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.*

Lisa Barré-Quick[1] *and Shannon Matthew Kasley*[2]

INTRODUCTION

Every year in America, thousands of women are assaulted, raped, and even murdered in the workplace. The incidence of less egregious forms of sexual exploitation and harassment, which continue to plague the workplace, is exponentially greater. With the civil rights provision of the Violence Against Women Act, Congress in 1994 gave victims of workplace violence and sexual harassment a powerful legal sword.[3] The articulated purpose of the Act is to provide a remedy for the myriad of problems associated with the epidemic of violence against women in this country, and to further address the civil rights

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[1]Lisa Barré-Quick, Esq. graduated *cum laude* from the University of Pennsylvania with a B.A. in American Civilization and Political Science and received her J.D. with honors from the National Law Center, George Washington University. Ms. Barré-Quick is Of Counsel with Florio & Perrucci, P.C. where she heads the Labor and Employment Group. She is also an Adjunct Professor at Seton Hall University School of Law.

[2]Shannon Matthew Kasley, Esq. graduated *magna cum laude* from Mary Washington College with a B.A. in Political Science and received his J.D. *cum laude* from Seton Hall University School of Law. Mr. Kasley is an associate in the Labor and Employment Group at Florio & Perrucci, P.C.

[3]42 U.S.C. § 13981 (1995).

implications of this ongoing dilemma.[4]

Noting the inadequacy of federal and state remedies, Congress, by legislating a private cause of action, endeavored to provide a curative for the civil rights violations arising out the plague of workplace violence. The mechanism pursuant to which Congress endeavored to provide a remedy for the civil rights violations arising from this plague of violence and from the inadequacy of federal and state remedies is a private civil rights cause of action.[5] Significantly,

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[4]42 U.S.C. § 13981(a) states:

> Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

42 U.S.C. § 13981(a) (1995).

[5]42 U.S.C. § 13981(c)-(d) states:

> (c) Cause of action
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> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
>
> (d) Definitions
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> For purposes of this section —
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> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means —
>
> (A) an act or series of acts that would constitute a felony against the per-

Congress crafted the provision to require neither prosecution nor conviction of an underlying gender-motivated crime as a prerequisite to a claim, thereby seeking to remedy the endemic effects of the systemic gender discrimination revealed by the congressional record. However, in order to focus the scope of the civil rights provision, Congress expressly excluded from the Act's coverage "random acts of violence."[6]

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son or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981(c)-(d).

[6]42 U.S.C. § 13981(e) states:

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

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.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

Just as Congress giveth, however, the justice system taketh away, and so the effective use of the Violence Against Women Act in the employment context is fraught with obstacles. If these obstacles can be overcome, however, the Violence Against Women Act will become an extremely important enforcement tool to remedy, and more importantly to deter, gender-motivated workplace violence as well as egregious instances of sexual harassment.[7] This vastly underutilized avenue is particularly important for victims who find no remedy under more traditional anti-discrimination legislation and/or who find themselves victimized in jurisdictions where state law does not adequately ameliorate the countless unremedied instances of gender-motivated workplace-harassment and violence.[8]

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. The first of these obstacles is currently on its way to resolution in the federal court system. The second is a matter for individual attorneys and judges to address in the context of individual cases and applicable state laws, and for Congress to address through clarifying legislation.

Part One of this article will address the need for the Violence Against Women Act in the employment context in order to give effective redress to employees who are victims of rape, egregious sexual harassment, and violence in the workplace. Part Two will consider the ongoing debate over the constitutionality of the civil rights provision of the Act and the status of that battle in

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(4) Supplemental jurisdiction

> 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.

42 U.S.C. § 13981(e).

[7]For purposes of this article, "egregious sexual harassment" refers to harassment of a sexual nature which has a physical component.

[8]*See* S. REP. NO. 103-138, at 42 (1993) (stating that the Violence Against Women Act is "a first step in developing a national consensus that society will not tolerate such violence" against women).

the federal courts. Part Three will address the barriers confronting plaintiffs seeking to state a cause of action under the civil rights provision of the Act and considers the pioneering cases in which plaintiffs have sought and succeeded in utilizing the Act. Finally, Part Four will comment on the hopes for the Violence Against Women Act in the context of workplace violence and suggest that in this era of increased workplace harassment and violence, the Act will become a powerful instrument of justice in the struggle to remedy and deter workplace violence in our society.

PART I: THE NEED FOR THE VIOLENCE AGAINST WOMEN ACT IN THE EMPLOYMENT CONTEXT.

A. VIOLENCE AGAINST WOMEN IN AMERICA.

It has been called a "national tragedy."[9] That is how Senator Joseph R. Biden characterized the pervasiveness of violence that is "played out every day in the lives of millions of American women."[10] Indeed, the four years of testimony before Congress on the subject of violence against women is a testament to the extent of this national tragedy. Violence tops the list of dangers to the health and well-being of American women.[11] In fact, "[v]iolence is the leading cause of injuries to women ages 15 to 44; more common than automobile accidents, muggings, and cancer deaths combined."[12] The homicide rate for women in America is about 5,000 per year.[13] Women are the victims of approximately 3.8 million assaults every year.[14] Furthermore, approximately

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[9]*See* S. REP. NO. 102-197, at 39 (1991).

[10]*Id.*

[11]*See id.* at 36.

[12]S. REP. NO. 103-138, at 38 (1993); *see also* S. REP. NO. 102-197, at 36 (1991) (citing U.S. Dep't of Justice, *Report to the Nation on Crime and Justice*, at 24 (2d ed. 1988) (comparing crime risks and other life events and reporting "a woman is 10 times more likely to be raped than she is to die in a car crash; a woman is 8 times more likely to be victimized by a violent crime than to die of heart disease and 15 times more likely to be a crime victim than to die of cancer").

[13]*See* Ronet Bachman & Linda E. Saltzman, U.S. Dep't of Justice, *Violence Against Women: Estimates from the Redesigned Survey*, at 3 (1995); *see also* S. REP. NO. 103-138, at 38 (1993) (noting that more than 90 women were murdered each week in 1991).

[14]*See* Bachman and Saltzman, *supra* note 13, at 2.

500,000 women are victims of rape and sexual assault every year.[15] While these statistics are staggering, even more alarming is the disturbing revelation that such statistics are woefully deficient, due in large part to the widespread reluctance to report such acts.[16] Combine this vast under reporting epidemic with the fact that this tragedy is occurring with distressing frequency,[17] and it becomes all too clear that violence against women permeates not only American homes, schools, and streets, but the American workplace as well.[18]

B. INSTANCES OF RAPE, SEXUAL HARASSMENT, AND VIOLENCE AGAINST WOMEN IN THE AMERICAN WORKPLACE.

Our understanding of the extent of this phenomenon of violence as it relates to the workplace is only beginning to evolve.[19] It is clear that not only does violence top the list of dangers to women generally, but it also tops the list of dangers to women on the job. Homicide is the *leading* cause of job-related fatalities for women, accounting for nearly half of all work-related fatal injuries

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[15]*See id.*; *see also* S. REP. NO. 103-138, at 38 (noting that "[e]very week, during 1991, more than 2,000 women were raped . . . ."); H. REP. NO. 103-395, at 25 (1993) (noting that "[t]here were 109,062 reported rapes in the United States in 1992—one every five minutes.").

[16]*See, e.g.*, National Victim Center & Crime Victims Research & Treatment Center, *Rape in America: A Report to the Nation*, at 6 (1992) (estimating that only 16% of all rapes are ever reported). *See also* H. REP. NO. 103-395, at 25-26 (1993) (noting that the reporting rate for rape victims is about fifty percent (50%)) (citing U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Violent Crime*, at 8 (Jan. 1991)).

[17]*See* Bachman and Saltzman, *supra* note 13, at 1 (reporting that women aged twelve and older experience approximately five million violent victimizations annually, which include homicide, rape/sexual assault, robbery, aggravated assault, and simple assault).

[18]*See* S. REP. NO. 102-197, at 39 (1991); *see also* NOW Legal Defense and Education Fund, *The Impact of Violence in the Lives of Working Women, Creating Solutions - Creating Change*, at 5 (noting that "[w]omen are twice as likely as men to be victims of assaults at work") (citing Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries, 1994," at Table 1 (1995)).

[19]*See* Nathalie F. P. Gilfoyle, Address at the 9th National Conference for Women Corporate Counsel, *Detecting and Preventing Violence in the Workplace* (Jan. 27, 1998) (noting that a "1993 survey conducted by Northwestern National Life Insurance suggested that more than 2 million employees suffer physical attacks at work each year and that more than 6 million are threatened in some way at work[,]" and further, that "[t]his probably underestimates the problem [because] it has been known for some time that five incidents of violence occur against employees for each one that is reported.") (citation omitted).

suffered by women.[20] The latest statistics report that an average of 13,000 women are raped on the job every year.[21] It is also clear that women are subjected to other forms of violence in the workplace, including egregious sexual harassment, in far greater numbers.[22]

Studies have only recently begun to quantify the occurrence of sexual harassment in the workplace because the statistics on violence against women generally have been under-reported.[23] These studies reveal that sexual harassment is widespread. For example, a 1997 survey found that one of every five working women said that they had experienced sexual harassment on the job in the last two years.[24] Surveys of women employed in both the public and private sector have found similar results.[25] Moreover, between 1991 and 1997,

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[20]*See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Fatal Work Injuries and Work Hazards*, Fact Sheet, at 1 (Aug. 1996) (citing U.S. Dep't of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries (1995)); *see also* Bureau of Labor Statistics Reports, 6,000 Annual Fatal Injuries, O.S.H. Rep. (BNA), Oct. 12, 1993, at 1 (noting that the Bureau of Labor Statistics reports that violence against women on the job accounts for 40% of all female job-related fatalities).

[21]*See* Ronet Bachman, *Violence and Theft in the Workplace*, Bureau of Justice Statistics Crime Data Brief, Bureau of Justice Statistics Clearinghouse (1994) (noting that each year from 1987-92 an average of 13,068 women were raped on the job); *see also* NOW Legal Defense and Education Fund, *The Impact of Violence in the Lives of Working Women, Creating Solutions - Creating Change*, at 4 (1996) (noting that the "United States Department of Justice estimates that 8% of rapes occur while the victim is working") (citation omitted). Again, however, statistics on workplace rape are woefully inadequate due to the well-documented reluctance of women to report such incidents. *See supra* note 16.

[22]*See* Stuart Silverstein, *Stalked by Violence on the Job: Domestic Violence is Spilling Over Into the Workplace*, L.A. TIMES, Aug. 8, 1994, at A1 (noting a U.S. Department of Justice report which indicated that husbands and boyfriends *alone* committed more than 13,000 acts of violence against women in the workplace each year); *see also* Claire Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149.

[23]*See* Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 271 (Winter 1996) (noting that "as many as ninety-five percent of all . . . incidents [of sexual harassment] may not be brought to light").

[24]*See Sexes Split on Workplace Equality*, COURIER NEWS (New Jersey), Oct. 21, 1997 (citing a NBC News poll). This number rose to two out of five among women under age thirty-five. *See id.*

[25]*See* Donald A. Maypole, *Sexual Harassment at Work: A Review of Research and Theory*, 2 AFFILIA 24, 30 (1987) (reporting that 36% of women surveyed identified themselves as being subjected to sexual harassment); United States Merit Systems Protection Board, Office of Merit Review and Studies, *Sexual Harassment in the Federal Workplace: Is it a Problem?*, at 36 (1981) (reporting that 42% of the 649,000 female federal employees

the number of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies (FEPA) by women has almost doubled.[26]

It is against this startling statistical backdrop that American women function in the workplace every day. Violence against women in the workplace plays a substantial role in the overarching national tragedy of violence against women in America today. However, of even greater import from a public policy perspective is the lack of available and effective remedies, at both the federal and state level, to assist victims of workplace rape, egregious sexual harassment, and other violence.

C. THE INADEQUACIES OF TRADITIONAL STATE AND FEDERAL REMEDIES FOR WORKPLACE VIOLENCE AND SEXUAL HARASSMENT.

1. THE AVAILABILITY AND EFFECTIVENESS OF STATE REMEDIES.

State law remedies designed to address and deter workplace sexual harassment and violence must be seriously questioned, as well as the enforcement and effectiveness of those remedies in the state courts. State law deficiencies poignantly demonstrated by the extensive congressional record which formed the backdrop for the enactment of the civil rights provision of the Violence Against Women Act.[27] To the extent they exist, state criminal and civil remedies are riddled with holes, leaving both individuals and whole classes of plaintiffs potentially without remedy. It is these gaps in coverage and enforcement which the civil rights provision of the Violence Against Women Act is designed to address. If the obstacles to its effective use can be overcome, clearly the Act will serve to bridge the existing gaps and provide recourse to victims of workplace harassment and violence while deterring their victimizers.

With the exceptions of Mississippi, Alabama, and Georgia, every state has civil rights legislation prohibiting a broad range of gender-based discrimination in the workplace. However, as this country's history has amply demonstrated

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surveyed identified themselves as being subjected to sexual harassment).

[26]*See* Equal Employment Opportunity Commission, Sexual Harassment Statistics, EEOC & FEPA's Combined: FY 1991 - FY 1997 (1997) (reporting that from 1991 - 1997 the number of sexual harassment charges filed by women rose from approximately 6,300 in 1991 to 14,140 in 1997).

[27]*See, e.g.*, S. REP. NO. 102-197, at 43-44 (1991); S. REP. NO. 103-138, at 49-50 (1993).

with regard to racial discrimination legislation, is only the first step.[28] Proscriptive legislation is, regretfully, only as good as the remedy it provides to victims and the deterrent effect it has upon the victimizers. The second, more important step, is to ensure that legislation contains effective remedial and deterrent mechanisms to address the problems at hand. The degree of success the

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[28]The following states all have statutes prohibiting discrimination in employment based upon gender: Alaska (ALASKA STAT. § 18.80.200 (Michie 1996)), Arizona (ARIZ. REV. STAT. ANN. § 41-1463(B) (West 1992 & Supp. 1997)), Arkansas (ARK. CODE ANN. § 16-123-107 (Michie 1998)), California (CAL. [GOV'T] CODE § 12940 (West 1992 & Supp. 1998)), Colorado (COLO. REV. STAT. ANN. § 24-34-402 (West 1990 & Supp. 1997)), Connecticut (CONN. GEN. STAT. ANN. § 46a-60 (West 1995)), Delaware (DEL. CODE ANN. tit. 19, § 711 (1995)), District of Columbia (D.C. CODE ANN. § 1-2512 (1992 & Supp. 1997)), Florida (FLA. STAT. ANN. § 760.10 (West 1997)), Hawaii (HAW. REV. STAT. § 378-2(1)(A) (1993 & Supp. 1997)), Idaho (IDAHO CODE § 67-5909 (1995)), Illinois (775 ILL. COMP. STAT. ANN. 5/2-102 (West 1993)), Indiana (IND. CODE § 22-9-1-2 (1991)), Iowa (IOWA CODE ANN. § 216.6 (West 1994 & Supp. 1997)), Kansas (KAN. STAT. ANN. § 44-1001 (1993)), Kentucky (KY. REV. STAT. ANN. § 344.040 (Michie 1997)), Louisiana (LA. REV. STAT. ANN. § 23:332 (Supp. 1998)), Maine (ME. REV. STAT. ANN. tit. 5, § 4572 (West 1989 & Supp. 1997)), Maryland (MD. ANN. CODE art. 49B, § 16 (1994)), Massachusetts (MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996 & Supp. 1997)), Michigan (MICH. COMP. LAWS ANN. § 37.2102 (West 1985 & Supp. 1997)), Minnesta (MINN. STAT. ANN. § 363.03(2) (West 1991 & Supp. 1998)), Missouri (MO. ANN. STAT. § 213.055 (West 1996)), Montana (MONT. CODE ANN. § 49-1-102(a) (1997)), Nebraska (NEB. REV. STAT. § 48-1107 (1993)), New Hampshire (N.H. REV. STAT. ANN. § 354-A:7 (1995 & Supp. 1997)), New Jersey (N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 1996)), New Mexico (N.M. STAT. ANN. § 28-1-7 (Michie 1997)), New York (N.Y. [EXEC.] LAW § 296 (McKinney 1993 & Supp. 1997-98)), North Carolina (N.C. GEN. STAT. § 95-151 (1997)), North Dakota (N.D. CENT. CODE § 14-02.4-03 (1997)), Ohio (OHIO REV. CODE ANN. § 4112.02 (Anderson 1995 & Supp. 1997)), Oklahoma (OKLA. STAT. ANN. tit. 25, § 1302 (West 1987)), Oregon (OR. REV. STAT. § 650.030 (1997)), Pennsylvania (43 PA. CONS. STAT. ANN. § 955 (West 1991 & Supp. 1997)), Rhode Island (R.I. GEN. LAWS § 28-5-7 (1995 & Supp. 1997)), South Carolina (S.C. CODE ANN. § 1-13-80 (Law. Co-op. 1986 & Supp. 1997)), South Dakota (S.D. CODIFIED LAWS § 20-13-10 (Michie 1995)), Tennessee (TENN. CODE ANN. § 4-21-101(3) (1991)), Texas (TEX. [LAB.] CODE ANN. § 21.051 (West 1996)), Utah (UTAH CODE ANN. § 34A-5-106 (1997)), Vermont (VT. STAT. ANN. tit. 21, § 495 (1987 & Supp. 1997)), Virginia (VA. CODE ANN. § 2.1-716 (Michie 1995 & Supp. 1997)), West Virginia (W. VA. CODE § 5-11-9 (1994)), Wisconsin (WIS. STAT. ANN. § 111.321 (West 1997)), Wyoming (WYO. STAT. ANN. § 27-9-105 (Michie 1997)).

Similarly, the District of Columbia, Puerto Rico, and the Virgin Islands all have statutes prohibiting discrimination in employment based upon gender. *See* D.C. CODE ANN. § 1-2512 (1992 & Supp. 1997); P.R. LAWS ANN. tit. 29 § 146 (1995); United States Virgin Islands (V.I. CODE ANN. tit. 10, § 64 (1982).

Alabama and Mississippi have no laws prohibiting employment discrimination. Georgia has laws prohibiting only wage discrimination based upon gender and gender discrimination in public employment. *See* GA. CODE ANN. § 34-5-1; 45-19-21 (Harrison 1992).

individual states have had in achieving this end has varied, but none are without room for improvement, and collectively, they lack a sense of uniformity.

Thus, even though the majority of states have a civil rights act or other law prohibiting gender discrimination in employment, the extent to which a victim of workplace rape, egregious sexual harassment, or violence may obtain protection and compensation under such state laws remains the source of a great deal of skepticism. This is due in large part to a long-standing and well-entrenched systemic gender bias that has only recently been recognized by Congress.[29] Specifically, Congress found that this gender bias prejudices not only state statutory compilations, but also the state law enforcement and judicial systems entrusted with the enforcement, application, and interpretation of these laws.[30] Further, Congress recognized that this gender bias causes what it called a sense of "double victimization," which, in turn, adversely impacts the effectiveness of state law remedies for gender-based crimes.[31] As a direct result of this inherent societal and systematic bias and the demonstrable ineffectiveness of state remedies,[32] victims of workplace violence and egregious sexual harassment are often left with inadequate or nonexistent protection under state law.[33] In this regard, the civil rights provision of the Violence Against

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[29]*See* S. REP. NO. 102-197, at 44-45 (1991) (discussing history of the 300 years of "legally sanctioned disbelief" of rape claims).

[30]*See* S. REP. NO. 102-197 at 45-48 (1991). *See also* S. REP. NO. 103-138 at 49-50 (1993).

[31]*See* S. REP. NO. 101-545, at 33 (1990) (describing this phenomenon as being created and perpetuated by certain aspects of state law enforcement and legal systems thereby causing victims of gender-motivated crimes to feel victimized "first by the attacker, and second, by society" in a justice system which is "often an alien environment, contributing less to their assistance than to their sense of revictimization").

[32]To the extent that state tort causes of action covering instances of workplace violence do exist, their effectiveness is compromised because they rarely provide the relief, such as attorneys' fees and/or punitive damages, necessary to ensure victims are able to obtain representation to pursue their claims. In contrast, the Violence Against Women Act provides not only attorneys' fees and punitive damages, but also a federal forum, thereby increasing the likelihood that meritorious plaintiffs will be able to obtain representation and pursue their claims. *See* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994); *see also* S. REP. NO. 102-197, at 28 (1991); S. REP. NO. 101-545, at 42 (1990) (finding that the Violence Against Women Act's federal remedy "offers victims the best court system in the world with judges insulated from local political pressures and the power to screen out jurors who harbor irrational prejudices."). For an in-depth examination of the availability and perceived inadequacies of various traditional state tort remedies, see Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. REV. 411 (1996).

[33]Congress recognized that:

Women Act will serve as a valuable supplement to this fractal conglomeration of state remedies.

2. TITLE VII AND ITS INADEQUACIES AND LIMITATIONS.

Prior to the enactment of the civil rights provision of the Violence Against Women Act, Congress' efforts to address the problem of gender discrimination in employment have fallen short, meeting only limited success. By its terms, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment with respect to "compensation, terms, conditions, or privileges of employment" on the basis of protected classifications, including gender.[34] Within Title VII's ambit also falls the federal proscription against workplace sexual harassment which takes two forms, quid pro quo and hostile work environment claims.[35]

Although egregious sexual harassment and gender-motivated workplace violence may technically be redressable under Title VII, there are both proce-

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> [I]n both formal and informal ways [S]tates condoned or overlooked such violence. Gender motivated violence, even when undertaken by individual citizens, does not occur in isolation. State policies condition and enable social behavior. Women's safety is lessened when a man knows that state officialdom shares, if only in a somewhat distant sense, his animus toward women as a group and will not therefore hold him fully and equally accountable for [his] assaultive conduct.

Amicus Brief of Law Professors, at 22-23, Doe v. Doe (No. 96-6-224) (2d Cir. 1996).

[34]*See* 42 U.S.C. § 2000e-2(a)(1) (1994).

[35]*See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Quid pro quo sexual harassment covers situations in which an employee is required to submit to gender-motivated harassment as a condition of employment. *See, e.g.*, Bonenberger v. Plymouth Twshp., No. 97-1047, 1997 WL 772842 (3d Cir. Dec. 17, 1997) (reiterating that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute [quid pro quo] sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . .") (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296 (3d Cir. 1997)) (other citations omitted). Hostile work environment sexual harassment occurs when conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank*, 477 U.S. at 65. "A hostile work environment exists [w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'" Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)).

dural and substantive limitations inherent in Title VII which render it, in certain instances, an ineffective remedy for victims of gender-motivated workplace harassment and violence. To this extent, Title VII is a flawed remedy that can be well supplemented by the civil rights provision of the Violence Against Women Act. As discussed at length herein, once the barriers to its effective use are overcome, the civil rights provision of the Violence Against Women Act will function to fill the chasms unbridged by Title VII, thereby more fully ensuring that victims of workplace violence and egregious gender-motivated harassment are not without remedy.

a. Procedural Limitations Inherent in Title VII.

Procedurally, both the exhaustion requirement in Title VII and the extremely short statute of limitations limit the effectiveness of the Title VII remedies.[36] Before Title VII plaintiffs can pursue any court action, they must exhaust administrative remedies by filing a charge of discrimination with the EEOC.[37] The EEOC then has an opportunity to investigate the complaint and attempt conciliation before plaintiffs may pursue their Title VII claim in state or federal court.[38] During this period, plaintiffs are without remedy and without recourse. Only after the EEOC has had an opportunity to investigate and attempt conciliation, and issues a right to sue letter, may plaintiffs proceed to pursue claims through private litigation.[39]

During this period, however, due to the EEOC's backlog and heavy workload, there is often little or no action by the EEOC, and a plaintiff's claim can lie dormant without attention.[40] This undoubtedly prejudices the plaintiff and stalls access to an effective forum in which to ameliorate egregious sexual harassment.[41] While the EEOC charge is pending, plaintiffs have no power to

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[36]*See* 42 U.S.C. § 2000e-5(e)(1), (f)(1) (1994).

[37]*See* 42 U.S.C. § 2000e-5(e)(1). Pursuant to work sharing agreements, a plaintiff may have the option of filing a charge with a state or local agency. For purposes of this discussion, references to the EEOC will encompass such cooperative agencies.

[38]*See* 42 U.S.C. § 2000e-5(f)(1).

[39]*See id.* Title VII gives the EEOC a period of six months to accomplish these tasks. *See id.*

[40]*See* Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 362-63 (1977) (recognizing that the EEOC is subject to a "burgeoning workload," resulting in an "administrative quagmire").

[41]This is compounded by the delay in getting to trial which plaintiffs will experience once they are finally permitted to pursue their claims in court, further frustrating any ability

conduct discovery, or otherwise preserve their claims through depositions of witnesses who are then likely available, and whose memories are fresh. Instead, the EEOC controls what, if any, information is obtained and preserved, and in what form. Plaintiffs are also deprived of emotional and financial redress during this period. In many instances, only after claims have become stale, witnesses disappeared, and memories faded, may a Title VII plaintiff pursue a claim in state or federal court.

A second procedural problem with Title VII which severely limits a plaintiff's ability to effectively remedy workplace violence under Title VII is the extremely short dual statute of limitations. The statute of limitations can function as double jeopardy for plaintiffs seeking to preserve and pursue a claim. In order to pursue a Title VII sexual harassment claim, the plaintiff must, in the first instance, file a charge with the EEOC within 180 days of the alleged harassment.[42] To the extent a plaintiff fails to do so, a Title VII claim is barred.[43] After the issuance of a right to sue letter, a plaintiff again must act quickly and initiate litigation within 90 days, or forever waive his or her claim.[44] This double statute of limitations can be a procedural nightmare, and may ultimately function as a procedural bar to the unwary, unsophisticated, and/or unrepresented plaintiff. This is particularly problematic for plaintiffs who either do not immediately consult with counsel because of personal difficulties in dealing with, accepting, and admitting that they have been a victim of harassment or violence, or who are not even cognizant of their rights, and to that extent, do not realize that they have any recourse for sexual harassment or workplace violence.[45] Thus, the procedural provisions of Title VII work against all but the most savvy of plaintiffs, from pursuing claims. Title VII thus creates a procedural labyrinth which plaintiffs must successfully navigate before they even gain the right to pursue their claim.

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of plaintiffs to vindicate their now perhaps elusive Title VII remedies.

[42]*See* 42 U.S.C. § 2000e-5(e)(1).

[43]*See id*; *see also* Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231 (8th Cir. 1975) (recognizing "that timely filing of an EEOC charge is a prerequisite to court action") (citations omitted).

[44]*See* 42 U.S.C. § 2000e-5(f)(1); *see also* Mosel v. Hills Department Store, Inc., 789 F.2d 251, 253 (3d Cir. 1986) (noting that failing to satisfy Title VII ninety day limit requires dismissal of complaint and absent "a recognized equitable consideration, the court cannot extend the limitations period even one day.") (citation omitted).

[45]Financial considerations may also cause a plaintiff to delay in consulting an attorney.

b. Substantive Limitation of Title VII's Coverage.

Substantively, Title VII limits the remedies available to plaintiffs through damage caps and definitional limitations. First, even after a Title VII plaintiff reaches the courthouse, damages are capped. Prospective compensatory damages and punitive damages are severely limited.[46] Specifically, the total damages awarded for emotional distress, prospective economic loss, and punitive damages may not exceed statutory caps ranging from $50,000 for employers with 14 to 100 employees, to $300,000 for employers with in excess of 500 employees.[47] Thus, regardless of the level of egregiousness of the harassment, Title VII protects both victimizers and employers by limiting potential liability. These limitations on plaintiff's remedies undermine both the remedial and deterrent impacts of Title VII claims.

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[46]*See* 42 U.S.C. § 1981a(b)(3) (1994).

[47]*See* 42 U.S.C. § 1981a(b)(3) provides in relevant part:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, *and* the amount of punitive damages awarded under this section, *shall not exceed*, for each complaining party —
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3) (emphasis added).

Second, definitional limitations leave gaps in Title VII's coverage that can effectively prevent plaintiffs from obtaining relief from their victimizers. For example, Title VII defines an "employer" as a business employing more than 15 employees.[48] Thus, victims of workplace harassment and violence who work for smaller businesses are without federal redress.[49] Moreover, Title VII is directed to "employers," and does not directly cover instances of harassment or violence by non-supervisory co-workers or third parties in the workplace.[50] Finally, Title VII does not reach harassment and violence occurring outside of the workplace or scope of employment.[51] Thus, Title VII suffers clear substantive gaps which leave classes of potential plaintiffs without any redress for egregious sexual harassment or gender-motivated violence in the workplace.

Additionally, under the current rubric of quid pro quo and hostile work environment sexual harassment, certain instances of egregious harassment and workplace violence may go unremedied because of the difficulty in demonstrating a claim based upon a single incident. A recent New York case is instructive on this point. In *Crisonino v. New York City Housing Authority*,[52] plaintiff alleged that she was called a "dumb bitch" and subsequently pushed in the chest and knocked to the floor by her supervisor, resulting in serious physi-

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[48]*See* 42 U.S.C. § 2000e(b) (1994) (defining an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of competitive service . . . or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation . . . .").

[49]Such employees constitute a significant segment of the working public. In 1995, of approximately 100 million people employed in the United States, approximately 16.3 million worked for employers who employed less than 15 employees. Telephone Interview with, Brian Headd, Economist, United States Small Business Administration, Office of Advocacy, in Washington, D.C. (Jan. 28, 1998).

[50]Although Title VII does permit a hostile work environment claim against an employer who tolerates harassment by a third party in the workplace, a victim of such harassment has no recourse against the non-supervisory co-worker or third party harasser under Title VII. *See* 42 U.S.C. § 2000e-2(a) (providing that it is unlawful for an *employer* to discriminate on the basis of gender).

[51]*See* Fleming v. Boeing Co., 120 F.3d 242 (11th Cir. 1997) (finding that an employer is not liable for hostile environment sexual harassment when the harasser is acting outside the scope of his employment).

[52]No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997).

cal and psychological injury.[53] Based upon the circumstances, including both the supervisor's remark and the nature and result of the assault, the district court in *Crisonino* concluded that plaintiff had stated a hostile work environment claim under Title VII sufficient to survive summary judgment.[54] In so holding, the district court emphasized the fact that the defendant had pushed plaintiff "above the breast" and called her a "dumb bitch."[55] The district court noted, however, that it was a "close question" as to whether the assault was sufficient to state a Title VII claim.[56] Even with these factors present, however, the district court expressly noted that the plaintiff's hostile work environment claim had only "*barely* survived summary judgment with respect to whether the incident was sufficiently severe or sexually related so as to meet the requirements for a hostile work environment charge."[57]

Although a sufficiently severe isolated incident of gender-motivated violence can form the basis for a viable Title VII hostile work environment claim, this may not be true in every situation.[58] For instance, in *Crisonino*, it is unclear whether the district court would have reached the same conclusion with respect to plaintiff's hostile work environment sexual harassment claim had the nature of the assault been different and/or the gender deprecating comment absent. Therefore, Title VII could be interpreted so that a single gender-motivated assault in the workplace may not be actionable as a hostile work environment claim.[59]

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[53]*See id.* at *1.

[54]*See id.* at *2.

[55]*See id.*

[56]*See id.*

[57]*Id.* at *3 (emphasis added).

[58]Quid pro quo sexual harassment analysis is largely irrelevant to single incidents of gender-motivated violence or harassment.

[59]In order to demonstrate a viable hostile work environment claim, a plaintiff must show a "practice or pattern of harassment against her; a single incident or isolated incidents are generally insufficient." Mastro v. Wausau Serv. Corp., 948 F. Supp. 1396, 1410 (E.D. Mo. 1996) (citing Clayton v. White Hall School Dist., 875 F.2d 676, 680 (8th Cir. 1989)). Although sufficiently egregious single incidents have been cognizable as hostile work environment claims under Title VII, such results are by no means guaranteed, and thus, plaintiffs subjected to an individual incident of workplace violence or harassment may find themselves without redress. *See id.*; *see also* Jeffries v. State of Kansas, Dep't of Soc. and Rehabilitation Serv., 946 F. Supp. 1556 (D. Ka. 1996) (finding that plaintiff had failed to establish a sufficiently severe single instance of harassment to alter the terms and conditions of her employment and therefore granting defendants' motion for summary judgment). *Cf.*

Thus, the procedural and substantive limitations inherent in Title VII render it an incomplete remedy for sexual harassment and violence in the workplace, leaving some victims, because of timing or the nature of their claim, without recourse. As discussed *infra*, the civil rights provision of the Violence Against Women Act will function as a valuable safety net to catch some of these victims who would otherwise slip through the cracks in the current system.

D. THE ABILITY OF THE CIVIL RIGHTS PROVISION OF THE VIOLENCE AGAINST WOMEN ACT TO PROVIDE AN EFFECTIVE AND UNIFORMLY AVAILABLE REMEDY FOR VICTIMS OF WORKPLACE VIOLENCE AND SEXUAL HARASSMENT.

The civil rights provision of the Violence Against Women Act does not suffer from the procedural and substantive pitfalls and limitations inherent in Title VII. For this reason, it is a valuable complement to Title VII's provisions and will serve to provide an alternative avenue to victims of workplace harassment and violence who might otherwise be left remediless under the more traditional Title VII analysis. Further, it creates a uniformly available remedy designed to ameliorate the shortfalls in state systems and statutes and protect all women, including those who happen to be victimized in jurisdictions with less progressive statutes, thereby striving to avoid their double victimization.

Procedurally, the Violence Against Women Act has no exhaustion requirement such as that found in Title VII and many analogous state statutes. Therefore, victims of gender-motivated workplace violence may proceed immediately to state or federal court for consideration of their claims.[60] Additionally, the Act gives plaintiffs almost immediate access to discovery mechanisms required to obtain and preserve the testimony and evidence necessary to effectively prosecute their claims, rather than leaving the critical component of initial discovery to the vagaries of administrative agencies. Importantly, this places the power to control and prosecute claims rightfully in the hands of victims and their counsel.

With respect to the statute of limitations, the Violence Against Women Act is subject to a four year statute of limitations rather than the double statute of limitations contained in the 180 and 90 day filing requirements under Title VII.[61] Thus, plaintiffs who may not immediately recognize and/or confront

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Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (finding that "the assaults were sufficiently severe to alter the condition [ ] of [plaintiff's] employment and to constitute actionable sex discrimination.").

[60]*Compare* 42 U.S.C. § 2000e-5(e)(1), (f)(1) (1994) *with* 28 U.S.C. § 13981 (1995).

[61]*See* 28 U.S.C. § 1658 (1994) (providing that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may

their victimization are not left without a remedy under the Violence Against Women Act as they may be under Title VII.[62] Because the Violence Against Women Act suffers from neither of these procedural shortcomings, once the impediments to its effective use are overcome, it will become a valuable mechanism for plaintiffs impeded by Title VII's inherent limitations.

Substantively, the civil rights provision of the Violence Against Women Act likewise does not suffer the defects and limitations of Title VII. The Act permits recovery of compensatory and punitive damages without limitations such as those contained in Title VII, thereby allowing the Act to maximize the effectiveness of both its remedial and deterrent aspects.[63] Further, it is undisputed that a single act of gender-motivated violence is sufficient to demonstrate a viable claim under the Violence Against Women Act.[64] Therefore, the problems inherent in demonstrating a hostile work environment claim under Title VII in the context of a single incident are not present in the context of civil rights claims under the Act. Absent a Violence Against Women Act civil rights claim, a plaintiff may be left with no remedy at all, particularly where the violence or harassment is not part of a pattern, but rather is an isolated, and grievous incident.[65] Moreover, the Violence Against Women Act is designed to reach any and all workplace victimizers whether employers, co-workers, or third parties. Therefore, the Act does not suffer from the limitations contained in Title VII in this regard, thereby expanding the scope of the remedy.[66] Thus,

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not be commenced later than [four] years after the cause of action accrues."); *see also* Betty Levinson, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 401, 407 n.41 (1996) (noting the four year statute of limitations for Violence Against Women Act claims for acts of violence committed after 1990).

[62]*Compare* 28 U.S.C. § 1658 (1994) *with* 42 U.S.C. 2000e-5(e)(1), (f)(1) (1994).

[63]*See* 42 U.S.C. § 13981(c) (1995) (providing for unlimited compensatory and punitive damages, as well as injunctive relief).

[64]Few remedies are perfect, however, and the Violence Against Women Act does create its own set of problems for plaintiffs endeavoring to articulate a gender-motivated violent crime sufficient to state a claim under the Act. *See infra* Part III, discussing this at length.

[65]*See supra* note 59.

[66]The Violence Against Women Act cannot, however, reach an employer unless the employer is the victimizer. In contrast, Title VII provides employer liability under certain circumstances. *Compare* 42 U.S.C. § 13981 (1995) *with* 42 U.S.C. § 2000e-2(a) (1994). Thus, the Violence Against Women Act is not without its limitations. *See also infra* Parts II and III.

it is clear that the civil rights provision of the Violence Against Women Act operates to bridge many of the gaps left by Title VII and the available state remedies.

As graphically demonstrated by the statistics, rape, sexual harassment, and violence against women in the American workplace is occurring at shocking levels. Equally alarming are the woefully inadequate remedies available under federal and state statutory law and state employment-related common law. Thus, as recognized by Congress, the civil rights provision of the Violence Against Women Act is necessary as it responds not only to the enormity of the problem of violence against women in America, but also to the subtleties of each individual case. However, the civil rights provision of the Act cannot function as an effective mechanism for addressing workplace violence unless several obstacles are overcome. The most significant of these obstacles are the constitutional challenge to the Act and the problems attendant to stating a claim under the Act.

PART II: THE ONGOING BATTLE OVER THE CONSTITUTIONALITY OF THE CIVIL RIGHTS PROVISION OF THE VIOLENCE AGAINST WOMEN ACT.

The first obstacle to the effective use of the Violence Against Women Act in the employment context is the ongoing constitutional challenge to the Act's civil rights provision. In enacting the civil rights provision of the Violence Against Women Act, Congress expressly grounded its authority to do so on two separate and distinct constitutional provisions: Section 5 of the Fourteenth Amendment and the Commerce Clause.[67] Since its enactment, defendants have uniformly challenged the constitutionality of the civil rights provision of the Violence Against Women Act on both of these constitutional bases.[68] The bulk of the scant jurisprudence in this area, however, has focused upon the Commerce Clause analysis in the aftermath of *United States v. Lopez*.[69] Several

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[67]*See* 42 U.S.C. § 13981(a) (1995).

[68]*See* Mattison v. Click Corp. of Am., No. CIV.A. 97-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997); Anisimov v. Lake, No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, Nos. 97-3086, 97-3087, 1998 WL 24118 (8th Cir. Jan. 26, 1998); Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).

[69]514 U.S. 549 (1995) (finding that the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. 1988) (amended 1994, 1996), which federally criminalized posses-

district courts and the United States Court of Appeals for the Fourth Circuit have ruled that the civil rights provision of the Violence Against Women Act constitutes a valid exercise of congressional authority under the Commerce Clause.[70] In so ruling, the Fourth Circuit reversed the only contrary decision on the constitutional validity of this provision under the Commerce Clause.[71]

With respect to the Fourteenth Amendment, only one district court found it necessary to reach this issue. In *Brzonkala v. Virginia Polytechnic and State University*, the United States District Court for the Western District of Virginia ruled that the enactment of the Violence Against Women Act was not a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.[72] As discussed more fully herein, the district court's ruling in *Brzonkala* misinterprets Supreme Court precedent and is based upon a flawed constitutional analysis, and therefore, was erroneous. Contrary to the district court's finding, the Violence Against Women Act constitutes a valid exercise of Congress' authority pursuant to both the Commerce Clause and Section 5 of the Fourteenth Amendment. Thus, the Act should, and will, ultimately be upheld by the federal courts, thereby removing the first barrier to its effective use in the employment context.

A. THE COMMERCE CLAUSE ANALYSIS.

In the only United States Court of Appeals decision on this issue, the Fourth Circuit ruled on December 23, 1997, that Congress' enactment of the Violence

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sion of a gun within 1,000 feet of a school, was an unconstitutional exercise of congressional Commerce Clause authority because there was an insufficient showing in the record to support Congress' finding that such activity substantially affected interstate commerce).

[70]*See* Brzonkala v. Virginia Polytechnic Instit. & State Univ., Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997) (reversing the district court and upholding the constitutionality of the Violence Against Women Act pursuant to Congress' authority under the Commerce Clause); Crisonino v. New York City Hous. Auth., No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997); Anisimov v. Lake, No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, Nos. 97-3086, 97-3087, 1998 WL 24118 (8th Cir. Jan. 26, 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).

[71]*See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (holding that Congress exceeded its power under the Commerce Clause in enacting the civil rights provision of the Violence Against Women Act), *rev'd on other grounds*, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

[72]*See id.*

Against Women Act was a valid exercise of constitutional authority pursuant to the Commerce Clause.[73] Prior to the Fourth Circuit's decision, United States District Courts for the District of Connecticut, the Southern District of New York, the Northern District of Iowa, the Eastern District of Tennessee, and the Northern District of Illinois reached similar conclusions on the issue.[74] Thus, at least currently there is agreement among the federal courts on this issue. Because of its constitutional soundness, the Fourth Circuit's approach should, and will likely be, adopted by other federal courts which will no doubt continue to confront this issue in the coming months and years, as litigants, lawyers, and judges seek to more fully understand and define the parameters of the civil rights provision of the Violence Against Women Act, and its role in our system of justice.[75]

1. THE *LOPEZ* IMPACT ON COMMERCE CLAUSE ANALYSIS.

In *Brzonkala v. Virginia Polytechnic Institute and State University*, the United States Court of Appeals for the Fourth Circuit affirmed that *Lopez* did not change Commerce Clause jurisprudence, overrule any Commerce Clause precedent, or otherwise alter the rational basis test.[76] In this regard, the Fourth Circuit recognized the "strong presumption of validity and constitutionality" which is to be afforded every act of Congress,"[77] and further reiterated that

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[73]*See* Brzonkala v. Virginia Polytechnic Instit. & State Univ., Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

[74]*See* Crisonino v. New York City Hous. Auth., No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997); Anisimov v. Lake, No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997),), *rev'd on other grounds*, Nos. 97-3086, 97-3087, 1998 WL 24118 (8th Cir. Jan. 26, 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).

[75]For additional discussion of the Commerce Clause basis for the civil rights provision of the Violence Against Women Act, see Johanna R. Shargel, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997); Comment, Mary C. Carty, Doe v. Doe *and the Violence Against Women Act: A Post-*Lopez, *Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465 (1997); Note, Karen Tichnor, *The Violence Against Women Act: Continued Confusion Over the Scope of the Commerce Clause*, 18 WOMEN'S RTS L. REP. 329 (1997); Note, Kerrie E. Maloney, *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).

[76]*See Brzonkala*, 1997 WL 785529 at *20.

[77]*Id.* at *15 (citations omitted).

congressional action will only be invalidated "for the most compelling constitutional reasons."[78] Finally, the Fourth Circuit reaffirmed that the *only* determination it needed to make under Commerce Clause analysis was "'whether a rational basis existed for concluding that a regulated activity' substantially affects interstate commerce."[79] It is against this backdrop, and "with these directives in mind," that the Fourth Circuit evaluated the Commerce Clause issue.[80]

The Fourth Circuit in *Brzonkala* recognized that even in the aftermath of *Lopez*, it remains clear that Congress can regulate three areas under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities "having a substantial relation to interstate commerce."[81] Because the civil rights provision of the Violence Against Women Act is neither a regulation of the use of the channels of interstate commerce, nor an attempt to regulate instrumentalities of interstate commerce, in order to constitute a valid exercise of congressional authority, the regulated activity must substantially affect interstate commerce.[82] In so finding, the Fourth Circuit rejected both the district court's interpretation of *Lopez*, as well as its comparison of the Violence Against Women Act with the Gun Free School Zones Act.

With respect to the first point, the Fourth Circuit cited ample precedent for the proposition that *Lopez* "reaffirmed rather than overturned the previous half-century of Commerce Clause precedent."[83] As to the second point, the Fourth Circuit properly noted that Congress had made no finding to support its assertion that the problems associated with the presence of guns in school zones, which prompted the enactment of the Gun Free School Zones Act, substantially impacted interstate commerce.[84] Therefore, in *Lopez*, the government was left to argue that "guns in schools affected commerce based upon several tenuous, multi-layered theories."[85] By complete contrast, the Fourth Circuit noted that

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[78]*Id.* (quoting Mistretta v. United States, 488 U.S. 361, 384 (1989)).

[79]*Id.* (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

[80]*See id.* at *16.

[81]*Id.* (quoting United States v. Lopez, 514 U.S.549, 558-59 (1995)).

[82]*See id.*

[83]*Id.* at *20 (citation omitted).

[84]*See id.* at *16.

[85]*Id.* at *21.

the Violence Against Women Act "regulates behavior—gender-motivated violent crime against women—which Congress has found substantially and gravely affects interstate commerce on the basis of abundant evidence."[86] The Fourth Circuit went on to hold that "[t]o connect [the Violence Against Women Act] with interstate commerce, a court need not make any inferences—Congress itself has clearly established and documented that gender based violence against women substantially affects interstate commerce."[87]

2. THE EXTENSIVE LEGISLATIVE RECORD.

In contrast to the silence in the congressional record regarding the actual impact of the problem created by guns in school zones in connection with the passage of the Gun Free School Zones Act, the Fourth Circuit aptly noted the "voluminous findings" which supported the passage of the Violence Against Women Act.[88] In examining the "mountain" of congressional findings in this regard, the Fourth Circuit noted that they were "detailed" and "extensive," and that the "enormity of the problem caused by violence against women" had been "carefully documented," specifically acknowledging that the congressional record reflected violence is the leading cause of injury to women ages 15-44; that three out of four women will be the victims of violent crimes, and that the instance of rape in this country has risen 4.5 times as fast as the total crime rate.[89]

The court further recognized that the "cost to society" of this escalating violence "is staggering."[90] Based upon its "exhaustive and meticulous investigation of the problem," the Fourth Circuit noted that Congress properly concluded that:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical

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[86] *Id.*

[87] *Id.*

[88] *See id.* at *17.

[89] *See id.* at *17-18 (citations omitted).

[90] *Id.* at *18 (quoting S. REP. NO. 101-545, at 33 (1990)).

and other costs, and decreasing the supply of and the demand for interstate products.[91]

Based upon this conclusive legislative record, the Fourth Circuit discerned that Congress had a rational basis for concluding that gender-motivated violence substantially affected interstate commerce.[92] Unlike the *Lopez* case, the Fourth Circuit did not need to "pile inference upon inference" to find a sub-

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[91]*Id.* (quoting H.R. REP. NO. 103-711, at 385 (1994)). Congress further noted in this regard that:

> 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. Gender-based violence bars its most likely targets—women—from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. . . . For example, women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the [number one] reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries . . . . Forty-two percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

Id. at *19 (quoting S. REP. NO. 103-138, at 54 n.70 (1993)); *see also* Kevin Conlon and Catherine Voight, *Sexual Harassment: An American Judicial Perspective*, LABOR L.J. (1997) (reporting that "[s]ome estimate that sexual harassment costs the typical fortune 500 company $6.7 million dollars a year, or $282.53 per employee) (citation omitted).

[92]*See Brzonkala*, 1997 WL 785529 at *19.; *see also* EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (upholding the Age Discrimination in Employment Act under Commerce Clause based upon abundance of evidence in record that the regulated activity had a substantial effect on interstate commerce); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964) (upholding Title II of the Civil Rights Act of 1964 under Commerce Clause based upon abundance of evidence in record that the regulated activity had a substantial effect on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (upholding Title II of the Civil Rights Act of 1964 under the Commerce Clause based upon an abundance of evidence in the record that the regulated activity had a substantial effect on interstate commerce); Abbott v. Bragdon, 912 F. Supp. 580, 593-95 (D. Me. 1995) (upholding the Americans with Disabilities Act under Commerce Clause based upon abundance of evidence in record that the regulated activity had a substantial effect on interstate commerce); Pulcinella v. Ridley Township, 822 F. Supp. 204, 211 (E.D. Pa. 1993) (upholding the Fair Housing Act under Commerce Clause based upon abundance of evidence in record that the regulated activity had a substantial effect on interstate commerce).

stantial effect on interstate commerce, but rather, the effect virtually lept from the record into the laps of the panelists.[93] Consequently, the Fourth Circuit found that Congress' action was justified and authorized by the Commerce Clause.[94]

B. FOURTEENTH AMENDMENT ANALYSIS.

Because the federal courts have almost uniformly found that Congress' enactment of the civil rights provision of the Violence Against Women Act was authorized by the Commerce Clause, most courts faced with the issue have found it unnecessary, and therefore declined, to address whether Congress' action was constitutional pursuant to Section 5 of the Fourteenth Amendment.[95]

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[93]*See Brzonkala*, 1997 WL 785529 at *16 (quoting United States v. Lopez, 514 U.S. 549, 567 (1995)).

[94]The Fourth Circuit also favorably noted that unlike the Gun Free School Zones Act, the Violence Against Women Act doe not "invade areas of traditional state control," but rather, leaves state criminal and tort remedies intact and unaffected to the extent that they exist, and "far from displacing state law," was rather, "carefully designed . . . to harmonize with state law and protect areas of state concern." *Id.* at *22. Thus, the Fourth Circuit concluded that "[i]n sum, [the Violence Against Women Act] acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence." *Id.*

Finally, and perhaps more importantly, the Fourth Circuit noted that in enacting the Violence Against Women Act, Congress acted in an area where perhaps more than any other, federal action is appropriate and necessary: the area of protection of civil rights. *See id.* The circuit court noted both the need for this action as demonstrated again by the congressional record which clearly set forth that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. [C]ollectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

Id. at *23 (quoting S. Rep. No. 103-138, at 49 (1993)). Thus, the Fourth Circuit noted that "[i]n [the Violence Against Women Act], Congress has passed a civil rights law, a quintessential area of federal expertise, in response to 'existing bias and discrimination in the criminal justice system.'" *Id.*

[95]*See supra* note 74.

The one court which reached this issue, the United States District Court for the Western District of Virginia, found that the enactment of the civil rights provision of the Violence Against Women Act did not constitute a valid and constitutional exercise of Congress' power under the Fourteenth Amendment.[96] The district court's analysis in that regard was flawed and will not, and should not, be followed by other courts faced with the issue. Therefore, in addition to constituting a valid exercise of congressional power pursuant to the Commerce Clause, the enactment of the civil rights provision of the Violence Against Women Act is also a valid exercise of congressional power pursuant to Section 5 of the Fourteenth Amendment.[97]

1. THE SCOPE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[98] Section 5 constitutes a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[99]

It can hardly be disputed that gender-motivated violence undermines the equal protection guarantees of women in this country or that gender-motivated crimes of violence, just like any other bias crime, are a violation of the victim's civil rights.[100] Further, the extensive legislative record reflects the utter failure of the states' civil and criminal justice systems to remedy, or even effectively confront, the pervasive gender-motivated violence rampant in our

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[96]*See Brzonkala*, 935 F. Supp. 779 (W.D. Va. 1996), *rev'd on other grounds*, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

[97]For additional discussion of the Fourteenth Amendment basis for the civil rights provision of the Violence Against Women Act, see Comment, Lisa A. Carroll, *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); Comment, Chris A. Rauschi, Brzonkala v. Virginia Polytechnic and State University*: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601 (1997); Note, Melanie L. Winskie, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985 (1997).

[98]U.S. CONST. amend. XIV, § 5.

[99]Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[100]*See* H.R. REP. NO. 103-711 at 385-86 (1994); S. REP. NO. 103-138 at 48-49 (1993); S. REP. NO. 102-197 at 53 (1991).

country.[101] This failure constitutes a classic denial of equal protection that Congress properly acted to rectify when it enacted the civil rights provision of the Violence Against Women Act.[102]

Thus, Congress rationally concluded that the civil rights provision was necessary to guarantee equal protection of the laws by providing victims of gender-motivated violence with a meaningful remedy to combat the blight of violence and systemic discrimination to which they are daily subjected.[103] Further, the remedy pursuant to which Congress sought to rectify the equal protection violation was clearly adapted to that end.

Specifically, Congress provided funding to aid local law enforcement initiatives[104] and created a private civil rights cause of action for victims in federal court.[105] The creation of this cause of action is a legitimate mechanism to remedy the discrimination against women that is rampant in our state criminal justice systems. Further, it serves a number of legitimate equal protection purposes including: (1) providing vindication to victims often denied recourse in the state criminal and/or civil justice systems in a more neutral forum, not directly influenced by local politics and prosecutorial discretion;[106] (2) allowing victims of gender-motivated violence to obtain "special societal judgment that crimes motivated by gender bias are unacceptable" too often denied victims in State court proceedings;[107] (3) serving as deterrent to victimizers;[108] (4) creating a national standard "in the presence of a patchwork of inadequate and un-

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[101]*See supra* note 27.

[102]Prior to the enactment of the civil rights provision of the Violence Against Women Act, Congress expressly recognized that gender-motivated violent crimes deprive women of equal protection. *See* S. REP. NO. 103-138, at 55 (1993). *See also* H.R. REP. NO. 103-711, at 385-86 (1994).

[103]*See* H.R. REP. NO. 103-711 at 385-86 (1994); S. REP. NO. 103-138 at 55 (1993); S. REP. NO. 102-197 at 53 (1991).

[104]The Violence Against Women Act provides $1.6 billion in funding to combat violence against women. *See* Merrick Rossein, EMPLOYMENT DISCRIMINATION, ch. 35, § 35.1 n.1 (Clark Boardman Callaghan 1997) (citing 42 U.S.C. §§ 3796gg-3796gg-5; §§ 13991-14002; § 316; §§ 1910A, 10409 (a); § 317; § 13961; and § 13931).

[105]*See* 42 U.S.C. § 13981(c) (1995).

[106]*See* S. REP. NO. 103-138 at 49 (1993); S. REP. NO. 102-197 at 48 (1991).

[107]*See* S. REP. NO. 103-138 at 50 (1993).

[108]*See supra* note 8.

der-enforced state criminal and civil laws" and avoiding the negative impact on victims of the variance in state remedies and procedures;[109] (5) enabling victims, rather than prosecutors or government agencies, to assert and control claims;[110] and (6) protecting women from discriminatory attitudes, which often make pursuit of claims in state criminal and/or civil forums unfruitful.[111] Beyond permitting victims an opportunity to obtain financial and emotional redress on their own behalf, the private cause of action created under the civil rights provision of the Violence Against Women Act serves a critical federal interest by functioning to combat gender discrimination on a wider scale in our society.[112]

Importantly, the civil rights provision of the Violence Against Women Act achieves these goals without any negative implications to federalism, because it does not interfere with or usurp state initiatives designed to combat this problem to the extent that they exist.[113] Further, it leaves state criminal and tort remedies intact and does not interfere in any way with the states' individual efforts to address the problems unveiled by Congress regarding gender-motivated violence. Thus, the civil rights provision of the Violence Against Women Act is plainly adapted to serve a number of legitimate Fourteenth Amendment purposes, and to that extent, constitutes a valid exercise of Congress' Fourteenth Amendment power.

2. THE WESTERN DISTRICT OF VIRGINIA'S FOURTEENTH AMENDMENT ANALYSIS IN *BRZONKALA v. VIRGINIA POLYTECHNIC AND STATE UNIVERSITY.*

As previously noted, the only court to address the Fourteenth Amendment

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[109]*See* Now Legal Defense Fund Brief, at 40, Doe v. Doe (No. 96-6224) (2d Cir. 1996). *See also* S. REP. NO. 102-197 at 53-54 (1991).

[110]*See Violence Against Women: Victims of the System, Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 126 (1991).

[111]*See* H.R. REP. NO. 103-711 at 385-86 (1994); S. REP. NO. 103-138 at 41-42, 49 (1993); S. REP. NO. 102-197 at 43-48 (1991); S. REP. NO. 101-545 at 42 (1990).

[112]*See* Doe v. Doe, 929 F. Supp. 608, 616 (1996) (noting that "[a] plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself [or herself] alone but also a 'private attorney general,' vindicating a policy that Congress considered of the highest importance'") (quoting City of Riverside v. Rivera, 477 U.S. 561, 575 (1986)).

[113]*See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., Nos. 96-1814, 96-2316, 1997 WL 785529 at * 22 (4th Cir. Dec. 23, 1997) (holding that the civil rights provision of the Violence Against Women Act "acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence").

issue raised by the civil rights provision of the Violence Against Women Act to date is the Western District of Virginia in the now highly controversial case of *Brzonkala v. Virginia Polytechnic and State University*.[114] After concluding the Violence Against Women Act was not a valid exercise of Congress' authority under the Commerce Clause, the district court proceeded to undertake an analysis of Congress' purported authority to enact the civil rights provision of the Violence Against Women Act under Section 5 of the Fourteenth Amendment.[115] In so doing, the district court properly noted that in undertaking such analysis, it must identify a protectable Fourteenth Amendment interest which the legislation at issue serves, and further, determine whether Congress' action is plainly adapted to serving that purpose.

In its analysis, the *Brzonkala* court identified two potentially protectable Fourteenth Amendment interests: (1) "to remedy private individuals' from gender-based violence"; and (2) "to remedy gender-based deficiencies in the states' criminal justice systems."[116] Of these two articulated purposes, the district court found that the first was not a legitimate Fourteenth Amendment concern. The district court further found that although the second was a legitimate Fourteenth Amendment concern, the Violence Against Women Act was not plainly adapted to achieving this end. The district court reasoned that the legitimate end of remedying equal protection concerns within the state criminal justice systems was not achieved by the civil rights provision of the Violence Against Women Act because the remedy did not directly address the systemic equal protection violations inherent in the state systems, but rather, targeted the private criminal discriminator.[117] These authors respectfully urge that the district court was wrong on both counts, and that the jurisprudence in the district court's decision should, and will, if reached by other courts, ultimately be rejected.

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[114]935 F. Supp. 779 (W.D. Va. 1996), *rev'd on other grounds*, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997). The remainder of the district courts in which this issue has been raised have failed to reach the Fourteenth Amendment issue as they have found the Violence Against Women Act constitutional on Commerce Clause grounds. *See supra* note 74. Likewise, because the Fourth Circuit, in reversing the district court in *Brzonkala*, found that the civil rights provision of the Violence Against Women Act is constitutional under the Commerce Clause, it needed not, and so, declined to reach, address, or potentially reverse, the district court's Fourteenth Amendment analysis. However, it is nevertheless necessary to address the district court's Fourteenth Amendment analysis in *Brzonkala*, because that opinion remains the only precedent addressing the constitutionality of the Act under the Fourteenth Amendment.

[115]*See Brzonkala*, 935 F. Supp. at 793.

[116]*Id.* at 797.

[117]*See id.*

a. Remedy Gender-Based Violence.

The district court's premise that the first "purpose" of the Violence Against Women Act was to "create a cause of action against the criminal discriminator" and that this purpose is illegitimate because it involves no state action is flawed on two levels. First, to create a private cause of action to address gender-motivated violence was not the "purpose" of the Violence Against Women Act, but rather, was the mechanism chosen by Congress to effectuate the purpose of addressing the ineffectiveness of the state court systems in dealing with violence against women.

Second, it can hardly be argued that the states' utter failure to address the escalating problem of violence against women, as is so amply demonstrated by the congressional record, involves no state action.[118] On this point, the district court suggested that because the states have outlawed rape and violence against women, they have acted, thus suggesting that absent further state action, Congress is without authority to remedy their failure to prosecute and effectively deal with criminals who violate such state statutes.[119] Such a conclusion clearly elevates form over substance.[120] In essence, the district court is saying that so

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[118]While it is not the subject of this article, and indeed, is not necessarily addressed to resolve the constitutional issue addressed herein, there is an ongoing constitutional debate as to whether State action is even required for Congress to act pursuant to Section 5 of the Fourteenth Amendment. *See Brzonkala*, 935 F. Supp. at 794 (noting *United States v. Guest*, 383 U.S. 745, 762, 774-86 (1966) in which six justices agreed that no state action was necessary for Congress' use of Section 5 and *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) in which the Court found that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct, however, discriminatory or wrongful'" and then stating in a footnote "[t]his is not to say, of course, that Congress may not proscribe purely private conduct under the Fourteenth Amendment") (citations omitted)).

[119]*See id.* at 799.

[120]As aptly stated by an amicus brief in the appeal to the Second Circuit in *Doe v. Doe*, on this issue:

> In the face of the congressional action resulting in the Civil Rights Remedy of the [Violence Against Women Act], it is untenable for a judge to conclude that the gender-based discriminatory policies of the states and the behaviors of individuals exist in separate, unconnected worlds. State gender bias is not a self-enclosed phenomenon; it shapes the context in which acts of violence based on gender occur and inextricably involves the state in those acts. When individuals inflict gender-based violence, they follow in the path of long-entrenched public norms and policies. In light of the history and ongoing pattern of state law and practice, violence that is animated by gender bias cannot be insulated from national remedial authority by characterizing it as "private."

long as the states outlaw violence and gender discrimination, as a matter of Fourteenth Amendment jurisprudence, Congress has no means pursuant to which it can deal with the states' failure to prosecute these crimes or the ineffectiveness of state law prohibitions, no matter how hollow. This premise should be rejected as a matter of law and of social and public policy, particularly in view of the well-documented failure of the states to diagnose and cure the epidemic of gender-motivated violence raging throughout our country.

b. Remedy Systemic State Discrimination.

The district court in *Brzonkala* ruled that the civil rights provision of the Violence Against Women Act was not plainly adapted to serving the legitimate Fourteenth Amendment interest of remedying discrimination against women in the criminal justice system. Consequently, congressional action in passing this provision was not authorized.[121] This conclusion must likewise be rejected for two reasons.

First, the court is simply incorrect when it asserts that the end of redressing discrimination against women in the criminal justice system is not remedied by the Violence Against Women Act. In fact, the civil rights provision of the Violence Against Women Act functions quite effectively to redress this wrong

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> That the Civil Rights Remedy of [the Violence Against Women Act] permits lawsuits against private citizens rather than authorizes lawsuits against state actors does not mean that the statute seeks to remedy "only" private deprivations of rights to safety. That the immediate defendants are not necessarily members of state law enforcement or of state judicial systems does not render Congress unable to respond to pervasively unequal protection by state law and practices.

Brief of Amici Law Professors in Support of the Constitutionality of the Violence Against Women Act, at 25, Doe v. Doe (No. 96-6224) (2d Cir. 1996). Further:

> Congress had more than ample evidence upon which to conclude that the interaction of state laws, state police and prosecutors, other state officials, and state courts results in failure to ensure systemic protection of women against bodily assaults (aimed at them because they are women) and thus gives unequal protection to women in their exercise of ordinary civil rights. Congress' recent response is an appropriate one: the Civil Rights Remedy in [the Violence Against Women Act] provides those victims of gender-based assaults (who can prove their assailants actions were motivated by gender-based animus) with relief.

Id. at 27.

[121] *See Brzonkala*, 935 F. Supp. at 800.

in a number of ways, including serving both remedial and deterrent purposes, creating a national standard for addressing the pervasive problem of gender-motivated violence, and enabling victims, rather than local prosecutors or government agencies, to control claims.[122]

Further, so long as the end is legitimate, it is up to Congress to determine the most effective means of achieving a Fourteenth Amendment purpose.[123] Simply because a district court does not agree with the means Congress chose, does not overturn the constitutionality of the congressional action.[124] In fact, the United States has argued that the alternative, the creation of a civil rights cause of action against the states or other government entities, although perhaps a more directed approach to the extent it targets the state equal protection violations, would in fact be more harmful and disruptive to the states and to federalism.[125]

Therefore, because the purposes served by the Violence Against Women Act are legitimate, and the remedial mechanism chosen by Congress is plainly adapted to effectuating these legitimate objectives, the analysis of the district court in *Brzonkala* must be rejected. Rather, it is clear that Congress acted within its authority pursuant to Section 5 of the Fourteenth Amendment in enacting the Violence Against Women Act. Accordingly, as evidenced by the federal courts' treatment of the constitutional challenges thus far, and their virtual agreement that Congress acted appropriately pursuant to its Commerce Clause powers, as well as the clear basis under Section 5 of the Fourteenth Amendment authorizing enactment of the civil rights provision of the Violence Against Women Act, the constitutional obstacle to the effective use of the Violence Against Women Act in the employment context can, and will, be over-

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[122]*See supra* notes 106-11.

[123]*See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[124]*See id.* at 653. ("It was for Congress . . . to assess and weigh the various conflicting considerations — the risk or pervasiveness of [the remedy] as a means of dealing with the evil, the adequacy of availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . ."). *Id.* at 53. "It [was] not for [the district court] to review the congressional resolution of these factors. It [was] enough that [it] be able to perceive a basis upon which Congress might resolve the conflict as it did." *Id.* The district court instead substituted its own judgment for that of Congress and ignored the clearly demonstrable, and constitutionally supportable, rationale for Congress' resolution of the problem of violence against women in our society through the mechanism of the creation of a private cause of action in the Violence Against Women Act.

[125]*See* Amicus Brief of the United States in Support of the Constitutionality of the Civil Rights Provision of the Violence Against Women Act of 1994,, at 27-28, Anisimov v. Lake (No. 97-C-0263) (N.D. Ill. 1996).

come.

PART III: THE CHALLENGE OF STATING A CLAIM UNDER THE VIOLENCE AGAINST WOMEN ACT: CASE STUDIES.

Even after these constitutional concerns are finally resolved by our federal courts, the challenges attendant to stating a viable claim under the Act's civil rights provision will remain an obstacle to victims seeking to use the Act to obtain redress for workplace violence and sexual harassment. That struggle is most poignantly demonstrated by the plaintiffs who have tried and succeeded in this endeavor.

As of March 1, 1998, there have been four reported cases in which plaintiffs have sought to use the Violence Against Women Act in the context of workplace harassment and violence.[126] Of these, one dealt solely with removability,[127] while the other three addressed, *inter alia*, the challenges of demonstrating a viable cause of action in the employment context under the civil rights provision of the Violence Against Women Act.[128]

In order to state a viable claim under the Violence Against Women Act, a victim must allege, and ultimately demonstrate a (i) gender-motivated (ii) violent crime.[129] The Violence Against Women Act's civil rights provision is in-

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[126]*See* Mattison v. Click Corp. of Am., No. CIV.A. 97-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York Hous. Auth., No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997); Newton v. Coca-Cola Bottling Co., 958 F. Supp. 248 (W.D.N.C. 1997); Anisimov v. Lake, No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997).

[127]*See* Newton v. Coca Cola Bottling Co., 958 F. Supp. 248 (W.D.N.C. 1997) (denying motion to remand after corporate defendants' removal of the action to federal court based upon the provisions of 28 U.S.C. § 1441 (c), despite the Violence Against Women Act's removal prohibition, due to independence of Title VII and Violence Against Women Act claims at issue).

[128]*See* Mattison v. Click Corp. of Am., No. CIV.A. 97-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York Hous. Auth., No. 96 CIV. 9742 HB, 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997) (finding viable cause of action stated under the Violence Against Women Act and denying Fed. R. Civ. P. 12(b)(6) motion); Anisimov v. Lake, No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997) (finding viable cause of action stated under the Violence Against Women Act and denying Fed. R. Civ. P. 12(b)(6) motion).

[129]42 U.S.C. §13981(c) (1995); *see also* Crisonino v. New York Hous. Auth., 1997 WL 726013 at *4. It is important to note, however, that in order to state a claim, the alleged gender-motivated violent crime need not be criminally prosecuted. *See* 42 U.S.C. § 13981(e)(2).

applicable to "random acts of violence," and thus, the first challenge is to demonstrate that the violent crime at issue was gender-motivated. The second challenge is to demonstrate that the alleged violence would constitute a felony pursuant to the statutory definition. The ways in which plaintiffs are endeavoring to meet these challenges in the context of workplace violence and egregious sexual harassment cases are demonstrated by the case studies chronicled below.

A. *CRISONINO v. NEW YORK CITY HOUSING AUTHORITY.*

In January 1996, plaintiff, Elizabeth Crisonino, went to the office of her supervisor, defendant, Kenneth Eisenstat, to ask for her paycheck.[130] The defendant refused to provide the check, believing that plaintiff had failed to properly turn over her jury duty reimbursements.[131] According to the plaintiff, during this exchange the defendant called her a "dumb bitch."[132] Thereafter, when plaintiff again attempted to collect her paycheck and was refused, she apparently used profanity, which allegedly prompted the defendant to stand-up, walk around his desk, and shove the plaintiff so hard in the chest that she fell backward hitting the floor and sustaining injuries.[133] Plaintiff was thereafter terminated.[134]

After her termination, criminal charges were filed against the defendant, who was initially charged with third degree assault.[135] This charge was later reduced to second degree harassment.[136] Following the filing of plaintiff's civil complaint alleging, *inter alia*, a cause of action under the civil rights provision of the Violence Against Women Act, the defendant moved for summary judgment, asserting that the plaintiff failed to state a claim under the Act because she had failed to allege a gender-motivated violent crime.[137]

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[130]*See Crisonino*, 1997 WL 726013 at *4.

[131]*See id.*

[132]*See id.*

[133]*See id.*

[134]*See id.*

[135]*See id.*

[136]*See id.*

[137]*See id.* at *2.

The district court noted that the issue of whether a particular act of violence is gender-motivated is a question of fact to be evaluated by the fact finder.[138] The court ruled that the plaintiff had sufficiently plead that the violence was gender-motivated since it was alleged that prior to attacking the plaintiff, the defendant called her a "dumb bitch."[139]

With respect to the second issue, defendant argued that because he was ultimately charged only with non-felonious harassment, plaintiff could not state a cause of action under the civil rights provision of the Violence Against Women Act because she could not demonstrate a "crime of violence" pursuant to the Act.[140] The district court, however, disagreed on two counts.

First, the court properly recognized that "the plain language of the statute and its legislative history makes [sic] clear that the criminal charges filed against a defendant do not determine whether the predicate offense qualifies as a 'crime of violence' under the Act."[141] In so finding, the court noted that the Act itself provides that no criminal prosecution of any kind is a necessary prerequisite to a viable Violence Against Women Act civil rights cause of action.[142] The court further noted that to permit the charges filed by the prosecutor to be dispositive of the issue of whether the action at issue constituted a "crime of violence" for purposes of the Act would "place an effective 'veto' power in the hands of local prosecutors."[143] In this regard, the district court recognized that Congress, in enacting the Violence Against Women Act, had expressly found that it was the very "bias and discrimination in the criminal justice system" which "often deprives [sic] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," thereby demonstrating both the need for the legislation and the illogic in thereafter allowing prosecutors to dictate the viability of Violence Against Women Act claims based upon their prosecutorial discretion and decisions.[144] Thus, the district court in *Crisonino* ruled that, notwithstanding the

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[138]*See id.*

[139]*See id.* at *4.

[140]*See id.* at *5.

[141]*Id.*

[142]*See id.* (citing 42 U.S.C. § 13981(e)(2) (1995)).

[143]*Id.* (citing H. Rep. No. 103-711 at 385 (1994); S. Rep. No. 103-138 at 49 (1993)).

[144]*See id.* (citing H.R. REP. NO. 103-711 at 385 (1994)).

prosecution's decision not to prosecute the defendant for a felony, "the determination of whether the predicate act constitutes a 'crime of violence' under the Act is a question for the Court or the jury, as appropriate," and that the prosecutor's decision in this regard, although it "may inform the Court's decision," is not dispositive of this issue.[145]

Finally, the district court rejected defendant's argument that regardless of the charges brought, the alleged attack upon plaintiff was not felonious conduct.[146] In rejecting this argument, the district court found that second degree assault resulting in "serious physical injury" is a felony under New York law.[147] In this regard, the district court found that plaintiff had alleged that she was "violently pushed to the ground, causing injuries to her chest, head, neck, shoulder and arm" following which she was unable to engage in manual drafting, an essential function of her job as an architect.[148] Plaintiff also alleged continuing pain and severe psychological trauma as a result of the incident and submitted medical reports collaborating her allegations.[149] With this background, the court concluded that plaintiff had alleged facts sufficient to support a finding that the defendant's conduct constituted a felony, and therefore, plaintiff was entitled to have a jury make the factual determination as to whether there was a sufficient showing that a qualifying gender-motivated violent crime had been committed to support plaintiff's claims.[150]

B. *ANISIMOV V. LAKE*

The second case in which a plaintiff's ability to state a claim under the civil rights provision of the Violence Against Women Act in the employment context has been challenged arose in the Northern District of Illinois in *Anisimov*

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[145]*See id.*

[146]*See id.* at *6.

[147]*See id.* (citing N.Y. [PENAL] LAW § 120.05(1) (McKinney 1998)).

[148]*See id.*

[149]*See id.*

[150]*See id.*; *see also* Doe v. Hartz, 970 F. Supp. 1375, 1402 (N.D. Iowa 1997) (finding that "[i]f the court finds as a matter of law that the crime [alleged] constitutes a crime of violence within the meaning of the [Violence Against Women Act], then the jury will decide as a matter of fact whether the elements constituting a felony have in fact been proved in the particular case.").

v. Lake.[151] The plaintiff, Oxana Anisimov, brought an action under the civil rights provision of the Violence Against Women Act, against the defendant, Jacob S. Lake, D.D.S., her employer.[152] In her complaint, plaintiff alleged she sustained injuries as a result of "crimes of violence motivated by gender," which ultimately culminated in defendant's alleged rape of the plaintiff.[153] Specifically, the plaintiff asserted that while she was employed by defendant's dental office over the course of several months, defendant made inappropriate sexual advances, including fondling her, attempting to remove her clothing, grabbing her breasts, assaulting and attempting to rape her, and ultimately raping her.[154] In response, defendant challenged, *inter alia*, plaintiff's ability to state a claim under the civil rights provision of the Violence Against Women Act.[155]

The plaintiff in *Anisimov* faced only one of the obstacles to stating a viable claim under the civil right provision of the Violence Against Women Act that the plaintiff in *Crisonino* confronted, as it was undisputed that rape was a felony sufficient to satisfy the "violent crime" requirement of the Act.[156] The defendant in *Anisimov* nevertheless argued that the alleged rape was not "gender-motivated," and so, plaintiff could not successfully state a claim.[157] Unlike the facts in *Crisonino*, the plaintiff in *Anisimov* alleged no gender-based comments.[158] The district court therefore had to look beyond such verbal demonstrations of gender motivation in making its assessment of plaintiff's ability to survive defendant's motion to dismiss.[159] In this regard, the district court con-

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[151]No. 97 C 263, 1997 WL 538718 (N.D. Ill. Aug. 27, 1997).

[152]*See id.* at *1.

[153]*See id.*

[154]*See id.*

[155]*See id.*

[156]*See id.* at *13.

[157]*See id.* at *12.

[158]*See id.* at *1.

[159]*See id.* at *13. Importantly, the district court in *Anisimov* did not find that the issue of gender motivation turned on whether gender animus was verbally expressed. Such a prerequisite was clearly not intended by Congress and cannot and should not be drawn, but rather, the issue of the gender animus motivating violence must be evaluated as a factual matter based upon the totality of the circumstances as was suggested by the district court's approach in *Anisimov*. *See also infa* note 174.

cluded that the cumulative nature of the various incidents of harassment, ultimately leading to rape, were sufficient to state a viable claim of gender-motivated violence under the civil rights provision of the Violence Against Women Act, at least in the context of the pending motion to dismiss. In so holding, the court recognized that while "Congress clearly did not intend to designate rape as a *per se* 'crime of violence motivated by gender,' the cases where it is not would appear to be few and far between."[160]

C. *MATTISON V. CLICK CORPORATION OF AMERICA, INC.*

The third case in which a plaintiff's ability to state a claim under the civil rights provision of the Violence Against Women Act in the employment context has been challenged, arose in the Eastern District of Pennsylvania in *Mattison v. Click Corporation of America, Inc.*[161] In *Mattison*, plaintiff alleged that, from almost the beginning of her employment, defendant, John Imbesi, a corporate officer and director, sexually harassed her both inside and outside of the workplace.[162] Plaintiff further alleged that as a result of defendant's "'constant insistence' coupled with her 'fear[] that she might lose her job,'" plaintiff engaged in a sexual relationship with the defendant for an approximately four month period.[163] When plaintiff subsequently refused defendant's request for sexual realtions, defendant verbally abused plaintiff by calling her vulgar and degrading names.[164] Thereafter, plaintiff acceded to defendant's sexual demands "because she feared for her safety having been exposed to defendant's . . . violent temper."[165] During this period, plaintiff alleged that defendant's sexual demands became increasingly threatening culminating in defendant's alleged rape of plaintiff.[166]

According the plaintiff, the sexual assault coupled with the defendant's continued harassment and threatening behavior forced plaintiff to "flee" her

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[160]*Anisimov*, 1997 WL 538718 at *13.

[161]Civ. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998).

[162]*See id.* at *1.

[163]*Id.*

[164]*See id.*

[165]*Id.* at *2.

[166]*See id.*

position as administrative position at Click.[167] Thereafter, plaintiff instituted an action in the United States District Court for the Eastern District of Pennsylvania against several defendants, including John Imbesi, asserting claims for sexual harassment under the New Jersey Law Against Discrimination, intentional and negligent infliction of emotional distress, assault, battery, various statutory and common law causes of action, and a claim under the Violence Against Women Act.[168] In response to plaintiff's Violence Against Women Act claim, defendant challenged plaintiff's ability to adequately allege that his actions were gender-motivated.[169]

In ruling on defendant's motion to dismiss, the district court found that the "outrageous, humiliating and degrading behavior on the part of the defendant John Imbesi . . . if proven, demonstrates 'disrespect for women in general and connects this gender disrespect to sexual intercourse,'" and therefore, plaintiff had alleged facts sufficient to support a claim under the civil rights provision of the Violence Against Women Act.[170] Even in this obviously factually egregious case, plaintiff was nevertheless confronted with the same challenge to her ability to demonstrate gender motivation sufficient to support her Violence Against Women Act claim as were the plaintiffs in *Crisonino* and *Anisimov*.

D. SIMILAR ISSUES FACED BY PLAINTIFFS IN NON-EMPLOYMENT CASES.

The problems attendant to stating a claim under the Violence Against Women Act in the employment context also arise outside of the workplace setting as demonstrated by *Doe v. Hartz*[171] and *Brzonkala v. Virginia Polytechnic and State University*.[172]

In *Hartz*, the same two issues which arose in *Crisonino*, regarding plaintiff's ability to state a claim under the civil rights provision of the Violence Against Women Act, arose in connection with a priest-penitent relationship. The plaintiff in *Hartz* alleged that prior to and following mass services, the defendant-priest "came up behind her, grabbed her with both of his hands and

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[167]*See id.*

[168]*See id.* at *1 n.1.

[169]*See id.* at *6.

[170]*Id. at* *7.

[171]970 F. Supp. 1375 (N.D. Iowa 1997).

[172]Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

pulled her back into his body, held her tightly and kissed her neck."[173] Later that same evening, defendant allegedly "rubbed [p]laintiff's back up and down with his hand."[174] Plaintiff asserted that the conduct was gender-motivated and constituted a violent crime pursuant to Iowa law criminalizing sexual exploitation by a counselor or therapist.[175] Defendant's motion to dismiss was premised in relevant part upon the assertion that the plaintiff had not alleged a gender-motivated predicate offense upon which a Violence Against Women Act cause of action could be based.[176] Although the trial court in *Hartz* rejected this argument, it reflects the likely two-pronged attack which all plaintiffs will have to confront and overcome to successfully utilize the civil rights provision of the Violence Against Women Act in the employment setting.[177]

The plaintiff in *Brzonkala* similarly faced the problem of demonstrating that the crime at issue was gender-motivated.[178] *Brzonkala* involved the gang rape of a college freshman by two football players.[179] During and subsequent to the assault, one of the defendants said to the plaintiff — "you better not have any fucking diseases."[180] Subsequently, that same defendant announced in the dormitory dining hall that "I like to get girls drunk and fuck the shit out of them."[181] Based upon these two comments, the fact that it was a gang rape of a woman the assailants hardly knew, and the fact that one assailant assaulted plaintiff two times, the district court found that plaintiff stated a claim under the civil rights provision of the Violence Against Women Act "at least" against the assailant who made the comments and sexually assaulted plaintiff more than

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[173]*Hartz*, 970 F. Supp. at 1381.

[174]*Id.*

[175]*See id.* (citing IOWA CODE ANN. § 709.15 (West 1993)).

[176]*See id.* at 1386.

[177]*See id.* at 1405, 1408.

[178]*See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 784 (W.D. Va. 1996), *rev'd*, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997). Like *Anisimov*, because a felonious rape was involved, there was no issue raised as to whether plaintiff had alleged a "violent crime," but rather, the dispute was whether the rape was in fact "gender-motivated." *Id.*

[179]*See id.*

[180]*Id.* at 785.

[181]*Id.*

once because, "at least" as to that defendant, she was able to demonstrate a *prima facie* case of gender-motivated violent crime.[182]

As evidenced by *Crisonino* and *Anisimov*, and reinforced by *Hartz* and *Brzonkala*, the successful application of the Violence Against Women Act's civil rights provision in employment context will turn upon the ability of individual plaintiffs in specific fact sensitive settings to legally and factually satisfy the statutory requisites of demonstrating a (i) gender-motivated (ii) violent crime.[183] This obstacle, however, is one which has been, and can be, overcome in employment cases. In order to succeed in this endeavor, plaintiffs, attorneys, and judges will have to consider, and work within, the nuances of state and federal criminal law, and on a case-by-case basis, be cognizant of the specialized facts and circumstances involved, so they can most effectively draw appropriate cases within the now largely undefined parameters of the civil rights provision of the Violence Against Women Act.[184]

PART IV: GETTING THE JOB DONE: IS THE VIOLENCE AGAINST WOMEN ACT UP TO THE TASK?

Despite the clear obstacles facing plaintiffs endeavoring to utilize the Violence Against Women Act's civil rights provision in the employment context, the Act clearly has the potential to ultimately serve as a valuable weapon in the battle against workplace violence and sexual harassment for several reasons.[185]

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[182]*See id.*

[183]In this regard, in endeavoring to state a claim under the Violence Against Women Act, Congress has suggested that plaintiffs consider utilizing some of the generally accepted guidelines for identifying hate crimes. These include, but are not limited to, "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense (burning a cross on a lawn has bias implications)." S. REP. NO. 102-197 at 50 n.72 (1991) (citation omitted). Congress should consider clarifying legislation which would specifically address this issue. Specifically, Congress should codify the "totality of the circumstances" standard alluded to in the congressional record, and define its considerations, thereby giving courts and litigants clearer understanding of the scope and applicability of the civil rights provision of the Violence Against Women Act. *See* S. REP. NO. 103-138, at 52 (1993).

[184]Two additional related obstacles to the effective use of the civil rights provision of the Violence Against Women Act in the employment context, which also similarly face the more traditional civil rights legislation, are the problems of judgment proof defendants and unreachable employers. These issues, however, pose larger problems which perhaps can only be resolved by further legislation in this, or some other context.

[185]While the focus of this article has concentrated upon the civil rights implications of violence against women because the congressional record demonstrated that the gender-

First, the Violence Against Women Act's civil rights provision operates to bridge the substantive gaps of Title VII and state laws in protecting and/or remedying violence against women. Further, the civil rights provision of the Violence Against Women Act operates to bridge the procedural gaps of these laws in the same areas. Second, the civil rights provision of the Violence Against Women Act creates a uniformly available federal remedy for violence against women that is removed from the pressures exerted at state and local levels. Moreover, the creation of a private civil rights cause of action will raise the internal consciousness of the state law enforcement and judicial communities, thereby functioning to cultivate an environment in which the systemic gender discrimination identified by Congress can be eradicated. Finally, the civil rights provision of the Violence Against Women Act operates to build public awareness not only of violence against women in the workplace, but in every facet of our society.

Once the barrier of constitutionality and the pitfalls of stating a claim are navigated, the Violence Against Women Act's civil rights provision will offer relief to victims of workplace violence heretofore largely unavailable. Although no remedy which is the product of legislative compromise is perfect, the civil rights provision of the Violence Against Women Act strives to address some of the inadequacies of state and federal law in remedying and deterring workplace violence and egregious sexual harassment. By providing a federal private civil rights cause of action for victims to proceed immediately without the interference of prosecutorial discretion, politics, or public policy determinations made by government agencies, the civil rights provision of the Violence Against Women Act places the power and control with the victim, and does so without jurisdictional or remedial limitations. To this extent, the civil rights provision of the Violence Against Women Act will provide valuable recourse for victims of workplace violence and egregious sexual harassment who might have otherwise slipped unceremoniously into the void left by the existing systems, and rescue them from the devastating effects of victimization without hope of recourse. It is this hope which the civil rights provision of the Violence Against Women Act offers to women, and to our society, in its ongoing

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motivated violence at issue is most often directed at women, the Violence Against Women Act prohibits and protects against gender-motivated violence, regardless of the sex of the victim or the victimizer. *See* 42 U.S.C. § 13981(1995). This nuance may be particularly important in the employment context in the event that the United States Supreme Court determines that same-sex sexual harassment is not cognizable under Title VII because the Act may provide a separate and distinct federal cause of action for certain instances of egregious same-sex sexual harassment. This issue is currently pending before the United States Supreme Court. *See* Oncale v. Sundower Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996) (finding that same-sex sexual harassment is not cognizable under Title VII), *cert. granted*, 117 S. Ct. 2430 (1997).

fight to eradicate violence against women in the workplace, and foster the creation of a safer and more secure environments in which all members of our society can prosper.