



12-1-1999

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## Recommended Citation

Christopher J. Regan, *While Lot of Nothing Going On: The Civil Rights Remedy of the Violence against Women Act*, 75 Notre Dame L. Rev. 797 (1999).

Available at: <http://scholarship.law.nd.edu/ndlr/vol75/iss2/8>

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## NOTE

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# A WHOLE LOT OF NOTHING GOING ON: THE CIVIL RIGHTS “REMEDY” OF THE VIOLENCE AGAINST WOMEN ACT

*Christopher James Regan\**

*Forma Pauperis—In the character of a poor person—a method by which a litigant without money for lawyers is considerably permitted to lose [her] case.*

—Ambrose Bierce<sup>1</sup>

## INTRODUCTION

When a law is referenced in more journal articles than court cases, both the writers and the lawmakers have made a mistake. One such mistake is the vaunted civil rights remedy provision of the 1994 Violence Against Women Act.<sup>2</sup> The civil rights remedy (CRR) was intended to be a federal response to the problem of violence against American women.<sup>3</sup> Unfortunately, the civil rights remedy has proven to be a federal response to the problem of journal topic selection for American law students.<sup>4</sup>

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\* J.D. Candidate, Notre Dame Law School, 2000. Thanks to my parents, Richard and Suzanne. Thanks also to those who read drafts of this Note and corrected errors of style, fact, and tone, only to see the author leave them in anyway: Professors Alan Gunn and Patrick Schiltz, Michael Davi, Melonie Jurgens, Jonathan Bridges, Paige Capacci, Robinne DeMayo, Brendan Gardiner, Rachel Sklar, and Lisa Pisciotta.

1 AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 38 (Stanley Applebaum ed., Dover Publications 1993) (1911).

2 Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55 (1994).

3 See 42 U.S.C. § 13981(a) (1998).

4 See, e.g., Kristin J. Bouchard, Note, *Can Civil Damage Suits Stop Stalkers?*, 6 B.U. PUB. INT. L.J. 551 (1997); Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic*

& Ignored, 11 LAW & INEQ. J. 1 (1992); Birgit Schmidt Am Busch, Note, *Domestic Violence And Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1 (1995); Corinne Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185 (1996); Lisa A. Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803 (1997); Mary C. Carty, Comment, *Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465 (1997); Christine Conover, *The Violence Against Women Act: Stabilizing Commerce Through a Civil Rights Remedy*, 1 J. GENDER RACE & JUST. 269 (1997); Jennifer Lynn Crawford, Note, *America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act*, 47 CATH. U. L. REV. 189 (1997); David Fine, Note, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252 (1998); David Frazee, Note, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 (1993); Jennifer Gaffney, Note, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247 (1997); W.H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577 (1993); Rebecca E. Hatch, Note, *The Violence Against Women Act: Surviving the Substantial Effects of United States v. Lopez*, 31 SUFFOLK U. L. REV. 423 (1997); Marcellene E. Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1998); Danielle Houck, Note, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University*, 31 U.C. DAVIS L. REV. 625 (1998); Derek A. Kurtz, Comment, *Does the Violence Against Women Act Do Violence to the Limits of Congressional Power?*, 34 SAN DIEGO L. REV. 1047 (1997); Lisanne N. Leasure, *Commerce Clause Challenges Spawned by United States v. Lopez Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate over How the VAWA Will Fare in the Wake of Lopez*, 50 ME. L. REV. 410 (1998); Judi L. Lemos, Comment, *The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce*, 21 SEATTLE U. L. REV. 1251 (1998); Sarah E. Lesch, Note, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535 (1993); Peter S. Liuzzo, Comment, *Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367 (1997); 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 (1996); Stacey L. McKinley, Note, *The Violence Against Women Act After United States v. Lopez: Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345 (1996); Kelli C. McTaggart, Note, *The Violence Against Women Act: Recognizing a Federal Civil Right to Be Free from Violence*, 86 GEO. L.J. 1123 (1998); Charis Mincavige, Comment, *Title III of The Violence Against Women Act: Can It Survive a Commerce Clause Challenge in the Wake of United States v. Lopez?*, 102 DICK. L. REV. 441 (1998); Jennifer L. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767 (1997); Chris A. Rauscl, Comment, *Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601 (1997); Melinda Renshaw, Comment, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819 (1998); Lori L. Schick, Comment,

The civil rights remedy allows women who have been physically abused because of their gender to sue their attackers for damages in federal court.<sup>5</sup> The United States Court of Appeals for the Fourth Circuit, sitting en banc last spring, produced over 80,000 words in four opinions discussing the constitutionality of this statute—even though it has produced fewer than ten reported decisions a year since it became effective in 1995.<sup>6</sup> In *Brzonkala v. Virginia Polytechnic Institute*

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*Breaking the "Rule of Thumb" and Opening the Curtains—Can the Violence Against Women Act Survive Constitutional Scrutiny?*, 28 U. Tol. L. Rev. 887 (1997); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997); Karen Tichenor, Note, *The Violence Against Women Act: Continued Confusion Over the Scope of the Commerce Clause*, 18 WOMEN'S RTS. L. REP. 329 (1997); Megan Weinstein, *The Violence Against Women Act After United States v. Lopez: Defending the Act from Constitutional Challenge*, 12 BERKELEY WOMEN'S L.J. 119 (1997); Melanie L. Winskie, Note, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985 (1997). This list reflects student work; there are several more pieces on the subject by admitted attorneys, United States Senators, and law professors.

5 See 42 U.S.C. § 13981(c) (1998).

6 See *McCann v. Rosquist*, 185 F.3d 1113 (10th Cir. 1999); *Gross v. Weber*, No. 98-2394, 1999 WL 604440 (8th Cir. Aug. 10, 1999); *Doe v. Hartz*, 134 F.3d 1339 (8th Cir. 1998); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997); *Santiago v. Alonso*, No. 97-2737, 1999 WL 688137 (D. Puerto Rico Aug. 27, 1999); *LeBlanc v. Lee*, No. CIV.A.97-1811, 1999 WL 670976 (E.D. La. Aug. 24, 1999); *Williams v. Board of County Comm'rs*, No. 98-2485-JTM, 1999 WL 690101 (D. Kan. Aug. 24, 1999); *Peddle v. Sawyer*, No. 398CV2364, 1999 WL 613312 (D. Conn. Jul. 22, 1999); *Dill v. Oslick*, No. CIV.A.97-6753, 1999 WL 508675 (E.D. Pa. Jul. 19, 1999); *Doe v. Old Rochester Reg'l School Dist.*, No. 99-10214MEL, 1999 WL 497402 (D. Mass. Jul. 6, 1999); *Bergeron v. Bergeron*, 48 F. Supp. 2d 628 (M.D. La. 1999); *Ericson v. Syracuse Univ.*, 45 F. Supp. 2d 344 (S.D.N.Y. 1999); *Grimm v. Shroyer*, 35 F. Supp. 2d 966 (E.D. Ky. 1999); *Liu v. Striulli*, 36 F. Supp. 2d 452 (D.R.I. 1999); *Harris v. Zappan*, No. CIV.A.97-4957, 1999 WL 391490 (E.D. Pa. May 28, 1999); *Doe v. Mercer*, 37 F. Supp. 2d 64 (D. Mass. 1999); *Braden v. Piggly Wiggly*, 4 F. Supp. 2d 1357 (M.D. Ala. 1998); *Truong v. Smith*, 28 F. Supp. 2d 626 (D. Colo. 1998); *Dolin ex. rel. N.D. v. West*, 22 F. Supp. 2d 1343 (M.D. Fla. 1998); *Kuhn v. Kuhn*, No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998); *Wilson v. Diocese of N.Y. of Episcopal Church*, No. 96 CIV.2400(JGK), 1998 WL 82921 (S.D.N.Y. Feb. 26, 1998); *Palazzolo v. Ruggiano*, 993 F. Supp. 45 (D.R.I. 1998); *McCann v. Rosquist*, 998 F. Supp. 1246 (D. Utah 1998); *Comardelle v. Hernandez*, 26 F. Supp. 2d 897 (E.D. La. 1998); *Mattison v. Click Corp. of Am., Inc.*, Civ. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); *Bridges v. City of Dallas*, No. Civ. 3:98-CV-0090-H, 1998 WL 320286 (N.D. Tex. Jun. 8, 1998); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507 (E.D. Va. 1998); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (E.D. Wash. 1998); *Newton v. Coca-Cola Bottling Co. Consol.*, 958 F. Supp. 248 (W.D.N.C. 1997); *Crisonino v. New York City Hous. Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288 (D. Kan. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Finley v. Higbee Co.*, 1 F. Supp. 2d 701 (N.D. Ohio 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996); *Doe v. Abbott Lab.*, 892 F. Supp. 811 (E.D. La. 1995); *Burns v. Landers*, No. CV 9661671S, 1997 WL 759828 (Conn. Super.

and State University,<sup>7</sup> the Fourth Circuit struck down the CRR, declaring that it was outside the powers granted to Congress in Article I of the Constitution.<sup>8</sup> The four separate opinions in the case consume over 100 pages of the Federal Reporter.<sup>9</sup>

*Brzonkala* addressed the constitutionality of the CRR,<sup>10</sup> but this Note intends to go beyond the fight over constitutionality and to look at what the parties are fighting for—the CRR itself. While a great deal of ink has been spilled analyzing whether Congress has the power to make this law, few have addressed whether the law can make a difference for abused women.

In this Note, I conclude that the CRR has failed to ameliorate the problems faced by abused women. Moreover, the law was a failure long before its constitutional problems were identified. Put simply, the law was enacted without a reasonable plan for its enforcement. In Part I, I explain how Congress created a cause of action without viable plaintiffs or defendants and then directed the (strictly theoretical) plaintiffs to courts that could not hear them.

In Part II, this Note examines how the CRR hurts women. The law not only fails to help, but actually harms women by distracting the nation's attention from the problem and focusing on the fool's gold of a civil rights action for domestic violence.

In Part III, I look at some of the more productive directions law and commentary have taken on this subject—not necessarily advancing these ideas as solutions, but as proof that the energy devoted to the CRR could have been far better spent.

## I. THE FAILURE OF THE CIVIL RIGHTS REMEDY TO MAKE A DIFFERENCE

In 1993, Congress found that four million women were battered every year.<sup>11</sup> In the five years the law has been in force, fewer than forty reported decisions refer to a suit under the CRR's provisions.<sup>12</sup> That contrast is the CRR's legacy.<sup>13</sup> Proceeding in federal court is a

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Ct. Nov. 21, 1997); *Balas v. Ruzzo*, 703 So.2d 1076 (Fla. Dist. Ct. App. 1997); *Reich v. Reich*, 657 N.Y.S.2d 671 (App. Div. 1997). This list is as inclusive as possible, citing each published decision that asserts that a CRR claim was filed.

7 169 F.3d 820 (4th Cir.) (en banc), *cert. granted*, 120 S. Ct. 11 (1999).

8 *See id.* at 826.

9 *See id.* at 820–933.

10 *See id.* at 826.

11 *See supra* note 4, at 810.

12 *See supra* note 6.

13 Of course, the number of published decisions under the CRR is not a particularly precise indicator of the number of cases filed or pending. Statistics on cases filed

costly process. The CRR assumes ample resources on the part of either the plaintiff or the defendant to support the cost of litigating. These resources do not exist. The CRR further assumes ample judicial resources in the form of federal judges to hear CRR claims. Those resources do not exist either. The CRR does indeed create a right, but it falls well short of a remedy.

### A. *The Problem and the Purported Solution*

Violence against women in this country is an epidemic. The four million women abused in their homes each year<sup>14</sup> are just the beginning of a appalling string of statistics. Domestic violence accounts for more injuries to women than automobile accidents, rapes, and muggings combined.<sup>15</sup> In 1990, there were more battered women than married women.<sup>16</sup> A woman is beaten by her partner every fifteen seconds.<sup>17</sup> A woman is raped every six minutes.<sup>18</sup> One in five women will be raped in her lifetime, and one in six women will be a victim of domestic violence before she dies.<sup>19</sup> Almost one-third of women killed are murdered by their husbands.<sup>20</sup> Because of sampling diffi-

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under individual federal statutes are only available for the most commonly used statutes and the CRR is not one of them. However, the number of published decisions under the CRR can be compared with the number of published decisions under civil rights statutes for which detailed statistics are kept. For example, since the CRR was enacted, there have been some 6600 published decisions under 42 U.S.C.A. § 2000e (1994) (employment discrimination). Over the same time period, approximately 90,000 cases have been commenced. See *Judicial Business of the United States Courts 1998*, at tbl. C-2A (visited November 10, 1999) <<http://www.uscourts.gov/dirprt98/c2asep98.pdf>> (copy on file with the *Notre Dame Law Review*). This suggests that published decisions undercount cases filed by a factor of about 13. In that case, the 40 reported decisions under the CRR would indicate roughly 520 actual filings. Of course, since CRR claims are novel, under federal jurisdiction and since they have thus far often involved constitutional questions, one might expect a greater proportion of CRR decisions to be reported than under more firmly established statutes.

14 See Carroll, *supra* note 4, at 810.

15 See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 *RUTGERS L. REV.* 1139, 1141 (1996).

16 See Carroll, *supra* note 4, at 810.

17 See Maloney, *supra* note 4, at 1878-79.

18 See *id.* at 1878-79; see also *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 913-14 (4th Cir. 1999) (Motz, J., dissenting).

19 See Maloney, *supra* note 4, at 1879; see also *Brzonkala*, 169 F.3d at 913-14. The author could uncover no accounting for the unexpected statistic that a woman is more likely to be raped than to be a victim of domestic violence.

20 See Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 *FORDHAM URB. L.J.* 1141, 1144-45 (1995).

culties, it has been suggested that all these numbers underestimate the rate at which women are victimized by their partners.<sup>21</sup>

The CRR declares that all people have a "right to be free from crimes of violence motivated by gender."<sup>22</sup> It creates a federal civil rights cause of action for women who are beaten because of their sex<sup>23</sup> and allows an abused woman to sue her abuser in federal or state court,<sup>24</sup> as long as she alleges gender-motivated violence.<sup>25</sup> The law permits her to seek both compensatory and punitive damages, as well as equitable relief.<sup>26</sup> Another federal law allows women to recover attorney's fees if they are successful in a CRR action.<sup>27</sup> Furthermore, if a woman recovers under the CRR, a pending bill would allow her to exclude the recovery from her gross income.<sup>28</sup>

### B. *Why the CRR Cannot Help*

It would seem that the CRR is a powerful weapon for abused women, but it just seems that way. Inability to pay an attorney, delay in obtaining a judgment (likely to be several years, if the suit is successful), and the unlikelihood of enforcing the judgment have been enough to deter nearly all abused women from availing themselves of the CRR's provisions.<sup>29</sup> The numbers cannot lie—after five years, there have been at most perhaps a few hundred filings.<sup>30</sup> Moreover, even if all of these difficulties could be made to disappear, and even if all four million abused women could sue without further delay in federal courts, nothing more would be accomplished than a shut-down of those courts. The impossibility of having 646 district judges<sup>31</sup> hearing

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21 See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 809 (1993).

22 See 42 U.S.C. § 13981(b) (1998).

23 See *Brzonkala*, 169 F.3d at 827.

24 See 42 U.S.C. § 13981(e)(3) (1998).

25 See *id.* § 13981(c) (1998).

26 See *id.*

27 See *id.* § 1988(b) (1998).

28 See H.R. 1997, 106th Cong. § 2 (1999). This raises the question (not dealt with here) of whether the average abused woman is likely to have a tax attorney.

29 Domestic violence is also typified by victims who do not want to prosecute their abusers, but it would be a mistake to see that phenomenon as isolated from the practical obstacles to doing so. See Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 177 (1997).

30 See *supra* note 13.

31 Congress has provided for 646 federal district court judges. See 28 U.S.C. § 133 (1998).

4,000,000 additional cases each year (over 6000 per judge) is just ignored by the CRR.<sup>32</sup>

### 1. There Are No Plaintiffs—And No Defendants Either

There are no CRR plaintiffs. Considering how powerful the CRR provisions are—choice of forum, punitive damages, attorney's fees<sup>33</sup>—this is telling. Plaintiffs' attorneys would certainly be eager to take CRR cases if there were plaintiffs to bring them and defendants from whom to recover. But there are virtually no such lawsuits because there are hardly any such people. Violence against women predominates among poor women and women of average means.<sup>34</sup> These women have little cash and may not even have a checking account, a charge account, or a car.<sup>35</sup> Their batterers are not deep-pocketed corporations, government agencies or people who happen to be insured against damage awards for their intentional torts. They are four million American boyfriends and husbands who are ex-

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32 One might object that statutes are not drafted with the intention of having every potential plaintiff sue. This is certainly true of statutes where one plaintiff's suit can create a remedy benefiting a large number of plaintiffs, like an antitrust statute. Where causes of action are created against institutional defendants (like employment discrimination statutes), all the potential plaintiffs don't have to sue because a small number of suits can create a large deterrent effect on employers. On the other hand, a cause of action for what is essentially an intentional tort, like the CRR, is only effective to the extent that it is used. CRR suits against one abusive man do not affect other abusive men and are therefore unlikely to have any deterrent effect, unless such suits become very common.

33 See *supra* notes 25–31 and accompanying text.

34 See Davis & Kraham, *supra* note 20, at 1150–51 (1995).

Many domestic violence victims are economically dependent on the men who abuse them [and] few victims have the resources necessary to begin a new life for themselves and their children. Batterers commonly isolate battered women from financial resources. For example, many battered women do not have ready access to cash, checking accounts, or charge accounts. One study showed that 27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car. This economic isolation may itself increase the violence.

*Id.*; see also Pamela Blass Bracher, Comment, *Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 158 (1996) ("Research shows that there are inverse relationships between income and domestic violence and between education and domestic violence.") (citing ROGER LANGLEY AND RICHARD C. LEVY, *WIFE BEATING: THE SILENT CRISIS* 45 (1977)).

35 *Id.*



tremely unlikely to have the cash on hand to support a civil-rights trial.<sup>36</sup>

Thus, the battered woman does not have enough money to pay an attorney if she loses.<sup>37</sup> The man cannot pay a judgment if she wins,<sup>38</sup> so a contingent fee arrangement is unlikely.<sup>39</sup> The man's homeowners policy does not cover him for intentional torts. Public interest groups can support only a few test cases, like *Brzonkala*.<sup>40</sup> This is all to say nothing of poor women, married to poor men, who are even farther from the courthouse.

In the end, the only people the CRR satisfies are people who hope for legislation seeming to favor women regardless of its contents. Perhaps not coincidentally, those are the people who are fighting for it. In *Brzonkala*, almost two dozen women's advocacy groups filed amicus curiae briefs on behalf of Christy Brzonkala, arguing that the CRR

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36 The notion that a civil rights plaintiff cannot be expected to pay her own way through a lawsuit is not, to be sure, new. For example, in a discussion of the Civil Rights Act of 1866, Professor Robert Kaczorowski writes,

A second obstacle to effective civil rights enforcement was the cost involved in enforcing civil rights through civil litigation in the federal courts. This cost would have rendered federal civil remedies a virtual nullity for those impoverished freedmen who needed them the most. The framers [of the 1866 Act] believed that penal remedies were more effective than civil remedies because the government would bear the cost of this protection, and because the deterrent effect of criminal penalties was greater than that of civil damages. The framers expressed these views in rejecting an amendment to the Civil Rights Bill that would have substituted civil remedies for the penal sanctions of section two.

Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 583 (1989).

37 See Stephen Pincus & David Rosen, *Fighting Back: Filing Suit Under the Violence Against Women Act*, 33 TRIAL 20, 20 (1997); see also Carroll *supra* note 4, at 1167-68.

38 See Pincus & Rosen, *supra* note 37, at 20; see also Bassler, *supra* note 15, at 1167-68.

39 See Bassler, *supra* note 15, at 1167-68.

40 Christy Brzonkala had a dazzling array of legal talent arrayed behind her as amici in the politically important Fourth Circuit battle. She received support from, among others, Virginians Aligned Against Sexual Assault, the Anti-Defamation League, Center for Women Policy Studies, the DC Rape Crisis Center, Equal Rights Advocates, the Georgetown University Law Center Sex Discrimination Clinic, Jewish Women International, the National Alliance of Sexual Assault Coalitions, the National Coalition Against Domestic Violence, the National Coalition Against Sexual Assault, the National Network to End Domestic Violence, National Organization For Women, Northwest Women's Law Center; the Pennsylvania Coalition Against Domestic Violence, Inc., Virginia National Organization for Women, Virginia Now Legal Defense and Education Fund, Incorporated, Women Employed, Women's Law Project, Women's Legal Defense Fund, Independent Women's Forum, and the Women's Freedom Network. See *Brzonkala*, 169 F.3d at 820.

was constitutional.<sup>41</sup> Of course, Christy Brzonkala had two things going for her that most abused women never will—an institution like Virginia Tech to collect from if she won, and test case status to bring numerous women's advocacy groups to her side.<sup>42</sup> Ordinary women's cases have no such prospects for financial recovery or for private funding.

As the CRR's supporters surely know, there has always been a cause of action for people who are violently attacked by others.<sup>43</sup> There is no complaint under the CRR that would survive summary judgment that would not also state a case for battery. Of course, a battered woman is unlikely to sue her husband for battery for the same reasons she is unlikely to employ the CRR. She just can't afford to. And we have known why for more than one hundred years. As Congressman James Wilson explained on the House floor during the debate on the Civil Rights Act of 1866, civil causes of action for civil rights violations require a plaintiff to

press [her] own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, it is a mockery . . . . The citizen can only receive [civil damages] in the form of a few dollars . . . if [she] shall be so fortunate as to recover against a solvent wrongdoer.<sup>44</sup>

## 2. There Are Not Enough Federal Courts

Even more disheartening than the CRR's failure to attract plaintiffs who can sue is the failure of its proponents to realize that, even if the intended plaintiffs could sue, the federal courts are not prepared to hear very many of their claims. An important motivating factor behind the enactment of the CRR was that state courts were not adjudicating the claims of abused women fairly.<sup>45</sup> But it is only in state courts that women can be heard in great numbers.<sup>46</sup>

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41 See *id.* at 820–21.

42 One court made it clear that only a few cases will see that kind of support for plaintiffs. See *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (“[B]ecause the Act’s constitutionality has not been previously considered, a group of non-profit organizations representing and advocating on behalf of women who have survived gender-motivated violence was granted leave to appear as *amicus curiae*.”).

43 See, e.g., *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955) (discussing the tort of battery).

44 CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (recording the statement of Congressman James Wilson).

45 See *supra* notes 21–24 and accompanying text.

46 Many of the reasons women do not bring CRR claims are equally applicable to state law claims like battery; however, state courts are developing responses to domes-

The impact of a cause of action like the CRR<sup>47</sup> has to be measured by the number of people who receive relief under its provisions—unlike an antitrust plaintiff, a CRR claimant cannot sue on behalf of those similarly situated. The idea of 6000 more civil filings for each federal judge is, of course, ridiculous, but even if only one in ten abused women filed a CRR claim, that would be 600 additional civil cases per judge. In 1997, there was a *total* of 272,027 civil filings in the United States District Courts.<sup>48</sup> That works out to about 421 filings per judge. If ten percent of abused women filed, their cases would be sixty percent of the federal civil docket. That will never come to pass. If only two and a half percent of the four million women abused each year filed, there would still be a back breaking 151 additional cases for every judge—an increase of about thirty-five percent. And all of this comes at a time when the Federal Judicial Center has concluded that the size of the federal docket is an “impending crisis.”<sup>49</sup>

One of the CRR’s premises was that state courts and state law remedies could not stem the tide of violence against women and that a national solution was required.<sup>50</sup> The House and Senate both recorded findings to the effect that state systems could not be trusted to do the job.<sup>51</sup> Support for this proposition came in two varieties. The

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tic violence that do not require the initiative of the victim. *See infra* Part III. It is in providing these kinds of remedies that states enjoy a decisive advantage over the federal government.

47 *See supra* note 13.

48 *See Judicial Business of the United States Courts 1997*, at tbl. S-7 (visited June 28, 1999) <[http://www.uscourts.gov/judicial\\_business/s07sep97.pdf](http://www.uscourts.gov/judicial_business/s07sep97.pdf)> (copy on file with the *Notre Dame Law Review*).

49 FED. CTS. STUDY COMM’N, REPORT OF THE SUBCOMMITTEE ON THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 1–2 (1990). One study determined (obviously incorrectly) that the CRR would create “58,800 suits, with 13,450 reaching the federal courts at a cost of \$43.6 million and 450 staff years.” *See* Charles Gardner Geyh, *Overcoming the Competence/Credibility Paradox in Judicial Impact Assessment: The Need for an Independent Office of Interbranch Relations*, in CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS 79, 90 (A. Fletcher Mangum ed., Fed. Jud. Center 1995) (visited Sept. 27, 1999) <<http://www.fjc.gov/LORANPLAN/efflegis/efflegis.html>>.

50 *See, e.g.*, S. REP. NO. 102-197, at 43 (1991); Cartoll, *supra* note 4, at 811; Fine, *supra* note 4, at 301 (“VAWA is an appropriate congressional response to a national problem.”); Maloney, *supra* note 4, at 1878 (“In particular, [the CRR] focuses on evidence that gender-motivated violence is a serious problem demanding a national solution.”); Shargel, *supra* note 4, at 1883 (“Gender-motivated violence is a federal problem that warrants a federal solution.”).

51 *See Brzonkala*, 169 F.3d at 913 (Motz, J., dissenting) (citing congressional findings); H.R. REP. NO. 103-395, at 27 (1993); S. REP. NO. 102-197, at 48 (1991); *see also* Carroll *supra* note 4, at 811.

first was a general allegation that the problem was out of control and that because the states were charged with solving the problem, they were failing.<sup>52</sup> The second was a direct allegation of bias against women in the state systems.<sup>53</sup>

Nevertheless, the CRR provides for concurrent jurisdiction in state courts, so women should be able to take their cases to the state courts if the federal courts are too busy. This sacrifices the goal of getting women out of an allegedly biased state court system, but at least it would be something. Nevertheless, there has been no significant CRR litigation in the state courts either.<sup>54</sup> The Honorable William Bassler, United States District Judge for the Northern District of New Jersey, catalogued the state remedies available to abused women<sup>55</sup> and determined that what women need most in an abusive situ-

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52 See *Brzonkala*, 169 F.3d at 914 (Motz, J., dissenting) (citing Congressional findings); see, e.g., *supra* note 12; Maloney, *supra* note 4, at 1886; Carolyn Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 727-32 (1997).

53 See *Brzonkala*, 169 F.3d at 914 (Motz, J., dissenting) (citing congressional findings); see also Joseph R. Biden, *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1301 (1994) ("The record of too many states in addressing violence against women has been marked by prejudice rather than reason."); Yvette J. Mabbun, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 216 (1997); Rauschl, *supra* note 4, at 1636.

54 There have been just five published decisions on CRR issues to date. See *supra* note 6 (listing cases).

55 Judge Bassler explained,

Research has established that a woman is at her greatest risk when separating from her abuser. Statutes providing for protection orders have proven effective in providing safety and autonomy for abused women and children and constraining and deterring abusing men. The majority of state codes impose no time limit within which an abused person must file after an abusive incident. Except for Delaware and South Carolina, all jurisdictions permit an abused person to obtain an ex parte temporary order of protection. Protection order codes authorize orders restraining the abuser from future acts of domestic violence, granting exclusive possession of the victim's residence to the victim, disallowing contact with the victim, awarding temporary custody to the non-abusing parent, and granting spousal or child support. Forty-nine states allow injunctions against further violence, while fifty permit exclusive use of a residence or eviction of a perpetrator from the victim's household. Forty-three jurisdictions authorize awards of custody or visitation, and twenty-three authorize the payment of child or spousal support in protection orders.

Half of state codes award attorneys fees and/or costs, although only about one-quarter permit further monetary compensation, such as out-of-pocket expenses, replacement of destroyed property, relocation expenses and/or mortgage or rental payments. Statutes in more than forty jurisdictions allow the court to order any additional appropriate relief.

ation is immediate relief—in the form of injunctions and protective orders against their spouses, in addition to social services like counseling and shelter.<sup>56</sup> He found such remedies to be available in nearly every state and although he concluded that they have not solved the problem, he argued that state remedies were the best answer in this area.<sup>57</sup>

Despite the claims of the CRR's defenders that it is an appropriate cause of action that cures the gaps in state law remedies, women have not taken advantage of its provisions. One possible reason is the difficulty of proving that an attack was "motivated by gender,"<sup>58</sup> but more likely it is because these women cannot get into court at all, or that once they are there, an action for money damages is not what they seek. In any case, the numbers again speak for themselves. If the purpose of the CRR was to get violence against women into federal court on a routine basis, it has certainly failed.

## II. THE FAILURE OF ACADEMICS TO CARE

The most disheartening aspect of the CRR is not its failure to help women who are victims of violence. It is the willingness of the legislature and the academia to pursue the discussion of the CRR without asking whether the law does anything practical for the women it is supposed to help.

### A. *Psychotherapeutic Legislation*

A recurring theme in the academic commentary on the CRR is that a "national solution" is necessary because violence against women

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Violation of a civil protection order constitutes a misdemeanor in thirty-five states. Contempt is an alternative charge that may be lodged against the violator in many states, with civil contempt available in thirty-one jurisdictions, and criminal contempt available in twenty-one. Although some states provide for a minimum jail sentence of forty-eight hours to five days imprisonment, most statutes give discretion to the court on sentencing. Generally, these statutes set sentences to a maximum of six months or one year and a maximum fine of \$1,000.

Bassler, *supra* note 15, at 1162–64 (footnotes omitted); *see also* Klein & Orloff, *supra* note 20.

56 *See* Bassler, *supra* note 15, at 1162–64.

57 *See id.* at 1167–68.

58 *See* 42 U.S.C. § 13981(c) (1998). Showing that an act of violence against a woman was motivated by her gender is at least a challenging factual proof. *See* Lisa Barre-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 418 (1998). Nevertheless, problems of proof have not been the story of the CRR cases. The story is that there are no cases.

is a "national concern."<sup>59</sup> Frequently, support for the assertion that violence against women is a "national concern" consists of statistics indicating that many women across the country are suffering from violence. This is typically followed by the claim that state governments are not getting the job done in this area.

The missing link is glaring. The CRR's supporters never explain how the federal remedy will be superior to the state remedies. It is the assumption on which their prolix analyses rests, and yet they seldom set fingers to keyboards to defend it. When they say something about what the CRR is supposed to *do*, the comments are revealing:

The signing of the Violence Against Women Act represented the culmination of a four-year struggle of politics, law and understanding . . . Here, I tell the story of [VAWA] with special reference to its major attempt to change the legal terms in which we understand this violence—the civil rights remedy.<sup>60</sup>

These civil rights laws reflect the growing recognition that rather than being random and private matters, domestic violence, rape and sexual assault are violent expressions of discrimination . . .<sup>61</sup>

For the first time, the right to be free from gender motivated violence has been recognized formally as a civil right.<sup>62</sup>

[VAWA] sends a message to the nation . . . that Congress considers domestic violence a serious national epidemic. VAWA's provisions tell victims that the nation takes their plight seriously . . .<sup>63</sup>

The VAWA represents an important opportunity for civil rights activists and feminists to identify common goals and philosophies of their respective social and legal reform movements, and an opportunity to convert their doctrines into practice through joint action.<sup>64</sup>

59 See, e.g., Fine, *supra* note 4, at 301 ("VAWA is an appropriate congressional response to a national problem."); Maloney, *supra* note 4, at 1878 ("In particular, it focuses on evidence that gender-motivated violence is a serious problem demanding a national solution . . ."); Shargel, *supra* note 4, at 1883 ("Gender-motivated violence is a federal problem that warrants a federal solution."); see also SENATE COMM. ON THE JUDICIARY, 101ST CONG., TURNING THE ACT INTO ACTION: THE VIOLENCE AGAINST WOMEN LAW (Comm. Print 1994) (copy on file with the *Notre Dame Law Review*).

60 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, 3-4 (1996).

61 Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 123-24 (1999).

62 Maloney, *supra* note 4, at 1939.

63 Fine, *supra* note 4, at 301-02.

64 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, 466 (1996).

These comments amount to unintentional self-parody.<sup>65</sup> The law “sends a message,”<sup>66</sup> “change[s] the legal terms,”<sup>67</sup> “reflect[s] the growing recognition,”<sup>68</sup> “recognize[s] a civil right,”<sup>69</sup> or “represents an important opportunity . . . to identify common goals and philosophies.”<sup>70</sup> What it manifestly does not do is something to improve the material condition of abused women.<sup>71</sup> If it did, someone would say so. But few of the CRR’s defenders seem disturbed by the fact that it has not.<sup>72</sup> The gap between the theory and the reality is deeply troubling.

One commentator put all of the CRR’s accomplishments in one basket, stating,

The passage of the Violence Against Women Act . . . represents a triumph of public education and awareness about what sexual assault and domestic violence really mean. It stands for the proposition that a violent act by a man against a woman is not just a private act, subject to traditional criminal and tort law remedies, but an act that implicates our public perception of civic freedom. It declares that women have a civil right to be free of violent attack and provides a remedy in federal court, thus acknowledging the historic failure of the states to adequately protect this right. Even in these

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65 See also McTaggart, *supra* note 4, at 1151 (“Congress, for the first time since Title VII of the Civil Rights Act of 1964, has recognized a federal civil right for women—a right to be free from violence.”).

66 Fine, *supra* note 4, at 1939.

67 Nourse, *supra* note 60, at 3–4.

68 Goldscheid, *supra* note 61, at 124.

69 Maloney, *supra* note 4, at 1939.

70 See Rivera, *supra* note 64, at 466.

71 One of these authors comes close to recognizing that the CRR will have no impact on the problem, but gives that fact no attention in her analysis of the law’s impact on “consciousness.” See *id.* at 499–501.

72 But see Daniel Atkins et al., *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WISC. WOMEN’S L.J. 69, 69 n.13 (1999). (“In light of the vast number of reports of domestic violence each year, VAWA cases are ridiculously infrequent. . . . [E]ither . . . the civil rights remedy of the VAWA is not well known among advocates for victims of domestic violence, or . . . pursuing a VAWA lawsuit is not an attractive legal option.”); Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 404–07 (“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.”); Stephanie Weiler, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 CAL. W. L. REV. 591, 607 (1998) (“The inadequacy of the VAWA is best seen by examining its track record. There have been only three cases brought under the VAWA since its enactment in 1994.”).

bleak times for public interest law, VAWA's enactment holds out hope for the efficacy of law as an agent of social change.<sup>73</sup>

That's it in a nutshell. The CRR represents triumphs, stands for propositions, declares rights, acknowledges failure, and most of all, holds out hope—but not by generating significant numbers of successful lawsuits.<sup>74</sup> Unaccountably omitted from the vast literature on the CRR is a discussion of its practical impact on the condition of abused women. Where are the judgments? Six years after “politics, law and understanding” “culminated,”<sup>75</sup> the fact remains: abused women are not better off because of this law.

The argument that the CRR will have great symbolic power in advancing the cause of women's rights<sup>76</sup> is also a red herring—in fact, the law will have just the opposite effect. As it becomes clearer that the law is impotent, the periodic flurries of attention paid to the law will reveal it for what it is—a fad. The price will be paid in wasted time and effort, and increased cynicism about the ability of the law to make a difference.

The CRR's proponents jumped to conclusions. They decided the states had failed to solve the problem and so the need for a federal remedy was assumed. But there was not enough thought given to how that federal remedy would succeed where the states had failed. The argument for the CRR is of the classic form: “Something must be done; this is something; therefore this must be done.” The time spent on the CRR has proven to be a very bad investment. The efforts of police and prosecutors in the state systems fail to grab headlines, but they also give an abused woman a chance to get what she needs—timely, physical protection from her abuser.<sup>77</sup>

The CRR is a kind of psychotherapeutic legislation. It is psychotherapy, not for abused women, but for people studying the problem of abused women. It makes legislators, lawyers, and law students feel better, as though something important has been done about the problem. The notion of “federal civil rights legislation” evokes images of the 1960s and dramatic action on behalf of disadvantaged minorities. Of course, the CRR has not (and will not) cause any action to be taken on behalf of abused women because, unlike the great civil rights legis-

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73 Minna J. Kotkin, *The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers*, 4 J.L. & Pol'y 435, 435–36 (1996) (footnotes omitted).

74 While cases do exist, they are so rare that authors have been driven to describe them in great detail (somewhat like the Ark of the Covenant) in articles concerning the CRR. See Atkins et al., *supra* note 72, at 77–99.

75 See Norse, *supra* note 60, at 1–2.

76 See, e.g., Cain, *supra* note 72, at 404.

77 See Bassler, *supra* note 15, at 1161.



lation of thirty-five years ago, it is not directed at viable defendants, nor are there willing and able plaintiffs. Nevertheless, the idea that the federal government has intervened is, in an academic sense, very comforting.

*B. Sound and Fury—The Constitutionality of the CRR*

The Supreme Court has granted certiorari in *Brzonkala*<sup>78</sup> to clarify the Court's recent Commerce Clause casuistry. The case may have major constitutional significance, but it will mean very little to abused women. The *Brzonkala* argument and opinion will provide another opportunity for the CRR to distract the nation's attention from the real problems battered women face.<sup>79</sup> The CRR's proponents will make absurd claims on the steps of the courthouse about a glorious victory or a tragic defeat while men continue to beat women.

Some have suggested that doubt about the CRR's constitutionality is the reason there have been so few cases;<sup>80</sup> but this is wishful thinking. The practical barriers to bringing a CRR claim are far more imposing than the constitutional ones.<sup>81</sup> Violence against women is outside federal jurisdiction as a practical matter, and the Court will not change that by deciding that it is within federal jurisdiction as a constitutional matter.

78 *Brzonkala v. Morrison*, 120 S. Ct. 11 (1999).

79 With over 40 articles so far, it would not be surprising if a Supreme Court case generated 40 more.

80 See, e.g., Barre-Quick & Kasley, *supra* note 58, at 418.

The two most significant obstacles to the effective use of the civil rights provision of the Violence Against Women Act in the employment context are the ongoing battle over the provision's constitutionality, and the challenges attendant to effectively stating a cause of action under the Act by articulating a gender-motivated, violent crime.

81 See, e.g., Wills, *supra* note 28, at 177; Duke Helfand, *Eyes on Evidence: LAPD Equips Patrol Cars with New Cameras to Document Domestic Abuse Victims' Injuries and Win Cases in Court*, L.A. TIMES, June 6, 1996, at B1 ("As many as eight of 10 battered women who contact police fail to pursue their cases by pressing charges or appearing in court.").

No matter how heinous the assault, the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible . . . Faced with having to testify in court, domestic violence victims, especially battered women, routinely either recant, minimize the abuse, or fail to appear.

*Id.*; see also Lisa R. Beck, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URB. L.J. 999, 1021 (1987) (referring to this phenomenon as "complaint attrition").

### III. POSSIBLE SOLUTIONS: LOOKING ELSEWHERE<sup>82</sup>

Some commentators have realized what battered women need—money and distance from their abusers.<sup>83</sup> Unfortunately, the ability of women to move away from their abusers is often hampered by their poverty.<sup>84</sup> Far worse, battered women are often unwilling to leave their abusers—making intervention on their behalf extremely difficult.<sup>85</sup>

Since large numbers of battered women are unwilling to press charges,<sup>86</sup> giving themselves at least a chance of sending the batterer to jail, it is no wonder women are reluctant to sue civilly, with little or no prospect of physical protection during the course of the suit. But by far the most significant problem facing a battered woman is financial.<sup>87</sup> If a battered woman had the money to pursue a lawsuit against her spouse, she would be far better off spending that money on a plane ticket, an apartment, and a job search in a city where her abuser has no contacts.<sup>88</sup> But of course, most battered women lack the resources to pursue such a course.<sup>89</sup>

Programs that require the arrest and detention of abusers and allow prosecutors to press charges without the victim's consent have a far greater chance of ameliorating the problem than another cause of action.<sup>90</sup> Providing women with the means to put distance between themselves and their abusers, through immediately available protec-

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82 The author wishes expressly to disclaim any intention of offering a comprehensive solution to this problem. This third section is included to point out that some legislative responses to violence against women are reasonably related to the problem and are worthy targets for further study, experimentation and expenditures.

83 See Davis & Kraham, *supra* note 20, at 1144–55.

84 See generally Martha F. Davis & Susan J. Kraham, *Beaten, Then Robbed*, N.Y. TIMES, Jan. 13, 1995, at A31.

85 See Wills, *supra* note 81, at 177 nn.23–24. The Anglo-American system of law does not easily adjust to protect those who are unwilling to assert their claims.

86 See *id.* The fact that women are unable to escape their abusers on account of their poverty is of course related to their unwillingness to sue or press charges.

87 See generally Davis & Kraham, *supra* note 20.

88 See *id.* at 1146–50.

89 See *supra* note 37 and accompanying text.

90 See Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove to Be the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 3 (1995); Bracher, *supra* note 34; Machaela Hctor, Comment, *Domestic Violence As a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 643 (1997); Marion Wanless, Note, *Mandatory Arrest: A Step Towards Eradicating Domestic Violence, But Is It Enough*, 1996 U. ILL. L. REV. 533, 573. But see Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1885 (1996).

tive orders, restraining orders and evictions of the abusers, is a job the several states are taking on.<sup>91</sup> In some cases, the legal weapons placed at an abused woman's disposal by the state government are so powerful, even the generous provisions of the CRR pale in comparison.<sup>92</sup>

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91 See Bassler, *supra* note 15.

92 In the State of New York an order of protection is available to women as long as domestic violence is simply *alleged*. See N.Y. CRIM. PRO. LAW § 530.12(1)(a), (3) (McKinney 1995). A woman proceeding in family court against her spouse is provided with counsel at no cost. See N.Y. FAM. CT. ACT (29A) § 262 (McKinney 1998). New York officials are further required to advise women of their rights in detail when investigating an incident of domestic violence:

Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be prepared in Spanish and English and if necessary, shall be delivered orally, and shall include but not be limited to the following statement:

If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court

But these remedies consume resources in the form of police, social workers, prosecutors, and judges. The CRR, by contrast, is practically free. If legislators want to protect women for violence, they are going to have to realize that self-help remedies like the CRR, which place the entire burden on the abused woman, are not the answer.<sup>93</sup>

#### IV. CONCLUSION

The civil rights remedy of the 1994 Violence Against Women Act resides in a category with the proverbial law against bad weather—the selected means bears no relation to the intended end. It is disheartening that so many legislators and legal commentators have failed to recognize that abused women lack the means to pursue a civil rights action against their spouse or partner and that the federal courts are in no position to take on the problem. Lawmakers and academics alike must recognize that social ills will not retreat in the face of highly

is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime.

N.Y. CRIM. PRO. LAW § 530.11 (McKinney 1995). Sharp criticism has been leveled at statutes which protect the victim in a domestic violence case to such an extent that they jeopardize due process for the man. See Christopher Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919 (1996). For a comprehensive treatment of the New York statutes, see Ronald J. Bavero, *Representing Clients in Family Offense Proceedings*, 16 PACE L. REV. 49 (1995). For a multijurisdictional review, see Frank, *supra*; Klein & Orloff, *supra* note 20.

93 In *Doe v. Doe*, 929 F. Supp. 608, 616 (D. Conn. 1996), the court described how the CRR is supposed to pay for itself. "A plaintiff who obtains relief in a civil rights lawsuit does so not for himself [or herself] alone but also as a private attorney general vindicating a policy that Congress considered of the highest importance." Compare this to Congressman Wilson's rebuke of a civil damages amendment for the Civil Rights Act of 1866. "This is called protection. This is what we are asked to do in the way of enforcing the bill of rights. Dollars are weighed against the right of life, liberty, and property. Sir, I cannot see the justice of that doctrine . . . it is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant on it." CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866) (recording the statement of Congressman Wilson).

publicized, symbolic action.<sup>94</sup> Real money will have to be committed if the problem is to be solved—but solutions like that won't be nearly as popular as the relatively cost-free CRR. No doubt legislators and academics were eager to support the CRR because it has such a small downside. It is very, very cheap—the fictitious plaintiffs get the lawsuits started and the imaginary defendants pay all the judgments and legal bills. In the civil rights remedy, America got exactly what it paid for.

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94 See, e.g., The Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1990).