court acknowledged that it had "upheld a wide variety of congressional Acts regulating intrastate economic activity . . . that . . . substantially affected interstate commerce . . . includ[ing] regulation of intrastate coal mining; intrastate extortionate credit transactions; restaurants utilizing substantial interstate supplies; inns and hotels catering to interstate guests; and production and consumption of home-grown wheat." (citations omitted). United States v. Lopez, 514 U.S. 549, 559-60 (1995).

174. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a single farmer's crop of wheat substantially affected interstate commerce).

and (3) "those activities that substantially affect interstate commerce."[175] The modern, expansive view of the Commerce Clause began during the post-New Deal era with *NRLB v. Jones & Laughlin Steel Corp.*[176] This case established the contemporary standard allowing government regulation of any activity having a "substantial economic effect" on interstate commerce.[177] In the cases that followed, "the Court made clear that 'economic effect' as used in *Jones & Laughlin* mean[t] the *aggregate economic effect* of the entire class of regulated behavior, as opposed to the effect of the single transaction before the Court."[178]

This generous and liberal approach to the Commerce Clause continued in *United States v. Darby* when the Court upheld the National Fair Labor Standards Act.[179] The Act sought to prohibit the sale of goods across state lines that had been produced under conditions that violated federal law.[180] The Court in upholding the Act represented a break away from the more traditional approach to the Commerce Clause, that of considering whether the activity in question was local or national in nature.[181] The Court held Congress could regulate local business conditions if the goods being produced would eventually enter interstate commerce.[182]

In *Wickard v. Filburn*, this standard was taken to an extreme when the Court held that wheat quotas established by the Agricultural Adjustment Act ("AAA") were constitutional to regulate the consumption of a single farm.[183] The Court upheld the national regulation of a local activity:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.[184]

With the *Wickard* decision, the Court held that Congress could consider local activities in the aggregate in its decision to regulate them.

Under this permissive view, Congress embarked on enacting a host of legislation geared at ending racial discrimination predicated on the idea that discrimination affected interstate commerce. Congress enacted Title II of the Civil Rights Act of 1964 which prohibited racial discrimination in public places such as hotels and

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175. *Lopez*, 514 U.S. at 558-59.
176. 301 U.S. 1, 57 (1937).
177. *See Jones & Laughlin*, 301 U.S. at 36-38.
178. *Victims of the System Hearings 102-369*, *supra* note 19, at 96 (testimony of Prof. Burt Neubourne on the constitutionality of Title III) (emphasis added).
179. *See* United States v. Darby, 312 U.S. 100 (1941).
180. *See id.* at 109.
181. *See id.* at 115-17.
182. *See id.* at 123.
183. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
184. *Id.* at 128.

restaurants.[185] Title II was challenged in *Heart of Atlanta v. United States*, a case involving a motel which refused to serve black patrons.[186] In *Heart of Atlanta*, the Court established a two-part inquiry in Commerce Clause legislation: (1) whether there is a rational basis for the regulation of intrastate activities; and (2) whether the means are appropriate and reasonable.[187] In upholding Title II, the Court rejected the hotel's argument that its operations were purely local: "It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'"[188]

A companion case to *Heart of Atlanta*, *Katzenbach v. McClung*, also sustained a constitutional challenge to Title II.[189] *McClung*, similar to *Heart of Atlanta*, involved a restaurant which refused to serve black patrons.[190] The Court applied the rational basis test, holding that refusing to serve blacks could result in "established restaurants . . . s[elling] less interstate goods because of the discrimination . . . [because] interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result."[191] This expansive view of the Commerce Clause granted Congress broad authority to pass mountains of general welfare legislation. Critics of the Court's liberal rationale warned that under such a view anything could be regulated, ultimately usurping all state sovereignty.[192]

It may have been this fear that proved as a catalyst for the decision handed down in *United States v. Lopez* in which the Court refused to uphold the Gun-Free School Zones Act of 1990 which made gun possession in a school zone a federal crime.[193] The Court held that the Gun-Free School Zones Act did not have a substantial impact on interstate commerce.[194] Additionally, the Court rejected arguments that gun possession affected interstate commerce as too tenuous and requiring a leap of faith the Court was unwilling to take.[195] The Court went on to posit, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[196] This decision represented a dramatic departure from the Court's

185. *See* 42 U.S.C. §§ 2000(a)-(h)(6) (1994).
186. *See* Heart of Atlanta v. United States, 379 U.S. 241 (1964).
187. *See id.* at 258-59.
188. *Id.* at 258 (quoting United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949)).
189. *See* Katzenbach v. McClung, 379 U.S. 294 (1964).
190. *See id.* at 296-97.
191. *Id.* at 300.
192. *See* NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 122 (3d ed. 1996) (quoting Chief Justice Hughes in *Schelter Poultry Corp. v. United States*, 295 U.S. 495 (1935)) ("If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.").
193. *See* United States v. Lopez, 514 U.S. 549 (1995).
194. *See id.* at 567.
195. *See id.*
196. *Id.*

permissive and indulgent Commerce Clause rationale.

Understandably, the *Lopez* decision has raised constitutional questions about legislation passed under the liberal Commerce Clause view. Pertinent to this comment, *Lopez* directly affects the constitutionality of § 13981 since its constitutionality is firmly rooted in a liberal Commerce Clause view. *Lopez* has produced conflicting results with respect to the Commerce Clause, evidenced by the outcomes in the first two cases to challenge the constitutionality of § 13981.[197]

## III. CASES LITIGATED UNDER § 13981

### A. Doe v. Doe[198]

In *Doe v. Doe*, Plaintiff Jane Doe sought "to avail herself of the civil rights remedy provided under the Violence Against Women Act of 1994 . . . for deprivation of her federal right to be free from her husband's alleged gender-based violence."[199] Jane Doe claimed that between 1978 and 1995 her husband "'systematically and continuously inflicted a violent pattern of physical and mental abuse and cruelty'" upon her by "throwing her to the floor, kicking her, throwing sharp and dangerous objects at her, threatening to kill her, and destroying property belonging to [her]."[200] Additionally, Jane Doe claimed she was forced "'to be a 'slave' and perform all manual labor, including maintaining and laying out his clothes for his numerous dates with his many girlfriends and mistresses.'"[201] Defendant, John Doe, moved to dismiss on the basis that Congress "lacked authority under either the Commerce Clause or the Fourteenth Amendment of the United States Constitution to enact" § 13981.[202] Pursuant to 28 U.S.C. § 2403(a), the government intervened and "argue[d] in support of the constitutionality" of § 13981.[203]

*Doe v. Doe* was the first case to challenge the constitutionality of § 13981. After reviewing "VAWA statutory language, legislative history, and briefing of the parties," the court held the defendant's "claims of unconstitutionality [were] unfounded."[204] The court recognized that a rational basis existed for "concluding that

197. *See* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996). Interestingly, several statutes have been challenged in the wake of *Lopez*, but to date "not a single one has been invalidated by a federal appellate court." Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 969 n.13 (4th Cir. 1997) (citing Hoffman v. Hunt, 126 F.3d 575, 582-88 (4th Cir. 1997) (upholding FACE); EPA v. Olin Corp., 107 F.3d 1506, 1509-10 (11th Cir. 1997) (upholding CERCLA); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir. 1997) (upholding Drug Free School-Zones Act); United States v. Bramble, 103 F.3d 1475, 1479-82 (9th Cir. 1997) (upholding the Eagle Protection Act); United States v. Lomayaoma, 86 F.3d 142, 144-46 (9th Cir. 1996) (upholding the Indian Major Crimes Act)). An overview of each court's determination of the constitutionality of § 13981 is discussed *infra* Part III.

198. 929 F. Supp. 608 (D. Conn. 1996).

199. *Id.* at 610.

200. *Id.* (quoting, in part, Complaint ¶12).

201. *Id.* (quoting Complaint ¶27).

202. *Id.*

203. *Id.*

204. Doe v. Doe, 929 F. Supp. 608, 610 (D. Conn. 1996).

gender-based violence . . . is a national problem with substantial impact on interstate commerce and thus is a proper exercise of congressional power under the Commerce Clause."[205] In making its decision, the court first considered that "Congress held numerous hearings over a four-year period and amassed substantial documentation on how gender-based violence impacts interstate commerce and interferes with women's ability to enjoy equal protection of the laws."[206]

The defendant's argument against the constitutionality of § 13981 was based upon the Supreme Court's decision in *United States v. Lopez*. The defendant argued that Congress exceeded its authority in creating VAWA because it "create[d] a 'plenary federal police power,' outside the Constitution's rubric which 'creates a Federal Government of enumerated powers,'" and that VAWA "impermissibly encroache[d] on the states' separate and distinct powers under the Tenth Amendment."[207] The defendant interpreted *Lopez* as overruling "the rationality test for determining whether federal regulation of interstate conduct can be sustained."[208] The court held that while "*Lopez* does warn that the Commerce Clause has limits," the Supreme Court "reaffirmed the rationality test of *Hodel*."[209]

The court distinguished the Violence Against Women Act from the Gun-Free School Zones Act: "The Congressional findings and reports qualitatively and quantitatively demonstrate the substantial effect on interstate commerce of gender-based violence, in marked distinction to the Gun-Free Zone Act challenged in *Lopez* which lacked such analysis, only theoretical impact arguments."[210] Finally, in upholding the constitutionality of § 13981 the court conceded that "[w]hile Supreme Court precedent does not articulate a particular standard or test to determine whether a particular activity 'substantially affects' interstate commerce, *Wickard v. Filburn*, is instructive as setting forth the outer limit of Congress's authority to regulate private intra-state conduct."[211] The court reasoned:

> repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace in response to or as a result of gender-based violence . . . is of such a nature to be as substantial an impact on interstate commerce as the effect of excess 'home-grown' wheat harvesting which was found to have been properly regulated by Congressional enactment.[212]

Additionally, the court found no merit in the defendant's argument that § 13981

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205. *Id.*
206. *Id.* at 611 (paraphrasing the results of *Domestic Violence: Terrorism in the Home*, 101st Cong. 2 (1990)); *see also Women and Violence*, 101st Cong. 7 (1990); *Victims of the System Hearings 102-369*, *supra* note 19; *Violence Against Women, Hearing Before the House Subcomm. on Crime and Criminal Justice*, 102d Cong. (1992).
207. *Id.* at 612 (quoting United States v. Lopez, 514 U.S. 549 (1995) (citing THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961))).
208. Doe v. Doe, 929 F. Supp. 608, 613 (D. Conn. 1996) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).
209. *Id.* at 613.
210. *Id.*
211. *Id.* at 614 (citation omitted).
212. *Id.* (citing Katzenbach v. McClung, 379 U.S. 294, 303 (1964)).

"encroaches on traditional police powers of the state," thus "'federaliz[ing]' criminal, family law, and state tort law."[213] The court recognized that VAWA "does nothing to infringe on a state's authority to arrest and prosecute an alleged batterer on applicable criminal charges."[214] The court held that VAWA did not invade state law, but rather supplemented state law by:

> recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence, and through the Civil Rights Remedy, makes operative the Act's remedial and deterrent purposes, by making violators of this right personally answerable to the victims in compensatory and punitive damages.[215]

Further, the court found the defendant's contention moot since the express language of the statute prohibits federal supplemental jurisdiction over claims involving divorce, alimony, or custody issues.[216]

In conclusion, the court found that the statute was reasonably adapted to its intended purpose because the congressional hearings and committees had proven that current federal and state law was inadequate in addressing gender-based violence.[217] Relying on Supreme Court precedent, the court reaffirmed that bias crimes are "thought to inflict greater individual and societal harm . . . [because they] are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[218] To that end, the court held that the statutory scheme was within Congress's Commerce Clause authority and "consistent with prior precedent related to other federal civil rights remedies enacted by Congress and upheld by courts as constitutional under the Commerce Clause."[219]

While the constitutionality of § 13981 was upheld in *Doe v. Doe*, its constitutionality was challenged again in *Brzonkala v. Virginia Polytechnic Institute & State University*.[220] In *Brzonkala*, the court found the statute to be unconstitutional as an excess of congressional power under the Commerce Clause and the Fourteenth Amendment.[221]

### *B.* Brzonkala v. Virginia Polytechnic Institute & State University

*Brzonkala* involved the rape of a Virginia Polytechnic Institute ("VPI") female

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213. *Id.* at 615-16.
214. Doe v. Doe, 929 F. Supp. 608, 616 (D. Conn. 1996).
215. *Id.*
216. *See id.*
217. *See id.*
218. *Id.* (quoting Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993)).
219. *Id.* at 617.
220. 935 F. Supp. 779 (W.D. Va. 1996).
221. *See id.* at 801. Because this comment deals exclusively with the effect of *Lopez* on the Commerce Clause, the court's arguments in reference to the Fourteenth Amendment and Title IX are not discussed.

student by two male football players.[222] Christy Brzonkala alleged that on September 21, 1994, "two men forced her to have sexual intercourse by threat and intimidation."[223] Brzonkala met her attackers in her dormitory room with another female friend and after talking together for approximately fifteen minutes, the other female left whereupon Antonio Morrison asked her to have sex with him two times.[224] Both times she said "no."[225] "When she tried to leave, Morrison forced her on to a bed, disrobed her, held her arms down at her elbows, pinned her legs with his knees, and raped her."[226] The second attacker, James Crawford, then entered the room and raped her while he held her down.[227] After Crawford finished, Morrison raped Brzonkala again and then stated, "[y]ou better not have any fucking diseases"; neither attacker used a condom.[228] "In the months following the rape, Morrison announced publicly in the dormitory dining room that he 'like[d] to get girls drunk and fuck the shit out of them.'"[229]

Because Brzonkala only knew her attackers' first names, she was unable to identify them.[230] Following the attack, she suffered severe depression, stopped attending classes, and attempted suicide.[231] Five months later in February of 1995, Brzonkala identified Antonia Morrison and James Crawford as her attackers and in April she filed a complaint with the university.[232] Brzonkala decided not to file criminal charges because she "believe[d] that criminal prosecution was impossible because she had not preserved any physical evidence."[233] "Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so."[234] In fact, rape is the "*only* violent felony that Virginia Tech authorities do not *automatically* report to the university or town police."[235] In May 1995, Morrison was found guilty of sexual assault and suspended for two semesters, but there was "insufficient evidence to take action against Crawford."[236] Morrison's sanction was upheld on appeal.[237]

A second hearing was granted on the grounds that Morrison's due process rights had been violated; Morrison's charge was reduced to abusive conduct and he received a two-semester suspension.[238] In conducting the second hearing, Brzonkala was "assured [by Dean of Students Cathryn T. Goree and a Virginia Tech administrator]

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222. *See id.* at 781-82.
223. *Id.* at 782.
224. *See* Security On Campus, Inc., *Statement of Subject Matter Jurisdiction*, Joint Appendix 71 [hereinafter *Joint Appendix*] (visited Nov. 30, 1997) <http://www.soconline.org/LEGAL/BRZONKALA/111896.html>.
225. *Id.*
226. *Id.* at 71-72.
227. *See id.* at 72.
228. *Id.*
229. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 953 (4th Cir. 1997).
230. *See Joint Appendix*, *supra* note 224, at 71.
231. *See id.* at 73, ¶¶26-27.
232. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 782 (W.D. Va. 1996).
233. *Brzonkala*, 132 F.3d at 954.
234. *See id.* at 954.
235. *Id.* (emphasis added).
236. *Brzonkala*, 935 F. Supp. at 782.
237. *See id.*
238. *See Brzonkala*, 132 F. 3d at 954-55.

that they believed her story, and that the second hearing was a mere technicality to cure the school's error in bringing the first complaint under the Sexual Assault Policy."[239] However, these assurances did not ring true when in actuality the hearing was "much more than a mere formality."[240] In addition to Brzonkala receiving inadequate notice of the hearing, Virginia Tech "belatedly informed her that student testimony given at the first hearing would not be admissible at the second hearing and that if she wanted the second judicial committee to consider this testimony she would have to submit affidavits or produce the witnesses."[241] Additionally, the school denied Brzonkala and her attorney "access to the tape recordings of the first hearing, while granting Morrison and his attorney complete and early access to those tapes."[242] Despite these inequities, the second judicial committee found Morrison guilty of violating the Sexual Abuse Policy and imposed the same sanction.[243] Morrison appealed and "without notice to Brzonkala" Senior Vice President and Provost Peggy Meszaros "set aside the sanction."[244]

In the fall of 1995, Brzonkala learned from an article published in the *Washington Post* that Morrison was returning to school (on a full athletic scholarship)[245] and that his charge had been reduced from abusive conduct to "using abusive language."[246] Because Brzonkala feared for her personal safety and "because of previous threats," she withdrew from VPI.[247] In making the decision not to return to school, Brzonkala stated she believed "Virginia Tech's actions signaled to Morrison, as well as the student body as a whole, that the school . . . did not view Morrison's conduct as improper."[248] In December 1995, Brzonkala instituted a § 13981 action and a Title IX action in federal court against Morrison, Crawford, and VPI.[249]

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239. *Id.* at 954.
240. *Id.*
241. *Id.* at 954-55.
242. *Id.* at 955.
243. *See id.* at 955.
244. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 782 (W.D. Va. 1996). In reviewing the appeal, Provost Meszaros acknowledged a violation of Virginia Tech's Abusive Conduct Policy; however, she felt that a two-semester suspension for the gang rape of a student was "excessive when compared" with similar cases. *Brzonkala*, 132 F.3d at 955. Significantly, the Provost failed to identify the "other cases" to which she relied on in suspending Morrison's sentence. *Id.* As a result, the Provost, "deferred suspension until [Morrison's] graduation from Virginia Tech," thereby emasculating the penalty. *Id.*
245. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 955 (4th Cir. 1997).
246. *See Joint Appendix, supra* note 224, at 81-82, ¶¶ 69-70.
247. *Brzonkala*, 132 F.3d at 955.
248. *Id.*
249. *See id.* Most universities have established procedures and protocols for dealing with sexual assault on campus. Some universities such as the University of Oklahoma (OU) in Norman, Oklahoma, have been very proactive in raising awareness about sexual assault in addition to general campus crime. For instance, OU has a web site dedicated to crime prevention and safety information linked to its university home page. Established in 1995, it was "one of the first law enforcement sites in the nation." Joe Lester, Director, University of Oklahoma, Department of Public Safety, *Welcome to The Police Notebook* (last modified Oct. 18, 1997) <http://www.ou.edu/oupd/welcome.htm>. OU's site is "recognized as one of the largest and finest public safety sites on the web." *Id.* In addition to hundreds of links, The Police Notebook site has a page dedicated to Personal Safety outlining several educational web pages, including one on sexual assault. *See id.* OU's sexual assault awareness program, Trust Your Instincts, was established in the late 1980s by OU administrators, students, and community organizations such as the Women's Resource Center, Inc. OU's program ranges from an Escort Service for students studying late on campus to a public speaker program to raise

The district court in declaring § 13981 unconstitutional relied primarily on *Lopez* to sustain its contention that Congress had acted outside its Commerce Clause authority in creating the civil rights remedy.[250] The court found that the "effects-analysis of the majority decision in *Lopez* can be broken down into four parts": (1) "nature of the regulated activity"; (2) jurisdictional element requirement; (3) legislative history; and (4) practical implications of the legislation.[251] Under the first element, the court interpreted *Lopez* as creating a demarcation between intrastate activities that are economic in nature and those that are not.[252] The court concluded "[a]fter *Lopez*, cases such as *Wickard*, where regulated intrastate activity is economic in nature, do not control cases where regulated intrastate activity is not economic."[253] Additionally, the court construed *Lopez* as requiring a jurisdictional element to test the effect of each case on interstate commerce.[254] The court downplayed the importance of congressional findings concluding that "such findings were not necessary."[255] Finally, the court interpreted *Lopez* as a warning that if congressional authority under the Commerce Clause was not curtailed it would lead to governmental regulation of traditional state areas (including family law and education).[256]

The district court reasoned that § 922 of the Gun-Free School Zones Act and § 13981 of VAWA were so similar as to conclude, as the Supreme Court did in *Lopez*, that § 13981 was unconstitutional.[257] The court first considered that § 13981 like § 922 was not "commercial or even economic in nature."[258] The court held that under *Lopez* the economic nature of the activity was a valid consideration.[259] The court cited *Doe v. Doe* criticizing its reliance on *Wickard* in upholding the constitutionality of § 13981 because "to analyze the commerce power in a case involving a non-economic activity is not tenable."[260]

The court weighed heavily the fact that neither § 922 nor § 13981 had a jurisdictional element requirement to serve as a gatekeeper to "limit[] each individual case under VAWA to situations involving interstate commerce."[261] The court

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consciousness about safety issues on campus. *See id.* It is a point of personal pride for this author to have been an original student involved in helping launch the Trust Your Instincts program. Perhaps not surprisingly, Virginia Tech's homepage has one page dedicated to sexual assault prevention linked to its campus police site. *See* Virginia Tech Police Department, *Sexual Assault/Sex Offenses*, (last modified Mar. 23, 1998) <http://ntserver.police.vt.edu/police/sexual.htm>. In contrast, VPI's athletic program's page is linked directly to VPI's homepage and offers over 20 links to sports related sites. *See* Virginia Tech Athletics, *The Official Athletics Website of the Virginia Tech Hokies*, (visited Oct. 12, 1998) <http://www.hokiesports.com/>. Finally, a Yahoo! search for Virginia Tech University finds over 20 sites to athletics alone, 8 of which are dedicated exclusively to football. *See* Yahoo! search engine (visited Oct. 12, 1998) (search conducted with the following search terms: U.S. States: Virginia: Cities: Blacksburg: Education: College and University: Colleges and Universities: Virginia Polytechnic Inst. & State Univ. (Virginia Tech)).

250. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 801 (W.D. Va. 1996).
251. *Id.* at 786-87.
252. *See id.* at 787.
253. *Id.*
254. *See id.*
255. *Id.*
256. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 788 (W.D. Va. 1996).
257. *See id.* at 793.
258. *Id.* at 791.
259. *See id.*
260. *Id.* at 791.
261. *Id.* at 792.

conceded that "[a]lthough it is unclear whether such a jurisdictional requirement is needed . . . Congress has often placed such a requirement in legislation similar to VAWA."[262] Finally, the court focused on the practical implications of upholding § 13981 under the Commerce Clause. The court noted that while the congressional findings illustrate that violence against women has an effect on the national economy, that alone "does not suffice to show that it has a substantial effect on interstate commerce."[263] The court criticized Brzonkala of using "'effects on the national economy' interchangeably with 'effects on interstate commerce.'"[264] This, the court stated, is unequivocally "wrong."[265] The court theorized that if Brzonkala's interpretation was accepted, congressional authority "would extend to an unbounded extreme."[266] The court was strongly influenced by the defendant's analogy that insomnia and domestic violence annually cost the country approximately $15 billion dollars each and under a liberal Commerce Clause rationale any activity could be regulated.[267] The court concluded that "to extend Congress's power to these issues would unreasonably tip the balance away from the states."[268] The flaw in the court's reliance on this analogy is that unlike domestic violence, insomnia is *not* a crime. The court's notation that domestic violence and insomnia are equivalent in terms of representing an economic drain on the national economy fails to take into account the millions of dollars associated generally with violence against women (i.e., medical and insurance costs, costs to businesses in terms of absenteeism and productivity, and costs associated with sexual assault).

The court concluded because § 13981 did not involve an economic activity and a jurisdictional requirement, enforcement would be an unlawful exercise of congressional power under the Commerce Clause and Fourteenth Amendment.[269] As a result, the court dismissed the federal action with prejudice and dismissed the state actions without prejudice.[270] Brzonkala appealed and a three-judge panel for the Fourth Circuit heard oral arguments on June 4, 1997.[271] Attorneys for VPI were "showered . . . with pointed questions."[272] Judge J. Michael Luttig questioned why VPI had continually "insisted on renaming 'rape' as 'abusive conduct'" which he considered "word-smithing."[273] On December 23, 1997, the Fourth Circuit in a 2-1 ruling reversed the lower court's decision.[274] In an analytical framework strikingly

262. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 792 (W.D. Va. 1996).
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 792-93.
267. *See id.* at 793.
268. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 793 (W.D. Va. 1996).
269. *See id.* at 801.
270. *See id.*
271. *See* Security On Campus, Inc., *U.S. Court of Appeals Hears Oral Argument on Brzonkala v. Virginia Tech* (visited Nov. 30, 1997) <http://www.soconline.org/LEGAL/BRZONKALA/060497.html>.
272. *Id.*
273. *Id.* Ironically, it was Judge Luttig who dissented vehemently in the Fourth Circuit's December 1997 decision to overrule the district court. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997).
274. *See Brzonkala*, 132 F.3d at 949.

similar to the rationale relied on in *Doe v. Doe*, the Fourth Circuit determined that Congress had not exceeded its authority under the commerce clause in enacting § 13981.[275]

The appellate court began by denying the defendants' assertion that Brzonkala failed to state a claim under § 13981.[276] The remainder of the court's analysis focused on the constitutionality of § 13981.[277] In this analysis, the court first acknowledged that congressional acts are "entitled to a 'strong presumption of validity and constitutionality.'"[278] Further, the court recognized that its role in determining "'whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow.'"[279] Looking to *Lopez*, the court recognized that § 13981 involved a regulation of a non-economic activity that substantially affects interstate commerce.[280]

In holding that § 13981 did not exceed congressional authority, the appellate court compared § 922 of the Gun-Free School Zones Act with § 13981 of the Violence Against Women Act.[281] The court first noted in "contrast to the congressional silence in *Lopez*, Congress made voluminous findings when it enacted VAWA."[282] To that end, the court found that it could "begin where the *Lopez* Court could not, by 'evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce.'"[283] The court found that the congressional hearings and findings spanning four years outlined in gross detail the economic impact that violence against women has on the national economy.[284] Following such findings, the court surmised that its "task [wa]s simply to discern whether Congress had 'a rational basis' for concluding that the regulated activity . . . substantially 'affected interstate commerce.'"[285] The rational basis test has been used by ten other circuits in testing "post-*Lopez* Commerce Clause challenges."[286]

The appellate court also weighed recent Fourth Circuit decisions involving post-*Lopez* challenges. In particular the court outlined its decision in *United States v. Leshuk*[287] focusing on its reliance of congressional findings in upholding the constitutionality of § 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[288] The court acknowledged that it "based [its] conclusion wholly on Congress's 'detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and

275. *See id.* at 973-74. *See generally* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).
276. *See Brzonkala*, 132 F.3d at 964.
277. *See id.* at 964-73.
278. *Id.* at 964 (quoting Barwick v. Celotex Corp., 736 F.2d 946, 955 (4th Cir. 1984)).
279. *Id.* at 965 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981)).
280. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 965 (4th Cir. 1997).
281. *See id.* at 965-73.
282. *Id.* at 965.
283. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 563 (1995)).
284. *See id.* at 965-69.
285. *Id.* at 967 (quoting *Lopez*, 514 U.S. at 558-59).
286. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 968 n.11 (4th Cir. 1997).
287. 65 F.3d 1105 (4th Cir. 1995).
288. *See Brzonkala*, 132 F.3d at 968.

direct effect upon interstate'" commerce.[289] Additionally, the court considered an earlier decision in which it relied upon congressional reports to sustain a constitutional challenge to the Freedom of Access to Clinics Act ("FACE").[290] The court referred to its reliance on congressional reports by noting that it "determin[ed] that those reports made 'clear' that 'several aspects of interstate commerce [were] directly and substantially affected by the regulated conduct.'"[291] Because the VAWA congressional findings were more substantial than those relied upon in either *Leshuk* or *Hoffman*, the court reasoned it had "no hesitation [in] similarly upholding VAWA."[292]

Finally, the Fourth Circuit noted that unlike § 922, VAWA did not infringe upon traditional state powers.[293] Instead, VAWA involved civil rights—an area historically dominated by federal law.[294] Additionally, the court found the defendants' reliance on *Lopez* misguided.[295] In particular, the court rejected the defendants' argument that *Lopez* required a jurisdictional element to withstand a constitutional challenge.[296] The court reasoned that "'[i]f a jurisdictional element were critical . . . the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the constitutionality of the gun possession statute.'"[297] In reversing the district court's decision, the appellate court held that "the core teaching of *Lopez* is simply that Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that 'substantially affect interstate commerce.'"[298]

The defendants appealed the Fourth Circuit's decision requesting a rehearing *en banc*.[299] In February 1998, the court agreed and vacated its December 1997 decision.[300] The Fourth Circuit heard oral arguments on March 3, 1998, in Richmond.[301] While a decision is still pending at the time of this writing, the Fourth Circuit is expected to affirm the district court's decision.[302] Brzonkala's attorneys believe "her lawsuit would make a good test case" for the Supreme Court.[303] To determine if creation of a civil rights remedy was warranted, Fourth Circuit judges questioned Brzonkala's legal team about congressional authority in enacting VAWA

289. *Id.* (quoting United States v. Leshuk, 65 F.3d 1105,1112 (4th Cir. 1995)).
290. *See id.*
291. *Id.* (quoting Hoffman v. Hunt, 126 F.3d 575, 586-88 (4th Cir. 1997)).
292. *Id.*
293. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 970 (4th Cir. 1997)
294. *See id.* at 971.
295. *See id.* at 970.
296. *See id.* at 973.
297. *Id.* at 973 (quoting Terry v. Reno, 101 F.3d 1412, 1418 (D.C. Cir. 1996)).
298. *Id.* Judge Luttig dissented, echoing similar concerns outlined in the district court's decision. *See id.* Because the Fourth Circuit's decision was ultimately vacated, Judge Luttig's dissent is not outlined in detail in this comment.
299. *See* Jan Vertefeuille, *Tech Players Finally Will Face Accuser*, ROANOKE TIMES & WORLD NEWS, Feb. 7, 1998, at B7.
300. *See id.*
301. *See id.*
302. *See* Jan Vertefeuille, *Appeals Court Scrutinizes Violence Against Women Act: Judges Question If Congress Usurped State Powers*, ROANOKE TIMES & WORLD NEWS, Mar. 4, 1998, at B1.
303. *Id.*

and about the effect of violence against women on interstate commerce.[304] Echoing identical concerns from VAWA's legislative history, one judge asked, "If we have a domestic assault that occurs in the bedroom .... how does that affect commerce?"[305] In the same vein, several judges warned that allowing a federal civil rights remedy could result in a federal divorce or murder law.[306] In conclusion, Chief Judge Harvie Wilkinson warned that "Congress is trying to usurp the 50 states' 'most basic power, which is the police power.'"[307]

If the Fourth Circuit affirms the district court's holding, *Brzonkala* will be ripe for the Supreme Court to clarify the issues raised by *Lopez*. Confusion stemming from *Lopez* has caused numerous challenges to statutes passed under the Commerce Clause.[308] Although several constitutional arguments have been based upon a Commerce Clause rationale, "not a single... [case] has been invalidated by a federal appellate court."[309] Should *Brzonkala* proceed to the Supreme Court, it is unlikely the Court will grant *Lopez* such an expansive reading.

## IV. ANALYSIS OF § 13981 CASES

### A. *Why* Lopez *Will Not Affect § 13981*

In *United States v. Lopez*, the Supreme Court refused to uphold a federal criminal statute banning firearms within 1,000 feet of a school because its link to interstate commerce was too tenuous.[310] The *Lopez* decision brings into question all the statutes and laws that have been passed under Congress's exceptionally broad Commerce Clause power to regulate and legislate activities that have a substantial economic impact on interstate commerce. Specifically, the *Lopez* decision threatens the use and constitutionality of § 13981 because its constitutional foundation is rooted within the Commerce Clause.[311] Ultimately, the *Lopez* decision will have no impact on § 13981 because of its many differences from the *Lopez* situation.

First, § 13981 involves a civil rights remedy and not a criminal remedy. Second, the *Lopez* decision did not prohibit Congress from regulating non-economic

304. *See id.*
305. *Id.*
306. *See id.*
307. *Id.*
308. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 969 n.13 (4th Cir. 1997) (citing Hoffman v. Hunt, 126 F.3d 575, 583-88 (4th Cir. 1997) (upholding 18 U.S.C. § 248 of FACE)); United States v. Lomayaoma, 86 F.3d 142, 144-46 (9th Cir. 1996) (upholding the Indian Major Crimes Act); EPA v. Olin Corp., 107 F.3d 1506, 1509-10 (11th Cir. 1997) (upholding CERLA); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996) (upholding prohibition of intrastate possession or sale of narcotics); United States v. Bramble, 103 F.3d 1475, 1479-82 (9th Cir. 1997) (upholding the Eagle Protection Act); United States v. Soderna, 82 F.3d 1370, 1373-74 (7th Cir. 1996) (upholding FACE); United States v. Hawkins, 104 F.3d 437, 439-40 (D.C. Cir. 1997) (upholding § 860(a) of the Drug Free School Zones Act); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir. 1997) (upholding § 860(a) of the Drug Free School Zones Act)).
309. *Brzonkala*, 132 F.3d at 969 n.13.
310. *See* United States v. Lopez, 514 U.S. 549 (1995).
311. *See id.*

activities that substantially affect interstate commerce. Third, § 13981 has a much stronger nexus to its impact on interstate commerce to justify its creation.[312] Fourth, the lack of a jurisdictional element is not fatal to § 13981 because jurisdiction is only one of many factors considered in a Commerce Clause analysis. The *Brzonkala* court's reliance on and interpretation of *Lopez* effected a perverse result of finding § 13981 unconstitutional. Because the court's arguments reflect common misreadings of *Lopez*, § 922 will be distinguished from § 13981.

1. Section 13981 Does Not Violate the Tenth Amendment

One of the most important differences between § 922 and § 13981 is that § 13981 is a civil statute and not a criminal statute. Section 922, unlike § 13981, constituted a direct intervention into a traditional state area—criminal law. However, § 13981 does nothing to impede a state from prosecuting domestic violence abusers or rapists. In fact, a § 13981 claim may be filed and litigated *independent* of any state claim.[313] Additionally, nothing in § 13981 strips states of their "primary authority for defining and enforcing the criminal law."[314] As the *Doe* court recognized, instead of "federalizing" state law, § 13981 "complements . . . [state laws] by recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence."[315] The statute expressly does not allow a cause of action for "random acts of violence unrelated to gender or for acts that cannot be demonstrated . . . to be motivated by gender."[316]

In the same vein, the idea that § 13981 "federalizes" family and criminal law is equally flawed for two reasons. First, the express language of the statute states:

> Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.[317]

The idea that women would file false claims simply to ensure a more favorable divorce decree is as stupid as it is sexist. As with most legislation, there are restrictions and penalties for filing false claims that easily supplant the "risk"of frivolous claims.

Second, § 13981 covers the gamut of gender-based violence regardless of the

312. Many of the findings are outlined and detailed *supra* Part I.
313. *See* 42 U.S.C. § 13981(e)(2) (1994) ("Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.").
314. *Lopez*, 514 U.S. at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).
315. Doe v. Doe, 929 F. Supp. 608, 616 (D. Conn. 1996).
316. 42 U.S.C. § 13981 (e)(1) (1994).
317. *Id.* § 13981 (e)(4).

relationship between the victim and the perpetrator. Instead of viewing § 13981 in a family law context, it is more correctly viewed as an anti-discrimination law which seeks to alleviate discriminatory violence against women.[318] While a substantial amount of violence against women occurs within the *context* of the family, the prosecution of such crimes does not involve family law but rather civil rights law. Section 13981 was created to allow women to prosecute crimes committed against them regardless of the woman's relationship with the perpetrator. For instance, § 13981 could cover stranger rape as well as marital rape providing the requirements of the statute are met. Paradoxically, it may be easier to bring a case under § 13981 if the victim and perpetrator are strangers because the burden of proof (i.e., animus of women) will be more difficult to meet between intimates because of societal attitudes.

### 2. *Lopez* Does Not Restrict Congress's Commerce Clause Authority

The defendants in both *Doe* and *Brzonkala* advanced the argument that since violence against women is not an economic activity *per se,* it could not be considered in the aggregate to calculate its effect on interstate commerce.[319] While violence against women on its face does not appear to have an economic link, the high workplace absenteeism by women who are abused, the increasing insurance rates and medical expenses required to treat battered women, and the loss of productivity that is directly attributable to women who are harassed, provoked, or stalked in the workplace all result in a high economic cost on the national economy.[320] These costs are a few of the numerous examples illustrating the economic link between violence against women and interstate commerce. However, reading *Lopez* to restrict congressional authority to cover only those activities with an express commercial link constitutes a serious misinterpretation.

The Supreme Court "has never held that the precise activity in question must itself be commercial or economic in nature."[321] Were this true Congress would have been unable to prohibit discrimination because discrimination in and of itself is not economic in nature.[322] "The error of this argument is in its premise—if one describes conduct so narrowly that it describes nothing but itself one has, by definition, made the conduct unconnected to anything, including commerce."[323] Had the Court intended this result in *Lopez* it would have stated so explicitly. It is unlikely the Court intended such an interpretation because it would result in overturning the

318. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 971 (4th Cir. 1997) ("VAWA . . . [is] a civil rights law, a quintessential area of federal expertise, in response to 'existing bias and discrimination in the criminal justice system.'" (citing H.R. CONF. REP. NO. 103-771, at 385 (1994))).

319. *See* Doe v. Doe, 929 F. Supp. 608, 614-15 (D. Conn. 1996); Brzonkala v. Virginia Polytechnic Instit. & State Univ., 139 F.3d 949, 966-67 (4th Cir. 1997).

320. The substantial costs to the national economy are outlined *supra* Part I.C.

321. Nourse, *supra* note 4, at 20.

322. *See id.*

323. *Id.* at 21.

majority of civil rights legislation passed under the broad Commerce Clause power, including the 1964 Civil Rights Act. "The Court has stressed that, even in the face of conflicting Supreme Court decisions, lower courts are not to assume that Supreme Court precedent has been implicitly overruled;"[324] this is exactly what the *Brzonkala* court did.

The *Brzonkala* court interpreted *Lopez* to mean that where the "regulated intrastate activity is economic in nature" precedent involving economic activities, like *Wickard*, "do not control."[325] However, this interpretation is not stated explicitly or implicitly in the *Lopez* decision precisely to uphold precedent passed under the liberal Commerce Clause view. Clearly cases like *Wickard* are still to be considered in determining whether a non-economic activity substantially affects interstate commerce. The Court in *Lopez* cited directly from *Wickard* when it held that *Wickard* "involved economic activity in a way that the possession of a gun in a school zone does not."[326] Furthermore, the *Brzonkala* court misread the facts in *Wickard* because the statute involved, like § 13981, did not "arise out of" nor was it "connected with a commercial transaction."[327] "Wickard involved no commercial transaction; the farmer grew the wheat for his family's consumption and for use on the farm."[328] Instead the Court looked to the nexus or connection between the activity regulated and its effect on interstate commerce.[329] Although § 13981 like *Wickard* does not involve an economic activity *per se*, it still passes constitutional muster under the Commerce Clause because its connection to and impact on interstate commerce has been substantiated.

3. Congressional Findings Meet Substantial Effect Standard

As set forth in Section I, the problem of violence against women is acute in the United States. Through a limited examination of rape and domestic violence laws, it is apparent that state laws have failed to provide a successful legal remedy for victims of gender-based violence. After conducting numerous hearings and establishing many committees, Congress concluded that violence against women constituted a substantial societal and economic problem warranting federal regulation.[330]

The *Lopez* Court focused on the fact that Congress failed to establish a clear nexus between gun possession and interstate commerce.[331] The Court additionally

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324. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 794 (W.D. Va. 1996).
325. *Id.* at 787.
326. United States v. Lopez, 514 U.S. 549, 560 (1995).
327. *Id.* at 561.
328. Stephen M. Mcjohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 28 (1995).
329. *See Lopez*, 514 U.S. at 560.
330. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 32 F.3d 949, 964 (4th Cir. 1997).
331. *See id.* at 560-61.

considered the noticeable lack of legislative and congressional findings to support the connection between gun possession and its impact on interstate commerce.[332] Chief Justice Rehnquist noted in *Lopez* that while congressional findings are not necessary: "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[333] Likewise, the effect of gun possession on interstate commerce was not, in the words of Chief Justice Rehnquist, "visible to the naked eye" on the face of the statute.[334] The congressional findings and legislative history of § 13981 clearly reveal that gender-based crimes are a constant and real threat. In contrast, the Supreme Court criticized the implementation of § 922 because it was based upon tenuous future harms instead of actual harms.[335] It was a *combination* of these factors coupled with the infringement into traditional areas of state sovereignty that culminated in § 922 being declared unconstitutional.[336]

4. *Lopez* Does Not Require a Jurisdictional Element

The Court considered the lack of a jurisdictional element in *Lopez* a fatal flaw; however, it was only one of several factors considered by the Court in making its determination on constitutionality.[337] In fact, "[p]rior to *Lopez*, the concept of a jurisdictional element did not present itself in Commerce Clause case law."[338]

The Seventh Circuit recently considered the treatment of jurisdictional elements in *United States v. Wilson*[339] which upheld the constitutionality of the Freedom of Access to Clinic Entrances Act ("FACE") despite its lack of a jurisdictional element.[340] The *Wilson* court held that in reference to jurisdictional elements, "the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is *per se* unconstitutional."[341] Further, the *Wilson* court interpreted the jurisdictional element as more of an assurance of constitutionality and not "a prerequisite of constitutionality."[342] Despite FACE not having a jurisdictional element, challenges to its constitutionality have survived six

332. *See id.* at 562-63.
333. *Id.* at 563. The Fifth Circuit stated in its decision striking down § 922 that much deference is given to legislative and congressional findings if there is any rational basis for them. *See* United States v. Lopez, 2 F.3d 1342, 1364 (5th Cir. 1993).
334. United States v. Lopez, 514 U.S. 549, 563 (1995).
335. *See id.* at 567.
336. *See id.*
337. *See id.* at 561-67.
338. Shargel, *supra* note 25, at 1859.
339. 73 F.3d 675 (7th Cir. 1995).
340. *See id.*
341. *Id.* at 685 (citing United States v. Lopez, 514 U.S. 549 (1995)) (emphasis added).
342. *Id.*

other courts.[343]

FACE is not the only legislation to pass constitutional muster without a jurisdictional element since the *Lopez* decision. The Drug Free School Zones Act and an anti-loan sharking act have both been upheld post-*Lopez* despite the lack of a jurisdictional element.[344] While the *Brzonkala* court considered the lack of a jurisdictional element to be significant, the court itself conceded that whether "such a jurisdictional requirement is needed" is "unclear."[345]

Without a clear consensus from the Court on the importance or unimportance of a jurisdictional element, this element can only be considered one of many factors to consider in the constitutional analysis. Because § 13981 was clearly shown to have a substantial impact on interstate commerce and because it does not offend the Tenth Amendment by infringing on exclusive areas of state power, § 13981 meets the constitutional requirements articulated in *Lopez*.

### *B. Practical Applications of § 13981*

As illustrated by the legislative history, the Violence Against Women Act and in particular § 13981 had a difficult and arduous passage through Congress.[346] While VAWA represents a giant step forward in raising consciousness concerning violence against women, § 13981, which was so strenuously opposed, in practice will not have a significant impact in eradicating crimes against women. The main strength of § 13981, rather, is in its societal message that crimes based upon gender will not be tolerated. Section 13981 is a first step in changing societal attitudes that crimes against women are serious enough to warrant federal attention. Burt Neuborne, a constitutional scholar who testified on behalf of the constitutional foundation of § 13981, commented on the impact that federal legislation has on the national psyche:

> One of the things that Federal civil rights legislation has always done is that it has reached down into the maelstrom of ordinary acts and picked out a group of them for community scrutiny in the high-visibility telescope of what the Federal courts can bring to bear, and to do this to gender-motivated violence at this point in the

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343. *See, e.g.*, United States v. Dinwiddie, 76 F.3d 913, 919-21 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995); United States v. White, 893 F. Supp. 1423, 1433-34 (C.D. Cal. 1995); United States v. Scott, 919 F. Supp. 76, 78-79 (D. Conn. 1996); United States v. Lucero, 895 F. Supp. 1421, 1423-24 (D. Kan. 1995); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996).

344. *See, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 969 n.13 (4th Cir. 1997) (citing Hoffman v. Hunt, 126 F.3d 575, 583-88 (4th Cir. 1997) (upholding 18 U.S.C. § 248 of FACE)); United States v. Lomayaoma, 86 F.3d 142, 144-46 (9th Cir. 1996) (upholding the Indian Major Crimes Act); EPA v. Olin Corp., 107 F.3d 1506, 1509-10 (11th Cir. 1997) (upholding CERLA); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996) (upholding prohibition of intrastate possession or sale of narcotics); United States v. Bramble, 103 F.3d 1475, 1479-82 (9th Cir. 1996) (upholding the Eagle Protection Act); United States v. Soderna, 82 F.3d 1370, 1373-74 (7th Cir. 1996) (upholding FACE); United States v. Hawkins, 104 F.3d 437, 439-40 (D.C. Cir. 1997) (upholding § 860(a) of the Drug Free School Zones Act); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir. 1997) (upholding § 860(a) of the Drug Free School Zones Act)).

345. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 792 (W.D. Va. 1996).

346. Many of the findings are outlined and detailed *supra* Part I.

Nation's evolution I think is a tremendously important step.[347]

Additionally, the federal forum is an enticement to attorneys and judges who otherwise might not consider litigating crimes against women. "[T]he high esteem in which all those associated with the federal forum are held—judges, attorneys, and litigants alike—will translate into a strong message that violence against women is a problem worthy of serious attention in a prestigious forum."[348] Indeed, by Sen. Biden's own words, VAWA was created as a catalyst to alter societal empathy concerning violence against women: "My intention in making this a civil rights violation is to change the Nation's attitude. I know of no circumstance under which the Nation has concluded that there is a serious problem where that problem has not been reflected in legislative form. *I know of none.*"[349]

This emphasis on changing societal perceptions of violence against women is pivotal because the practical difficulties of litigating crimes against women still exist even with § 13981. Section 13981 may be problematic because (1) access to the legal system, especially for women of color and impoverished women, continues to be a problem; and (2) the burden of proving gender animus may prove problematic depending upon the relationship between the victim and perpetrator.

Women's traditional lack of access to the legal system has been a difficult obstacle to overcome, especially for women of color and impoverished women.[350] Language barriers and illiteracy rates could render § 13981 meaningless to women who cannot learn of its existence, let alone bring a claim. Unfortunately, neither the express language of § 13981 nor the congressional findings address this problem effectively. Because this is a civil rights remedy, the prestige of bringing a case under § 13981 may entice attorneys to accept these cases on a *pro bono* basis or encourage them to work with local legal aid clinics to ensure disadvantaged women have equal access to § 13981 remedies.

In addition to social and economic barriers, the burden of proof may also prove difficult in litigating claims under § 13981. Section 13981 defines "crime of violence motivated by gender" as a crime "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[351] While "crime of violence" is defined as any act which would "constitute a felony" or one that would constitute a felony "but for the relationship between" the victim and perpetrator, it does not define "animus."[352]

Despite this ambiguity, § 13981 was designed not to cover all crimes against women, but only those that constitute a violation of a woman's civil rights (in other

347. *Victims of the System Hearings 102-369*, *supra* note 19, at 127 (statement of Prof. Burt Neuborne).
348. Maloney, *supra* note 41, at 1902 (citing Judith Resnick, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L.REV. 171, 220-21 (1995)).
349. *Senate Hearings Part I, 101-939*, *supra* note 100, at 62 (opening statement of Sen. Biden) (emphasis added).
350. *See* Rivera, *supra* note 1, at 412-13. *See also*, 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, 469-73, 511 n.54 (1996).
351. 42 U.S.C. § 13981(d)(1) (1994).
352. *Id.* § 13981(d)(2)(A), (B).

words, those crimes that are motivated by gender). In essence, § 13981 is an anti-discrimination measure; to allow it to be more would infringe on traditional areas of state authority. The question then becomes exactly what crimes against women are motivated by gender. Most feminists would argue that rape, domestic violence, and sexual harassment are by definition gender-biased crimes.[353] However, during the legislative process that presumption was deliberately removed from the statute.[354] In reality, most of the crimes committed against women will rarely fit under § 13981.

Although the legislative history reveals that § 13981 is to be proven by considering many of the same factors a court might consider in a racially-motivated crime, race and gender are not identical.[355] This lack of similarity is evidenced by the fact that previous civil rights statutes have failed to sufficiently address problems specific to women because of gender.[356]

Since the passage of the Violence Against Women Act in 1994, few cases have been litigated under § 13981. Because the majority of the cases brought under § 13981 have focused almost exclusively on the constitutionality of § 13981, it is difficult to predict how issues of proof will impact future litigation.[357] What is

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353. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3 (1987) "The first theme is the analysis that the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex. Men in particular, if not men alone, sexualize inequality, especially the inequality of the sexes." *Id.* (citation omitted). "Rape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography, seen for the first time in their true scope and interconnectedness, form a distinctive pattern: the power of men over women in society." *Id.* at 5.

> The crime of rape . . . is defined around penetration. That . . . [is] a very male point of view on what it means to be sexually violated. And it is exactly what heterosexuality as a social institution is fixated around, the penetration of the penis into the vagina. Rape is defined according to what men think violates women, and that is the same as what they think of as the *sine qua non* of sex. What women experience as degrading and defiling when we are raped includes as much that is distinctive to us as is our experience of sex.

*Id.* at 87.

354. *See* S. REP. NO. 102-197, at 28 (1991).

355. *See* S. REP. NO. 103-138, at 50 (1993).

> To satisfy the burden of establishing a civil rights cause of action, the plaintiff must prove that the defendant's act was motivated by gender bias. This civil rights cause of action is no different than the cause of action an African-American might use. For example, an Africa-American man or a woman who is the victim of an assault, cannot under our present laws say, "My civil rights were violated because I am an African-American and someone that wasn't African-American did me harm." He or she must prove racial animus. Similarly, a woman who is attacked and seeks relief under [T]itle III must demonstrate that the defendant attacked her because she is a woman and that the attacker was motivated, at least in part, by her gender. For example, she might offer proof that a defendant entered a department store, carrying a gun, picked out women in the store and shot her while screaming anti-women epithets, and leaving the many nearby men unharmed. The fact that the attacker in this example verbally expressed his bias against women is helpful, but not mandatory. The fact that the attacker segregated the men from the women and then shot only the women *might* be evidence enough of his gender-based motivation.

*Id.* at 50-51 (emphasis added).

356. *See* discussion *supra* Part II about the ineffectiveness of current civil rights statutes in addressing gender-based violence.

357. *See, e.g.*, Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa. 1997) (holding that VAWA was a constitutional exercise of Congress's Commerce Clause authority); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (holding that VAWA did not violate the Commerce Clause); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D. N.Y. 1997) (holding that VAWA was a valid exercise of Congress's Commerce Clause power); Mattison v. Click Corp. of America, Inc., 1998 WL 32597 (E.D. Pa.) (holding that VAWA passes constitutional muster); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) (holding that VAWA is constitutional).

entirely predictable is until the Supreme Court clarifies its decision in *Lopez*, the full potential of § 13981 will not be realized because it will continue to be plagued with constitutional challenges.

## V. CONCLUSION

The Violence Against Women Act was enacted as an ambitious attempt to rectify the horrific atrocities women face daily in terms of violence and abuse. To that end, § 13981 was created to grant women a civil forum in which to seek redress of crimes committed against them simply because they are women. While § 13981 was vehemently opposed by several groups, including Chief Justice Rehnquist and the Deputy Assistant Attorney General, constitutional scholars, legislators, and women's advocates collaborated to pass VAWA in 1994 as part of the President's crime bill.

To date few cases have been brought under § 13981. The cases brought have all been constitutional challenges to § 13981 caused by the recent Supreme Court decision in *Lopez*. While there are many differences between §13981 and § 922, at least one court refused to rule on the constitutionality of § 13981 because of the conflicting results generated by *Doe* and *Bronzkala*. The Fourth Circuit's decision will prove critical to the future health of § 13981. Should the Fourth Circuit affirm the district court's decision, the Supreme Court must accept the *Bronzkala* case on *certiorari* to clarify the meaning and intent of *Lopez*. It is clear that based upon the legislative history of § 13981 and the evidence adduced through multiple congressional hearings that violence against women has a substantial impact on interstate commerce warranting federal action. However, the evident resistance to this civil rights remedy crystallizes the fact that to survive further scrutiny, the Court must address any *possible* constitutional problems created by *Lopez*.

A cynic may view these constitutional challenges to § 13981 as yet another attempt to subjugate women, as if the passage of § 13981 were not difficult enough. Considering the number of violent crimes against women is reaching epidemic proportions coupled with the fact that these crimes reach much further than the initial victim, these challenges arguably are a deliberate attempt to prevent women from asserting control over their own lives. Regardless, the need for § 13981 is clear—if only to provide a catalyst for deconstructing misogynistic attitudes that continue to pervade American society.

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