Unequal Outside and Inside the Coutroom:

Rape and the Law in the U.S.

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Approximately 1 in 5 women in America have been raped in their lives.[1] 1 in 5 of the women one passes on the street, sits on the bus next to, or attends work or school will be the victim of sexual assault. While the crime of rape has historically been handled by the individual states, rape in America is a pervasive and national crisis. While not in the headlines or on the front page every day, rape is a problem that plagues the men and women of this country. It affects women's role in the economy, the workplace, and the family. Rape is not a private problem, but a public one that every day becomes the problem of thousands of women.[2] If rape is such a national problem, what is the U.S. government doing to protect half of its citizens? What do federal laws do to provide for the liberty, equality, and protection of women who have been raped? How does our legal institution view rape as a crime?

The individual states are not able to provide justice to many rape victims. While many of the draconian state laws of the past have been removed, they are, in effect, still used through state's weak definitions of what constitutes rape or force and by case law. Most legal changes and case law changes have focused on identifying who can be raped and added married people, men, minorities, the intoxicated, the sexually active, etc. What has not happened has been a change in the definition or paradigm of rape. Many court decisions and state laws continue to treat rape as sex and seduction, as opposed to recognizing and treating rape as a crime of violence, failing to see

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[1] Although the standard is usually 1in 4, that number comes from the disputed Ms. Magazine survey. The 1 in 5 women statistic comes from the US Department of Justice, Office of Justice Programs, and Center for Disease Control and Prevention 1998 survey entitled "Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey", www.ncjrs.org. This survey included forced oral, anal, and vaginal sex. The National Health and Social Life Survey also found that 1 in 5 women have been "forces to do something sexual" at some point in their lives.

[2] For the purposes of this essay, rape will discussed from the perspective of women even though men are also raped and are covered by hate crimes and civil rights remedies about gender. This is because sex based crimes disproportionately affect women – 1 in 5 women are raped as compared to 1 in 33 men, according to the National Violence Against Women Survey. The survey shows that most sexual violence is perpetrated by males – 93% of women and 86% of the men who were raped or assaulted were assaulted by a male. Moreover, the survey proves that the problems women and men face when raped are different. Women are significantly more likely than men to be victimized by intimate partners - 76% of women (1.5 million annually) are the victims of "simple" rape - raped by a date, husband, former husband, or live in partner; while only 18% of men are raped by an intimate partner. Women are also more likely to be injured during the assault – 32% compared to 16% of men. Women are 7 to 14 times more likely to be beaten, choked, or

nonconsent as rape, coercion as rape, or rape as a hate crime or violation of civil rights. Many states decisions still reflect the belief that a man must use force and a woman must physically fight back to demonstrate nonconsent. Thus, there is a disconnect between state's requirement of injury and the way, in reality, woman are raped since many women do not physically resist for fear of being seriously injured, killed, or are psychologically or verbally coerced. Furthermore, female victims of rape are most often raped by acquaintances, be it their husband, date, neighbor, or friend, and are overwhelmingly disadvantaged by state legal systems and standards which hold outdated views of how and by whom women are raped. State legal remedies fail these women because no matter how the language is structured in the law, the jurisprudence surrounding rape, especially acquaintance rape, is sexist.

Thus there is a need for a new legislative framework and a paradigm shift within legal jurisprudence to take place concerning what is rape and how laws should reflect what rape is. While some feminists claim that changing the laws are not effective and that changing social attitudes are more effective, they miss the connection between laws and attitudes. If the law reflects society's norms and society acts on what is considered permissible and impermissible behavior by the law, then an important step in changing attitudes about rape consists in changing the laws and the framework in which the laws are analyzed. Conduct is labeled criminal to "announce to society that these actions are not to be done and to secure that fewer of them are done."[3]

The law and the courts can either push society, take the lead, and legitimize reform, as it did with civil rights laws for African Americans, or it can reflect the biases of the past. Legally reinforcing a definition of rape as "nonconsent" or rape as "forcible compulsion" provides very different beliefs in what constitutes rape. A good is in sexual harassment law. While the public

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threatened with a gun by intimate partners than men and 2 to 3 times more likely to be hurt, pushed, grabbed, or shoved by an intimate then men.

[3] Estrich, Susan, *Real Rape* (Cambridge: Harvard University Press, 1987) p104

became more aware and opposed to sexual harassment after the Clarence Thomas confirmation; the legal recognition of sexual harassment as illegal discrimination further contributed to the public awareness of sexual harassment and to the development of workplace sexual harassment policies. Accordingly, the relationship between the norms of society and the law is a mutually dynamic one. Furthermore, attempts to change the law encourage dialogue about the subject amongst lawmakers and citizens. Moreover, recognizing a crime such as rape as a national problem and making the solutions available on a federal level help make the public more aware of the true nature of rape as sexual violence and not a crime of passion. A shift in the paradigm of rape towards a reasonable woman standard would change the way both the law and society views rape.

This essay will address two ways in which rape victims can receive more justice – through an institutional change, adopting the reasonable woman standard, and through federal legal solutions. Of course societal attitudes towards rape must change, but this essay will look at the ways in which the law, both practically and institutionally, can and should change its attitudes and definitions of rape in order to help rape's primary victim, women. First, the history of rape law will be examined. Next, feminist theory and feminist jurisprudence will be examined to arrive at an explanation and argument for the reasonable woman standard. Finally, the issues surrounding federal law will be addressed, including VAWA, the Supreme Court challenge to it, and gendered federal hate crime laws. Ultimately, the law must be changed to abandon the myth of legal objectivity regarding rape and adopt the reasonable woman standard. In accordance, federal laws must change to reflect the bias of these crimes by including gender in civil rights protections and hate crimes laws in order to provide justice to rape victims in America. Moreover, the legal system must change the way society looks at rape.

The History of Rape Laws

In the Anglo-American legal tradition, rape was a serious felony under the common law. Common laws are laws that are made by judges and based on precedents and many of these common laws became the basis for American statutory law. Of course, the common law was decided upon by men, as women were neither judges nor lawyers when common law was practiced. The pronouncements of British jurist Matt Hale represent the embodiment of how rape was treated in the common law. Hale believed that "rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though ever so innocent."[4]

Rape laws became an important issue to feminists in the 1960's and 1970's for several reasons. First, rape victims were treated as untrustworthy in the courts and their stories were often doubted. Women were often made to feel as if they "asked for it" because of how they reacted or what they were wearing. Second, many states had laws that required independent corroboration of the crime or used the victim's sexual past against them to prove they had willingly had sexual relations in the past. Courts often admonished juries, especially when the victim was "unchaste", with a warning similar to the one mentioned above by 17th century jurist Lord Hale. Third, rape laws and case law reflected and enforced the myths surrounding rape such as women only claimed rape after bad sex or out of revenge, guilt, or embarrassment; that certain behaviors showed that they could not have been raped, such as drinking, hitchhiking, or being alone at a bar; and that "bad" women enjoyed aggressive sex or had rape fantasies.

[4] Hale, Matthew, *The History of the Please of the Crown* (1778) p635

Earlier rape laws required not only the use of force, but proof that the woman resisted the rape to the "utmost" degree. Victims of other crimes against person or property, such as robbery, neither required corroboration by someone else or proof of physical resistance. Only in rape cases was saying "no" not an adequate defense. It was generally assumed that a woman could not physically be raped against her will since she would defend her chastity at all costs (unless she was unchaste and in that case she probably wanted it.) This dominant view of the common law - that "rape is not committed unless the woman resist the man to the utmost limit of her power"[5] was exemplified in the 1906 Wisconsin case, *Brown v State*. In this case, a 16 year old virgin was allegedly raped by a neighbor. The victim screamed and tried to get up, but her assailant held her down and almost strangled her. The court found the assailant guilty of rape, but this decision was overturned by Wisconsin's Supreme Court on the grounds that the victim had not adequately demonstrated her nonconsent by resisting strenuously enough. The Court stated, "Not only must there be entire absence of mental consent or assent, but there must be the more vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated."[6]

According to Estrich, the woman failed to meet the standard because "she only once said "let me go"; her screams were considered "inarticulate", and her failure to actually resist – to use "her hands and limbs and pelvic muscles", obstacles which the court noted that "medical writers insist…are practically unsuperable" – justified reversal of the conviction….her absence of bruised and torn clothing was "well-nigh incredible"".[7] To put it another way, "if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must

[5] Brown v State of Wisconsin, 106 N.W. 536, 539 (1906)
[6] ibid, 538
[7] Estrich, p30

it not be that she is not entirely reluctant?"[8] The judges writing the opinions in these cases assumed that *they* would have fought back as hard as possible, kicking and screaming, and of course ultimately resisting penetration; of course these judges were all men holding women to a standard of what they would have done. In society, women should be "passive and powerless" while in "matters of sex they be strong and aggressive and powerful."[9]

In the 1960's and 1970's a concerted effort was made to change these laws and most states did so. Most states have removed the "utmost resistance" requirement or changed it to "reasonable resistance". Now, almost every state makes rape of a spouse a crime and all have removed their corroboration requirement. Most states have passed "rape shield" laws, which protect a victim's sexual past from being used as evidence against them. Some states have enacted legislation that allow a defendant's prior sexual assault record to be admitted as evidence to provide evidence that the defendant is a habitual sex offender.

While some states have outdated rape statutes[10], many states have reformed their rape laws. Rape law reforms have tended come from one of two examples – the Model Penal Code or the Michigan statute. Many states combine elements of both. Under the Model Penal Code, consent is emphasized, but the issue of the victim's subjective nonconsent is avoided. The code focuses on "outward manifestations of nonconsent such as physical resistance, corroborating testimony, or fresh complaint…In this the code resembles the common law requirement of utmost resistance, although the code takes resistance as important evidence of nonconsent rather than as essential evidence."[11] The Code claims that the emphasis is not on the female's nonconsent, but on the forceful actions of the male. However, in practice, the force required has become that of

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[8] People v Dohring, 59 NY 374, 384 (1874)
[9] ibid, p31
[10] In Mississippi it is a felony to "forcibly ravish any person" (Miss. Code. Ann 97-3-65 (1848)) or to "assault with intent to forcibly ravish any female of previous chaste character." (Miss. Code. Ann 97-371 (1906)) Louisiana's laws still use the common law definition of resistance to the "utmost".

overcoming female resistance; thus the definition of "force" has became defined once more in the terms of a woman's resistance. Under the MPC, courts have focused on the woman's response instead of what the assailant did or did not do.

An example of the force requirement turning on the victim is *State v Alston* in 1984 in North Carolina Supreme Court. The assailant and the victim had dated and the relationship had been abusive. They broke up and a month later the assailant saw her on the street and threatened to "fix" her face. They went to a friend's house to discuss their relationship where he told her he had a right to have sex with her. She said no, he undressed her and raped her while she cried. The Court agreed that the victim did not consent, that she provided "substantial evidence" that the sexual intercourse was against her will, and that the victim was not required to resist physically to establish nonconsent.[12] However, it paradoxically held that the element of force was not met since the victim did not physically resist. The fear she felt related to his actions and threats was not deemed relevant to the rape. Even though the Court agreed she said no, nonconsent was not enough to prove rape in the Model Code; the man was entitled to have sex with the victim regardless of her verbal protestation. As Estrich points out, the Court ignored the incidental force of the man undressing the woman and pushing her legs apart and did not include her fear as "force" to have sex.[13]

The conclusion they reached makes no sense – "the woman was not forced to engage in sex (as proven by her failure to resist), but the sex she engaged in was against her will."[14] The Court could not understand that she did not fight back physically because they could no look at the case through her point of view, through a woman's point of view. She did not resist physically because she had felt threatened and recently ended a physically and emotionally abusive relationship with him, but she said no and cried throughout. Estrich states that Alston "reflects the adoption of the

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[11] Posner, Richard and Silbaugh, Katharine, *A Guide to America's Sex Laws* (Chicago: University of Chicago Press, 1996) p6

[12] State v Alston, 61 NC App 454, 300,SE.2d 857 (1983)

most traditional male notion of a fight as the working definition of force…in a fight the person attacks fights back. In these terms there was not fight in Alston. Therefore, there was no force...She did not fight, she cried. It is the reaction of "sissies" in playground fights."[15]

Similar to this case is the case of *State v Rusk* in Maryland in 1981. The victim repeatedly said no, but did not use physical force because she claimed she was scared and he had her car keys. The Court claimed that being scared does "not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person…She must make it plain that she regards such sexual acts as abhorrent and repugnant to he natural sense of pride."[16]

The code also lowers the offense when the parties were voluntarily associating, such as the offense for date rape, creating two types of rape – aggravated rape and "simple" rape. Rape is only a felony when there is evidence of physical violence. Thus, the crime of rape compose two different categories of crime under the MPC – "real" rape by a stranger who jumps out of the bushes, and "simple" rape where the attacker is a date, friend, acquaintance, neighbor, ex-boyfriend, or husband. For example, Massachusetts law states that it is a felony to engage in sexual intercourse "where the victim is compelled to submit by force and against his or her will or is compelled to submit by threat of bodily injury"[17].

The Model Penal Code assumes that nonconsent is not enough to prove rape – there must be some form of resistance. It appears to accepts Lord Hale's beliefs about women and presumes that women are confused or ambivalent when it comes to what they want sexually or what the say they want. Or as the *Stanford Law Review* in 1966 stated, "although a woman may desire sexual intercourse, it is customary for her to say "no, no, no" (although meaning "yes, yes, yes") and to

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[13] Estrich, p62
[14] ibid
[15] ibid

expect the male to be the aggressor…. often a woman faces a trilemma….being a prude, a tease, or an easy lay. Furthermore, a woman may note a man's brutal nature and be attracted to him rather than repulsed".[18] To remedy the problems, the article urges that the resistance standard be "high enough to assure that resistance is unfeigned".[19]

An even more influential article on what women "want" is from the *Yale Law Journal*. According to Estrich, the article proves that a woman's "behavior is not always an accurate guide to her true desires, for it may suggest resistance when in fact the woman is enjoying the physical struggle….it would be unfair to punish the man who was not acting entirely against her wishes"[20] A freudian take on what influences women's sexual behavior, it states that many women "require as part of preliminary love play aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depends upon, an accompanying physical struggle."[21] The article goes on to say that a women's "need for sexual satisfaction may lad to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation."[22] The subconscious conflict in a woman who is ambivalent outwardly towards sex may cause her to run away from the situation, to scratch the man, and to resort to "infantile behavior" such as crying. These two articles illustrate the view that women's consent is not enough to accuse a man of rape since a woman often does not know what she wants or might say no and mean yes and even the presence of some force does not show rape since women might enjoy it. The only thing that can "prove" to a man that a woman is actually not consenting is resistance since he cannot depend on her words.

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[16] Rusk v State, 289 MD 230, 255
[17] Mass. Gen. Laws ch.265,22, (1974)
[18] "The Resistance Standard in Rape Legislation", Stanford Law Review, 18, 2/66, 682
[19] ibid
[20] Estrich, 39
[21] "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard", Yale Law Journal, 62, 12/52, 55
[22] ibid

The Michigan statute has been hailed by feminist reformers. The statute focuses on the conduct of the defendant, and whether they used force or coercion as opposed to resistance by the victim. The "concept of nonconsent is not a part of the Michigan definition of rape, in keeping with Michigan's focus on the defendant's conduct alone."[23] Rape is defined in Michigan as the use or threat of force and/or coercion. Force or coercion is defined as the threat to use violence against the victim, being "overcome" by the use of violence or by concealment or surprise, threat of future retaliation against the victim, and unethical medical examinations. However, Michigan too leaves out the concept of whether the victim said no, displayed outward signs of nonconsent, is threatened by retaliation against their child or family, or is coerced by threats of being fired. Thus states with Michigan reforms or the MPC frequently exclude victims of date rape from being able to receive justice.

In contrast to both Michigan and the MPC, some states focus on whether the victim consented. Montana's statute states that "it is felony to engage in sexual penetration…without the victim's consent."[24] In Maine, "it is a felony to engage in sexual contact with a person who has not expressly or impliedly acquiesced in the sexual contact".[25] Utah use a definition of " forcible compulsion" to make intercourse without consent a felony. "Without consent" includes the threat or use of violence, when the victim is unconscious or "physically unable to resist", or when the victim "expresses lack of consent through words or conduct."[26] Pennsylvania recently created a "no means" no rape law which recognizes a woman has been raped when she does not consent or had been psychologically or mentally coerced. Some states make nonconsensual sex a misdemeanor. For example, in Alabama "it is a misdemeanor to engage in sexual intercourse…without the

[23] Posner, p7
[24] Mont. Code Ann. 45-5-501 (1973)
[25] Me Rev. Stat. An. Tit. 17-a, 255 (1975)
[26] Utah Code Ann 76-5-406 (1973)

victim's consent" while sexual intercourse by "forcible compulsion" is a felony. [27] Many state laws see acquaintance rape as a less punishable offense then rapes where the women fights back physically enough to get bruises.

Moreover, not only does the law discriminate not protect women, women often have trouble getting the police to file a report or a D.A. to prosecute. Police decide how much evidence, if any to collect, and whether a woman's case is "founded" or "unfounded"; only "founded" complaints are forwarded to the D.A.'s office.[28] These decisions can be decided on how quickly the woman complains, whether the victim "contributed" to the rape (i.e. went back to his house, took off her blouse, had a couple drinks, hitchhiked, smoked marijuana, etc), whether the deem the victim's testimony "plausible", and how successful ultimately they think the case could be (whether the assailant was a wealthy white businessman or known politician, etc). Neither the police nor the D.A. are required to give reasons for not following up on a case. The "fact that juries distinguish among rape cases based on prior relationship and force and resistance provides a powerful defense for the reliance on these factors by police and prosecutors."[29]

State rape remedies rely on the prosecutor taking the case to court, and often in acquaintance rape cases the prosecutor does not. In New York City, 50% of the acquaintance rape cases were dismissed outright, compared to 33% of stranger rape cases.[30] New York's Task Force found that after their legislative reform, "rape was no longer virtually unprosecuteable" yet "problems in enforcement and protection of the victim remain" when the two are acquainted.[31] In Minnesota, their Task Force found that their 1975 state rape law reform failed to benefit 90% of acquaintance rape victims and that a significant amount of victims were "not heard in court due to gender-based

[27] Ala. Code 13a-6-60 (1977)
[28] Estrich, p15
[29] Estrich, p20
[30] Estrich, p 18. Numbers from 1982.
[31] New York State Task Force, at 78-81, from State of AZ, et al, amicus brief for Brzonkala, p20

stereotypes about acquaintance rape."[32] Vermont's state report found that sexual assault charges are treated less seriously when the victim and the attacker know each other. Washington state also found that their 1975 statutory revision showed differential treatment towards acquaintance rape cases. According to Estrich, rape is treated by the state system as the same as other crimes. However, unlike other crimes such as robbery and assault, rape is less likely to be corroborated, may require less force, and generate less resistance.[33]

Thus, from the examples above and the differing state definitions, one can see that women receive unequal justice depending on where they live. A woman who says no and cries in one state will be seen as legally being raped, while in an adjacent state they will not. Even in states with rape law reform, such as Michigan, the reform does not attempt to address the issues of consent, subjective nonconsent, or verbal coercion. Throughout the country, acquaintance rape victims are still not taken seriously, despite the feminist legal reforms. As the U.S. Senate found, "traditional state laws 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 comparable crimes affecting men."[34] The states own studies provided for testimony before the Congress showed that their individual efforts at rape law reform were not enough to remedy the epidemic of violence against women in this country, especially when it came to acquaintance rape, the most common form of rape which affects women. Hence, there is a need for new federal ways to get involved in helping these women.

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[32] Minnesota Supreme Court Task Force on Gender Issues in the Courts, Final Report 57-58, 63 (1989)
[33] Estrich, 20-21
[34] H.R Rep 711 at 385

Feminist Theory

One of the most pressing and complicated theoretical dilemmas concerning feminists today are the issues relating to whether the law best helps women when women are treated as a special protected class or when women are treated gender-neutrally under the law. Feminists argue about whether considering women from the point of "sameness" or "difference" (compared to men) best advantages women. Those who advocate difference, or the asymetrical approach, believe that that women should receive special treatment since they are different from men as a group; while those that advocate sameness, or the symetrical approach, argue that unequal treatment disadvantages women and that sex should be considered irrelevant. However, in order for difference feminists to advocate special treatment, "women" must have common interests separate from men. Essentialists argue that this is true while postmodernists argue that there is difference among women. On the issue of rape laws, "difference" feminists would argue that women need to be treated differently from men and receive special protections from rape, while "sameness" feminists would argue that women do not need more protection from rape than men do under the law. Neither of these approaches justifies the reasonable woman standard or VAWA adequately, and so they must be rejected in favor of both dominance theory and a modified postmodern approach.

Sameness feminists argue that their approach avoids negative stereotypes of women and promotes equal treatment, not special treatment. In this view, treating women differently than men hurts women's chances at achieving equality since their rights will be different from those of men's, and thus implies they are less then men. If women want to be equal and want a sex-blind society, then they cannot demand special treatment. Wendy Williams argues that treating women with special laws is reminiscent of the paternalistic and protective laws that women have fought

against.[35] Laws that limited where and when women could work were passed for women's benefit, but in reality limited their economic opportunity and ability to receive employment equal to men. These theorists would argue against any rape laws that would specially benefit women since they would fail to provide the same important protections for male victims. While most state and federal laws applicable to rape use the word "gender", in reality they were created for and used mostly by women. Sameness feminists would support the gender-neutral language of these statutes, but might not support the reality that these laws would in effect give women "special" protection from hate crimes and "special" access to federal courts for civil damages because of sexual assault.

Difference feminists claim that sex is a division that cannot be ignored by the law. Women's interests are not the same as men's interests because of biological differences and differences such as being historically under-represented in the public sphere. As Florence Kelly states, the "inherent differences are permanent. Women will always need many laws different from those needed by men."[36] Elizabeth Wolgast frames the argument; "if justice means providing equal rights to all, then by implication, such rights must be appropriate to everyone. But what if the needs and concerns are different?"[37] Thus they believe that in order to recognize women's needs, there must be differential treatment for women as a class. Women need laws to protect them specifically because they are women and laws should reflect the difference in women's experience.

Essentialists believe that women are different from men as a unified class. They argue that there are characteristics that women possess that are different from men, such as being more caring, compassionate, and relationship-oriented and less focused on the liberalism ideals of individual

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[35] Taub, Nadine, p125
[36] "Shall Women Be Equal Before the Law?" *The Nation* (4/12/22), from Taub, Nadine, p108
[37] Wolgast, Elizabeth, "Equality and the Rights of Women" (1980) from Taub, Nadine, p120

rights, autonomy, and hierarchy. Carol Gilligan claims women have an "ethics of care"[38] as opposed to a male ethics of rights and that women's moral development is not the same as men's.

Postmodern feminists argue that there is no essential "woman's experience" to rely on. A reknowned critic of essentialism, Angela Harris[39] discusses how the intersections of race and gender prove that there is no holistic "female" identity for law to base itself on. Harris claims that essentialism often categorizes "women" together, but really means white, heterosexual women. The experience of black women has been very different both economically and socially from white women's experience, and this difference in experience refutes the claim that all women have a common experience. Black women have historically been "rapeable" women while rapists of white, married, upper class women often received the death penalty.

The Link Between Group and Individual Justice

The argument for both VAWA and the reasonable woman standard relies on the assumption that the individual and the group are linked. The power of a group helps to determine the power of the individual. The Supreme Court acknowledged in *Beauharnais v Illinois,* that harm to a group's status harms its individual members. It said that "the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs."[40] Many studies have shown that if a group's status is devalued than the individual members suffer.[41] It is easy enough to pick out examples to highlight this; when

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[38] Frug, Mary Joe, p24
[39] Harris, Angela, "Race and Essentialism in Feminist Theory" (1990) from Taub, Nadine, p134-138
[40] Beauharnais v Illinois, 343 U.S. 250 (1952) at 262
[41] Andrew Taslitz, *Rape and the Culture of the Courtroom* (New York: New York University Press, 1999) p135, Taslitz lists several studies in his notes to support this such as Rupert Brown, *Prejudice: It's Social Psychology* (1995) and Kenneth Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* (1993)

African Americans as a group were believed to be inferior to whites, individual African Americans were seen as such, regardless of their mental and physical capabilities.

Part of the way people define themselves is through group membership, whether it be color, religion, socio-economic status, race, or gender. Attitudes, beliefs, and values are in part shaped by which groups we identify with. More importantly, groups are not only defined by those that internally identify with those groups, but by how outsiders view them. This is especially true when the group on the outside is creating the definition and has been historically been more powerful or the majority. Women, regardless of color, race, or religion, comprise an oppressed group because of their historical oppression by men who, as a powerful majority, have classed them together as being "other". They have done this through laws that have defined employment and voting rights for all women, and through cultural stereotypes such as all women being weaker, more emotional, more dependent, and less intelligent than men. Consequently, because of women's historical oppression as a class, women have needed certain laws (sexual harassment laws, equal opportunity laws, the Pregnancy Discrimination Act, etc) in order to make them equal to men in the public sphere.

In the case of sexual assault, the "silencing of individual rape victims harms women as a group, and silencing women as a group harms individual rape victims."[42] The not guilty verdicts that result from rape trials sends a message to all women that she has no right to be independent, sexual, alone at night, or say no. According to Andrew Taslitz, since groups speak through individuals, if individual women are silenced by the belief that the law will not protect them or help them, then there is no group voice. When a woman is raped based on her status as a woman and the laws and case laws reflect male bias, then "all women lose a voice in the immediate political process."[43]

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[42] Taslitz, p134
[43] Taslitz, p137

The beliefs ascribed above most closely correlate with dominance theory.[44] Dominance theorists, associated with radical feminists, believe that women are oppressed as a class, because they are women. They posit that feminists waste too much time discussing the issue of sameness and difference which "covers up the reality of gender as a system of social hierarchy, as an inequality."[45] The differences between men and women are an issue of power and victimization, not of sameness and difference. Men's historical dominance of American culture and institutions has led to men's "perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family…their image defines God, and their genitals define sex."[46] Thus to understand rape, violence is not the only issue; the issues of power and hierarchy must be examined as well. Dominance theorists belief that the law is male and that men provide the model for which women are judged will be addressed again in the discussion on the reasonable woman standard.

This dominance/historical oppression approach is similar to the postmodern approach taken by Joan Williams.[47] Postmodern feminists usually argue, as Harris does, that women do not share a common "female" identity. However, Williams argues that depending on the context, gender or race or religion, etc can determine one's outlook. She uses the example of an upper middle class, African American male friend to highlight that her friend does not just have one perspective and in some situations he reacts as a black catholic and sometimes does not. Williams claims that no category is ever determinative all the time in every situation and so gets around the problems of difference and sameness, essentialism and postmodernism. Black, white, Hispanic, Asian, and lesbian women are not "identical" as sameness feminists claim, but sometimes gender does transcend these other

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[44] I say most closely correlate with dominance theory since the aspects of historical oppression correlate. However, I am not fully endorsing dominance theory since theorists often advocate positions like all sex is rape.
[45] MacKinnon, Catherine, "Sex Equality: On Difference and Dominance", from Taub, p85
[46] ibid, p87
[47] Williams, Joan, "Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminist and Critical Race Theory", from Taub, Nadine, p130-134

operative categories. Hence, there can be a "woman's voice" on which to base some laws, but it depends on the context since in other contexts women might identify with other parts of their identity.

Williams's theory can apply to the arguments surrounding rape laws. Since women are disproportionately the victims of sexual assault and are raped because they are women, they have a common experience and voice and in this context can be considered as a group. In this context, "the characteristics that A and B share are more important for the purpose at issue than the ones they do not share."[48] Thus, this perspective allows women to be viewed as a group in this context, but does not have to accept the essentialist framework that endows women with the positive stereotypes that women are more selfless, connected, and caring than men.

However, the postmodern approach allows for difference arguments in other contexts outside of rape. In other cases, perhaps being a black woman matters more than simply their gender, as Harris claims. Whether women should be considered the same as men under the law or different does not matter under this analysis, since it is the context which determines whether women should be considered as a group or other factors overshadow the issue of gender.

Williams's analysis further discusses the concept of "standards". She claims that "neutral standards systematically disadvantage outsiders".[49] This can be applied to show that supposedly neutral and objective standards applied to women in the legal system are not neutral, since women, as a collective class, have historically been outsiders in the legal system. This postmodern conception of analyzing "neutral" standards will be addressed in the next section discussing the reasonable woman standard.

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[48] ibid, p 132
[49] ibid, p133

Feminist Jurisprudence

Feminists consistently note that the state rape law reforms of the 1970's have not really changed the way in which rape is handled by the courts. Cases in the 1980's and 1990's[50] demonstrate that women were still being denied justice the same way victims in the 1950's were. Thus, there must be something more than the wording of the law that influences the way rape is perceived. Within the legal framework and jurisprudence itself there must be some forms of institutionalized and historicized myths about women and rape. Hence, it is important to determine whether the law has biases and what those biases are before change can be made. Feminists are not the first to challenge the "neutrality" of the law – marxists and critical legal theorists have also challenged the law's objectivity. Whether the law of rape is sexist can only be understood with an examination of the jurisprudence surrounding rape. From a "sameness" perspective, the legal system is neutral, and laws that formally treat women and men "equally" produce equality. From a dominance perspective, "equality" with men really means conforming to a male standard as the law is sexist. An examination of jurisprudence from the dominance perspective uncovers the myth of objectivity surrounding the law.

The elements of rape, from a legal standpoint, are often framed in male terms. The law is patriarchal because it has historically been written by men, controlled by men, decided by men, and applied from a male point of view – the reasonable "person" view, which is inherently masculine. The reasonable person is supposed to represent the "values and expectations of the community as a whole, and which was usually applied regardless of the actor's gender."[51] The "universally true" reasonable person derives from the common law tradition of the reasonable man. However, when

[50] See Rusk, Alston, Goldberg, Gonzales, Berkovitz in which in the 1980's and 1990's female victims demonstrated nonconsent, but were not found to be raped because of state laws
[51] Forell, Caroline and Matthews, Donna, *A Law of Her Own* (New York: New York University Press, 2000), p6

common law was developed, women and men had very different roles in society as women were excluded from politics and the workforce. Forell and Matthews argue that the reasonable person is simply a superficially 'neutral' change in terminology which "didn't change the underlying reality" and "simply glosses over fundamental differences between the perceptions and experiences of men and women."[52] Dominance theory questions whether men and women can be similarly situated enough to see the same thing, to both represent the reasonable person. MacKinnon writes that "social circumstances, to which gender is central, produce distinctive interests, hence perceptions, hence meanings, hence definitions of rationality."[53] For example, what appears as "seduction" to the "reasonable man/person" might be date rape to the woman.

The law reflects what we as a society define as right and wrong behavior, but this "we" did not always include women. Historically, men in the U.S. have used the law to prevent women from owning property, entering into covenants, holding jobs, and voting. The U.S Constitution, which delineates the rights of all Americans, did not include women, or the poor, or racial minorities when it was written. Women's labor, emotionality, children, body, and sexuality have historically belonged to men as women were considered property. Unlike men, they were not "owners of their labour power, of their bodies" which meant they could not "become free citizens or historical subjects" or be included under "civil liberties".[54] Women were not even protected under the equal protection clause of the 14th amendment of the Constitution until the 1971 Supreme Court case *Reed v Reed*. Thus men have defined the law, and as women's rights have increased and women have joined the voting ranks and the workplace, the law and theory of law did not change; women were expected to fit into the framework already in place. Congress has found that the state legal framework surrounding rape has only "institutionalized the historic prejudices against victims of

[52] Forell and Matthews, p6
[53] MacKinnon, Catherine from Taub, p88
[54] Mies, Maria, *Patriarchy and Accumulation On a World Scale* (NY: St. Martin's Press, 1998) p169

rape…by erecting formal and informal barriers to justice not encountered by victims of other serious crimes – barriers that many courts already have recognized violate the Equal Protection Clause."[55]

Not only does the law reflect a masculine perspective, the prosecution of the case and decision of the jury often reflects male domination of the law. The way in which rape is seen often uses male perspectives to analyze women's behavior. If there is any crime that women and men are going to have very different perspectives on, it is rape. Very often criminal law "reflects male views and male standards" and "imposes its judgement on men who have injured other men. It is 'boys rules'…".[56] "Boys rules" dictates that the female victim's conduct be deemed "reasonable" by a male standard – did she physically fight back or did she just cry? Did she leave or did she stay? What was she wearing? Thus women "are held responsible for *how men treat them*".[57] The law relates women to the "objective" criteria of how men react and men's criteria.

The 1989 case *People v May*[58], illustrates these issues. The victim was slapped and punched by May and vomited during forced oral sex. However, the court said that even if the victim's testimony was true, her lack of consent "could *reasonably* have been misiniterpreted by May as the conduct of someone playing games rather than resisting his advances." A "reasonable person", i.e. man, would not have been drunk or in May's apartment and would have fought back harder.[59] The victim must have somehow enjoyed being hit by her date to the point where it made her vomit. Obviously to the Court, some physical violence "reasonably" is part of a normal date and normal intercourse.

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[55] Senator Joseph Biden, Amicus Brief for Morrison v Brzonkala, p5
[56] Estrich, Susan, "Rape", 95 Yale L.J. 1087 (1986) from Frug, Mary Joe, *Women and the Law* (NY: Foundation Press, 1992) p835
[57] Forell and Matthews, p10
[58] *People v May* 213 Cal. App. 3d 118 (1989)
[59] Forell and Matthews, p222

Furthermore, men have deemed some women "unrapeable"[60] under the law. Laws and case laws only recently have allowed for wives and African American women to be considered rapeable women. Prostitutes still are unrapeable according to most state laws. Women who are dressed promiscuously, or were intoxicated, or allowed the man to touch or undress her, but say no to intercourse often fit into this category as well. The 1981 statutory rape case, *Michael M. v Superior Court* illustrates this. The sixteen year old victim, Sharon, was drinking and making out with Michael M, whom she had just met a bus stop, but said no to intercourse. Michael M. responded by punching her two to three times in the face, leaving bruises. Justice Blackmun referred to his behavior as "foreplay, in which she willingly participated and seemed to have encouraged." As Forell and Matthews put it, "for a girl *like her*, a few slugs in the face were foreplay…Sharon represents the dichotomy drawn between good women who get raped and bad women who have rough sex."[61] In the 1989 Florida case, *State v Lord*, the jury acquitted a defendant who had kidnapped and raped his victim at knifepoint because she was wearing a tank top and sheer miniskirt. The jury believed that "she was up to no good by the way she was dressed" and that "she asked for it…she was advertising for sex."[62]

During the trial, the victim will be attacked if "any aspects of her post-rape behavior fail to conform to male notions of a logical response to a crime"[63], for example, not physically resisting to the utmost, delaying the report of the rape, not screaming loudly, etc. An illustrative example is from the William Kennedy Smith rape trials. The lawyer asked the complainant when she had her pantyhose on. The witness remembered that she did up until the point when she got out of the car. Afterwards, she could not answer the lawyer to tell him whether she had her pantyhose on into the kitchen, house, or stairs. From a male perspective, "there are two principal classes of clothing:

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[60] ibid, p229
[61] ibid, p230
[62] ibid, p231

clothes and underwear"[64] and pantyhose constitutes underwear since it is not worn alone in public. According to this perspective, underwear is exposed during intimacy and people do not lose track of their underwear in mixed company. From a female perspective, "pantyhose are interstitial."[65] Their removal does not automatically imply intimacy and many women would remove their pantyhose before walking on a beach as the victim did. From the female view, the "status of Bowman's pantyhose at various times during the evening is irrelevant to the issue of Bowman's consent to sex."[66] This example demonstrates the difference in males and females perspective over an element of the rape concerning when and where the victim "undressed".

Although there have been many changes in the U.S. that have positively affected the legal status of women, the "elimination of discriminatory legal rules may not have changed the law's essentially patriarchal character."[67] Both liberal feminists, such as Susan Estrich, and radical/dominance feminists, such as Catharine MacKinnon consider the law sexist. When rape is considered against other crimes the sexism is fully exposed. Other crimes "in which consent is a defense" do not "require the victim to resist physically in order to establish nonconsent" and while rape is not the only crime which takes into account the prior relationship, "yet we have not asked whether considering prior relationships in rape cases is different, and less justifiable, than considering it in cases of assault."[68] Similarly, when someone is robbed, being drunk at the time or having been robbed before does not take the blame off the robber. Despite the formal removal of sexist elements like corroboration requirements and reasonable resistance, many jurisdictions still use these standards in cases. In looking at the law, the "reasonable man" standard should be

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[63] Conley, John and O'Barr, William, *Just Words: Law, Language, and Power* (Chicago: University of Chicago Press, 1998) p 17
[64] ibid, p37
[65] ibid
[66] ibid
[67] Conley, p61
[68] Estrich, Susan, "Rape", 95 Yale L.J. 1087 (1986) from Frug, Mary Joe, *Women and the Law* (NY: Foundation Press, 1992) p836

changed from reflecting a "Playboy-macho philosophy that says no means yes" to "respect to a woman's words."[69]

The solution to the problem of the male standard in rape cases is to create a paradigm shift and use the "reasonable woman" standard in sexual assault cases where the victim is female and the perpetrator male. True equality cannot be achieved when women are defined, in cases of sexual assault, by male criteria. Men and women experience sexual assault differently[70] and much more often the male is the aggressor; therefore the law should reflect these separate experiences. The "boys rules" that hold female victims to the standards of what reasonable people (i.e. men) would do in the situation should be changed. According to Caroline Forell and Donna Matthews[71], the reasonable woman standard would be based "to the extent possible on the experiences and expectations of most women" by "emphasizing that women want and demand respect, personal autonomy, agency, and bodily integrity."[72]

The reasonable woman standard is already in use for other crimes which affect women, such as male-on-female sexual harassment. The U.S Court of Appeals for the Ninth Circuit ruled in 1991 in *Ellison v Brady* that sexual harassment should be determined based on the reasonable woman standard. In their reasoning they said that "we realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share…men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."[73]

Ideally, the reasonable woman standard would be used in state rape laws or federal laws or through jury instructions. The words themselves - "reasonable woman" instead of "man" or

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[69] ibid, p838
[70] see footnote in beginning of VAWA section on statistics on how men and women's experiences with rape differ
[71] Forell, Caroline and Matthews, Donna, *A Law of Her Own* (New York: New York University Press, 2000)

"person", encourage judges and juries to question their assumptions on sexual violence and take into account the perspective and views of the victim. A reasonable women's perspective would consider sex without consent rape and make "without consent" include behaviors such as crying, saying "no", trying to leave (regardless of whether she actually succeeded or not), trying to push the man away, etc. A reasonable woman does not believe that actions such as kissing, making out, previous sexual history, drinking, wearing provocative clothing, going to a bar alone, etc imply consent to sexual intercourse. This standard acknowledges that both acquaintance rape and stranger rapes harm a woman's autonomy and personal integrity and are offensive and personal violations. A reasonable woman recognizes that even though most courts do not accept the idea that simple verbal nonconsent or psychological coercion is rape, a woman's wishes should be respected and sexual intercourse should be based on mutual consent.

Those who argue against the reasonable woman standard claim that the standard is not objective, but subjective and that there is no "reasonable woman". Rod Van Mechelen, in an article on the aptly named backlash.com, writes that the reasonable woman standard is the same as a "reasonable white person standard" and to "define unlawful behaviors on the basis of race would clearly be prejudicial…it's not universal, but discriminates on the basis of sex."[74] Mechelen goes on to say that general legal standards must be universal in order to address all situations. He claims that the standard makes male judges and legal scholars judge men by "anti-male standards". In agreement with Mechelen would be symetrical feminists who believe that there is no female experience or standard that would universalize women's values. The reasonable person addresses everyone as "equals" and so is a fairer unbiased standard.

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[72] Forell and Matthews, p xvii-xix
[73] Ellison v Brady, from Van Mechelen, Rod, "Sexual Harassment" (1992),p2 www.backlash.com/book/sexhar.html
[74] ibid, p3

The reasonable woman standard, like rape laws that take into account the victim's perspective, is not a "special" protection for women that denies men their "rights". Women are disproportionately the victims of sexual assaults and past case history and laws show that men who have presided over these cases and created the laws have a different perspective than women. Moreover, the current reasonable person standard is not objective in itself. Anti-feminists are quick to jump on the bandwagon against "subjective" woman's standards, but neglect to see the subjectiveness of the "reasonable person" standard which inherently embodies the values and ideals of men. It is not gender neutral "to demand that women resist an attacker who is likely to be larger and stronger than she is" and while women understand this, men do not.[75] Women should not be judged according to male beliefs about women's behavior in a crime which predominantly is a male on female crime.

Furthermore, the standard should not be universally applied to all cases of criminal behavior as Mechelen or symetrical feminists fear, but to crimes that disproportionately affect women, such as rape. When it comes to rape, gender does transcend the class, race, age, etc since most women are raped because they are women. Forrel and Matthews state that "recognition of women's viewpoints and experience in areas where women are primarily on the receiving end of violence aids in achieving equality…by applying these gendered perspectives and viewing certain behavior in context of women's experience, we may begin to achieve true equality of the sexes."[76] They further maintain that to achieve real gender equality the "law must demand that *men conform* to women-based norms concerning sex and violence."[77] Women's views and values on sexual assault, on what is threatening or intimidating behavior, should be the standard on which men's conduct is

[75] Estrich, p22. Estrich also sites a study in which male subjects overwhelmingly conclude that the rape was less serious where there was little resistance, but the female subjects have the exact opposite reaction.
[76] Forell and Matthews, p xxi
[77] ibid, p9

judged. "Under this new paradigm, women's differences from men form a basis for condemning and reducing gendered violence and abuse of power, rather than for excusing it."[78]

Regardless of whether the "differences" in values between men and women on sexual assault result from nature or nurture, the reality is that women are much more likely to be the victims of sexual violence than men. If the law treats women as "equals", in reality it is treating women by male standards since the law has been historically a male institution in which women played little role in defining or creating it. To treat sexual assault by a reasonable woman standard does not impose a "lower" or "unfair" standard or turn women into perpetual victims, but recognizes that men and women are not similarly situated when it comes to sexual assault. Most men are not rapists; but most rapists are men. As Catherine MacKinnon argues in *Feminism Unmodified*, women's values are the values of victims because that is the role they have held in society; "inequality comes first; differences come after."[79] Susan Estrich seems to concur when she states, "power and powerlessness are not gender neutral in our society. When women are the victims, gender is an issue that should not be avoided."[80] Creating a legal framework for women in an area in which women are primarily the victims would thus help reduce the inequalities between men and women.

Federal Rape Remedies

Historically rape has been considered a criminal offense, and as such, under the purview of state criminal laws. State criminal laws, as discussed, do not provide equal or adequate justice. The states varying definitions and case laws concerning what rape is and the gender bias in their legal systems prove that states themselves do not have the sufficient resources to eradicate violence

[78] ibid, p12

against women. Constitutionally, the federal government cannot make a universal definition of rape to force states to administer. However, federal laws can complement existing state laws to maximize the options and recourse for rape victims. Further, federal laws can change the way in which rape is seen as a crime of passion to a hate crime or a civil rights violation. Women should be considered, like other historically oppressed groups, a group whose rights need to be protected by the federal government, not as "special protection" but as a way to correct for past oppression and current biases. Federal civil solutions allow for rape victims, especially acquaintance rape victims, to take their case to court since their cases are often unfairly treated by the police, prosecutors, and courts.

Can Hate Crimes Be Gendered?

Currently, the federal hate crimes law does not include gender and so women must rely on the state to provide remedy for hate crimes. Women have been left out of hate crimes protection, even though they have been historically oppressed. Most states hate crimes laws do not provide civil remedies for gender bias; only for crimes based on race, ethnicity, national origin, and occasionally age or sexual orientation. Of the 48 states that have hate crimes legislation, only 13 include gender. Thus, women's protection from these crimes is sporadic and variable. Hate crimes legislation often does not criminalize new behavior, but often increases the severity of the crime. The term hate crime encompasses more than just raw emotional hatred. It includes the bias and prejudice that can be seen in ethnic slurs and stereotypes, and emotions such as fear or disgust towards people who are different. These crimes usually involve some form of dehumanization of the victim. It is more difficult to hurt an individual human who has feelings and a family than it is to

[79] ibid, p13

hurt someone who is a dehumanized image or a representative of a hated group. According to Jack Levin and Jack McDevitt, hate crimes are often motivated by "an offender's psychological need to feel superiority at the expense of his victims."[81] This view, of power motivating hate crimes, is very similar to the feminist belief that rape is a crime of violence and of exerting power over the victim, as opposed to it being an act of lust and sexual desire.

Hate crimes should be treated differently from other crimes since they harm and terrorize not only the individual, but the group. Those opposed to hate crimes legislation claim that hate crimes give special consideration to its victims and thus deny equal protection under the law. Furthermore, they argue that those crimes already have penalties and it is unfair to give more protection to some victims than to others. There are several reasons why hate crimes should be treated differently. First, the characteristic motivating the attack is immutable. Anyone can be a college student or a delivery person; women cannot change being women. There is no way for women to change their lifestyle or to change their chances of being victimized. Second, hate crimes are directed at a group, not an individual.

The victims of all hate crimes are selected because of their class status, not because of who they are as individuals. These crimes are motivated to create fear and terror within the hated group. Victims are "reduced to symbols of hatred."[82] The reasoning behind including women under hate crimes is that women are raped because they are women. A violent crime committed against an individual because of their membership in a group is a hate crime and not random or arbitrary. Hate crimes against women are expressed through acts of sexual and physical violence based on their anatomy. Rape is not about sex, but about violence and is often based on male superiority, misogny, male domination, putting women 'in their place', humiliation, or sexism. Rape not only affects

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[80] Estrich, p82
[81] Levin, Jack, and McDevitt, Jack, "Hate Crimes", www.violence.neu.edu/publications4.html, p5

individual women on a personal level, but all women on a collective level since it limits their choices and opportunities. According to Kristian Miccio's testimony to the Judiciary Committee, rape and the threat of violence based on gender takes away women's freedom and violates women's civil rights. Rape is the "most powerful tool of domination" and "operates as a means of social control."[83] She sees rape as a political act since it can tear apart society the same as hate crimes based on other factors. Rape "results from the structural relationships of power, of domination, and of privilege between men and women in society."[84]

The crimes of violence and rape are not isolated incidences, but crimes against individual women to intimidate and terrorize the larger class of women. Rape, like other bias crimes, creates psychological and emotional responses from the entire group. Rape is not an act of passion, but motivated by "hatred, anger, and the desire to control a whole class of individuals – women." Women should be protected by hate crime legislation because they are raped because they are women. The message sent to women when they are raped is the same message that a hate crime against a black person sends to all black people – a message of "domination and control."[85] The fear of violence permeates women's lives and influences their life choices, behaviors, and lifestyles. Rape keeps women in a "secondary status" by "closing doors, limiting options and opportunities, and denying autonomy and freedom."[86] Adding rape to the list of hate crimes will take the blame off the victims since they were victimized by something they could not control – their sex.

While the argument that stranger rape is a hate crime seems stronger than that of acquaintance or date rape, both types of rape can be hate crimes. It is easier to see the connection

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[82] Goldscheid, Julie, "Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement", 22 Harvard Women's Law Journal 123 (Spring 1999), p125
[83] "Rape Is a Gender Based Crime", testimony by Kristian Miccio, Director of the Sanctuary's Center for Battered Women's Legal Services, before the U.S. House Judiciary Committee, Subcommittee on Crime and Criminal Justice, 5/11/92
[84] ibid
[85] ibid
[86] ibid

with stranger rape- a man rapes a woman not because of who she is or because she is an individual, but because she is a woman. Since the man does not know the woman, there is no reason to believe the motivation was anything other than violence against women as a group. In acquaintance rape, the victim and assailant know each other and voluntarily were associating with each other. However, this does not mean that the crime is not a hate crime. Drawing swastikas on a neighbor's house or calling a co-worker racial slurs does not make the crime any less of a hate crime just because they know each other. The requirements to prove whether a crime is a hate crime do not include how well the victim and assailant knew other; they include proof of discriminatory motive and evidence of discrimination.

Those who discount acquaintance rape from being a hate crime discount the true motivation behind it. The argument that the "relationship between the victim and the perpetuator is the salient factor assumes the legitimacy of male ownership and domination of women…the notion that violence committed by an acquaintance… cannot, by definition be motivated in major part by women-hating ignores the reality of these crimes against women."[87] Whether the rape is a "simple" rape or a stranger rape, all rapists "use sex as a weapon….the act can be accompanied by brutal violence or verbal intimidation, but the motive is always dominance and control."[88] Hence, date rapes can be seen not as isolated incidents, but as part of the historical context of violence against women and of disregarding a woman's choices or autonomy.

While neither hate crime laws nor VAWA include the presumption that rape is always gender biased, it is hard to separate rape from gender and gender hierarchies. There is evidence to support this omission since some commentary and social science data shows that not all rapes are motivated by discrimination – they can be motivated by anger, personality, demonstrating their

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[87] ibid
[88] Madigan, Lee and Gamble, Nancy, *The Second Rape: Society's Continued Betrayal of the Victim* (New York: Lexington Books, 1991) p4

dominance or distinction from other men, or might demonstrate sexually violent conduct towards both men and women.[89] However, these "neutral" factors can be present along with bias; they are not mutually exclusive. As Julie Goldscheid hypothesizes, can one imagine any act of rape against women that "is not in part fueled by the tradition of gender-motivated violence?"[90] She posits that acts of rape should be analogized to lynchings or cross burnings and "viewed as symbolic acts that alone reflect gender motivated bias."[91] If 90% of all lynchings happened to African Americans we would agree that lynchings are evidence of prejudice, so then why do we not see 90% of all rapes happening to women by men the same way? Rape should be seen as gender bias with the same ease with which lynching is seen as prejudice.

However, these arguments prove the necessity of including rape as a hate crime, not that the law recognizes that rape is always a hate crime. Neither VAWA nor hate crimes proposals have included rape as automatic proof of gender animus.[92] While it is understandable that assault, car jacking, or robbery against a woman might not be a hate crime and could motivated by non-discriminatory reasons, it is difficult to understand how raping a woman and violating her body can be ambiguous. A rapist need not say he hates all women as he rapes his victim to prove he has committed a hate crime since animus need not be malicious, but rather show that the rape was not non-discriminatory or random[93].

Ultimately, all rapes should be considered hate crimes since they violate women's rights and autonomy and create fear in the group. Rape victims should not have to prove that the crime was due to animus based on the victim's gender because rape is overwhelmingly gendered. For those

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[89] Baker, Katharine, "Once a Rapist? Motivational Evidence and Relevancy in Rape Law", 110 Harv. L. Rev. 563, 599-612 (1997)
[90] Goldsheid, p151
[91] ibid
[92] Although VAWA itself does not state that rape is proof enough of gender animus and it's legislative history in fact rebuts this by requiring proof that the act is committed "because of" gender and in part by gender animus, one court, in Bradden v Piggly Wiggly, which is mentioned later. did agree that rape could be proof of discrimination in itself.
[93] Bray v Alexandria Women's Health Clinic, 506 U.S. 263, 269-270 (1993)

rapes that might not be based on gender such as when both the victim and assailant are of the same gender or when the assailant is female, the law should include a rebuttable presumption that the rape occurred "because of" gender in order to provide the assailant with their due process rights. [94] Nonetheless, the way both VAWA was written and the way the Hate Crime Prevention Act will likely be written force the victim to prove discrimination. Since there is very little case law on evidence for gendered hate crimes, the case law would probably be similar to VAWA's since VAWA, in effect, works like a hate crime law. Fortunately, the requirement of circumstantial evidence to prove discriminatory intent under VAWA was both fair and unburdensome as courts recognized derogatory names, inappropriate touching, domestic abuse, rape, and attempted rape as proving discriminatory intent and did not distinguish between "because of" gender and gender animus. Like VAWA, the HCPA would probably include the term "animus" or "because of" gender only to clarify gender based crimes from random acts of violence against women. Hopefully, the hate crimes legislation will use the "because of" standard, since an animus standard might lead courts to discount date rape as not being motivated by emotional hatred of women. The "because of" standard would allow for date rapes that the court sees as motivated by personality, desire for sex, or indifference to women's objections.

Although current laws in the majority of the country do not recognize rape as a hate crime, it should be. John Leo has argued against the gender provision, claiming it could "make every rape and incident of domestic violence a federal hate crime". [95] However, like the civil remedy of VAWA, gender animus, at least partly, will have to be shown. The motivation of the assailant must be examined in order to be fair to both parties. If the HCPA is passed, this will spur case law developments that will provide the framework for what constitutes rape as a hate crime. Hence, a

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[94] Gaffney, Jennifer, "Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases", 6 J.L. & POL'Y 247

[95] Leo, John, "Punishing Hate Crimes", *US News and World Report*, 10/26/98

federal hate crimes law that includes gender would provide another legal option for women who have been raped to achieve justice and would send the message to society that rape is a hate crime on par with other violent crimes targeted against racial and ethnic minorities.

Violence Against Women Act

VAWA was created because violence against women is a serious problem in American society. While violent crimes affect all racial, ethnic, and gender groups; crimes such as domestic violence, stalking, and rape disproportionately affect women. Department of Justice Bureau of Justice Statistics (BJS) report that women are the victims of more than 4.5 million violent crimes each year.[96] According to the Senate Judiciary staff, during 1991, more than 2000 women were raped every week and more than 90 women murdered; 90% of them by men.[97] The report states that violence is the leading cause of injuries to women ages 15 to 44, more than accidents and cancer deaths combined. Three out of four women will be the victim of a violent crime sometime during their life. According to the FBI, between 1980 and 1990, rape rates of women rose four times as fast as the national crime rate and statistics showed that a women is raped every six minutes.[98] The report stated that "violence against women reflects as much a failure of our nation's collective willingness to confront the problem as it does the failure of the Nation's laws and regulations. Both our resolve and our laws must change if women are to lead free and equal lives…Our laws, policies, and attitudes remain inadequate in the face of the epidemic of violence against women."[99] The report further states that over 60% of rape reports to the police do not result in arrests and less than

[96] Jasper, Margaret, *The Law of Violence Against Women* (Dobbs Ferry, NY: Oceana Publications, 1998) p1
[97] "The Violence Against Women Act of 1993", report by the U.S. Senate Judiciary Committee, 9/7/92. The National Violence Against Women Survey puts this figure even higher with 1.9 million rapes a year.
[98] "Rape Is a Gender Based Crime", testimony by Kristian Miccio, Director of the Sanctuary's Center for Battered Women's Legal Services, before the U.S. House Judiciary Committee, Subcommittee on Crime and Criminal Justice, 5/11/92

half of those arrested for rape are convicted. Of those convicted, almost 25% serve no time and more than 25% serve an average of one year or less in prison.. Compare these numbers to the 69% conviction rate for murderers and the 61% conviction rate for robbers.[100] It is apparent from these statistics that many victims of rape not only do not receive adequate justice, they receive unequal justice.

VAWA was first introduced in 1990 by Senator Biden in response to escalating violence against women and to provide a national remedy in response to states collective failures at prosecuting and convicting rapists. Many states have high acquittal rates for rapes and low conviction rates. VAWA enjoyed wide bipartisan support with 68 co-sponsors in the Senate and 226 co-sponsors in the House. VAWA was landmark bipartisan legislation which was passed by overwhelming margins. It was created to protect women from sexual assault and domestic violence through law enforcement guidelines, civil rights remedies, stiffer penalties for repeat sex offenders, amending the Federal Rules of Evidence to limit questioning the victim's sexual past, and monetary grants for hotlines and awareness programs.

Congress held many hearings to prove the necessity of a law like VAWA. Four years of witnesses and studies and testimony from state attorney generals, judges, police, law professors, social scientists, physicians, and victims proved that state legal systems and laws were not effective in addressing gender based violence. Still many states laws are inadequate to the task as discussed earlier. Further, women are subjected to a "second rape" by prosecutors and policemen. Police sometimes do not file the report. Prosecutors often do not take a case where the woman did not report it immediately or they question the woman's behavior or sexual past. In addition, state task

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[99] "The Violence Against Women Act of 1993", report by the U.S. Senate Judiciary Committee, 9/7/92
[100] All statistics taken from the "The Violence Against Women Act of 1993", report by the U.S. Senate Judiciary Committee, 9/7/92

forces showed the sexist bias in the way the courts treated rape victims and the low levels of credibility they experienced.

VAWA's Federal Civil Remedy for Gender Motivated Violence

The "Civil Remedies for Gender-Motivated Violence Act", or Title III of the Violence Against Women Act (VAWA), was one of America's greatest civil rights acts. Title III was a novel civil rights remedy to help provide justice for victims of violent gender based crimes and acknowledged for the first time that gender based crimes violate a victim's federal civil rights. It allowed any victim to bring a civil action against her attacker in Federal Court for damages and sue under federal law. It stated that "all persons within the U.S. shall have the right to be free from violence motivated by gender" and that if the defendant is found liable, they are "liable to the party injured." VAWA complemented existing federal civil rights laws which did not include gender. By phrasing the law to include "gender" and not "women", Congress allowed for men to make claims under the act. VAWA made rapes and domestic abuse that were motivated by gender a crime as serious as those motivated by religious and racial bias. The Judiciary Committee's report stated that the purpose of VAWA was to "provide an effective anti-discrimination remedy for violently expressed gender prejudice." Not only did it provide a civil remedy, it stood as a statement that the United States would not tolerate gender motivated violence. It recognized the threat that women face daily from their husbands, their boyfriends, their employers, and strangers. Furthermore, it is easier to prove rapes in civil court because the standard of proof is lower –from "beyond a reasonable doubt" (99%) to "a preponderance of the evidence" (51%).

VAWA is based on the commerce clause like most other civil rights legislation. The premise of VAWA is that violence against women adversely affects interstate commerce. The fear of being

a victim or being a victim prevents women from taking jobs in certain areas, taking higher paying night jobs, shopping in certain areas, using public transportation , traveling interstate on business, and can force them to drop out of school. This diminishes national productivity and can decrease supply and demand for products because of the lower wages women earn from not taking certain jobs. According to the National Federation of Business and Professional Women, women who cannot leave their homes "or are afraid to show the physical effects of violence will either forego employment opportunities available or jeopardize their current employment by absenteeism and poor work performance."[101] Thus violence and the fear of violence deprives women of their legal right to equal opportunity employment.

Violence against women also costs society socially and economically. Estimates show that the U.S. spends $5 to $10 billion a year on health care, criminal justice, and other costs of domestic violence. Many women who are raped leave school, take time off from their jobs, suffer from depression and other post-rape trauma that limits their economic opportunity and increases medical costs. Congress documented that over 50% of rape victims leave or lose their jobs.[102] The estimated costs of rape to its victims is $127 billion per year, which the government bears a significant portion of through lost tax revenues, Medicare payments, health insurance payments, and emergency services.[103] Hence Congress determined that the "brunt of so many crimes of violence imposes an artificial restriction on the market"[104] that brings the federal government into play.

VAWA would allow women to directly sue their attacker themselves and not have to rely on a criminal system they have no control over, thereby bypassing the widespread gender bias evident in the state criminal and civil legal systems. According to Senator Biden, this widespread gender bias is evident in state legal systems since they "treat gender-based crimes of violence less seriously

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[101] 1991 S. Hrg 241
[102] "The Violence Against Women Act of 1993", report by the U.S. Senate Judiciary Committee, 9/7/92
[103] State of AZ, et al, Amicus Brief for Brzonkala, p11

than other major crimes, denying victims the equal protection of the laws and the redress to which they are entitled."[105] Under VAWA, victims would be able to receive compensatory and punitive damages in court, which they do not receive in criminal proceedings. Monetary damages are important because very rarely do they receive monetary damages in state courts and because of the economic loss women experience due to rape. Victims of gender crimes "often have unpaid medical bills or lost wages and need a way of recovering that money."[106] If the accused lost the case, he would have to compensate the victim for things such as attorneys fees, income from missed days of work, mental health care, and even punitive damages to the victim. The recovery of attorneys fees allowed VAWA to provide relief for poorer women or minority women whose cases are prosecuted less often than white women, since they could hire a lawyer who would only get paid if they won.

Historically it has been Congress which has had the power to provide relief for discriminated peoples in the U.S, not the states. In title VII of the Civil Rights Act of 1964, Congress recognized a federal interest in fighting gender discrimination. Also in 1964, the Court unanimously reaffirmed Congress's power to use the commerce clause for civil rights relief in *Heart of Atlanta Motel v U.S.*[107] In this case, a motel owner in Atlanta refused to serve blacks as required by the Civil Rights Act. The Court rejected his argument that Congress extended their power too far. In a later decision, the Court upheld that even though a restaurant's clientele was local, that it used interstate commerce to purchase its food supplies and so could not refuse to serve blacks.[108] Hence, Congress could force private businesses to serve blacks if their business, in any way, was affected by interstate commerce, be it their clientele, their supplies, their products dissemination, etc. In *EEOC v Wyoming*, the Court upheld extending the Age Discrimination in Employment Act to state employers claiming that the economic impact of age discrimination

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[104] Senator Joseph Biden, Amicus Brief for Brzonkala, pg 5
[105] ibid
[106] "Law Would Let Victims Sue Over Gender Crimes", 1/9/01, *Journal News*

"deprived the national economy of the productive labor of millions of individuals."[109] Therefore Congress based the civil rights remedy on the concept that Congress could regulate not only interstate commerce, but also local activities that affect commerce.[110]

The VAWA remedy would have been used against those who committed gender based crimes of violence, including sexual assault. VAWA "recognizes that gender discrimination may take the form not only of a lost pay raise or promotion, but also a violent, criminal attack."[111] VAWA does not apply to all rape victims – the plaintiff must prove that the defendant's action was motivated "because of" gender and prove, at least in part, that the defendant was motivated by animus based on the victim's gender. The "in part" animus allows for a person to prove that not only gender but race, age, religion, etc was part of the discriminatory action. The victim has to prove that she was a victim of a violent crime and that the defendant was motivated by the victim's gender by a "preponderance of the evidence", a standard used in civil trials which requires evidence that shows it was more likely than not. Focusing on the animus of the assailant is a much different way of approaching rape and abuse than most states law which focus on the behavior of the victim.

The difficulty in VAWA, and in federal hate crimes legislation, lies in what determines gender based motivation. The only way to establish this is in case law and the only real uses of VAWA have been challenged on constitutionality grounds, not on what constitutes gender bias, although there have been a few cases. In *Doe v Doe*[112], the woman sued her husband for damages after seventeen years of physical and mental abuse, threats, property destruction, and forcing her to be a "slave" and won under a VAWA claim. In *Anismov v Lake*, the court found proof of gender animus because the assailant made inappropriate sexual advances, attempted rape, touched her

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[107] Heart of Atlanta Motel v U.S., 379 U.S. 241 (1964)
[108] Katzenbach v McClung (1964)
[109] EEOC v Wyoming, 460 U.S. 226, 231 (1983)
[110] "Virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the state – at least when considered in the aggregate." Heart of Atlanta Motel, 379 U.S. 241 at 251
[111] "Law Would Let Victims Sue Over Gender Crimes", 1/9/01, *Journal News*

breasts, and finally raped her in a secluded cabin.[113] Another court proved gender bias through lewd comments, calling the woman a "bitch", and shoving her.[114] In *McCann v Rosquist*, the Utah Court rejected the VAWA based sexual harassment claim, but stated that "the notion that non-consensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong…non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women."[115]

One VAWA case, *Brzonkala v Virginia PolyTechnic Institute*, showed that courts might treat "simple" rape differently than stranger rape in regards to being able to prove gender based animus. The court said that "date rape could involve a misunderstanding and is often less violent than stranger rape" and that "date rape could also involve a situation where a man's sexual passion provokes the rape by decreasing the man's control…date rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim's personality to some extent."[116] The court's reasoning regarding date rape represents an outdated stereotype that rape is about "sexual passion" and that the female must have done something to provoke the man to the point where he has no self control left and must rape the woman. The court appears to be trying to argue that men should not be responsible for rape if they are on dates and cannot control their lust when a woman says no. To the second part of their argument, the court "missed the essential point that forced sexual contact in the name of passion or personality may support rather than refute a claim of gender-motivation because it shows a disrespect for women…It also contradicts research indicating that acquaintance rapes frequently are premeditated and are predicated on discriminatory

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[112] Doe V Doe, 929 F. Supp 608 (D. Conn 1996)
[113] Anismov v Lake, 982 F. Supp 531 at 541 (N.D. Ill 1997)
[114] Crisonino v NY City Housing Authority, 985 F. Supp 385, 391 (S.D. NY 1997)
[115] McCann v Rosquist, 998 F. Supp 1246, 1252-53 (D. Utah 1998) The court dismissed the VAWA claim since their claim of sexual harassment did not meet VAWA's "crime of violence" element.
[116] Brzonkala, 935 F. Supp at 784-85

biases about male entitlement to coerce sexual relations with women against their will."[117] In addition, a perpetrator might have made anti-woman comments during the act, such as calling her a "bitch" or "whore", or date raped other women. Moreover, in date rape cases a defendant may have purposefully disregarded a woman's protests or other signs of not consent, "reflecting the stereotypical view that no means yes that underlies much violence against women."[118] Knowing the person that shouted racial slurs or committed a racially motivated attack does not discount racial discrimination and so should not discount sex based discrimination either.

One court rightly criticized the Brzonkala court statements saying that there was no mention in the legislative history of Congress trying to distinguish between date rape and stranger rape when it came to VAWA. [119] The court said that it could "not even fathom" a "common sense basis" for the distinction. It stated that "rape is rape" and that it would not be any less difficult for the victim to endure simply because the perpetrator was a friend or date. The court affirmed that "a date and a friend can be motivated by gender animus." [120] Relying on an article by radical feminist Catharine MacKinnon, the court claimed that allegations of sexual violence alone may be "itself indicative of gender animus" and would therefore satisfy the gender based motivation requirement.[121]

However, there has not been enough case law to determine what would constitute gender motivation under VAWA or the HCPA. According to VAWA's legislative history, it is likely that evidence of motivation would have been patterned on the precedents set by sexual harassment law under Title VII (determining whether action occurred "because of sex") and Reconstruction-era civil rights statutes, such as 42 U.S.C 1985(3). Thus the "totality of the circumstances", such as statements made before and after the attack, patterns of behavior, excessive force, severity, derogatory language towards that group, and location of the attack, could prove gender motivation.

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[117] Goldscheid, Julie, "Gender Motivated Violence", Harvard Women's Law Journal 123 (Spring 1999), p146
[118] ibid, p147
[119] Braden v Piggly Wiggly, 4 F. Supp 2d 1357, 1361-1362 (M.D. Ala 1998)

Federal and state courts often use this form of circumstantial evidence to determine bias and this use has been "remarkably consistent, regardless of whether courts are analyzing federal or state hate crime laws or sexual harassment laws."[122] VAWA's legislative history specifically referred to *Griffin v Breckenridge*[123], which determined racial animus under the above mentioned reconstruction era statute since the types of evidence used would be similar.

The only Supreme Court case to use Section 1985(3) involving gender was *Bray v Alexandria Women's Health Clinic*[124]. In this case, the Court decided that anti-abortion protests do not reflect gender bias since the protestors actions are motivated by an objection to abortion, not discriminatory motivations towards women. More importantly, however, the Court said that one not need prove hatred for all women to prevail in a claim that a violent act was motivated by discriminatory animus. In a related case[125], the first circuit found that conduct associated with anti-abortion protestors (shouts of "lesbians" and defendants testimony that pro-choice women are "satan-worshippers", and "drug addicts" and that women are ignorant about abortion) was proof of a discriminatory gender-based animus. While circumstantial evidence would be similar in these situations, neither the HCPA nor VAWA requires proof of invidious (conscious) discrimination as section 1985(3) calls for.

In addition, the FBI developed guidelines for hate crimes that could also be used for gender based crimes. These guidelines to assess bias include whether the offender and victim were of different groups; whether the offender made bias related comments, written statements, or gestures or left bas related markings or symbols at the crime scene; whether a substantial portion of the

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[120] Braden v Piggly Wiggly, 4 F. Supp 2d 1357, 1361-1362 (M.D. Ala 1998)
[121] Id at 1362
[122] Goldscheid, p130
[123] Griffen v Breckenridge, 403 U.S. 88, 103 (1971). In this case, the Court inferred an intent to discriminate on the basis of race from the fact that a group of whites attacked a group of African Americans and whites they believed to be civil rights workers.
[124] Bray v Alexandria Women's Health Clinic, 506 U.S. 263 (1993)
[125] Libertad v Welch, 52 F. 3d 428 (1st circuit, 1995)

community percieves that the incident was motivated by bias; whether historically established animosity exists between the victim's and offender's group; and whether other incidents happened in the same locality.[126]

David Frazee[127] provides an explanation of how VAWA could have be used in the highly publicized St. John's University case. In this case, 5 white upper class men were charged with raping a Jamaican woman in a fraternity house at St. John's. They were acquitted, and one juror said that the jury did not want to "ruin the boy's lives." To prove sex bias, the victim could use expert testimony about the pattern of gang rapes committed in fraternities (using the FBI standard of showing bias through the location having been a place where other incidents occurred) and sue the fraternity and college for failing to prevent the known occurrence of rapes in fraternities. She could use testimony to show that black women "from the time of slavery have been viewed by white men as sexually available and rapeable with impunity" (using the FBI standard of historical animosity between her 'group' and the offender's 'group'). She could then focus the trial on how her life was "ruined" by the attack, as opposed to the alleged rapists.

Arguments against VAWA

The opposition to VAWA consists of Supreme Court justices to conservatives to constitutional groups to the ACLU. Chief Justice Rehnquist came out against VAWA publicly, stating that federal courts should be "reserved for issues where important national interests predominate."[128] Joining Rehnquist's opposition was the Conference of Chief Justices of the States. The group issued a statement that claimed that the civil rights provision would be used as a

[126] Department of Justice, Federal Bureau of Investigation, Hate Crime Data Collection Guidelines, p2-3
[127] Frazee, David, "At a Glance: A Trial Under the New Civil Rights Law", Fall 1995, www.echonyc.com/~onissues/f95vamagl.html

bargaining tool in divorces and because women were likely to file false and vindictive claims.[129] Judges feared that VAWA cases would flood their courts. Even the ACLU, the supposed champion of civil rights, agreed, claiming that VAWA cases would "adversely affect other civil rights lawsuits."[130] After the fact, one can see that their fears were misguided as the courts were not overwhelmed by VAWA cases. However, the issue still remains – should women be forced to suffer from gender based violence because of judicial economy? Justice for women should not be determined on whether it might make life a little more difficult for judges presiding over cases. As Julie Goldscheid put it, "rather than justifying inaction, the pervasiveness of h problem should instead provide a rallying cry for creative efforts to eliminate the root of bias and all its violent manifestations."[131]

Another argument against VAWA, and hate gendered hate crimes laws, concerns how to prove that the sexual assault was gender based and not based on personality or other reasons. The ACLU claimed that gender bias would be too difficult to prove in the case of VAWA. However, other case law already provide the basis for determining gender bias such as sexual harassment cases. In those cases it is the role of the judge and jury to decide whether the employment action was based on gender or not. Thus there are precedents on which to base both the hate crimes legislation and VAWA.

A final argument against VAWA is the argument against all rape reform laws, especially those targeted to addressing date rape. A *National Review* article stated that feminists "have attempted to strengthen the likelihood of conviction by inventing the concept of date rape which means…any sexual contact that a woman subsequently regrets."[132] Anti-reformers claim that "date

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[128] Frazee, David, "Court TV We'd Like to See: A Plain English Guide to VAWA", Fall 1995, www.echonyc.com/~onissues/f95vama.html, p2
[129] ibid
[130] ibid
[131] Goldscheid, Julie, "Gender Motivated Violence", Harvard Women's Law Journal 123 (Spring 1999)p128
[132] *National Review*, 1/10/00

rape is a vindictive social fantasy, a collective hysteria, invented by that mass of vindictive women, feminists."[133] Women will use VAWA and hate crime laws to vindictively charge rape when they have bad sex or to punish men who have left them or cheated on them. According to University of California Berkeley professor Neil Gilbert, rape victims do not receive unequal justice compared with other crime victims. VAWA is a solution for "radical feminist lawyers" and was created to deal with "an epidemic of date rape that does not really exist."[134] He claims that victims of other crimes such as robbery know their offenders as often if not more often than rape victims and that the amount of robbery convictions is also substandard. The rates of convictions, dismissal, arrest, and reportings of rape are not treated any differently from other violent crimes. Making rape a civil crime would lower the threshold of proof and provide a "huge financial incentive for expanding the definition of rape" to include "ambiguous" and "unpleasant" sexual experiences.[135]

Gilbert discredits statistics from both the Senate Judiciary Committee, which estimates that 84% of rapes are never reported, and from the less conservative estimates of the Ms. Magazine Campus Project on Sexual Assault which claimed that 27% of college women were victims of rape or attempted rape twice between the ages of 14 and 21. The Ms. Magazine project used women who did not believe that they were raped. The Judiciary Committee used numbers from the National Victim Center and the Crime Victims Research and Treatment Center's report "Rape in America". According to this survey, 683,000 women are rape victims a year, but Gilbert claims that the second wave of interviews did not include the entire original sample. For more "accurate" results, Gilbert turns to the Bureau of Justice Statistics surveys, conducted by the Census Bureau, which revealed in 1990 that almost half of their respondents did not report their rapes to the police. Also according to BJS data, 49% of robberies and 43% of aggravated assaults were not reported to the police, proving

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[133] Dworkin, Andrea, "Women in the Public Domain: Sexual Harassment and Date Rape" (1992) from Dworkin, Andrea, *Life and Death* (New York: Free Press, 1997) p214
[134] Gilbert, Neil, "The Wrong Response to Rape", *Wall Street Journal*, 6/29/93

that "rape victims do not differ from victims of other violent crimes." However, Gilbert admits that the BJS studies have been "widely criticized for underestimating the incidence of rape".[136] Most feminists believe that the incidence of rape is much higher because women do not report it. And of those that get reported, many never make it to trial. Unfair and biased treatment by prosecutors, judges, and police prevent many women from reporting rape. Although statistics conflict, many statistics place false rape claims by women around 2-8% of cases[137] thus rebutting the "vindictive woman" fear.

Challenge to VAWA

The challenge to VAWA came in the beginning of 2000 in the Supreme Court case *United States v Morrison*. Ultimately, the Supreme Court struck a blow to women's rights and ruled that VAWA does not fit under the commerce clause. The issue changed from where it should be rightly- a woman's civil rights protection and issues of gender bias and discrimination to an issue of states' rights. On the side of Brzonkala were 36 states and the Clinton administration. On Morrison's side were groups who believed in strict interpretations of the Constitution.

Christy Brzonkala was a student at Virginia Tech who was raped by two football players when she was a freshman and reported the rapes several months later. Eventually Brzonkala dropped out of college, losing the economic benefit of a higher education. The U.S. District Court agreed that Brzonkala had proved that the rape was gender motivated, but ruled that the law was unconstitutional under both the commerce clause and 14th amendment. The court detailed what they believed was proof of discriminatory gender animus – that she was raped by strangers within

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[135] ibid
[136] ibid
[137] Feminists often use a 2% number, the 8% number comes from the FBI.

minutes of meeting them, the severity of gang rape, lack of another motive, testimony from an assailant that she said "no" twice, and assailant's statement that he "liked to get girls drunk and f*** the shit out of them."[138] The Supreme Court, ignoring the issues of gender animus, agreed with the District Court that VAWA was unconstitutional.

The Court's final decision weakened the power of Congress to address national problems that Congress determines are issues of commerce and limited the abilities for victims of gender based crimes to seek redress. It rejected the Garcia balance that had said that "Congress, not the courts, must remain primarily responsible for striking the appropriate federal/state balance."[139] The Court ignored Congress's four years of findings on the link between commerce and gender based crimes and instead posited its own reasoning on whether such a link existed. The Court ignored the fact that for decades Congress has had the power to address race and religious based violence as a national problem and was merely adding gender to that list. It also erred in not allowing VAWA under the 14th amendment as "that constitutional provision permits Congress to act to protect civil rights in the face of inadequate state laws or enforcement."[140] VAWA was not going to supplant state rape law as the Court feared, but supplement it. Congress had shown that the states were failing in their efforts to help rape victims and believed that under the 14th amendment they could remedy the actions of the states. The states rights argument that the Court supported has historically been used in the U.S. as a cover to hide the interests of race, class, religion, and power and was used here to limit the rights of women.

Up until the 1995 case, *United States v Lopez*,[141] the Supreme Court had recognized the right of Congress to use the commerce clause broadly and to protect groups from economic harms. In Morrison, the Court relied heavily on the arguments of this case. The Lopez case held the Gun Free

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[138] Brzonkala v Morrison, 132 F. 3d at 963
[139] Garcia v San Antonio Metropolitan Transit Authority, 469 U.S. 528, 552 (1985)
[140] "The Violence Against Women Act", NOW Legal Defense Fund, 1996, p4

School Zones Act unconstitutional as an invalid exercise of Congress's commerce powers. The Court claimed that Congress had failed to establish a link between gun possession and interstate commerce and that this sort of regulation belonged at the state level. The majority opinion was one of the few opinions since the 1930's that declared a federal law unconstitutional on the basis of state sovereignty. While Congress has banned alcohol and asbestos in schools, guns were seen by the Rehnquist opinion as exceeding Congressional power. Justice Thomas's concurrence went even further by providing a conservative definition of the commerce power and calling past Court allowances for its use a "blank check" for Congress to incorporate everything under commerce.

However, the Court was mistaken in its comparison of Lopez to Morrison. First, one can read from the Lopez decision that the reason it was struck down was because Congress had not proven a link or held hearings on the link between gun possession and commerce. There was no legislative history for the Court to consider. VAWA, on the other hand, had four years of testimony and witnesses demonstrating the link between gender based violence affecting interstate commerce. Furthermore, that link was not as tenuous as the one on Lopez. Lopez's defenders used a "cost of crime" argument that said that gun possession might lead to violent crimes, which might affect the learning environment, which might lead to less productive citizenry, and would thus adversely affect the economy. In contrast, VAWA's link between gender violence and commerce, as illustrated earlier, is a direct and tangible one. Moreover, the Court claimed in Lopez that the Congress was taking over an area that was constitutionally given to the states, whereas violence against women is a national problem with national effects and Congress was cooperating with the states, not taking away their power.

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[141] U.S. v Lopez, 514 U.S. 549 (1995)

What Now?

The concept of citizenship and by extension, civil rights, should ensure that all people are protected equally by the government and that the law treats them fairly. Women have the right to be protected from gender based violence. The states have mostly failed in their efforts to provide justice for victims of gender based violence and a civil rights remedy would have provided a way for women to take the matter into their own hands instead of suffer the bias of their state's criminal justice system.

However, the situation is not hopeless. Invoking the "reasonable woman standard" in rape cases would go a long way towards helping women who are held to male standards concerning rape. Further, in the case of VAWA, the history of the commerce clause is a history of going towards one extreme and reversing and moving towards the other. While the Court is currently headed towards a conservative interpretation of the commerce power, there is always the possibility for change. Further, Congress has come up with a new civil rights provision[142] that clearly states the link between gender based violence and commerce within the bill itself. Moreover, states have the ability to enact their own laws which include gender in hate crimes, and some states have already done so following VAWA's repeal. The provisions of VAWA still intact help rape victims through grants to crisis centers and for police and judge education about rape. There is also the possibility for a version of the Hate Crimes Prevention Act, which includes gender, to pass Congress. While President Bush helped derail hate crimes laws in Texas, this does not mean that he would not pass a hate crimes law which includes gender since his opposition was based on the inclusion of sexual orientation. Bush has not made public his stance on current bills being circulated in Congress, but

[142] H.R. 5021 is almost the same as the civil rights remedy of VAWA but adds that these crimes must take place when the victim or defendant is engaged in interstate commerce or uses a facility or instrumentality of interstate or foreign commerce.

has said that the existing civil rights laws are inadequate.[143] Ultimately, through civil rights remedies or hate crimes, the federal government must take action to help remedy the epidemic of violence against women and the law must recognize the difference in which women perceive violence against them by adopting the reasonable woman standard.

[143] "Lawmakers Unveil Bill Protecting Gays Under Hate Crimes", *Houston Chronicle*, 3/28/01