Can We Lose the Battle and Still Win the War?:
The Fight against Domestic Violence after the
Death of Title III of the Violence against Women
Act

Jennifer R. Hagan

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Jennifer R. Hagan, Can We Lose the Battle and Still Win the War?: The Fight against Domestic Violence after the Death of Title III of the Violence against Women Act, 50 DePaul L. Rev. 919 (2001)
Available at: https://via.library.depaul.edu/law-review/vol50/iss3/6

This Notes & Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
CAN WE LOSE THE BATTLE AND STILL WIN THE WAR?: THE FIGHT AGAINST DOMESTIC VIOLENCE AFTER THE DEATH OF TITLE III OF THE VIOLENCE AGAINST WOMEN ACT

INTRODUCTION

The time when a woman had to suffer—in silence and alone—because the criminal who abuses her happens to be her husband or boyfriend is on its way to becoming ancient history . . . but just because we have had some success does not mean we can become complacent and abandon the fight against domestic violence . . . .

It only took a year for Vincent Doan to kill Carrie Culberson.² On the morning of August 29, 1996, Debra Culberson awoke to find her worst fears had become a reality. Her daughter Carrie was missing and last seen³ in the company of her ex-boyfriend Vincent Doan.⁴ Debra had good reason to fear for her daughter’s life because over the previous nine months Carrie had repeatedly suffered physical and mental abuse at the hands of Doan.⁵

Doan had been vicious and violent towards Carrie, oblivious to who was around when he threatened or hit her.⁶ In fact, Debra and her family had even witnessed incidents, which had become progressively

1. Biden Webpage, infra note 455.

2. Although Carrie Culberson’s body was never found, her disappearance was ruled a homicide. See Culberson v. Doan, 65 F. Supp.2d 701, 704 (S.D. Ohio 1999). These facts were reiterated in the pleadings and facts of the cited case in which Clarissa (Carrie) Culberson’s estate and her family brought suit against Doan claiming his “actions against Carrie were based primarily on account of her gender in violation of the Violence Against Women Act, 42 U.S.C. § 13981 (VAWA I).” Id. Doan challenged the constitutionality of the VAWA I on its face and as applied, claiming it was beyond the Commerce Clause powers of Congress. See id. The district court held that the VAWA I was constitutional under the Commerce Clause and consistent with other civil rights legislation enacted by Congress. See id. at 714.

3. Id. at 703. Doan’s neighbor was the only witness to come forward and claim to have seen Carrie on the day of her disappearance. See id.

4. Id. The witness testified that around 1:30 that morning he had seen Doan hitting Carrie on the head. See id.

5. As in many domestic abuse cases, the violence in the relationship had escalated over time. The family actually witnessed at least one occurrence when Doan attempted to hit Carrie. See id. In July of 1996, Doan had thrown Carrie across the room and hit her in the head with a metal object, causing her to need surgical staples in her scalp. See id. Three days before she disappeared, Doan had held Carrie at gunpoint in a barn. See id.

more violent, in their own home. Only one month before Carrie disappeared, Doan had attacked her so brutally that, as a result of the injuries, Carrie required surgical staples in her scalp. Debra's fear for her daughter's life stemmed not only from the fact that Carrie had last been seen with her violent ex-boyfriend but also because she had reason to believe that the police would not do anything until it was too late. Over the previous two years, Debra and Carrie had filed numerous criminal reports documenting Doan's violent behavior and the threats that he made against Carrie. However, the police never filed charges. Although this incident was not the first time that Doan had hit Carrie, it would be the last time. Even if they had tried, the police could not have done anything. It was too late for Carrie. Debra would never see her daughter again.

One year after Carrie Culberson's disappearance, a jury found Vincent Doan guilty of aggravated murder and sentenced him to life imprisonment without parole. Sadly, Carrie's story is not unusual.

---

7. According to Debra, Doan had attempted to physically assault Carrie in her home and when Debra refused to get out of the way and attempted to intervene, Doan assaulted Debra. See id.
8. See id.
9. Id. Carrie and her family had called the police to file criminal reports against Doan at least four out of the five times he had attacked Carrie in recent months, yet no charges were ever filed against him. See id. In fact, on the day that Debra reported Carrie missing the police chief, who filed the missing persons report, made sure to visit Doan's best friend, Baker (later arrested as an accomplice) to warn him that Doan was now a suspect. See id.
10. Id.
11. See id. Debra testified that when she reported her daughter missing to the Police Chief of Blanchester, she reminded him of the threats Doan had made to Carrie and the criminal reports she had filed. See id. Debra claimed that the Chief responded, "Why does she keep going back to it?" Id. For further discussion of police responses to domestic violence situations and the problem of underenforcement, see infra Part II.A.1.a.
12. On the evening Carrie disappeared, Doan was seen leaving his house with blood on his clothes and carrying several garbage bags. Culberson, 65 F. Supp.2d at 704. According to witnesses from the search party who looked for Carrie after her disappearance, dogs tracked Carrie's scent to a pond in Doan's best friend's junkyard, with Doan's friend present at the time. Id. When the search party asked the police chief about draining the pond he wanted to wait until the next day. Id. According to witnesses, the pond was drained a day later and nothing was found except footprints at the bottom of the pond and a muddy trail in the brush leading away from the area. See id.
13. See id. The evidence was so great against Doan that he was convicted without the body of Carrie. See id. In fact, her body has yet to be located. Id.
15. Statistics show that domestic violence is the single largest cause of injury to women in the United States, and that it accounts for thirty percent of all murders of women. Bureau of Justice Statistics, Violence by Intimates V (1998). See also Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 Yale J.L. & Feminism 3, 4 (1999) (discussing domestic violence statistics and the lack of support for state intervention). In the legislative hearings before the enactment of
however, it is particularly disturbing because her murder could have been prevented. In Carrie’s case, as with many cases of domestic violence, the abuse was not only public knowledge, but the victim, as well as her family, had tried to get her help. Yet, the criminal justice system had failed Carrie and her family, and effectively left them powerless to stop a relentless Doan.

Cases like that of Carrie Culberson reiterate the need for the United States to treat violence against women as a serious problem in society. Congress recognized this need when it enacted the Violence Against Women Act (VAWA I), specifically Title III, which provided victims of gender-motivated violence with the opportunity to

Title III of the VAWA I, Congress cited to statistics that “in 1991, at least 21,000 domestic crimes were reported to the police every week . . . .” S. REP. NO. 103-138, at 37 (1993).

16. Doan had begun abusing Carrie by threatening her and pushing her around. See Culberson, 65 F. Supp.2d at 703-04. Within a matter of months he was hitting her in the head and throwing her across the room. See id.

17. Id. at 703. See supra note 9.

18. After Carrie’s death, Title III of the VAWA I gave Carrie’s family the option to file suit against Doan, and they exercised that option. See Culberson, 65 F. Supp.2d at 702-03. The case is currently pending. See Culberson v. Doan, 72 F. Supp.2d 865 (1999) (denying Doan’s motion for summary judgment).


21. See Violence Against Women Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(b) (1994)). This provision, entitled Right To Be Free From Crimes of Violence, provides that “all persons within the United States shall have the right to be free from crimes of violence motivated by gender.” Id. Although Title III is gender-neutral, the focus of this Comment will be on violence against women from a domestic violence perspective. The term “victim” will be used interchangeably with “survivor” and will refer to females as the victims and men as the abusers or attackers. It is a fact that men are also victims of domestic violence, at the hands of both men and women, nonetheless, statistics show that women are more likely to be abused by a male intimate. See BUREAU OF JUSTICE STATS., U.S. DEPT. OF JUSTICE, No. NCJ-167237, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS AND GIRLFRIENDS 1 (1998) [hereinafter VIOLENCE BY INTIMATES]. The term “intimate” includes current and former spouses, boyfriends, and girlfriends. Id. at 4. In March of 1998, the U.S. Department of Justice Bureau of Justice Statistics released a report presenting a summary of the statistical information about violence committed against intimates. See id. The report concluded that “intimate violence predominately affects women as victims,” representing “about 21% of the violent crimes experienced by women . . . .” See id. According to the report, “although less likely than males to experience violent crime overall, females are 5 to 8 times more likely than males to be victimized by an intimate.” Id. The report also confirmed the traditional notion about domestic violence: that women are usually the victims. See id. at 1 (noting that women represent about eighty-five percent of the vic-
bring a civil suit in federal court in order to obtain monetary relief from an abuser or attacker.\textsuperscript{22} Congress enacted Title III in 1994, pursuant to its powers under the Commerce Clause\textsuperscript{23} and the Fourteenth Amendment,\textsuperscript{24} less than a year before the Supreme Court's landmark decision concerning the Commerce Clause in \textit{United States v. Lopez}.\textsuperscript{25}

---

\textsuperscript{22}. Violence Against Women Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(c) (1994)). This provision, entitled Cause of Action, states: A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

\textit{Id.}

\textsuperscript{23}. \textit{U.S. Const.} art. I, § 8, cl. 3. The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States . . . ." \textit{Id.} Congress enacted the VAWA I pursuant to its Commerce Clause powers noting that "[t]he Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce; Congress need only have a 'rational basis' for creating such a law." S. Rep. No. 103-138, at 54 (1993). Congress supported the connection between violent acts directed at women and interstate commerce with statistical studies and testimony from the legislative hearings. \textit{See infra} notes 254-386 and accompanying text. The United States Court of Appeals for the Fourth Circuit, in \textit{Brzonkala v. Virginia Polytechnic Institute & State University}, analyzed Title III in light of the Commerce Clause and found that the connection between interstate commerce and violence against women was too attenuated. \textit{See Brzonkala v. Virginia Polytechnic Institute & State University,} 169 F.3d 820 (4th Cir. 1999), \textit{cert. granted} U.S. v. Morrison, 529 U.S. 598 (2000). For a discussion of the problems associated with the enactment of Title III pursuant to the Commerce Clause, see \textit{infra} note 28.

\textsuperscript{24}. \textit{U.S. Const.} amend. XIV, § 1. The Fourteenth Amendment states, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." \textit{Id.} It also states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." \textit{Id.} at § 5. Congress declared its authority to enact Title III of the VAWA I pursuant to the Fourteenth Amendment. \textit{See S. Rep. No.} 103-138, at 55 (1993). Congress indicated that the purpose of Title III of the VAWA I was to redress gender-motivated violence committed by individuals, not the state. \textit{See id.} (noting that Congress is authorized to enact "appropriate legislation to enforce the [Fourteenth] Amendment's guarantee of equal rights" and declaring Title III as "appropriate legislation"). Such assertion of authority is highly problematic, however, statutes enacted under the Fourteenth Amendment have generally been limited to proscribing state action. \textit{See United States v. Guest,} 383 U.S. 745, 755 (1966) ("It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority."); \textit{Civil Rights Cases,} 109 U.S. 3, 11 (1883) (determining section one of the Fourteenth Amendment to be applicable only to actions involving the states, and noting that the Fourteenth Amendment only authorizes Congress to provide redress against equal protection violation of state laws); \textit{John E. Nowak & Ronald D. Rotunda, Constitutional Law 595} (5th ed. 1995) [hereinafter \textit{Nowak & Rotunda}] ("The equal protection clause of the Fourteenth Amendment by its own terms applies only to state and local governments."); \textit{Mabbun, infra} note 28, at 240-43 (arguing that because Title III does not address violations committed by the states or remedy conduct of an individual it "cannot be deemed appropriate legislation" under the Fourteenth Amendment).

Five years after Lopez, the Supreme Court in United States v. Morrison declared that Congress had exceeded its authority under the Commerce Clause and the Fourteenth Amendment when it enacted Title III of the VAWA. This Comment will explore the continued need for this type of legislation and the available alternatives in light of the Supreme Court's decision to uphold the Fourth Circuit Court decision in United States v. Morrison.

26. 120 S. Ct. 1740 (2000).
27. Id. at 1759.
28. This Comment will not enter the debate as to the wisdom of the Supreme Court's decision holding Title III unconstitutional, but rather will focus on the ramifications of the decision on the fight against domestic violence. Numerous articles have been written concerning the issue of Congress' constitutional powers to enact Title III. For an article detailing why the Supreme Court should have found Title III constitutional, see Senator Joseph R. Biden, The Civil Rights Remedy of the Violence Against Women Act: A Defense, 37 HARV. J. ON LEGIS. 1 (2000). Prior to the decision in Morrison, the majority of articles that addressed the constitutionality of Title III argued that it was a constitutional enactment under Congress' Commerce Clause powers. See Jennifer Lynn Crawford, Note, America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act, 47 CATH. U. L. REV. 189 (1997) (arguing the Title III of the VAWA I satisfies the standards set forth in Lopez and compares Title III to other statutes upheld under Commerce Clause); Christine Conover, Student Recent Development, The Violence Against Women Act: Stabilizing Commerce Through a Civil Rights Remedy, 1 J. GENDER RACE & JUST. 269 (1997) (analogizing the enactment of Title III to the enactment of the Civil Rights Act of 1964 and arguing that it supplements available state action); Rebecca E. Hatch, Note, The Violence Against Women Act: Surviving the Substantial Effects of United States v. Lopez, 31 SUFFOLK U. L. REV. 423 (1997) (calling for the Supreme Court to uphold Title III due to the legislative findings connecting gender-motivated violence to interstate commerce and the fact that the provision compliments existing state laws); Judi L. Lemos, Comment, The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce, 21 SEATTLE U. L. REV. 1251 (1998) (predicting that the Supreme Court would deny certiorari to Brzonkala and nevertheless the congressional findings in enacting the VAWA I ensured its constitutionality); Peter J. Liuzzo, Comment, Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing That Violence Targeted at Women Affects Interstate Commerce, 63 BROOKL. L. REV. 367 (1997) (arguing against the district court's opinion finding Title III unconstitutional in Brzonkala and calling for deference to the legislative findings); Kelli C. McTaggart, Note, The Violence Against Women Act: Recognizing A Federal Right to Be Free From Gender-Motivated Violence, 86 GEO. L.J. 1123 (1998) (arguing that Title III should be upheld due to the extensive congressional findings linking it to interstate commerce and that federalism should not be a concern since the Act supplements state laws); Lori L. Schick, Comment, Breaking the "Rule of Thumb" and Opening the Curtains—Can the Violence Against Women Act Survive Constitutional Scrutiny?, 28 U. TOLEDO L. REV. 887 (1997) (explaining that the district court's opinion in Brzonkala adopted a "far too restrictive view of Lopez" and the congressional findings show a sufficient link to interstate commerce); Megan Weinstein, Comment, The Violence Against Women Act After United States v. Lopez: Defending the Act From Constitutional Challenge, 12 BERKELEY WOMEN'S L.J. 119 (1997) (discussing the need for Title III and distinguishing the Lopez Commerce Clause analysis from an analysis of Title III); Carolyn Peri Weiss, Recent Development: Title III of The Violence Against Women Act: Constitutionally Safe and Sound, 75 WASH. U. L.Q. 723 (1997) (criticizing the district court's opinion in Brzonkala and declaring Title III as appropriate and necessary legislation); Melanie L. Winskie, Note, Can Federalism Save the Violence Against Women Act?, 31 GA. L. REV. 985 (1997) (stating that Title III of the VAWA I is only "filling in the gap left by the states" and is a valid exercise of Congress' Commerce Clause powers). Fewer articles have addressed whether Title III should be found as a
of Appeals' ruling, in Brzonkala v. Virginia Polytechnic Institute & State University, that Title III is unconstitutional under the Commerce Clause and the Fourteenth Amendment. In discussing the constitutional enactment under Congress' Fourteenth Amendment powers. See Danielle M. Houck, Note, VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University, 31 U.C. Davis L. Rev. 625 (1998) (arguing that in light of Lopez, Title III is an unconstitutional enactment under the Commerce Clause, but constitutional under an "expansive" reading of section 5 of the Fourteenth Amendment); Melinda M. Renshaw, Comment, Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act, 47 Emory L.J. 819, 857 (1998) (noting that "[t]he current inability of states to prevent and remedy gender-motivated crimes constitutes an affirmative action that violated the Equal Protection Clause of the Fourteenth Amendment"). For arguments that support the Supreme Court's rationale, in U.S. v. Morrison, that Title III is unconstitutional under the Commerce Clause, see Mary C. Carty, Comment, Doe v. Doe and the Violence Against Women Act: A Post-Lopez, Commerce Clause Analysis, 71 St. John's L. Rev. 465 (1997) (arguing that the Commerce Clause does not extend to Title III, noting federalism concerns such as interference with state functions and a burden on federal courts); Houck, supra (arguing that in light of Lopez, Title III was an unconstitutional enactment under the Commerce Clause); Yvette J. Mabbun, Comment, Title III of the Violence Against Women Act: The Answer To Domestic Violence or a Constitutional Time-Bomb?, 29 St. Mary's L.J. 207 (1997) (discussing the possibility of unconstitutionality and arguing that a change in the language might save Title III); Stacey L. McKinley, Note, The Violence Against Women Act After United States v. Lopez: Will Domestic Violence Jurisdiction Be Retumed To The States?, 44 Clev. St. L. Rev. 345 (1996) (predicting that Title III will be invalidated under a Commerce Clause analysis and noting that the states should implement this type of law); Charles Mincavage, Comment, Title III of the Violence Against Women Act: Can It Survive a Commerce Clause Challenge In the Wake of United States v. Lopez, 102 Dick. L. Rev. 441 (1998) (predicting that the Supreme Court will decide the issue in the near future, breaking down how each Justice might vote and concluding that the Court will find it unconstitutional); Jennifer C. Philpot, Note, Violence Against Women and the Commerce Clause: Can This Marriage Survive?, 85 Ky. L.J. 767 (1996-1997) (analogizing Title III to the statute in Lopez and arguing that more than congressional findings are needed to save Title III, since its connection to interstate commerce is so attenuated); Renshaw, supra, at 842 (same). 29. 169 F.3d 820 (4th Cir. 1999), cert. granted U.S. v. Morrison, 529 U.S. 598 (2000). 30. See supra note 28 (listing sources detailing the analysis of Title III in light of Lopez, and how it is beyond Congress' Commerce Clause powers). In 1991, Chief Justice Rehnquist expressed concern over the proposal of the VAWA I and its effect on federal courts by appointing an Ad Hoc Committee on Gender-Based Violence to coordinate the Judicial Conference Response to the Act and to ascertain the impact on the federal courts. Bassler, infra note 134, at 1148. The Committee supported the policies underlying the VAWA I, but opposed certain provisions, including Title III, because of the effect it would have on federal court dockets and the concern that the federal/state balance would be disrupted. See id. (arguing that Title III federalizes an area of the law that is better handled by the states). Congress spent four years conducting hearings before enacting Title III. Id. Before the United States Supreme Court's decision in U.S. v. Lopez, it would have seemed that legislative findings connecting an action to interstate commerce would be enough. The importance of legislative findings was called into question by the Lopez decision. See Michael H. Koby, The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique, 36 Harv. J. On Legis. 369 (1999) (discussing studies about the Supreme Court's reliance on findings and concluding that they have been cited to very little since the late 1980s). 31. See supra note 24. In Brzonkala, the Fourth Circuit Court of Appeals agreed with the district court that legislation enacted pursuant to Congress' Fourteenth Amendment powers could not be directed at private actors. See Brzonkala, 169 F.3d at 889.
Supreme Court's decision, Part II will explore the reasoning behind the enactment of Title III and the need for legislation addressing violence against women.\(^{32}\) Part II will also briefly discuss the Court's rationale for finding Title III unconstitutional.\(^{33}\) Part III will argue that despite the Court's decision, Congress could protect the civil rights of domestic violence victims through the reenactment of Title III pursuant to its Thirteenth Amendment powers.\(^{34}\) Part III will also explore the alternatives that states have begun to consider in order to effectively address the problem of domestic violence.\(^{35}\) Further, Part III will discuss the need for the federal government to continue working with the states and the need for all states to aggressively deal with domestic violence issues through other provisions of the VAWA I, state constitutions, and hate crime bills that protect gender.\(^{36}\) Part III will conclude by addressing the future of the right to be free from gender-motivated violence as a civil right.\(^{37}\) Part IV will consider the impact of the Supreme Court's decision on other federal legislation and, correspondingly, the subsequent efforts of the states to deal with violence against women.\(^{38}\) Part V will conclude that the loss of Title III is a step backward in the fight against domestic violence, but that its enactment began a national movement against domestic violence that must continue.\(^{39}\)

II. BACKGROUND

A. The Enactment of Title III of the VAWA I

Violence against women affects women of all racial, ethnic, and social classes,\(^{40}\) and has become a problem of epidemic proportions facing this country.\(^{41}\) Carrie Culberson's story is only one example of the seriousness of this issue. The national statistics concerning violence against women are startling.\(^{42}\) For example, violence is the leading

---

32. See infra notes 40-194 and accompanying text.
33. See infra notes 195-288 and accompanying text.
34. See infra notes 289-358 and accompanying text.
35. See infra notes 359-438 and accompanying text.
36. See infra notes 439-448 and accompanying text.
37. See infra notes 449-453 and accompanying text.
38. See infra notes 454-484 and accompanying text.
39. See infra note 485 and accompanying text.
40. Acts of violence against women include, but are not limited to, rape, sexual assault, battery, assault, armed robbery, and murder. This Comment will focus more specifically on domestic violence against women. For current statistics on domestic violence and its victims, see VIOLENCE BY INTIMATES, supra note 21 (noting that women of all races were equally vulnerable to attacks by intimates).
41. See infra notes 43-46 and accompanying text.
42. See supra note 21 and accompanying text.
cause of injuries to women ages fifteen to forty-four, and affects more women than automobile accidents, muggings, and cancer deaths combined. As many as four million women a year are the victims of domestic violence, and three out of four women will be the victims of violent crime sometime during their lives. In response to the problems of domestic violence and other violent crimes against women, coupled with the failure of the states to adequately deal with these problems, Congress enacted the VAWA I.

The VAWA I, enacted in 1994, pursuant to Congress' Commerce Clause and Fourteenth Amendment powers, signified an unprecedented and comprehensive attack on the problem of violence against women. The act represented this nation's first attempt to address gender-motivated violence, a problem facing society that has been traditionally ignored or otherwise regarded as a private issue. The VAWA I was over four years in the making, a result of extensive hear-

44. See id. at 36, n.3 (citing testimony of Dr. Angela Browne before the Committee on the Judiciary, U.S. Senate, Senate Hearing 101-939, part 2, 101st Cong., 2d sess., Dec. 11, 1990, at 116-117).
46. See S. REP. No. 102-197, at 43 (1991) (stating that "[s]tate remedies have proven insufficient to protect women against some of the most persistent and serious of crimes"). For a discussion of the inadequacy of state criminal law, see infra notes 96-183 and accompanying text.
47. The first version of the VAWA I was introduced on June 19, 1990. See Victoria P. Nourse, Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy, 11 WIS. WOMEN'S L.J. 1, 7-13 (1996) (recounting the first drafts and hearings of the VAWA I).
49. This is especially true when referring to domestic violence. See Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 OHIO ST. L.J. 1, 3 (arguing that the VAWA I should be examined in the context of "the current controversy over gender-specific concepts of privacy," and that contrary to traditional notions, domestic violence is not just a private, individual harm); Epstein, supra note 15, at 10 (quoting a North Carolina Supreme Court Judge from 1874: "If no permanent injury has been inflicted . . . it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"); Karla M. Digirolamo, Myths and Misconceptions About Domestic Violence, 16 PACE L. REV. 41, 42 (1995) (addressing the issue of privacy in the context of domestic violence); Andrea Brenneke, Civil Rights For Battered Women: Axiomatic & Ignored, 11 LAW & INEQ. 1, 22-27 (1992) (discussing the historical legal discrimination affecting women and its survival due partly to the failure of officials to see beyond the common law private treatment of domestic violence and familial relationships).
ings, debates, testimony, and legislative findings documenting the troubling effects that violence against women has on both victims and society as a whole. In response to its findings, Congress created the numerous provisions of the VAWA I, focusing on prevention of gender-motivated violence through education, deterrence, and restitution for victims.

Congress structured the VAWA I to "remedy not only the violent effects of the problem, but the subtle prejudices that lurk behind it," acknowledging that "none of the proposals of ... [the VAWA I], alone or together, are likely to end violence against women." The VAWA I contained numerous provisions scattered throughout the United States Code, including provisions which provided federal funding for states, education-prevention programs, new federal domestic violence crimes, and full faith and credit for protection orders.

---


52. See 42 U.S.C. §§ 13991-14002 (1994 & Supp. II 1996). Otherwise known as Subtitle D-Equal Justice For Women In Courts, this provision authorizes funding to counter gender biases in state and federal courts through training. The "VAWA provided federal grant money for community efforts to fight violence against women." Cain, supra note 48, at 368. The funding under the VAWA I was provided to communities for many uses, including domestic violence shelters, 42 U.S.C. § 10402(a)(1) (1996), state databases to track reporting of rape and domestic violence, id. at § 13962 (1995), and reports on battered women's syndrome, id. at § 14013 (1995).


56. Id.


59. See id. As for the criminal provisions, thus far all of the courts to address the criminal provisions have found them to be constitutional enactments under Congress' Commerce Clause powers. See U.S. v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998); U.S. v. Bailey, 112 F.3d 758 (4th Cir. 1997); U.S. v. Wright, 128 F.3d 1274 (8th Cir. 1997); U.S. v. Gluzman, 953 F. Supp. 84 (S.D. N.Y. 1997). For an in-depth analysis of the criminal provisions of the Act, see Michelle W. Easterling, Student Work, For Better or Worse: The Federalization of Domestic Violence, 98 W. VA. L. REV. 933 (1996) (discussing the background of the criminal provisions and the pros and cons of the enactment).
though the provisions of the VAWA I ran the gamut of legal areas and issues, only Title III, the provision many considered to be the most significant, faced serious constitutional challenges.

From the beginning, Congress recognized the potential challenges Title III might face. In fact, Title III represented the most controversial, yet most “closely considered,” provision of the VAWA I. Title III established a federal civil right cause of action for victims of gender-motivated violent crimes, and provided victims with the opportunity to bring a civil claim in federal court against their attackers in order to receive injunctive or monetary relief. Following its enactment, the constitutionality of Title III became the subject of great debate. Yet, until 1996, when the United States District Court for the Western District of Virginia decided *Brzonkala v. Virginia Polytechnic Institute & State University*, each of the federal district courts that had considered the constitutionality of Title III had upheld the provision as constitutional. In *Brzonkala*, the district court held that Title

60. *See* 18 U.S.C. § 2261 (2000). Although numerous other provisions are included in the Act, this Comment will focus on 42 U.S.C. § 13981 (1996), Title III (The Civil Rights Remedy). For a discussion of other provisions of the Act, see *supra* notes 52-54.

61. *See* *Weinstein, supra* note 28, at 120 (declaring Title III as an “imperfect solution to the problem against women,” but that it needs to be maintained to protect women from violence); *McTaggart, supra* note 28, at 1150 (arguing that Title III is “important and necessary to secure federal protection of women’s civil rights); *Crawford, supra* note 28, at 235 (recognizing that Title III would help in achieving the goal of categorically stopping violence against women); *Winskie, supra* note 28, at 1029 (arguing that Title III is needed to “fill the gap left by the states’ failure to enforce” the criminal laws on behalf of female victims of violence); *Cain, supra* note 48, at 405 (noting that regardless of constitutionality, the need for Title III is clear).


64. *See* 42 U.S.C. § 13981 (1996). The short title is “Civil Rights Remedies for Gender-Motivated Violence Act.” *See* *Cain, supra* note 48, at 367 (noting that Title III is the “most controversial aspect of VAWA”).

65. *Id.*


69. Some cases decided before and after the district court decided *Brzonkala*, upheld the constitutionality of Title III of the VAWA I. *See supra* note 62.
III was an unconstitutional exercise of congressional power under the Commerce Clause and the Fourteenth Amendment.\textsuperscript{70} The \textit{Brzonkala} decision became a great concern for supporters of the VAWA I when in May of 1999, the Fourth Circuit Court of Appeals, the first federal appellate court to address the issue, agreed with the district court in a rehearing en banc.\textsuperscript{71}

After the Fourth Circuit Court of Appeals' decision in \textit{Brzonkala}, and the confusion in the federal courts that followed,\textsuperscript{72} the Supreme Court granted certiorari to \textit{Brzonkala} under \textit{United States v. Morrison},\textsuperscript{73} in order to settle the debate over Title III's constitutionality. In May of 2000, the Court declared that Title III was unconstitutional in light of its landmark decision in \textit{Lopez},\textsuperscript{74} concerning the Commerce Clause, and the settled jurisprudence of the Fourteenth Amendment.\textsuperscript{75} As a result, Title III is no longer an available avenue of relief for victims of domestic violence. Since Title III represented much needed legislation, alternatives should now be seriously considered.\textsuperscript{76}

To fully explore the alternatives to Title III, it is important to under-
stand the concerns and factors that led to the enactment of the legislation.

Throughout this country’s history, Congress has enacted legislation in response to social problems. For example, in the 1960s, Congress passed one of the most important pieces of legislation in this country’s history, the Civil Rights Act of 1964. Although it was enacted primarily in response to racial discrimination, the Civil Rights Act of 1964, also known as Title VII, has been recognized as the first significant piece of federal legislation to protect women’s civil rights. Thirty years later, with the enactment of Title III, Congress, for the first time, declared that violence against women constituted gender discrimination. Congress discussed the need for a civil rights remedy based on gender, focusing specifically on the need for both society and the criminal justice system to recognize that “attacks motivated by gender bias . . . [should] be considered as serious as crimes motivated by religious, racial, or political bias.” While acknowledging that violent crime is a threat to our nation, afflicting men, women, and children, Congress specifically noted that “there are some crimes . . . that disproportionately burden women.”

78. See NOWAK & ROTUNDA, supra note 24, at 970.
79. See id. at § 14.6.
80. See McTaggart, supra note 28, at 1123. Many scholars have noted that gender was included in Title VII to ensure its failure. See WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKLEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 15-16 (2d ed. 1995) (stating that the purpose of Judge Howard Worth Smith’s amendment that introduced the word “sex” into the list of impermissible bases for employment decisions was to make the whole bill “so controversial that it would fail”); MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 21 (1st ed. 1994) (noting that gender was introduced into Title VII “jokingly by a southern ‘gentleman’ to kill the whole of Title VII by making its anti-discrimination provision ridiculous”).
81. See 18 U.S.C. § 13981 (1996). In enacting Title III, Congress acknowledged the connection between Title VII and Title III of the VAWA I. See S. REP. No. 103-138, at 48 (1993) (stating that “gender discrimination may take the form not only of a lost pay raise or promotion, but also a violent, criminal attack”). For an account of the enactment of Title III, see generally Nourse supra, note 47, at 5 (discussing the various versions of the provision that were considered, the scope, and the power Congress used to enact Title III). See S. REP. No. 103-138, at 48 (1993) (stating that “Congress has the power to recognize that violence motivated by gender bias is not merely an individual crime or a personal injury, but it is a form of discrimination”); “Women and Violence,” Hearings before the Committee on the Judiciary, U.S. Senate, 101st Cong., 2d Sess. (June 20, 1990) (written testimony of Helen Neuborne). See Brenneke, supra note 49, at 1102 (discussing the enactment of Title III and the innovation it represented); Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2197 (1996) (stating that Title III “broke new ground”).
83. Id. at 37.
In further support for Title III, Congress noted that American society has continually failed to recognize the disproportionate burden of violent crime on women, stating that "[v]iolence against women reflects as much a failure of our Nation's collective willingness to confront the problem as it does the failure of our Nation's laws and regulations."\(^84\) In addition, Congress found an inherent bias within both the states' legal systems and the law enforcement bodies that handle cases of violent acts against women.\(^85\) Congress concluded that federal legislation was necessary due to the absence of adequate federal legislation\(^86\) and the states' failure to sufficiently deal with the pervasive problem.\(^87\) In response to these findings, Congress structured Title III to specifically address those problem areas.\(^88\)

1. Inadequacy of the State Criminal Justice System

Domestic violence, as well as other violent acts against women, has traditionally been handled by the state criminal justice system.\(^89\) For many years, women have sought justice through the state criminal system for violent crimes\(^90\) such as domestic violence,\(^91\) battery,\(^92\) assault,\(^93\) kidnapping,\(^94\) or rape.\(^95\) Although many have found

---

84. *Id.*
85. See *infra* notes 89-175 and accompanying text.
86. See also *infra* notes 166-169 and accompanying text (discussing the federal statutes in existence at the time of Title III's enactment); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. Pa. L. Rev. 1097, 1111-13 (1998) (discussing the legislative findings by Congress specifically); Cain, *supra* note 48, at 383-84 (arguing that the existing federal statutes are inadequate, specifically noting that "none of these statutes allowed redress for violence committed in the home").
87. See *infra* notes 176-196 and accompanying text.
88. See Biden, *supra* note 28, at 2-7 (discussing the national scope of violence against women and the role states have played in perpetuating the problem).
89. See *infra* notes 90-96.
90. See Brenneke, *supra* note 49 at 29-30 (exploring state criminal law in the context of domestic violence); Hart, *infra* note 116, at 211 (elaborating on the role of the criminal justice system in the context of violence against women).
92. For an example of a state statute for battery see Illinois Compiled Statutes 5/12-3 (1993) (formerly Ill. Rev. Stat. ch. 38, para. 12-3 (1991)). Illinois has also codified aggravated battery, which is considered a felony. Aggravated battery requires proof of a battery and "certain aggravating circumstances, each of which requires an additional social evil and merits a more serious sanction." Decker, *supra* note 91, at §9.20.
vindication through the system, state laws still suffer from major flaws that prevent effective and adequate remedies for victims of gender-motivated violence. The VAWA I was "intended to respond both to the underlying attitude that this violence [was] somewhat less serious than other crime and to the resulting failure of our criminal justice system to address such violence."\(^{97}\)

One of the motivating factors behind Title III was the conclusion that the states were not adequately dealing with the problem of violence against women.\(^{98}\) Congress specifically cited to the lack of state laws addressing the problem,\(^{99}\) inadequate existing remedies,\(^{100}\) and uneven enforcement of existing laws.\(^{101}\) Congress found support in over seventeen studies conducted by the states, which discovered that crimes against women are treated less seriously than other violent crimes.\(^{102}\) Accordingly, Congress concluded that "[s]tate ... criminal laws do not adequately protect against the bias element of gender-motivated crimes, which separates these crimes from acts of random

aggravated assault, which covers assaults that are committed under circumstances of aggravation. See Decker, supra note 91, at §9.09.

94. For example, kidnapping in Illinois requires unlawful seizure and secret confinement. See Decker, supra note 91, at §7.03. Kidnapping has been codified in Illinois as 720 Illinois Compiled Statutes 5/10-1 (1993) (formerly ILL. REV. STAT. ch. 38, para. 10-1 (1991)).


96. See Cain, supra note 48, at 377-80 (discussing the inadequacy of the state response to domestic violence, specifically, the misperception of victims, the problems with enforcement, and the unequal sentencing guidelines). Many commentators have mentioned the historical doctrines that might be seen as the foundation for the lack of seriousness accorded to violence against women in the states. See infra notes 293-299. See also Epstein, supra note 15, at 9-10 (discussing the early American court system and its response to incidents of domestic violence). The English common law treatment of women will be discussed further infra Part III.A.2. concerning the Thirteenth Amendment.


98. See infra notes 99-106 and accompanying text.


100. Congress specifically stated that “[s]tate and federal criminal laws do not adequately protect against the bias element of gender-motivated crimes . . . .” S. Rep. No. 102-197, at 27 (1991). For an analysis of what states are doing to protect against the bias of gender-motivated crimes such as state hate crime bills and equal rights amendments to state constitutions, see infra Part III.B.3.

101. See Hearn, supra note 86, at 1111-12 (discussing the congressional findings specifically); Mabbin, supra note 28, at 216 (noting that gender bias in the criminal justice system has resulted in underenforcement of the existing laws); Brenneke, supra note 49, at 29-31 (discussing gender bias in the state legal system and its effects); Cain, supra note 48 (same).

violence, nor do those laws adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests.\textsuperscript{103} Congress found that as a result of the inadequacy of the state criminal justice systems, women who were victims of violence were less likely to come forward and seek help.\textsuperscript{104}

To understand how state criminal laws fail, it is necessary to recognize that the purpose of Title III was to go beyond state criminal laws by not only bringing attention to the plight of victims of gender-motivated violence, but also to redress "an assault on a commonly shared ideal of equality."\textsuperscript{105} In contrast to Title III, state criminal laws focus on the individual state’s interest in protecting its citizens.\textsuperscript{106} State laws may remedy singular situations of violence, but often fail to address a victim’s interest in equal treatment or to recognize the "broader societal implications"\textsuperscript{107} of violence against women. Accordingly, Title III, along with the other provisions of the VAWA I, supplied what "[s]tate laws [did] not provide, and by their nature [could not] provide, a national antidiscrimination standard."\textsuperscript{108}

The main criticism of state criminal laws involved the enforcement of the laws, not the content of the laws themselves. Specifically, in the incidents of violence against women, "[a]t every step of the way, the criminal justice system poses significant hurdles for victims."\textsuperscript{109} The gender biases within state law enforcement and the state judicial sys-

\textsuperscript{103} S. Rep. No. 102-197, at 27 (1991). The question here might be what exactly are the victim’s “interests” to be vindicated? The Culberson case is an example of a situation where none of the victim’s interests were vindicated, at least not while she was alive. Many times the victim’s interest will be in escaping the situation and making sure that her family is provided for. Many women who are victims of domestic violence are financially dependent on their abusers and a successful criminal case would only place her supporter (and abuser) in a position where he would no longer provide for her or her family. Women are often torn between the desire to escape the abuse and a feeling of obligation to keep the family together in the hope that the abuse will stop. See Linda Kelly, Domestic Violence Survivors: Surviving the Beatings of 1996, 11 Geo. Immigr. L.J. 303, 307-09 (1997). Many women are so emotionally and economically dependent on their spouses that they can see no alternative to staying in the marriage. See id.

\textsuperscript{104} The failure of the state criminal justice system to effectively deal with violence against women, specifically domestic violence, essentially perpetuates the victimization of women. It is only logical that a woman, who has been abused in her home by an intimate and is hesitant to seek help, will be discouraged by an unresponsive criminal justice system. Statistics show that domestic violence victims are likely to be abused repeatedly and the fear of retaliation, coupled with the view that the system will not help her, only encourages her to remain in the situation. See Hanna, infra note 113, at 1558-59; Mahoney, infra note 113, at 61-68.


\textsuperscript{107} Brenneke, supra note 49, at 36. Violence against women committed by men, especially domestic violence, is seen as a way of controlling and oppressing all women. See generally Epstein, supra note 15 (discussing failures and reforms in the judicial system).


\textsuperscript{109} Hearn, supra note 86, at 1112 (citing S. Rep. No. 103-138, at 42 (1993)).
tems\textsuperscript{110} prevent the existing laws from being adequately and evenly enforced, especially those concerning domestic violence.\textsuperscript{111} Congress specifically found that in many incidents of domestic violence “[p]olice may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters . . . .”\textsuperscript{112} This response to domestic violence cases commonly stems from the misperception of the victim's situation and the belief that the woman should simply leave her abuser.\textsuperscript{113} In the rare case where a domestic violence victim's attacker is brought to justice, it is important to recognize that the “criminal system’s remedies and the battered women's needs may not correspond.”\textsuperscript{114} Title III was enacted to address this disparity between injury and recovery.

\begin{footnotes}
\item[110] See id. See infra notes 159-169 and accompanying text.
\item[111] See supra notes 40-88 and accompanying text.
\item[113] For people who have not experienced violence at the hand of an intimate relation, including many of those who handle domestic violence cases, it is difficult to understand why anyone would remain in a violent situation or relationship. Although many in society have begun to empathize with domestic violence victims, few can understand the reasons why they stay. Many victims of domestic violence believe that the violence will stop if she stays and tries to “work it out.” Other domestic violence victims might feel there is no place to go or are so financially dependent on their abuser that there seems to be no way to leave. For example, Sarah M. Buel, an attorney and activist who was once an abused wife, has created a list of fifty reasons why abused women feel they cannot leave. Sarah M. Buel, Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay, 28 Colo. Law. 19, 19-26 (1999). These reasons include believing the threats of the batterer, family pressure to stay together, fear of retaliation, low self esteem and fear of losing the children. Id. See Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, WM. & MARY L. REV. 1505, 1558-59 (1998) (stating that “the most often asked question in these cases is why the woman does not leave,” and discussing the different factors that make women stay); Martha Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 61-68 (1991) (discussing the fact that women may try to leave an abuser many times before she is actually able to free herself from a violent situation).
\item[114] Brenneke, supra note 49, at 32. In the Cook County State's Attorney's Office-Domestic Violence Division, it is clear that most domestic violence defendants plead guilty only to face the most common punishment of counseling and probation or conditional discharge, rather than imprisonment. (documents on file with author). Whatever the punishment may be, the victim may still fear retaliation from either the defendant or his friends or family, many times a protection order only applies against the defendant. See Jennifer R. Adler, Note, Strengthening Victims' Rights In Domestic Violence Cases: An Argument For 30-Day Mandatory Restraining Orders in Massachusetts, 8 B.U. Pub. Int. L.J. 303, 305 (1999) (arguing that the states should implement mandatory restraining orders and enforce them if they want to sufficiently protect victims of domestic violence). Title III provides domestic violence victims with the chance to recover damages incurred as a result of the abuse, which they cannot recover under state criminal laws.
\end{footnotes}
The breakdown of the state criminal justice system, as it pertains to domestic violence, begins when the police do not enforce existing laws. The police represent a state's first line of attack on domestic violence, the power to make arrests. In fact, Congress cited to many studies showing that, despite evidence that domestic violence was widespread, the police officers were not doing their job of protecting women.

For instance, one study found that in 1986, police officers for the District of Columbia responded to over ninety-thousand domestic violence calls, yet arrested only forty people. A similarly drastic statistic may not be apparent in every state, however, it illustrates a serious problem in the criminal justice system and a lack of support for domestic violence victims after they have called for help.

Due to privacy interests, many police officers today still view arrest as a last resort in domestic violence situations. The "private do-

115. See infra notes 116-118 and accompanying text. See Adler, supra note 114, at 311 (discussing the fact that "[p]rior to the 1980s the preferred law enforcement technique in responding to domestic abuse call was mediation").
116. See Barbara J. Hart, Arrest: What's the Big Deal, 3 WM & MARY J. WOMEN & L. 207, 211 (1997) (noting that "police officers are the gatekeeper of the criminal legal system"). Arrest is the "first link in a vital chain of institutional interventions that saves . . . lives of battered women and children . . . . " Id.
117. See VIOLENCE BY INTIMATES, supra note 21, at v.
118. See S. REP. No. 103-138, at 41 (1993). Consider the case of Carrie Culberson, who had called the police at least four times to file reports of the domestic abuse she suffered at the hands of her boyfriend, Doan. See Culberson, 65 F. Supp.2d at 703. The police never filed charges against Doan, even though in one instance Carrie required a hospital visit. Id. Carrie disappeared one month after her last call to the police; Doan was later convicted of her murder. Id. at 704. The failure of the police to deal with domestic abuse the same way as other violent crimes, has been acknowledged by members of police departments themselves as recently as 1997. See Douglas R. Marvin, The Dynamics of Domestic Abuse, Law Enforcement Bulletin (July 1997), at http://www.fbi.gov/library/leb/1997/july73.htm (last visited Mar. 21, 2001). Marvin is a police lieutenant acknowledging that domestic violence is treated differently than other violent crimes and calling for more education of police officers so that they are better suited to deal with domestic violence situations. Id.
120. See Cain, supra note 48, at 377 (noting that "the legal system has contributed to the misunderstanding about domestic violence by refusing to offer substantive civil and criminal remedies to victims of domestic violence").
121. Congress recognized that the home has always been considered a private domain, resulting in a habit of violence in the home that is harder to break than anywhere else. S. REP. No. 103-138, at 41 (1993). "This rule, originally intended to protect women from excessive violence, in fact led to a reluctance on the part of the government to interfere to protect women even where serious violence occurred." Id. at 41. "Prior to the 1970s, the typical police response to domestic violence was to mediate the situation. Police advised the husband or boyfriend to 'take a walk around the block' rather than arrest him." Hanna, supra note 113, at n.48. See Adler, supra note 114, at n.22 (citing to President Clinton's 1996 address where he acknowledged that
main"122 of the marital relationship, along with the historical view of domestic violence as a private issue,123 has fostered and encouraged the police to attempt to help the parties rather than arrest the abusers.124 It is remarkable that “[e]ven in situations where a woman is actually bleeding from wounds, arrests occur in less than 15% of these cases.”125 In an attempt to deal with the privacy issue, most states have begun to change their discretionary arrest policies.126

Since the enactment of Title III, all fifty states have enacted legislation allowing “police officers to make warrantless arrests upon probable cause that someone committed a domestic violence misdemeanor or violated a restraining order.”127 In fact, as of 1996, most states had gone further in the fight against domestic violence by implementing mandatory or preferred arrest policies for domestic violence situations.128

Mandatory arrest policies require police officers to arrest a suspect when they have probable cause to believe that a domestic violence assault has occurred.129 Although these policies may increase the number of domestic violence arrests, they do not necessarily increase

“domestic violence is an issue that ‘has been swept under the rug for quite a long time now.’”); Machaela M. Hoctor, Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California, 85 CAL. L. REV. 643, 649 (1997) (“Police treatment of domestic abuse calls has traditionally consisted of not responding at all, purposely delaying response, . . . or, when officers did respond, attempting to talk to or separate the parties so that they could cool off.”); Marvin, supra note 118, at 1 (“[U]ntil fairly recently, police officers rarely ventured into the private domain of the marital relationship.”).

122. Marvin, supra note 118, at 1.

123. Adler, supra note 114, at n.22; Hoctor, supra note 121, at 649-50; Marvin, supra note 118, at 1.

124. Even more troubling is the failure of police to make an arrest when the victim has a restraining order on the attacker. Restraining orders, which are available from a civil court if police have not pursued criminal charges, are the most common request of domestic violence victims. Many studies have questioned the effectiveness of restraining orders, noting that many abusers who are subject to an order continue to abuse the victim. For a discussion of the inadequacy of restraining orders, see Cain, supra note 48, at 379 (explaining the reasons why protective orders have failed).


126. See infra notes 133, 137 and accompanying text.

127. Hanna, supra note 113, at 1518. No longer must the police officer witness the incident, or condition an arrest of an abuser on the statement of a victim. See infra notes 357-370 and accompanying text. These laws give the police much more power in dealing with domestic violence situations and correspondingly should result in more arrests since the arrest is not dependent on the victim.


129. SHERMAN, supra note 128, at 111.
the response of the police. For instance, in many states with mandatory arrest policies, it has been found that if the "abuser is not present when the police arrive, the police may have no duty to go after him and investigate."\(^{130}\)

The failure of police officers to make arrests or believe a victim's story perpetuates the problem of domestic violence\(^{131}\) by discouraging victims from calling the police, thereby increasing the risk of repeated abuse by the attacker.\(^{132}\) The victim takes a chance when she calls for help that she will not receive the help she needs, and, even if the police respond, they are limited in what they can do.\(^{133}\)

b. The Problem with Prosecutorial Discretion

In addition to the problem with police response, Congress found that in the unlikely event that a domestic violence incident resulted in the arrest of the abuser, the problem of underenforcement continued at the prosecutorial level.\(^{134}\) The prosecutor serves as the gatekeeper to the judicial system, since the discretion as to whether to continue

\(^{130}\) Brenneke, \textit{supra} note 49, at 34.

\(^{131}\) See \textit{supra} note 113 (discussing why a domestic violence victim might stay with her abuser); Fitzgerald, \textit{supra} note 125, at 48-49 (discussing the problem of women not reporting domestic violence because of "fear they will not be believed," or "that they will be treated harshly and disrespectfully by police, judges, or lawyers").

\(^{132}\) See Brenneke, \textit{supra} note 49, at 34 (describing the lack of arrests when a temporary restraining order is violated and the likelihood of repeated assaults as a result); David M. Fine, Note, \textit{The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence}, 84 \textit{CORNELL L. REV.} 252, 256 (1998) (citing to Bureau of Justice Statistics stating that "[v]ictims of domestic violence are three times more likely that victims of other assaults to become victims again within six months").

\(^{133}\) In mandatory arrest states, the police can arrest the alleged abuser if the officer has probable cause, regardless of whether the victim wants to proceed with the charges. See Adler, \textit{supra} note 114, at 309 (explaining historical police responses to domestic violence). Beyond making an arrest, providing the victim with the court information, and possibly testifying in court, the police have a limited role in providing a victim with relief. Some helpful policemen and women have provided victims with shelter and counseling information. At the Domestic Violence Division of the Cook County State's Attorney's Office, a police officer actually provided a victim with this little bit of advice that he thought would be helpful, which he recorded on the police report, "I recommend that you get a protective order, get an attorney and find a more personally fulfilling relationship." (on file with author).

\(^{134}\) See H.R. REP. No. 103-395, at 27 (1993). See also Brenneke, \textit{supra} note 49, at 30-32 (discussing gender bias in the legal system); Hearn, \textit{supra} note 86, at 1113 (same). For a discussion on why the civil rights remedy is not needed since the states are handling the problem of domestic violence, see William G. Bassler, \textit{The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources}, 48 \textit{RUTGERS L. REV.} 1139, 1166 (1996) ("Available evidence indicates that state domestic violence laws are not simply on the books, but are in fact being utilized . . . . Recent statistics reveal that caseloads have grown by thirty-eight percent since 1988.").
with the criminal prosecution usually lies solely in his hands. Once a victim decides that she will testify against her abuser, the prosecutor must then consider whether he wants to litigate the case. Congress found many studies showing that prosecutors were often reluctant to "pursue rape and domestic violence complaints," and in the event that the prosecutor went forward, the "battered women's experiences were trivialized as 'non-crime' by prosecutors and judges."

Prosecutors consider many factors when deciding whether to litigate a case. Congress found that there were many reasons why a domestic violence case specifically might not be prosecuted. The factors included, but were not limited to, "victim reluctance or refusal to cooperate, lack of proper police investigations, prosecutors untrained in how to proceed without the victim's testimony, and the belief that these cases were a private family matter." In the event that the victim wanted to press charges, she was still limited by the system because she could not access the courts unless the prosecutor saw the case as worthy of pursuing.

State prosecutors, in many cases, find themselves strapped for time and funding, as well as juggling many different cases. In the context of domestic violence cases, this situation created an environment in

---

135. See Hanna, supra note 113, at n.2 (arguing that prosecutors should retain the control over whether to proceed with a domestic violence case).

136. In discussing prosecutorial discretion, one must assume that the victim has agreed to testify in court because without her testimony, the case could be dropped. In interviewing domestic violence victims, the responsibility was often to determine whether the victim was willing to testify to the alleged event and if not, to let the prosecutor know so that the case could be dismissed. See Epstein, supra note 15, at 15 (discussing "auto-drop" prosecution policies based on the belief that convictions could not be attained without victim cooperation and testimony); Adler, supra note 114, at 309 (discussing the high probability that a case will be too weak to prosecute if the victim does not testify). This is true unless the state has a "no-drop" policy. See infra notes 395-429 and accompanying text.


140. Id.

141. See Brenneke, supra note 49, at 32 (discussing criminal prosecutions of domestic violence noting that "[t]he power and control of the state replaces that of the batterer in a criminal prosecution and may perpetuate battered women's experience of victimization").

142. Working in the Domestic Violence Division of the Cook County State's Attorney's Office this author noticed that all of the prosecutors single-handedly dealt with over thirty domestic violence victims every day and made less in salary than the public defenders assigned to represent the batterers. Although funding seems to be tight in most domestic violence court-
which many cases were dropped because the prosecutor had no time to investigate the charges or speak to the victim at length. In the cases where the victim wanted to go forward with the charges,\textsuperscript{143} credibility of the victim often became the primary consideration in the decision to pursue the case. As a result, prosecutors would often find themselves dealing with a victim who told a story of brutality without emotion,\textsuperscript{144} causing the prosecutor to question the credibility of the victim and her situation.\textsuperscript{145} Congress noted that when a woman reported a violent attack at the hands of a man, many times the prosecutor would view her story with suspicion and believe that she had an ulterior motive or that she might not be telling the truth.\textsuperscript{146} The prosecutor's actions of dropping a case would result in the victim feeling as though she could not be helped and, beyond telling her story, that she had no say in the outcome of the case.\textsuperscript{147}

In the event that the prosecutor decided to go forward with the prosecution, it was unlikely that the case would ever reach trial.\textsuperscript{148}

\textsuperscript{143} Historically, most states had "automatic drop" policies, mandating a prosecutor drop the case if the victim decided not to go forward. See Epstein, supra note 15, at 15 (discussing "automatic drop policies and the corresponding control they gave defendants over the criminal justice process).

\textsuperscript{144} See infra notes 346-351 and accompanying text (discussing Battered Women's Syndrome).

\textsuperscript{145} See infra notes 346-351 (noting the persistent and pervasive view that women's stories about domestic violence generally are not considered credible).

\textsuperscript{146} See S. Rep. No. 102-197, at 44 (1991) (noting the circular dilemma inherent in the suspicion that the victim's story might not be true deters many prosecutors from going forward with cases and in turn, prevents many victims from reporting abuse). Although rare, some purported victims of domestic violence have come forward, not because of the crime committed, but rather to get back at their boyfriend/husband for infidelity or for filing for divorce. This is a problem in any legal situation, but especially in domestic violence cases, when it is usually one party's word against the other's and many times there is no physical evidence of abuse.

\textsuperscript{147} This is especially true when a defendant pleads guilty. A large number of domestic violence cases never actually reach the courtroom; most defendants plead guilty and receive only a slap on the wrist. See supra note 114; infra note 159 and accompanying text (stating that strangers receive harsher penalties than abusers who are intimate with their victims).

\textsuperscript{148} Domestic violence crimes are most commonly prosecuted as misdemeanors and accordingly, most defendants plead guilty rather than spend the time and money to go to trial. See Hanna, supra note 113, at 1521 (noting that "[o]f those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony"); Guns and Domestic Violence Change to Ownership Ban: Hearings on H.R. 26 and 445 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 105th Cong. (1997), available at 1997 WL 8219577 (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence) (finding that "to the extent criminal charges result from a domestic violence incident, it is likely to be charged and prosecuted as a misdemeanor crime"). During the summer of 1999, in one Cook County domestic violence courtroom, an average of thirty-five misdemeanor cases were tried each day. Typically, the Assistant State's
Congress found that the final disposition of a domestic violence case was "often a period of probation either pre- or postconviction, contingent upon completion of a batterer treatment program." \textsuperscript{149} Accordingly, in this type of environment the victim remained powerless because "[t]he power and control of the state replace[d] that of the batterer . . . [and] perpetuate[d] battered women's experience of victimization." \textsuperscript{150}

c. Gender Bias in the Judicial System

Congress also found that a victim of domestic violence, who was willing to testify against her abuser and who found a prosecutor willing to litigate her case, faced further gender bias in the judicial system. \textsuperscript{151} Congress cited several state studies documenting the effects gender bias in the courts had on women, \textsuperscript{152} finding specifically that "cases involving domestic violence [were] regarded [by judges] as trivial or unimportant." \textsuperscript{153}

Congress looked beyond the statistics to examine the actual situations where judicial bias was obvious. \textsuperscript{154} Congress found stories of judges who stated outright that they did not believe the victim or who mocked the victim and her story. For example, former prosecutor Deborah Epstein related one of her client's stories, a victim of domestic violence who attempted to press charges against her husband. At the conclusion of the trial, the judge turned to the victim, who still suffered a blue and swollen eye and stated:

Ma'am, I credit your testimony, and I am convinced your husband assaulted you in violation of the law. As a result, I am authorized to award you a civil protection order, which could order him to stay away from you and stop hurting you. But I am not going to do that.

\begin{footnotes}
\item[149] Hanna, \textit{supra} note 113, at 1522. Requiring the abuser to attend counseling has become the preferred way of punishment in courts around the country. Even when a batterer is convicted of a serious offense "few batterers ever see the inside of a jail cell." \textit{Id.} at 1523. Unfortunately, treatment does not work for many abusers and many times it gives the victim hope that her abuser is rehabilitated and encourages her to stay. \textit{See id.} at 1536.
\item[150] Brenneke, \textit{supra} note 49, at 32.
\item[151] See H.R. \textit{Rep.} No. 103-395, at 27-28 (1993); S. \textit{Rep.} No. 102-197 (1991). This is a major concern because the judicial system hears the case, decides the merits, hands out the punishment, and is essentially the main component of the criminal justice system that can actually prevent further violence. \textit{See generally} Adler, \textit{supra} note 114; Epstein, \textit{supra} note 15. For a discussion of the movement to make judicial education and training a priority in combating domestic violence, see \textit{infra} Part III.B.1.c.
\item[154] \textit{See id.}
\end{footnotes}
today. Because you have children together, you're going to have to find some way to cooperate with each other to raise them. So, I want you to go home and try to work things out in private. And I suggest that you go see a movie I saw recently. "Mrs. Doubtfire," where Robin Williams and his wife decide to separate, but still manage to find a creative way to work together when it came to their children.155

The gender bias was just as clear in another case where "[a] state judge jailed a rape victim when the victim recanted her prior accusation because she felt pressure from her ex-boyfriend and his family who were in the courtroom."156 These examples, coupled with the gender bias studies, further supported the conclusion that gender bias exists in most state judicial systems.157

The gender bias in the judicial system became even more apparent when cases of domestic violence, cases where there was a relationship between the victim and the abuser, were compared with cases of assault or battery by a stranger.158 Assault committed by a stranger had traditionally been treated as a serious criminal offense that should yield a serious jail term159 as the normal outcome of such a case. Yet, when the assault was perpetrated on a wife or girlfriend, the punishment rarely included jail time.160 Furthermore, Congress noted that in most states domestic violence crimes, regardless of the severity, qualified as misdemeanors.161 As a result, abuse that would qualify as a felony when performed against a stranger would merely result in a

156. Hearn, supra note 86, at 1113 (emphasis in original).
157. See S. REP. No. 103-138, at 49 (1993). See Cain, supra note 48, at 380 (noting that the average prison sentence for women who kill their abusers is between twelve and sixteen years, while men who kill their significant others only serve between two to six years, "illustrating the inequity women face in the legal system"); Mabbun, supra note 28, at 221 (discussing the fact that Congress was responding to the bias in the judicial system when it enacted Title III).
159. Id. See Leonore M.J. Simon, A Therapeutic Jurisprudence Approach to the Legal Reasoning of Domestic Violence Cases, 1 PSYCHOL. PUB. POL’Y & L. 43, 74 (1995) (finding that most research indicates that “stranger offenders fare worse than nonstranger offenders in sentencing outcome”).
160. See Domestic Violence Hearing: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong. 2 (1994) (statement of Rep. Charles E. Schumer) (“According to one study, as many as 90 percent of all family violence defendants are never prosecuted, and one-third of the cases that would be considered felonies if committed by strangers are charged as misdemeanors when committed by nonstrangers.”).
161. A “misdemeanor” refers to a “class of criminal offenses consisting of those offenses less serious than felonies and which are sanctioned by less severe penalties.” BARRON’S LAW DICTIONARY 319 (3d ed. 1996). See also BLACK’S LAW DICTIONARY 1150 (4th ed.) (defining misdemeanors as “offenses lower than felonies and generally those punishable by fine or imprisonment otherwise than in penitentiary”).
misdemeanor, qualifying for less than a year in jail, when perpetrated against a wife or girlfriend.

The problem of gender bias in the judicial system was so widespread that it was recognized by integral members of state criminal justice systems. The pervasiveness of the problem was illustrated through testimony at the 1990 hearings on the VAWA. During the hearings, an Assistant District Attorney from Massachusetts testified about the difficulty of prosecuting and obtaining a conviction in a rape case where the two parties had a relationship, stating:

I can try two cases back-to-back. If it is a stranger assault, I have no trouble getting the maximum, absolutely none. I get the married couple in there and the judge wants to talk about, "Now, are you sure you don't want to go to marriage counseling . . . and just complete denial about her danger. I am terrified for her life, and the judge wants to talk about this illusion of mom, pop, bud, sis, and dog Spot . . . ."

The judiciary not only treated the victims and defendants of domestic violence cases differently, but also applied different standards to domestic violence cases.

The disparate standards applied to domestic violence cases become clear when the treatment of domestic violence victims is examined in comparison to victims of other crimes. Contrary to other cases, such as drug cases, "a perpetrator's threats to the victim [in domestic violence cases], before trial often go unpunished." This is true despite the fact that domestic violence cases often require the cooperation of the victim in order to fully prosecute the perpetrator, while

162. "Integral members" include police departments, prosecutors, court systems, and the legislatures. See supra notes 157-158 and accompanying text (discussing gender bias in the judicial system).

163. See Hanna, supra note 113, at 1508 (noting that as a "former prosecutor" she was "continually frustrated with the unwillingness of judges to sentence domestic violence offenders to incarceration, opting most often for batterer treatment as a condition of probation").


165. Courts are much more likely to accept a guilty plea and a recommended sentence that lacks jail time in a domestic violence case. See supra notes 114, 159-161.


167. See Nourse, supra note 47, at 10 n.57; Hearn, supra note 86, at 1113 (discussing discrepancies in attitudes toward domestic abuse and other crimes).

168. See supra notes 136, 143 and accompanying text.
cases involving other crimes, such as drug cases, are normally prosecuted by the state regardless of victim or witness participation.169

Additionally, sentencing in domestic violence cases is treated much differently than other types of crimes.170 For example, if the abuser in a domestic violence case pled guilty or was found guilty, he would most likely be sentenced to probation conditioned with domestic violence counseling.171 In comparison to the sentencing of other crimes, such as drug cases,172 “preferring treatment to incarceration for domestic violence looks like lingering sexism.”173 As a result of the different treatment and sentencing that domestic violence cases received, the state criminal law system appeared to prefer the abuser’s well-being to that of the victim.174 Thus, Title III represented an attempt to remedy this longstanding disparity in the treatment of victims of gender motivated violence, including domestic violence.175

2. Existing Federal Legislation as Inadequate

Congress enacted Title III in response to not only the underenforcement of state laws, but also the lack of federal legislation addressing

169. Traditionally acts qualifying as criminal, such as drug possession, are considered crimes against the state. See Nourse, supra note 47, at 10-11; Hearn, supra note 86, at 1113 (discussing treatment of domestic violence crimes in contrast to other criminal acts).

170. See supra notes 159-166. A dramatic disparity exists between sentencing in drug cases and domestic violence cases. See Hanna, supra note 113, at 1541-42 (noting that “[t]he reasons for disparity in sentencing between offenses involving violence against women and illegal substances are indeed many, but we should not ignore the implicit value judgement about which offenses constitute the greater social harm”); Epstein, supra note 15, at n.11 (noting that specialized drug courtrooms were created long before domestic violence courtrooms).

171. See Hanna, supra note 113, at 1508.

172. Stopping drug use has become an American obsession over the last twenty years, resulting in nationwide education campaigns and aggressive legal reforms. See NAT’L CRIMINAL JUSTICE COMM’N, THE REAL WAR ON CRIME 14-16 (Steven R. Donziger ed., 1996) (listing the significant anti-crime legislation since 1980). As a result, legislation such as “three strikes and you’re out” has been enacted. See generally Michael Vitiello, Three Strikes: Can We Return to Rationality?, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997) (discussing “three strikes” legislation in California). Logically, because of the high-profile drug cases, most prosecutors find it a privilege to be asked to chair a drug case. On the other hand, domestic violence prosecutors were usually only involved in domestic violence cases because they were assigned. Traditionally, many prosecutors have felt that dealing with the domestic violence cases should be the job of young and inexperienced attorneys, finding it something of a punishment to be required to rotate through domestic violence. See Swent, infra note 368, at 55-59 (reviewing obstacles faced by women in domestic violence cases).


174. See Marvin, supra note 118, at 2. Domestic violence victims do not receive counseling or financial assistance from the criminal system, yet the convicted abuser receives treatment that he would not be able to afford on his own. “When the final outcome in a criminal case is treatment [for the abuser], the offender gains many benefits and suffers few consequences.” Hanna, supra note 113, at 1544.

the issue of violence against women.\textsuperscript{176} Title III filled a prominent gap in existing federal legislation addressing civil rights.\textsuperscript{177} Prior to the enactment of Title III, civil remedies existed for violent discrimination because of race,\textsuperscript{178} religion,\textsuperscript{179} political beliefs,\textsuperscript{180} and gender-motivated "crimes committed in the workplace,\textsuperscript{181} but not for gender crimes committed on the street or in the home."\textsuperscript{182} As a result, in the area of domestic violence, Title III went where no approach had gone before, by establishing a woman’s right to be free from violence and characterizing domestic violence as a public rather than a private harm, while at the same time allowing individual victims recovery of damages.\textsuperscript{183} It was “an approach designed to achieve what the mainstream legal doctrine of sex discrimination ha[d] been ‘utterly ineffective at getting women’– namely ‘a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity.’”\textsuperscript{184}

Although Title III was modeled after the already existing statutes contained within Chapter 42 United States Code sections 1981, 1982, 1983, and 1985(3),\textsuperscript{185} Congress recognized that these statutes failed to address gender-motivated violence, and designed Title III to address

\begin{footnotesize}
\begin{itemize}
  \item[176.] See S. REP. No. 102-197, at 43 (1991).
  \item[177.] See id.
  \item[178.] There have been many federal laws enacted to remedy violent discrimination based on race, including: 42 United States Code sections 1981, 1982, 1983, and 1985(3), Title VII and Federal Hate Crimes Statistics and Reporting Act (28 U.S.C. § 534 (1994)). After ratification of the Thirteenth Amendment, 42 United States Code sections 1981 and 1982 were enacted to deal with both private and government acts of race discrimination in making and enforcing contracts and owning and selling property. See Brenneke, supra note 49, at 45.
  \item[179.] Violent crimes that are based on prejudice due to the victim’s religious beliefs are recognized as hate crimes and therefore punishable under The Federal Hate Crimes Statistics Act of 1990. 28 U.S.C. § 534 (1994). The Act recognizes crimes based on religion as hate crimes by providing for the acquisition and publication of data about crimes that manifest evidence of prejudice based on religion. 28 U.S.C. § 534 (b)(3) (1994).
  \item[182.] S. REP. No. 103-11 (1993).
  \item[183.] See Brenneke, supra note 49, at 29 (discussing civil rights remedies). See also supra note 28 (citing articles that analyze Title III).
  \item[184.] See Brenneke, supra note 49, at 8 (quoting Catharine MacKinnon, Not a Moral Issue, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 133 (1987)).
  \item[185.] See S. REP. No. 103-138, at 51 (1993); S. REP. No. 101-545, at 57 (1990).
\end{itemize}
\end{footnotesize}
LOSE THE BATTLE AND WIN THE WAR?

that need. 186 Congress explicitly stated that Title III was "in no way intended to undermine existing civil rights protections" 187 or to "revise or broaden" 188 the already existing statutes. Rather, the intent behind Title III was to address problems not already covered by other federal legislation. 189 Accordingly, Title III represented "a national


42 United States Code section 1983 provides a private civil rights cause of action for individuals deprived, "under color of" law, of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1994). The central limitation of the section 1983 remedy for battered women is that only those acting "under color" of law can be held accountable for deprivation caused to the victim, and even that use has been limited by the Supreme Court. See DeShaney v. Winnebago Co. Dept. of Soc. Serv., 489 U.S. 189, 197 (1989) (holding that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause"). See also Hearn, supra note 86, at 1104 (discussing the Civil Rights remedy). Accordingly, section 1983 may be used by battered women or victims of gender-motivated violence against municipalities and police departments for failure to protect their constitutional rights, but cannot be used by most battered women or victims of violent crime to obtain justice for the abuse they have suffered. See Brenneke, supra note 49, at 47 (explaining the scope of 42 U.S.C. § 1983 (1992)).

42 United States Code section 1985(3) does not extend to gender-motivated violence by a private individual, unless it involves a conspiracy. Section 1985(3) of Chapter 42 of the United States Code provides a cause of action against private individuals who conspire "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1983 (3) (1994). The legislative history of the VAWA I stresses the distinction between criminal prosecutions and civil rights remedies, namely that "[w]hile traditional criminal charges . . . focus on the harm to the individual, a civil rights claim redresses an assault on a commonly shared ideal of equality." S. Rep. No. 102-197, at 49 (1991). The Supreme Court's narrow interpretation of the statute in Bray v. Alexandria Women's Health Clinic has made it nearly impossible for victims of gender-motivated violence to succeed in a cause of action charging private conspiracies. See 506 U.S. 263, 275-77 (1993). In Bray, the Supreme Court held that interference with the claimant's underlying right must be a conscious, intentional objective of the enterprise, and that the conspirators must "act at least in part for the purpose of producing" deprivation of the right. Id. at 276.


188. Id.

189. For a discussion of why 42 United States Code sections 1981, 1982, 1983, and 1985(3) are not applicable to gender-motivated violence, see supra notes 172, 180. Title VII provides a mechanism to eradicate discrimination against women and minorities in employment, but is not designed for use against private individuals outside the scope of employment. Title VII provides a valuable tool that reaches private actors in their acts of sex discrimination, but because it addresses the employer/employee context, it does not provide a civil right to be free from gender-motivated violence. It is important to note that Congress recognized Title VII's failure to protect women outside the scope of employment, but acknowledged Title VII's value by model-
commitment to condemn crimes motivated by gender in just the same way that . . . [the federal government had] made a national commitment to condemn crimes motivated by race or religion."

Before Title III, the federal statutes that provided legal avenues for women who suffered discrimination on the basis of sex did so only in isolated contexts. Congress recognized this occurrence as a problem, questioning why a civil right to be free from gender discrimination existed in the workplace, but not on the street or in the home. Title III addressed the lack of federal legislation, which could provide "relief for gender-motivated deprivations of civil rights," along with the inadequacy of the state criminal legal system. Title III was enacted to address the weaknesses in the fight against gender-motivated violence, yet despite the extensive hearings and worthy policy objectives, it could not escape constitutional scrutiny.

B. The Debate Over Title III's Constitutionality

Immediately after the enactment of Title III, the question of whether Congress exceeded its constitutional authority became the subject of controversy among commentators and legal scholars. In Title III after Title VII. See S. Rep. No. 102-197, at 27 (1991) (stating that "[c]urrent law provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home . . . "). Title VII, like Title III of the VAWA I, provides for a remedy for the individual victim and has deterrent value.

Women who are victims of gender-motivated violence are not considered to be victims of hate crimes, due to the fact that the Hate Crimes Statistics and Reporting Act does not define crimes of gender bias as hate crimes. Id. See U.S. HATE CRIMES: Definitions, information and legislation, Hate Crimes Legislation, at http://www.religioustolerance.org/hom_hatl.htm (last visited Feb. 20, 2001) (discussing four different definitions of what constitutes a "hate crime"). The Act provides for the acquisition and publication of data about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, and explicitly does not create a cause of action or a right to bring an action for discrimination. Federal Hate Crimes Statistics and Reporting Act, the Hate Crime Statistics Act of 1990, Pub. L. No. 101-275 (codified at 28 U.S.C. § 534 (1992)). For more discussion of the specifics of the Hate Crimes Statistics Act see Brenneke, supra note 49, at 52. See generally Joseph M. Fernandez, Recent Development, Bringing Hate Crimes Into Focus, 26 Harv. C.R-C.L. L. Rev. 261 (1991) (discussing the need for hate crime legislation). Title III was enacted specifically with federal legislation that excludes gender as a protected class in mind. For a discussion about the possibility of including gender in the Act and recognizing gender-motivated violence as hate crimes, see Diane L. Rosenfeld, When Hate Crimes Are Based on Gender, Violence Against Women Act News, U.S.D.O.J. 3 (February/March 1998).

194. See supra Part II.A.1.
195. See supra notes 28, 30 and accompanying text.
LOSE THE BATTLE AND WIN THE WAR?

addition, Title III faced six constitutional challenges between 1994 and 1998. In 1998, the Fourth Circuit Court of Appeals became the first federal appellate court to consider Title III when it heard Brzonkala v. Virginia Polytechnic Institute & State University. In 1999, the Fourth Circuit Court of Appeals decided Brzonkala, and held that by enacting Title III, Congress had exceeded its powers under the Commerce Clause and the Fourteenth Amendment. As a result of this decision, Brzonkala appealed to the United States Supreme Court, which granted certiorari in 1999 under United States v. Morrison, in order to decide the constitutionality of Title III.

1. The Brzonkala Decision

In January of 2000, the Supreme Court heard arguments in the Morrison case. In May of 2000, a much-divided Supreme Court declared that Congress, by enacting Title III, had overreached its powers granted by both the Commerce Clause and the Fourteenth Amendment. Although limited by the constitutional issue of Title III, the Court recognized the social significance of fighting gender-motivated crime, as evidenced by the Court's recitation of the facts of the case, its comments about the severity of the crime, and its concern that the state had not punished the perpetrator. In order to examine the future of Title III, the facts and decision of Morrison require a brief discussion.

196. See supra note 62.
198. Id. at 826.
200. Id. Morrison, similar to most decisions in the 2000 term, was a five to four decision with Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas voting together as the majority. Id. See e.g. Bd. of Regents of Univ. of Wisc. v. Southworth, 529 U.S. 217 (2000); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). The swing vote came from Justice O'Connor, who was faced with the state rights versus gender rights issue and decided in favor of state rights. Morrison, 120 S. Ct. 1740 (2000). Accordingly, the four dissenters were Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Id.
201. Morrison, 120 S. Ct. at 1759.
202. Id. at 1745-47.
203. Id. at 1759. The Court specifically noted that "[i]f the allegations here are true, no civilized system of justice could fail to provide [Brzonkala] a remedy for the conduct of respondent Morrison." Id.
204. Id.
a. The Facts of United States v. Morrison

In September of 1994, a few weeks after beginning her freshman year at Virginia Polytechnic Institute, Christy Brzonkala was gang-raped in her dorm room by two members of the school's football team. Fearful of retaliation and unable to name her attackers, Christy did not begin legal action until seven months later, when it was too late to collect the physical evidence necessary to pursue criminal charges. Although one of the men eventually admitted to the crime, a judicial committee at the Institute refrained from punishing the attackers.

In 1996, Brzonkala filed an amended complaint in the United States District Court for the Western District of Virginia, alleging that her right under Title III of the VAWA I to be free from gender-motivated violence had been violated. After the District Court dismissed her complaint on constitutional grounds, Brzonkala appealed to the Fourth Circuit Court of Appeals. As a result, in 1997, the court, in an opinion by Judge Diana Motz, reversed the district court's opinion, and held that Title III was well within Congress' powers under the Commerce Clause.

The Fourth Circuit Court of Appeals then decided to reconsider the case en banc in early 1998. Thus, in May of 1999, the court released a lengthy opinion, agreeing with the district court that Title III was an unconstitutional exercise of congressional power under the Commerce Clause and the Fourteenth Amendment. As a result, Brzonkala appealed her case to the United States Supreme Court, which granted certiorari in September of 1999.

205. Id. at 1745-46.
207. Morrison, 120 S. Ct. at 1746 (discussing the facts of the case and the failure of the school to actually punish either of the alleged rapists).
208. See id.
211. Id.
212. See id.
b. *United States v. Morrison* and the Death of Title III

On May 15, 2000, the United States Supreme Court decided Brzonkala’s appeal under the name *United States v. Morrison.*\(^{213}\) In *Morrison,* the Court decided the fate of Title III by holding that it could not be sustained under either the Commerce Clause\(^ {214}\) or section five of the Fourteenth Amendment.\(^ {215}\) Despite its lengthy review of the facts of Brzonkala’s case,\(^ {216}\) and the congressional record accompanying the enactment of Title III,\(^ {217}\) the Court agreed with the Fourth Circuit Court of Appeals’ reasoning in *Brzonkala.*\(^ {218}\) The Court found that Title III did not satisfy the Commerce Clause framework established in *Lopez.*\(^ {219}\) In addition, the Court held that Title III was not permissible under section five of the Fourteenth Amendment because it was an overbroad statute directed at private conduct.\(^ {220}\)

c. Commerce Clause Analysis in Light of *United States v. Lopez*

Similar to many constitutional principles, the Supreme Court’s interpretation of the Commerce Clause “has changed as our Nation has developed.”\(^ {221}\) In *Morrison,* the Court recognized this evolving interpretation noting that as the modern interpretations of the Commerce Clause have become more expansive,\(^ {222}\) so to has the latitude given to Congress “in regulating conduct and transactions under the Commerce Clause.”\(^ {223}\) Yet, despite this wide latitude given to Congress, the Court emphasized that “Congress’ regulatory authority [was] not

---

213. 120 S. Ct. 1740 (2000).
214. *Id.* at 1754-55.
215. *Id.* at 1759.
216. *Morrison,* 120 S. Ct. at 1745-47.
217. *Id.* at 1751-53.
218. *Brzonkala,* 169 F.3d 820 (4th Cir. 1999) (holding in an en banc opinion that Title III is unconstitutional under the Commerce Clause and the Fourteenth Amendment).
219. *United States v. Lopez,* 514 U.S. 549 (1995). In *Lopez,* the Court had found that “the Gun-Free School Zones Act of 1990, . . . which had made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress’ authority under the Commerce Clause.” *Id.* at 551.
221. *Id.* at 1748. See also *Lopez,* 514 U.S. at 552-57 (discussing the evolution of Commerce Clause interpretation).
222. *Morrison,* 120 S. Ct. at 1748. Specifically the Court recognized that “in the years since *NLRB v. Jones & Laughlin Steel Corp.*, Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.” *Id.* See *Lopez,* 514 U.S. at 552-57 (discussing the evolution of Commerce Clause interpretation).
223. *Morrison,* 120 S. Ct. at 1748.
without effective bounds" and went on to analyze the enactment of Title III under the Commerce Clause.

The Court began its analysis of Title III by noting that although there are “three broad categories of activity that Congress may regulate under its commerce power,” Title III could only be analyzed under the third category, “as a regulation of activity that substantially affected interstate commerce.” The Court specifically noted that “[g]iven [Title III’s] focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce),” the proper inquiry was whether gender-motivated violence substantially affected interstate commerce. As a result, the Court analyzed Title III according to the principles in Lopez.

The Court in Morrison stated that Lopez provided the “proper framework for conducting the required analysis” of Title III since the Lopez decision had “canvassed and clarified our case law governing this third category of Commerce Clause regulations.” The Court then took the opportunity to clarify the Lopez framework by specifically considering four different factors in deciding whether gender-motivated violence substantially affected interstate commerce.

The first factor that the Court considered was whether Title III regulated activity that was economic in nature. The Court found that although there was no categorical requirement that the activity be economic, it had never upheld “Commerce Clause regulation of intra-state activity” where the activity was not economic in nature. Similar to the possession of a firearm in a school zone, as explained in

---

224. Id.
225. Id. at 1749 (citing Lopez, 514 U.S. at 558). These three categories, as identified by the Court include: the use of channels of interstate commerce, the instrumentalities of interstate commerce and activities having a substantial relation to interstate commerce. Id. See Lopez, 514 U.S. at 558-59 (identifying the three broad categories of regulation under the Commerce Clause).
226. Morrison, 120 S. Ct. at 1749. The Court noted that the petitioners did not attempt to claim that Title III could fall into either of the other two categories. Id.
227. Id.
228. Id.
229. Id. at 1749 (citing Lopez, 514 U.S. at 551).
230. Morrison, 120 S. Ct. at 1749.
231. Id. at 1749-54. The Court made it clear that the factors it considered in the analysis of Title III were to be applied to any regulation that purported to be a regulation of an activity that substantially affected interstate commerce. Id. at 1751.
232. Id.
233. Id. The Court noted that if it were to allow Congress to regulate noneconomic activities based on the aggregate effects of the activity on “national productivity,” Congress could effectively regulate any activity. Id.
Lopez, the Court found that "[g]ender-motivated crimes of violence [were] not, in any sense of the phrase, economic activity." Accordingly, the Court held that the first factor weighed against Congress' authority to pass Title III.

In addition, the Court examined the second factor in Lopez, as to whether Title III contained a jurisdictional element which might establish that the federal cause of action it provided was in pursuance of Congress' power to regulate interstate commerce. The Court explained that although satisfaction of the jurisdictional element was not required for Title III to be valid under the Commerce Clause, it "would lend support to the argument that [Title III was] sufficiently tied to interstate commerce" to withstand a Commerce Clause challenge. The Court found that Title III, like the Gun-Free School Zones Act at issue in Lopez, contained no jurisdictional element since "Congress elected to cast [Title III's] remedy over a wider, and more purely intrastate, body of violent crime."

With the first and second factors weighing against Congress' authority to pass Title III, the Court went on to examine the third factor, whether Congress had supported the enactment of Title III with findings detailing the need for the regulation. The Court recognized that unlike the Gun-Free School Zones Act in Lopez, which had no congressional findings to support it, Title III was supported by "numerous findings regarding the serious impact that gender-motivated violence ha[d] on victims and their families." In regard to the Title III findings, the Court explained that although the congressional findings were helpful in the analysis, the mere presence of them was "not sufficient, by itself, to sustain the constitutionality" of Title III or any other Commerce Clause legislation. In holding that the congressional findings did not strengthen the argument for Title III, the Court

---

234. *Id.* The Court in Lopez stated that "[s]ection 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms." *Lopez,* 514 U.S. at 561.


236. *Id.* at 1751-52.

237. *Id.*

238. *Id.* See *Lopez,* 514 U.S. at 561-62 (stating that "[section] 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have explicit connection with or effect on interstate commerce").

239. *Morrison,* 120 S. Ct. at 1752.

240. *Id.* In Lopez, the Court indicated that although formal congressional findings are not required, such findings may "enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce ... [and such findings] are lacking here." *Lopez,* 514 U.S. at 562-63.

reiterated the fact that “[s]imply because Congress [might] conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”

The fourth factor considered by the Court in analyzing Title III under the Commerce Clause was whether Title III would potentially “obliterate the Constitution’s distinction between national and local authority . . . .” The Court argued that if Congress were allowed to enact legislation similar to Title III, legislation that addressed violent crime, an area of law traditionally regulated by states, then it could further expand its legislative scope to regulate other state areas such as divorce and childrearing. The Court supported this argument by noting that Congress had recognized this danger when it had gone to the trouble of “expressly preclud[ing] [Title III] from being used in the family law context.” The Court considered not only the federalism concerns of Title III, but also the noneconomic nature and absence of a jurisdictional element, when it held that Title III could not be upheld under the Commerce Clause. Accordingly, the Court addressed the constitutionality of Title III under Congress’ remedial power under section five of the Fourteenth Amendment.

d. Fourteenth Amendment Analysis

Section one of the Fourteenth Amendment provides in part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

---

242. Id. (internal citations omitted).
243. Id. This concern for state rights has been a divisive issue for the Supreme Court since the Lopez decision. In fact, the five to four split on the Court often seems to depend on the different Justices’ views on federalism. See generally id. (discussing the jurisprudence of the Rehnquist Court and noting that in many issues, including those involving state rights, often one Justice is the decisive vote). In the Morrison decision, Justice Sandra Day O’Connor, commonly known as the “swing voter” on the current Court, was forced to decide between two issues she has supported throughout the years: women’s rights and state rights. See Patrick Tracey, Christy’s Crusade, Ms., April/May 2000, at 53 (detailing Brzonkala’s story fight to the Supreme Court, while noting that “[a]ll eyes are on Justice . . . O’Connor, one of the two critical swing votes . . . who has been a staunch defender of women’s rights, [who] now questions the wisdom of treading on the traditional right of the states to prosecute rape charges”). It is clear by the Morrison holding that Justice O’Connor came down on the side of state rights in this case; she joined the opinion of the majority. Morrison, 120 S. Ct. 1740 (2000).
244. Id. at 1753.
245. Id.
246. Id. at 1751-54.
247. Morrison, 120 S. Ct. at 1754-55. The Court stated that “Section 5 [of the Fourteenth Amendment] states that Congress may ‘enforce,’ by ‘appropriate legislation’ the constitutional guarantee [under the Fourteenth Amendment] that no State shall deprive any person of ‘life, liberty or property, without due process of law,’ nor deny any person ‘equal protection of the laws.’” Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997)).
any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 248

The duty of enforcing the Fourteenth Amendment belongs to Congress. According to section five of the Fourteenth Amendment, "Congress shall have [the] power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." 249 Although the Constitution grants Congress this remedial power, the Supreme Court has limited this power by holding that the "language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct." 250

When Congress enacted Title III, it "expressly invoked the Fourteenth Amendment as a source of authority." 251 As a result, the Court in Morrison analyzed Title III’s constitutionality under the Fourteenth Amendment and found that it was an invalid exercise of Congress’ remedial powers. 252 Furthermore, in addressing Title III under the Fourteenth Amendment, the Court acknowledged that "[t]he principles governing an analysis of congressional legislation under [section five] are well settled." 253 The Court reviewed its Fourteenth Amendment jurisprudence, and specifically found that Congress' remedial powers could only be used to prohibit discriminatory state action. 254 In addressing the claim that Title III was enacted to remedy "pervasive bias in various state justice systems against victims of gender-motivated violence," 255 the Court found that Title III was not directed "[a]t any State or state actor, but at individuals who have committed criminal acts motivated by gender." 256 As a result, the Court held that Title III could not be valid under the Fourteenth Amendment. 257

249. U.S. Const. amend. XIV, § 5.
250. Morrison, 120 S. Ct. at 1755.
251. Id.
252. Id. at 1758-59.
253. Id. at 1755.
254. Id. The Court stressed that the limitations on Congress under the Fourteenth Amendment were "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." Id.
255. Id.
256. Morrison, 120 S. Ct. at 1758.
257. Id. at 1759.
2. The Aftermath of United States v. Morrison

Although the Court’s decision in *Morrison* acknowledged that Title III addressed a national problem, the Court failed to provide Congress with any guidance as to the appropriate means for addressing the problem after the death of Title III. Accordingly, if Congress wants to continue its search for a solution that will address the problem of remedies for victims of gender-motivated violence, it will now need to consider alternative avenues. A consideration of the advantages and disadvantages of Title III, as it existed, supports the need for the nation to address the problem of gender-motivated violence, however, as a result of the Court’s holding, now the nation must consider alternatives to Title III.

C. Was Title III Worth Saving?

The debate over Title III centered on the question of whether it would survive constitutional scrutiny, overshadowing the important social and policy aspects of Title III. The issue of constitutionality did not question whether Title III was needed, but rather the method by which it was enacted and whether the federal government was infringing on an area of law typically reserved for the states. Due to the invalidation of Title III, the question that remains to be answered is whether the advantages offered by Title III warrant an attempt to reenact the statute, or whether alternatives have surfaced which sufficiently address the problem. A careful examination of the advantages and disadvantages of Title III supports the need for its reenactment.

1. Advantages of Title III

Over the course of Title III’s enactment, Congress stressed the need for a civil rights remedy for gender-motivated violence, since no other civil rights legislation addressed this specific issue. Congress created Title III to provide a civil cause of action for victims of gender-motivated violence, with the intent that the statute act as an extension of existing state laws and to supplement federal civil rights causes of

258. *Id.*
259. Other provisions of the VAWA I provide assistance to victims of gender-motivated violence, but not a way for the victims to bring a civil claim or collect damages. *See supra* notes 52-53.
260. *See supra* notes 77-194 and accompanying text.
261. *Morrison*, 120 S. Ct. at 1752-54, 1756-59 (discussing the concerns that under Commerce Clause and Fourteenth Amendment analysis, Title III would take over areas of traditional state concern).
action.263 “In addition to serving the important societal function of recognizing that violence against women [was] gender discrimination, the VAWA remedy [had] distinct advantages over existing state laws.”264 Title III provided a victim of gender-motivated violence with more control over her situation than state laws had provided, by mandating civil relief when the state refused to prosecute her case,265 or when she was precluded by state law from bringing a state civil cause of action.266

Title III also offered decided advantages over the criminal justice system by allowing the victim to “call her attacker to the witness stand to account for his behavior,” whereas “in a criminal case the defendant may remain silent . . . .”267 Victim empowerment was evident in Title III because it gave the victim the opportunity to obtain a permanent injunctive order forbidding the defendant from contacting her, rather than a state-law order of protection that lasts for a specific amount of time.268

Another advantage of Title III, over existing state laws, was the ability of the victim to collect damages from her attacker, including punitive damages and reasonable attorney’s fees.269 Many times in criminal proceedings, when the attacker was prosecuted, the result of a guilty verdict did little to benefit the victim personally or financially.270 A guilty verdict for an attacker or abuser could result in fines paid to the court, probation or possible imprisonment, none of which provide for the financial needs of the victim as a result of the attack or abuse.271 Accordingly, Title III addressed gender motivated violence, specifically domestic violence, in a way that state laws had never considered.

2. Disadvantages of Title III

The opponents of Title III attacked the legislation, not because of its substance, but rather because of its constitutional implications. Those who opposed the enactment of Title III had three primary con-

263. See Hearn, supra note 86, at 1102-03 (discussing the VAWA I civil rights remedy).
264. Id. at 1104.
265. Id. (noting that nine states still have a rape exclusion for married women, where the state will not prosecute a husband accused of raping his wife).
266. Id. at 1105 (“Some states, for example, limit a wife’s ability to sue her husband for an intentional tort such as battery.”).
268. See Hearn, supra note 86, at 1105-06 (examining the VAWA I civil rights remedy’s advantages over state laws).
269. Id. at 1103.
270. See supra notes 165, 174 and accompanying text.
271. See supra notes 165, 174 and accompanying text.
cerns, each of which were based on the idea of federalism: the possible infringement of a traditionally state governed area, the impact that Title III would have on the federal courts, and the possibility of unlimited congressional power. Addressing the first concern, Title III was perceived as interfering with a matter that traditionally belonged to the states and as "unnecessarily duplicative of existing state remedies." Many critics of Title III argued that it also ignored the benefits of state intervention, such as "the expertise of state courts in the area," and "the capacity of the states to experiment with local solutions."

The second concern expressed by opponents was that Title III would further tie up an already overburdened federal court system. Title III, although not a criminal provision, functioned in a similar fashion to other federalized criminal provisions, by allowing "a large volume of actions traditionally tried in state courts to be brought in federal courts." Critics, before the decision in Morrison, identified Title III as providing a "new private right of action so sweeping, that it could involve the federal courts in a whole host of domestic relations disputes." Notably, this was one of the main concerns of the Supreme Court in Morrison, and the concern that most influenced the deciding vote of Justice Sandra Day O'Connor.

272. See Bassler, supra note 134, at 1162-64 (discussing how states have traditionally dealt with domestic violence and that there is no evidence that demonstrates that states cannot handle the problem on their own).

273. Id. at 1148-49 (predicting that Title III would add to the already over-crowded federal court docket and place a huge strain on the federal court system). See Carty, supra note 28, at 483-84 (noting that the potential impact of the VAWA I on federal courts "cannot be ignored").

274. Brzonkala, 169 F.3d at 828-29 (reasoning, by the district court, that "the practical implications of concluding that gender-motivated violence was sufficiently related to interstate commerce to justify its regulation would be to grant Congress power to regulate virtually the whole of criminal and domestic relations law").


276. Id. at 482-83. See Bassler, supra note 134, at 1184 (noting superior skills of state courts in the domestic violence area and a greater extent of resources for victims in state court); Betty Levinson, The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications, and Litigation Strategy, 4 J.L. & POL'Y 401, 406 (1996) (recommending use of state court to bring the VAWA I action due to greater expertise of state judges in domestic violence).

277. Carty, supra note 28, at 482-85; Brzonkala, 169 F.3d at 828-29 (discussing one reason why the district court held Title III unconstitutional was because it would have allowed federal remedies in addition to state remedies, even when state remedies were sufficient).

278. Carty, supra note 28, at 483.

279. Hearn, supra note 86, at 1124. See also Sullivan, supra note 74 (discussing the extent of congressional power under the commerce clause after Lopez).

280. See supra note 243. See Minicavage, supra note 28, at 441 (breaking down the probable votes of the current Justices in Commerce Clause cases).
The third concern expressed by opponents of Title III was that by enacting Title III, Congress displayed that it has unlimited power.\textsuperscript{281} The concern over "the proper state-federal balance"\textsuperscript{282} was evident in the Supreme Court's 1994 decision of \textit{United States v. Lopez}.\textsuperscript{283} In fact, the Supreme Court reiterated the same federalism concerns in \textit{Morrison} when it found Title III unconstitutional.\textsuperscript{284} This concern centered around the use of Congress' powers under the Commerce Clause and the Fourteenth Amendment. The Court noted that if Title III were to survive constitutional scrutiny, then Congress would, in effect, have unbridled power to pass any type of legislation.\textsuperscript{285}

Although critics of Title III have expressed various constitutional concerns, they have never opposed the goals of the legislation. The Fourth Circuit Court of Appeals expressly acknowledged this fact in \textit{Brzonkala}, by specifically stating that "no one favor[s] violence against women."\textsuperscript{286} The court also alluded to the proposition that Title III was "laudable social policy"\textsuperscript{287} that was simply enacted under the wrong constitutional power.\textsuperscript{288} The recognition of the purpose behind Title III left the door open for the consideration of saving Title III or exploring alternative ways to accomplish similar goals. Unfortunately, the goal and purpose behind Title III will need to be accomplished through alternative methods.

\textbf{III. Analysis}

Entering the Twenty-first Century, the United States remains a country where the saying "all men are created equal"\textsuperscript{289} means exactly what it says; "men" are created equal. Sadly, although society has made great strides, gender inequality remains an issue of great debate among feminists and legal scholars.\textsuperscript{290} Nowhere in society are the ste-
reotypes and gender biases more obvious than in the treatment of domestic violence crimes and its victims.\textsuperscript{291} Although the state legislatures have made great strides in the area of gender equality, "those responsible for applying and enforcing the laws . . . have lagged far behind."\textsuperscript{292} As illustrated by the extensive legislative findings of Title III, violence against women remains a serious problem affecting women all over the country, and it demands more aggressive measures.\textsuperscript{293} Title III represented the beginning of those measures.

Domestic violence, as well as other violent acts directed at women, continues to scar America's families and our society, with no end in sight.\textsuperscript{294} Since the Supreme Court agreed with the Fourth Circuit Court of Appeals in\textit{Brzonkala} and declared Title III unconstitutional,\textsuperscript{295} the need for legislation protecting victims of domestic violence mandates that alternative theories for enacting this type of legislation be explored. In considering the alternatives, an inherent tension exists between the broader goal of Title III, providing a civil rights remedy for victims of gender-motivated violence, and its under-

\textsuperscript{291} See National Committee on Pay Equity,\textit{The Wage Gap Over Time: In Real Dollars, Women See a Widening Gap}, available at http://www.feminist.com/fairplay/f_change.htm (last visited Feb. 20, 2001) (citing median weekly earnings of full-time wage and salary workers by occupation). In fact, since the Equal Pay Act of 1963, the average woman has earned approximately $13,000 less than the average man.\textit{Id.} For example, in 1997 women aged twenty-four to fifty-four earned 74.4 percent less than men in the same age group. See Borgna Brunner,\textit{The Equal Pay Act Revisited: Narrowing the Wage Gap Half a Penny Per Year}, available at wsysiwyg://764/http://www.infoplease.com/spot/equalpayact/html (last visited Feb. 20, 2001). Despite these facts, the awareness of gender inequality has become more public, resulting in greater discourse concerning the subject. Currently many law schools offer classes that focus on feminist issues such as feminist jurisprudence or other issues such as domestic violence or sex crimes. For example, the law schools of DePaul University, the University of Chicago, and Northwestern University all offer at least one course each semester that focuses on legal issues examined through a feminist theory or theories.

\textsuperscript{292} Epstein, supra note 15, at 13. See Bracher,\textit{infra} note 405, at 156 (discussing the traditional treatment of domestic violence crimes by law enforcement in comparison to the state legislatures' responses to the problem).


\textsuperscript{294} It is commonly accepted that domestic violence is cyclical and that it will continue if not interrupted by someone outside the family unit. Studies have indicated that most abusers encountered domestic violence in their own homes as children, either as a victim or a witness.\textit{Kaplan, infra} note 382, at 141. Society's failure to effectively deal with the root of domestic violence in the home has resulted in an environment where women fear for their lives if they call for help and children grow up believing that violence is the normal way of dealing with relationships.\textit{Id.}

\textsuperscript{295} Morrison, 120 S. Ct. 1740 (2000). See supra notes 213-259 and accompanying text (discussing the\textit{Morrison} opinion).
lying narrow focus of remediating the problem of domestic violence. This requires a difficult determination of the primary purpose of Title III of the VAWA I and how that purpose can survive after its death.

Title III represented the federal government's response to a serious problem, yet when considered in the context of domestic violence, there remained a question as to whether it was the most effective remedy.\(^2\)\(^9\)\(^6\) Despite Title III, most domestic violence victims can still only find the relief they need through the criminal justice system, thus very few victims of domestic violence are willing or able to pursue the remedy that Title III offered. Bringing a suit under Title III required not only an affirmative action by the victim, but also the funds and the time to hire an attorney to pursue the case. In many cases of domestic violence, the victim relies on her abuser for financial support, and the attempt to collect damages from him in a civil suit might be a costly and futile effort.

Nonetheless, Title III represented necessary social policy. Accordingly, reenactment pursuant to another constitutional power should be considered. The Thirteenth Amendment represents a rarely used constitutional weapon, designed to provide Congress with the power to remedy occasions of involuntary servitude,\(^2\)\(^9\)\(^7\) and should be considered as an alternative basis for reenacting Title III.\(^2\)\(^9\)\(^8\)

### A. Can The Thirteenth Amendment Revive Title III?

In 1865, the Thirteenth Amendment to the United States Constitution was passed.\(^2\)\(^9\)\(^9\) The intent behind the Amendment was to eradicate the slavery of African-Americans in the United States.\(^3\)\(^0\) The Thirteenth Amendment represented one of the first affirmative actions taken by the United States government to address the abridg-

---

296. This presents a difficult dilemma, although there is the belief that this country should recognize the civil rights of victims of gender-motivated violence, this Comment will focus on domestic violence. Domestic violence, by its nature, and the majority of its victims requires more than a civil remedy to combat the problem. The question arises as to whether victims of domestic violence really have the opportunity to go to federal court to sue for damages when in many cases, it is difficult to get them to testify in a criminal case. See supra notes 134-139.


298. For an in-depth analysis of the possibility of Congress enacting Title III under the Thirteenth Amendment powers, see generally Hearn, supra note 86; Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 Yale J.L. & Feminism 207 (1992).

299. U.S. Const. amend. XIII.

300. The Slaughter-House Cases, 83 U.S. 36, 72 (1872) (stating that "[u]ndoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter"). See Nowak & Rotunda, supra note 24, at 645-46 (discussing the enactment of the Thirteenth Amendment and the Supreme Court cases defining the scope of the Amendment).
ment of a group's human rights, specifically that of the African-American population.

Although the government has been involved in the protection of human rights since the enactment of the Thirteenth Amendment, it is clear that it takes more than the law to define the rights of human beings and to ensure that those rights are not abridged. Along with the support of the legal system, human rights must begin in the home: "To punish disobedience and discipline liberty, family tradition perpetuates a culture of terror that humiliates women, teaches children to lie, and spreads the plague of fear. Human rights should begin at home . . . ." Domestic violence represents the antithesis of this idea.

The definition of what constitutes "human rights" is constantly being questioned. In the ever-changing American society, the concept of what constitutes a fundamental freedom and the scope of civil rights has continually evolved over time. It could be argued that the rights accorded to citizens throughout American history have been, and continue to be, based partially on physical characteristics, such as gender, or external characteristics, such as social class.

The scope of civil rights becomes more uncertain when examined in the context of the Constitution. This uncertainty stems from the conflicting views of how the Constitution should be interpreted and how that interpretation affects issues in modern society. One view of legal commentators is that the Constitution, designed to be a flexible document, should be interpreted according to the changing values and beliefs of American citizens. Other scholars disagree with this interpretation and argue that the Constitution should be interpreted ac-

---

302. It is clear from an examination of Supreme Court jurisprudence that the Court's interpretation of the Constitution has changed over time, depending on the members of the Court and the social situation of the country. See Ralph A. Ross & G. Alan Tarr, American Constitutional Law 7-10 (1983). The Supreme Court has actually acknowledged that its interpretation of certain constitutional principles has evolved over time, according to the changes in society and the legal realm. See Morrison, 120 S. Ct. at 1748-54 (discussing the evolving interpretation of the Commerce Clause).
303. Critical scholars have attacked the validity of interpreting the Constitution based on original intent. According to Randall Kennedy:

[T]he endeavor to confine choice by reference to the intentions of white men situated in the [E]ighteenth or [N]ineteenth [C]entury should be rejected as aspiration because, if followed, it would quite likely portend the nullification of legal achievements that supports the rights of racial minorities and others whose interests in previous centuries generally had a lower level of priority than obtains today.

cording to the intent of the men who created it;\textsuperscript{304} a time when gender, race, and social class were not recognized as social issues.\textsuperscript{305}

The largest threat to the possible reenactment of Title III is a stagnant interpretation of the Constitution. The only problem with Title III, according to the Supreme Court, is that its enactment was beyond Congress' powers under the Commerce Clause and the Fourteenth Amendment.\textsuperscript{306} Accordingly, it should be reenacted under a valid power. Therefore, to reenact Title III, Congress must look beyond its settled interpretation of the Constitution and arrive at an interpretation which allows the enactment of legislation that addresses the problems of the future.

1. \textit{The Thirteenth Amendment Power}

The Thirteenth Amendment to the Constitution was passed in order to eradicate slavery of African-Americans in the United States.\textsuperscript{307} Despite the context of its passing, the Thirteenth Amendment was not specifically limited to the slavery of African-Americans; in fact, the Amendment used very broad language that is open for interpretation.\textsuperscript{308} Specifically, section one of the Thirteenth Amendment instructed that "[n]either slavery nor involuntary servitude, . . . shall exist within the United States, or any place subject to their jurisdiction."\textsuperscript{309} The Thirteenth Amendment of the Constitution is a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."\textsuperscript{310} This broad language of the Supreme Court\textsuperscript{311} confirms the idea that the protection granted by the Thirteenth Amendment is not conditioned upon race, gender, age, sexual orientation, religious belief, or any other personal characteris-

\textsuperscript{304} Several of the Supreme Court justices over the years have interpreted the Constitution based on the "original intent" of the Framers. See \textit{Constitutional Law} 37-46 (Geoffrey R. Stone, et al eds., 3d ed. 1996). For example, Justice Hugo Black is well known for his staunch support for interpreting the Constitution based on the Framers' intent as defined by looking to the text. \textit{Id.}

\textsuperscript{305} At the time the United States Constitution was written, property owners, who were white men, were the only people allowed to vote. See \textit{Rossum \& Tarr}, supra note 302, at 10-13. At the time this important document came into existence, African-Americans were considered property and women had no rights outside of the home. \textit{Id.}

\textsuperscript{306} See supra notes 213-257 and accompanying text.

\textsuperscript{307} See supra note 300 and accompanying text.

\textsuperscript{308} See \textit{id}. The Thirteenth Amendment was specifically worded so as to outlaw all forms of slavery or involuntary servitude. U.S. \textit{Const.} amend. XII § 1.

\textsuperscript{309} The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

\textsuperscript{310} \textit{Id.}

\textsuperscript{311} \textit{Id.}
tic.  The Thirteenth Amendment was enacted for the purpose of abolishing slavery and involuntary servitude forever, commanding that "[n]either slavery nor involuntary servitude . . . shall exist."

Section two of the Thirteenth Amendment granted Congress the broad power to enforce the amendment with "appropriate legislation." It was not until 1883 that the concept of what constituted "appropriate legislation" was considered by the Supreme Court in the Civil Rights Cases. The Supreme Court explained that enforcement of the Thirteenth Amendment meant that Congress had the power to regulate the "badges and incidents" of slavery. As a result, the Thirteenth Amendment abolished both slavery and involuntary servitude, and granted Congress the authority to legislate against any deprivation of the rights that were enumerated in the Civil Rights Act of 1870.

Although the current interpretation of the Thirteenth Amendment implies that it only reaches situations dealing with race, the Supreme Court has never expressly stated that gender could not fall within the boundaries of the amendment. Further, the Thirteenth Amendment has always been applied to private conduct. An examination of the historical subjugation of women, the societal acceptance of domestic violence, and the conditions battered women commonly face, will support Congress' use of the Thirteenth Amendment to enact Title III.

2. Involuntary Servitude Today

The Thirteenth Amendment's "sweeping words and underlying vision" outlaw slavery of all forms in all places, as it was designed to eradicate societal and individual coercion or control over one or more

312. See Akhil Reed Amar and Daniel Widawsky, Child Abuse As Slavery: A Thirteenth Amendment Response To DeShaney, 105 HARV. L. REV. 1359, 1359 (1992) (discussing the history of the Thirteenth Amendment and stating that "[e]mancipation did not discriminate because of age . . . the Amendment embraced . . . all persons, whatever their race or national origin").
313. See Hearn, supra note 86, at 1142.
314. U.S. CONST. amend. XIII, § 2. Section two of the Thirteenth Amendment specifically states, "Congress shall have the power to enforce this article by appropriate legislation." Id.
316. Id. at 20 (stating that Congress has the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States").
318. Amar, supra note 312, at 1359.
319. For a discussion of domestic violence as torture and an argument that it should be considered a human rights violation, see Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, 25 COLUM. HUM. RTS. L. REV. 291 (1994).
LOSE THE BATTLE AND WIN THE WAR?

Accordingly, the Thirteenth Amendment applies in the context of domestic violence, if it can be shown that there are “incidents of slavery or involuntary servitude” present in the relationships.

The use of the term “slavery” to describe any modern situation strikes fear in the hearts of politicians and judges, and remains the reason why the Thirteenth Amendment is a nullity. The word “slavery” has become taboo in this country, with most of society equating it with the horrific experiences of African-American slaves. Although the Thirteenth Amendment was enacted in response to those experiences, this interpretation need not be the only one.

Fortunately for this country, slavery, as it was historically defined, no longer exists in the United States, yet a different type of involuntary servitude has replaced that historical version. However, society fails to see beyond the history of the American slave trade to consider that slavery might still exist in another form. “Slavery” is not so narrowly defined as to only require whips and chains, but rather, it is broadly defined as “a power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.” The power relationship exercised in incidents of domestic violence fits within this definition of slavery, because control and physical coercion lie at the heart of abusive domestic relationships. It is arguable that society’s passive acceptance of domestic violence is not based on lack of concern, but rather rooted in historical notions about women and abusive relationships.

320. Amar, supra note 312, at 1365.
321. The term “domestic violence” is used in this section to describe relationships where the abuse/battering has taken place more than two times and has been instigated by a male intimate. This is not to belittle the experience of one who has suffered at the hands of an intimate on only one occasion or those who have suffered at the hands of a female intimate, but this reflects the scope of the Thirteenth Amendment in that one incident would not necessarily be considered controlling or coercive. Statistics show that women are more likely to suffer abuse at the hands of a male intimate than vice versa. See supra note 21.
322. U.S. CONST. amend. XIII. See NOWAK & ROTUNDA, supra note 24, at 645 (discussing the Supreme Court interpretations of the Thirteenth Amendment).
323. See supra note 300 and accompanying text.
324. Amar, supra note 312, at 1365.
325. The purpose of this Comment is not to analogize the experiences of a domestic violence victim who voluntarily stays with an abuser to the experiences of those who were forced into slavery in this country. The concept of “slavery” here is limited to the enunciated definition and not the structure of slavery that existed in the United States. Here it is only to say that the psychological and physical abuse that a domestic violence victim faces fits within the definition of “slavery” concerning a power relation of degradation.
326. See infra notes 327-336 and accompanying text.
Historically, women were considered property of the men in their families, either their fathers or their husbands, and had no legal status separate from the men in their families. As long ago as the Roman Era, incidents of domestic violence were present and condoned. These same attitudes were later reflected in the English common law.

The English common law not only permitted, but expected husbands to chastise their wives, resulting in the "rule of thumb." The "rule of thumb" theory placed a limit on the husband's ability to punish his wife; he was allowed to hit her as long as the rod was no thicker than his thumb. Although this rule was enacted supposedly to protect women, it only perpetuated the idea that husbands were to control their wives. The English common law and its descendent, the early American legal system, represented a systematic relegation of an entire group of people to a condition of inferiority and attributed this inferiority to their physical characteristics. Accordingly, the modern problem of domestic violence can be traced to the acceptance of wife "chastisement," which was present in the American legal system as recently as the early Twentieth Century. Although the laws concerning domestic violence have changed, the social perceptions about domestic violence and its victims have not been altered.

"Violence is the most overt and effective means of male societal control over women." "Male violence against women captures the essence of male dominance, female submission," which is similar to the violence practiced against African-American slaves. "[M]odern violence against women is a badge and incident of [N]ineteenth-[C]entury slavery of the [N]ineteenth-[C]entury involuntary servitude of coveture." For example, in battering relationships, women are deprived of their personal liberty and dignity through physical constraint, violence, injury, or death, which is not unlike the experiences

328. Roman society was very patriarchal in nature and, accordingly, wives were controlled by their husband and the husbands were expected to punish their wives. "According to early Roman law, a man could beat, divorce or murder his wife for offenses committed by her which besmirched his honor or threatened his property rights." Sewell, supra note 327, at 985.
329. See supra note 96.
330. See supra note 121.
331. Cain, supra note 48, at 376; Mabbun, supra note 28, at 212-13; Sewell, supra note 327, at 988.
333. Id.
334. Id. at 11. See generally McConnell, supra note 298 (discussing domestic violence as involuntary servitude).
335. Id.
336. Hearn, supra note 86.
of slavery that resulted in the enactment of the Thirteenth Amendment.

3. Reenacting Title III Pursuant to the Thirteenth Amendment

Title III was originally enacted in response to the failure of society and the criminal justice system to treat gender-motivated crimes as seriously as other bias-related crimes. Domestic violence represents the quintessential gender-motivated crime where the victims are abused simply because they are women. The characteristics of an abusive relationship support Title III's reenactment under the Thirteenth Amendment.

The Thirteenth Amendment incorporates domestic violence by addressing private actions and prohibiting all forms of slavery or involuntary servitude. Domestic violence consists of the violent acts of one man against one woman and when it manifests as a cycle of abuse, it results in a form of slavery to the victim. Once the cycle of domestic violence begins, it is likely to escalate until the legal system intervenes or one of the participants is dead.

Domestic violence is a system of dominance and subservience, often on a personal scale, and represents the reduction of women to the status of material possessions. It results from an abuser's need for domination, coercion, degradation, and control. A man who abuses women often engages in such behavior because he believes that his wife or girlfriend, in essence, is a possession that he has a right to control. Once a pattern of violence is established, the victim essentially becomes captive to her abuser, feeling the need to request permission to leave or make any personal decisions, lest she pay the price for disobedience. A woman who finds herself in this situation may

337. See supra note 82. Although Title III addressed all acts of gender-motivated violence, the discussion of its reenactment under the Thirteenth Amendment will focus on domestic violence where women are the victims.
338. See supra notes 300, 308 and accompanying text.
339. Of course, there may be children involved, which brings up issues beyond the scope of this Comment. For an analysis of how the Thirteenth Amendment could be used to protect children in abusive households, see generally Amar, supra note 312.
340. See generally Hearn, supra note 86.
341. Amar, supra note 312, at 1384.
342. See Kaplan, infra note 382, at 148-49 (discussing the personality traits of the typical batterer and his need for control over the victim).
feel she cannot leave due to the man's threats of further violence or even death.

It is impossible to understand the physical and psychological effect that domestic violence has on its victims, that is unless an individual has personally experienced such abuse or has spent an extensive amount of time with a victim of domestic violence. Therefore, the problem of domestic violence is often not given the attention it truly deserves. Further, victims rarely have the ability to help themselves because the victim often finds herself in a situation that is beyond her control as the cycle of abuse escalates. For example, the abuser will often have financial control or use the victim's children to threaten her to stay.

The psychological and physical effects of domestic violence, which result in the involuntary servitude of the victim to her abuser, have been acknowledged by the courts that have recognized the battered woman's syndrome (BWS). BWS recognizes that most domestic violence is a cycle of abuse and reconciliation that leads the victim into codependency with the batterer, both emotionally and financially. BWS refers to a "set of symptoms commonly found in women who are involved in intimate relationships with men who use physical and psychological coercion to dominate and maintain the relationship." BWS is characterized by the response that the victim has to the cycle of abuse. Specifically, victims who exhibit BWS have experienced

343. See supra note 113 and accompanying text.
344. See supra note 21, at v (noting that only fifty percent of domestic violence incidents are reported, the most common reason being that victims "feared retaliation or they felt the police would not be able to help them").
345. See generally supra Part III.B. (discussing the importance of educational programs and training for all of those involved in domestic violence cases).
346. In one of the most disturbing cases, the victim, Molly, who was married to Jim, the abuser, endured over five years of abuse that began as hair pulling and slapping and evolved into sexual abuse and home imprisonment. Angela Brown, When Battered Women Kill 56-58, 89-93 (1987). At one time, after a night of rape and beating, Jim told Molly that if she ever left the house or disobeyed him she would "lose" her son, Kevin. Id. Molly was only able to escape Jim in the end by killing him; she shot him when he began strangling Kevin. Id. at 131-33. Jim told Molly that he was going to kill Kevin because he was the "only thing that really matters to her." Id.
348. See Boumil, supra note 347, at 211-14.
349. Id. at 212 (discussing typical phases of the cycle of abuse that often results in BWS).
350. Many commentators have focused on the cycle of abuse and explored the specific phases that are involved. Studies have shown that both victims and abusers tend to have certain charac-
physical ailments not connected to the physical abuse, and psychological disturbances such as anxiety and agitation.\footnote{351} There are different experiences that often overwhelm the victim and make it impossible for her to break out of the cycle. Thus, the acceptance of BWS by courts supports the characterization of domestic violence as involuntary servitude.

Just as slavery, domestic violence was at one time socially acceptable.\footnote{352} Although such violence is no longer considered acceptable, the problems in the legal system have created abusers that have no fear of punishment,\footnote{353} and victims without means of escape. The failure of the legal system to deal with the problem of domestic violence effectively condones the abuser’s actions.\footnote{354}

Most victims internalize the blame for their situation, as a result of the social stigma that is associated with domestic violence, and often refuse to report the incidents.\footnote{355} For example, studies show that “the most common reasons given by victims for not contacting the police [are] often that they consider the incident to be a private or personal matter, they fear retaliation, or they feel that the police [will] not be able to do anything about the incident.”\footnote{356} Further, statistics show that domestic violence is the leading cause of injury to women in the United States, yet it is one of the most underreported crimes.\footnote{357}

The Thirteenth Amendment provides Congress with an alternative constitutional power under which it can reenact Title III. In the event that Congress could not use the Thirteenth Amendment to reenact Title III, the federal government should focus on working with the states. This focus would acknowledge the role of the states in enforcing the civil rights of domestic violence victims, while also providing incentives for the states to take affirmative actions against domestic violence. Through the other provisions of the VAWA I, Congress has

\footnote{351} These include stomach pains and sleeping difficulties. See Boumil, supra note 347, at 213.

\footnote{352} See supra notes 49, 121, 328 and accompanying text.

\footnote{353} See supra note 96 and accompanying text.

\footnote{354} See supra notes 98-150 and accompanying text.

\footnote{355} See Violence By Intimates, supra note 21, at v.

\footnote{356} Id.

\footnote{357} Estimates are that only forty-five percent of domestic violence incidents are actually reported. See supra note 15 and accompanying text.
the ability to provide additional funding to states that specifically focus on domestic violence prevention and education.\textsuperscript{358}

\textbf{B. The States’ Changing Role}

Six years have passed since Title III was enacted and many things have happened to bring domestic violence out of the private homes and into the public sector. In 1995, domestic violence came to the forefront when the public learned that O.J. Simpson had abused his murdered wife, Nicole Brown Simpson.\textsuperscript{359} During the same time period, the Department of Justice recognized domestic violence as a national problem through its creation of the Violence Against Women Office.\textsuperscript{360} As a result, the states began to receive more funding from the federal government for implementing domestic violence programs,\textsuperscript{361} a domestic violence hotline was created,\textsuperscript{362} and all fifty states formed domestic violence coalitions pursuant to the other provisions of the VAWA I.\textsuperscript{363}

If Title III cannot be reenacted pursuant to the Thirteenth Amendment, Congress should consider furthering its collaboration with the states to address the problem of domestic violence at the state level. There is evidence to show that the states have affirmatively responded to the problem of gender-motivated violence, specifically domestic vi-

\textsuperscript{358} See supra note 52 and accompanying text. See also infra notes 368, 373, 464 and accompanying text.

\textsuperscript{359} See State v. Simpson, No. BA097211, 1995 WL 21768, at *8 (Cal. Super. Ct. Jan. 18, 1995). Although O.J. Simpson was found not guilty of the murder of Nicole Brown Simpson, there were at least four police reports in existence that documented his escalating violent behavior. \textit{Id.} Immediately after the news of the Simpson’s prior abuse, domestic violence hotlines received a significant increase in calls. See Cheryl Hanna, \textit{No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions}, 109 \textit{HARV. L. REV.} 1849, at 1852 n. 10 (1996) [hereinafter Hanna, \textit{No Right to Choose}].

\textsuperscript{360} The Violence Against Women Office was created by the Department of Justice as a result of the provisions of the VAWA I. See U.S. Dep’t of Justice, \textit{VIOLENCE AGAINST WOMEN OFFICE}, \textit{available at} http://www.ojp.usdoj.gov/vawo \textit{(last visited Sept. 14, 2000)} [hereinafter VAWO website]. In collaboration with the Violence Against Women Advisory Council, the Violence Against Women Office has taken on the responsibilities of increasing awareness and education about domestic violence and approving the grants to states that apply for funds supplied through the VAWA I. \textit{Id.} Information about the Office and the different activities it is involved in are available on the Internet at the Department of Justice website. \textit{Id}.

\textsuperscript{361} See infra note 362.

\textsuperscript{362} On February 26, 1996, President Clinton announced a nationwide, 24-hour, toll-free domestic violence hotline. The number is 1-800-799-SAFE, and is also available for the hearing-impaired and those who do not speak English. The hotline provides immediate crisis intervention for those in need. Callers can receive counseling and be referred directly to help in their communities, including emergency information and shelters. Also, counselors can refer callers to community resources and medical help. VAWO website, supra note 360, http://www.ojp.usdoj.gov/vawo/speeches/manual/help.htm.

\textsuperscript{363} See id.
violence, since the enactment of Title III.364 States have financial incentives to treat domestic violence more seriously pursuant to the funding provisions of the VAWA I,365 the desire to maintain control of a traditional state legislative area, and the political accountability of the state legislature to the public.

Statistics show that a number of states have responded by mandating change in the way its legal system handles domestic violence.366 Many states have enacted aggressive legislation targeting law enforcement367 and the criminal justice system,368 as well as advocacy and community outreach programs.369 In light of the states' changing role in the context of gender-motivated violence and the possibilities of restitution under state law,370 the concern should be to continue the promotion of state action. The enactment and subsequent striking down of Title III need not have been in vain. The federal government can continue to address the concerns underlying Title III by providing more incentives to the states and collaborating with the states to ensure that programs directed toward domestic violence are successful and domestic violence victims receive justice.371

364. Although it has only recently become an important social concern, incidents of domestic violence have actually decreased over the past six years. According to Violence By Intimates, "the rate of victimization of women by an intimate declined from 1993-1996." VIOLENCE BY INTIMATES, supra note 21, at 3. The number of murders by intimates have also been decreasing steadily since the 1970s, "in 1996 the number of intimate murders was 36% lower than in 1976." Id. at 5.


366. See THE URBAN INSTITUTE, 2000 REPORT: EVALUATION OF THE STOP FORMULA GRANTS TO COMBAT VIOLENCE AGAINST WOMEN viii (noting that the grants provided to communities through the VAWA I have increased the number of domestic violence victims treated by agencies).

367. These include police training and education programs on how to handle domestic violence calls, as well as varying types of arrest policies. See supra Part III.B.1.a.

368. Title V (Equal Justice for Women in the Courts Act) of the VAWA I provides for funding to states for education and training for judges and court personnel concerning gender-motivated violence. S. REP. No. 103-138, at 4 (1993). A majority of states have implemented gender bias task forces to study their court systems and the findings have been disturbing. See Jeannette F. Swent, Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 3 (1996) (stating that "at least thirty-five jurisdictions" have admitted "that they are plagued with bias based on gender").

369. See supra Part III.B.1.d.

370. These include bringing suit under tort law for battery or assault, or in the states with hate crime legislation, bringing suit for domestic violence as a bias crime. See infra Part III.B.2.

371. For a discussion of how the Supreme Court's holding that Title III was unconstitutional has jeopardized states' funding, see infra Part IV.
1. Incentives Available Under the VAWA I

The VAWA I did more than just provide for a civil remedy for victims of gender-motivated violence. The act was one of the many bills passed by Congress that appropriated conditional funding to states.\(^\text{372}\) Many of the VAWA I provisions, other than Title III, created incentives for individual states to address violence against women.\(^\text{373}\) The provisions were designed specifically to encourage states to become more proactive in preventing gender-motivated violence.\(^\text{374}\) The provisions included funding for states to provide education and prevention programs,\(^\text{375}\) to develop support programs for victims of gender-motivated violence,\(^\text{376}\) and to implement new ways of addressing this pervasive problem.\(^\text{377}\) To receive funding under the VAWA I, the state was required to apply for each grant and implement certain changes determined by the type of grant that the state was seeking. The more creative the measure or drastic the change, the more money the state was eligible to receive.

One of the primary justifications for Title III was the evidence that the states were not adequately addressing the problem of gender-mo-

\(^{372}\) The numerous amount of legislation that has been passed is beyond the scope of this Comment. For a focused look at the federal legislation passed between 1990-1997 dealing with domestic violence, see George B. Stevenson, Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children, 33 WILLAMETTE L. REV. 848, 854 (1997) (discussing the VAWA I as part of the Violent Crime Control and Law Enforcement Act).


\(^{374}\) See the VAWA I Subtitle B § 1701 “Law Enforcement and Prosecution Grants to Reduce Violent Crimes Against Women” (stating that the general purpose of the program and grants is to “assist States, Indian tribes, cities, and other localities to develop effective law enforcement and prosecution strategies to combat violent crimes against women and in particular, to focus efforts on those areas with the highest rates of violent crime against women”).

\(^{375}\) Services*Training*Officers*Prosecutors (STOP) Grants are awarded by the Violence Against Women Office (VAWO) pursuant to the VAWA I. These grants were provided to states in order to develop and strengthen their response to domestic violence. VAWO website, supra note 360.

\(^{376}\) Twenty-five percent of each STOP grant awarded to a state must be allocated to victim services. Id.

\(^{377}\) Grants available through the VAWO include: STOP Violence Against Women Formula Grants, STOP Violence Against Women Indian Women Discretionary Grants, Grants to Encourage Arrest Policies, Rural Domestic Violence and Child Victimization Enforcement Grants, Domestic Violence Victims’ Civil Legal Assistance Grants, and Grants to Combat Violent Crimes Against Women on Campuses. These grants were available to any state or local government for uses involved in combating domestic violence. See VAWO website, supra note 360.
tivated violence.\textsuperscript{378} The enactment of the VAWA I made dramatic changes in how the states dealt with domestic violence. The funding provisions of the act provided the states with over $800 million in order to encourage change. As a result of this funding, states began to address domestic violence as the disturbing epidemic that it had become.\textsuperscript{379}

Despite the more proactive response that most states have taken, there remains much work to be done in the quest to put an end to domestic violence, especially in light of the fact that Title III has been struck down. States cannot end domestic violence alone; a fundamental change must be made in our society, at both the state and community level, if we are to end the plight of domestic violence victims. The steps that Congress took to return the power to the states represented a movement in the right direction. Accordingly, the developments that the states have made should be examined in deciding what action Congress should take in the future.

a. The Legislative Response

The states’ legislative response to the problem of domestic violence represents the first step in combatting gender-bias in the state legal system and improving the lives of domestic violence victims nationwide. Over the last twenty years, state legislatures have taken steps to address the need for more aggressive domestic violence legislation\textsuperscript{380} and the presence of gender bias in the legal system.\textsuperscript{381} As a result, the increasing public acknowledgement of the domestic violence epidemic\textsuperscript{382} has created a situation where state politicians cannot afford to ignore the need for legislation dealing with gender-motivated violence, unless they risk being voted out of office. This public accounta-

\textsuperscript{378} See \textit{supra} Part II.

\textsuperscript{379} See BOUMIL, ET AL., \textit{supra} note 347, at 214 (noting that the states are treating domestic violence as a serious problem, “[t]he efforts [of states] to combat [domestic violence] are . . . more genuine than ever”).

\textsuperscript{380} See \textit{infra} notes 381-383 and accompanying text.

\textsuperscript{381} Pursuant to increased public awareness and provisions of the VAWA I, many states have created task forces with the responsibility of investigating the presence of gender bias in the justice system and recommending remedial actions. \textit{See} Swent, \textit{supra} note 368, at 29, Table 3 (reporting the results of task force investigations in fourteen states).

\textsuperscript{382} See Epstein, \textit{supra} note 15, at 3 (discussing the fact that “[s]ociety now widely accepts intrafamily abuse as a crucial goal . . .” yet noting that “state intervention in family violence cases has long undermined any meaningful government response”). It has been this incredible public response, grounded in the movement of women’s groups over the last twenty-five years that led to the enactment of the VAWA I. \textit{See generally} MARY LYSTAD ET AL., \textit{Domestic Violence, in Family Violence: A Clinical and Legal Guide} 140 (Sandra J. Kaplan ed., 1996) (discussing the progress made by women’s groups in bringing family violence to the public’s attention).
bility, along with the financial incentives provided by the VAWA I, has encouraged the enactment of state anti-violence legislation across the country.\textsuperscript{383}

Although there is still room for improvement, the realization that domestic violence affects society as a whole, and that there is a need for a solution rather than a quick fix, has spawned incredible growth in the attack on domestic violence. States have acknowledged the need for women to feel protected by the system, both when they first leave the abuser, as well as during the period when they are seeking justice.\textsuperscript{384} Accordingly, every state has enacted civil protection order statutes\textsuperscript{385} and provisions for emergency ex-parte relief for victims attempting to leave an alleged abuser. These protection orders demand that the alleged abuser stay away from the victim, her home, her workplace, and her family, until the outcome of the case or for a specific duration. The protection statutes also provide support for the victim in her attempt to regain control of her life, providing that the state will charge the abuser criminally if he violates the order.\textsuperscript{386}

The limit on the state legislative development has been the legislatures' inability to enforce the legislation; this remains the duty of the police and the court system.\textsuperscript{387} In this situation, the state legislatures have been proactive, creating legislation that mandates or encourages the state court systems, as well as local jurisdictions, to enforce protective legislation. Since 1994, all fifty states have enacted some sort of domestic violence arrest policy,\textsuperscript{388} thereby limiting the amount of discretion available to the police.\textsuperscript{389} These policies, coupled with further

\textsuperscript{383} See Epstein, supra note 15, at 4 (discussing the "remarkable progress made by legislators" in the context of domestic violence).

\textsuperscript{384} See supra note 113 (discussing why women do not leave violent relationships).

\textsuperscript{385} See Buel, supra note 113 (characterizing the civil protection order as "essential relief necessary for battered women to leave an abusive relationship"). Civil protection orders remain the most requested form of relief by domestic violence victims, although without enforcement by the other members of the legal system a protection order does not benefit the victim as it should. For an example of a civil order of protection, see 3 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 1-12, "The Civil Justice System's Response to Domestic Violence" (Patricia G. Barnes ed. 1998) [hereinafter DOMESTIC VIOLENCE: FROM A PRIVATE MATTER].

\textsuperscript{386} All fifty states now have criminal contempt statutes in place for violators of civil protective orders, thus, the violation of a civil protection order is considered a crime against the state. For a thorough discussion of civil protection orders, the requirements for obtaining one and the benefits to the order, see Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 801-1019 (1993).

\textsuperscript{387} See infra notes 397-407 and accompanying text.

\textsuperscript{388} See supra Part III.B.1.b. (discussing various arrest policies).

\textsuperscript{389} See supra notes 113-134 and accompanying text (discussing the troubling effects of police discretion in whether to arrest an alleged abuser in a domestic violence situation).
educational programs and domestic violence training for both law enforcement and court personnel. have begun to make a dramatic difference in the statistics concerning domestic violence.

Statistics support the conclusion that the state legislatures have begun to respond to the problem of domestic violence, addressing this very personal crime with victim-focused legislation. With the continued state legislative fight against domestic violence, the loss of Title III does not signify the end of the fight against domestic violence. Despite the legislative advancements, the quest for an end to the problem of domestic violence has only begun to take shape. "[A] law is only as good as the system that delivers on its promises," thus, the states must continue to improve upon the methods of dealing with domestic violence and those who suffer as a result. To fully comprehend the proactive stance of the states and the continued quest for further advancement in dealing with domestic violence, it is necessary to examine the response of state law enforcement and court personnel.

b. Police Response

The states’ response to domestic violence must begin with ensuring law enforcement participation. Police officers take an oath to protect the public; unfortunately, for many years the police officers’ definition of the public did not include domestic violence victims. Accordingly, a large amount of federal legislation, including the VAWA I, has been enacted to provide incentives for the states to improve the response of law enforcement to the needs of domestic violence victims. States and communities across the country have responded to these incentives. In addition, states have responded to law enforcement’s failure to take domestic violence victims seriously

---

390. See supra note 52 (citing to a provision of the VAWA I that provides funding to states that implement further training and educational programs for law enforcement and court personnel concerning domestic violence).
391. See supra note 386 and accompanying text.
393. See KAPLAN, supra note 382, at 167 (discussing issues relating to victims of domestic violence and noting that “cases of partner abuse are likely to be adequately and fully addressed only within the criminal justice system”).
394. For an analysis of the historical problems with law enforcement and court personnel faced by domestic violence victims, see supra Part III.A.1.
395. See supra notes 115-134 and accompanying text (discussing the importance of law enforcement in the fight against domestic violence).
396. See supra notes 372, 374-379 and accompanying text (discussing the incentives of increased funding awarded to the states for creating training and educational programs concerning domestic violence).
through the implementation of training and education programs on dealing with domestic violence situations.\textsuperscript{397}

These programs serve as reminders to police officers that domestic violence victims are the victims of violent crime, regardless of their relationships with their abusers, and encourage the officers to treat the crimes just as seriously as they would treat stranger violence. The focus of many of these programs has been to dispel the stereotypes about family violence\textsuperscript{398} and to educate police officers about the severity of domestic violence.\textsuperscript{399} These programs, coupled with proactive arrest policies, have brought about dramatic results thus far. The number of homicides resulting from domestic violence has decreased by over fifty percent in Los Angeles and New York City since 1996.\textsuperscript{400} Hard numbers such as these, along with the increase in funding from the federal government, spur the leadership of law enforcement in states across the country to continue training and educating their officers.\textsuperscript{401}

Domestic violence training helps police officers handle situations in which they must decide whether to arrest the abuser, or, as in certain states, where they are required to arrest the alleged abuser regardless of the victim’s wishes.\textsuperscript{402} Arrests represent the first step in holding an abuser accountable for his crimes and helping a victim change her life. Historically, police officers took the position that arrests in domestic

\textsuperscript{397} At least twenty-five states and the District of Columbia require entry-level domestic violence training for police officers. For an example of the type of domestic violence training many officers receive, see Washington State Criminal Justice Training Commission handout, \textit{in Domestic Violence: From a Private Matter}, supra note 385, at 77.

\textsuperscript{398} See supra notes 118, 121, 124 and accompanying text (discussing the historical response of law enforcement to domestic violence situations).

\textsuperscript{399} For an example of domestic violence training that informs officers as to the warning signs of homicidal abusers, see \textit{Domestic Violence: From a Private Matter}, supra note 385, at 77. From 1986 to 1992, the U.S. Department of Justice conducted a research study on training programs for law enforcement concerning domestic violence for an overview of the results, see National Institute of Justice, \textit{Evaluation of Family Violence Training Programs} (1995), at http://www.ncjrs.org/txtfiles/famvio.txt (last visited March 23, 2001).

\textsuperscript{400} Hart, supra note 116, at 212.

\textsuperscript{401} In many cities across the country, proactive domestic violence policies have decreased domestic violence and have resulted in the creation of specialized domestic violence units. For example, in 1996, Quincy, Massachusetts, a city of 90,000, reported that they had not had a domestic homicide in over ten years. “Long-Term Effectiveness” in \textit{Domestic Violence: From a Private Matter}, supra note 385, at 76. The Quincy Police Department had implemented domestic violence education and policies over a period of twenty years. \textit{Id}. “In addition to standard recruit training and state-mandated training, Quincy police officers receive twenty additional hours of domestic violence training.” \textit{Id}. This increased training teaches the officers to counsel the victim and collect evidence at the scene so as to make prosecution, without the victim’s cooperation, a possibility. \textit{Id}.

\textsuperscript{402} This is called “mandatory arrest.” See supra note 133 and infra note 406 and accompanying text.
situations were to be avoided, due to the belief that domestic violence was a private issue. However, this view is being replaced by the belief that the police have the responsibility of protecting citizens, and in a case of domestic violence, it is even more important that the officers intervene on behalf of the victim. In response to legislation passed by more proactive state lawmakers, and the increase in education about domestic violence, every police officer in this country now has the ability to make an arrest in a domestic violence situation provided that there is probable cause.

The days when the police responded to a domestic violence call and left without making an arrest are over. Since 1990, over twenty-five states have enacted mandatory arrest policies in domestic violence situations. Mandatory arrest policies dispel with police discretion, the root of the problem with the response to domestic violence. Mandatory arrests actually help the victim, although taking away her control of the situation, because she is not forced to make an immediate decision on whether to press charges against her abuser. These policies effectively remove the alleged abuser from the situation and allow the victim time to think. Further, in communities with advocacy programs, this type of policy allows an advocacy program access to the

403. See supra notes 121-124 and accompanying text.

404. Many commentators feel that arrest does not serve as a deterrent, but rather only increases the likelihood that the abuser will take revenge on the victim when he is released from custody.

405. These are termed “permissive arrest statutes” and are the baseline for domestic violence arrest policies. For further discussion of these statutes see Pamela Bless Bracher, Comment, Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem, 65 U. CIN. L. REV. 155, 166-68 (1996) (explaining that many states have adopted permissive arrest statutes that allow police officers to make warrantless arrests in certain circumstances).

406. For examples of mandatory arrest statutes, see Cecelia M. Espenoza, No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections, 83 MARQ. L. REV. 163, 182-91, n.103 (1999); Adler, supra note 114, at n.12.

407. Although beyond the scope of this Comment, this is one of the biggest criticisms of mandatory arrest policies. Many critics claim that mandatory arrests actually harm the victim by fostering the feeling of helplessness and controlling the victim just as her abuser had done. Most critics of mandatory arrest policies criticize law enforcement’s focus on punishing the batterer and not empowering the victim. See Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REV. 550, 551 (1999) (stating that mandatory state interventions “are in danger of replicating the rejection, degradation, terrorization, social isolation, missocialization, exploitation, emotional unresponsiveness, and close confinement that are endemic to the abusive relationship”); Bracher, supra note 405, at 179 (noting that mandatory arrest fails to “address the causes underlying the violence”); Donna M. Welch, Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?, 43 DEPAUL L. REV. 1133, 1164 (1994) (finding that mandatory arrest policies are “not likely to deter subsequent violence”).
victim without the abuser's threatening presence. Besides helping the victim in the immediate situation, mandatory arrest policies demonstrate that the states are beginning to recognize that domestic violence is a crime not only against the victim, but also against the state.

In a mandatory arrest jurisdiction, the police officer must arrest the suspect if there is probable cause that a domestic violence incident occurred. These policies have resulted in an increase in domestic violence arrests. For example, in Washington, D.C., the percentage of domestic violence arrests after the enactment of a mandatory arrest policy jumped from five to forty-one percent. An increase in the number of arrests should correspondingly result in an increase in the number of domestic abusers punished and, consequently, the number of victims that are effectively helped.

In a majority of states, preferred arrest policies are in place. In a preferred arrest situation, the police officer has more discretion than in a mandatory arrest, but can still act regardless of the victim's wishes. These policies, unlike mandatory arrests, allow the victim to have input in the outcome of the situation, however, the decision is still ultimately left to the police. Preferential arrest statutes usually contain language from the legislature that encourages arrests in cer-

---

408. In fiscal year 1999, the Violence Against Women Office, in conjunction with the Department of Justice, pursuant to the VAWA I, made over $21 million of grants available to communities who established legal advocacy and domestic violence victim advocacy programs. See U.S. Department of Justice, Justice Department Announces $21.9 Million to Assist Victims of Domestic Violence, at http://www.prnewswire.com/cgi-bin/...1999/000970722&EDATE=Jun+25+1999.htm (last visited Feb. 4, 2000). For example, in Cook County, Illinois, the Domestic Violence Courthouse houses a community-based advocacy program. The main purpose of the advocacy program is to provide domestic violence victim with information concerning protection orders, shelters, legal counsel, and court proceedings. The advocacy programs are under no obligation to share information with the prosecution or defense: their obligation is solely to the victim and the victim's well-being. Id.

409. The fact that domestic violence crimes are crimes against the state is a very important element that has historically been overlooked in the domestic violence context. See supra note 14 and accompanying text. In no other criminal situation does a victim have the right to prevent the state from arresting her attacker.


411. Id. at 15.


413. See Bracher, supra note 405, at 168-70 (discussing Ohio's preferential arrest statute and the concern of the legislature that police discretion be limited). See also Welch, supra note 407, at 1151 (discussing preferential arrest statutes as "pro-arrest" statutes).
tain situations or fact patterns. In encouraging, but not mandating, arrests, the state places its confidence in the police officers and encourages the officers to take a more educated role in the process of handling domestic crimes. Of course, the success of arrest policies depends on the continued training of officers in order to dispel stereotypes about domestic violence, and instruct them on how to deal with these types of situations.

One of the most important areas where these arrest policies have begun to make a difference is in the enforcement of civil protection orders. Enforcement of protection orders is arguably the most important duty of the criminal justice system in combating domestic violence. Protection orders provide the victim with time and space away from her abuser, as well as the right to stay in her home and keep her children. Protection orders were a main concern of the VAWA I, thus, funding was made available to states that adopted more stringent arrest policies and made a concentrated effort to enforce protection orders. Through enacting these proactive policies and coupling them with domestic violence training for police officers, the states have attempted to respond to Congress’ concerns with varying degrees of success.

c. Response of Prosecutors

Along with the statutes enacted to increase arrests, state legislatures responded to the incentives under the VAWA I by implementing guidelines for prosecutors who deal with domestic violence cases. These policies represented vast improvements over the automatic drop policies concerning domestic violence that had been in place in most states. Automatic drop policies allowed the abuser to coerce the victim into dropping the charges, and effectively allowed the abuser to control the legal system that should have been punishing the offender. Acknowledging this control and the effect it has on a victim’s rights, states have responded by enacting policies such as no-

---

414. For instance, in the twenty-seven states with preferred arrest policies, the laws adopted encourage arrest when “there is probable cause that he or she has assaulted a family member or has violated a domestic violence protection order.” See VAWO Website: Arrests, supra note 412.

415. Research has shown that along with enforcement, “the effectiveness of civil protection orders for victims of family violence depends on how specific and comprehensive the orders are . . . .” National Institute of Justice, Civil Protection Orders: Victims’ Views on Effectiveness U.S.D.O.J. (Jan. 1998). For a review of research conducted by the U.S. Department of Justice concerning domestic violence victims’ views on the effectiveness of civil protection orders, see id.

416. See supra notes 385-386 and accompanying text.


418. For a discussion of the reluctance of the prosecutor to pursue charges without the cooperation of the victim, see supra notes 137-146 and accompanying text.
drop prosecution\textsuperscript{419} and mandatory participation policies for victims.\textsuperscript{420}

No-drop prosecution policies dictate that once charges are brought, the case will proceed regardless of the victim's wishes, "as long as sufficient evidence exists to prove criminal conduct."\textsuperscript{421} Similar to mandatory arrests, no-drop prosecution takes the decision out of the hands of the victim, and some claim it fails to allow victim input and perpetuates her status as a victim.\textsuperscript{422} Although this is a valid concern, the increase in domestic violence abusers who have been punished as a result of the no-drop policies and the corresponding drop in intimate murders support the continued use of this proactive policy.\textsuperscript{423} This policy encourages the prosecutor to treat the case as if there was no complaining witness, effectively increasing the chances that evidence and other witnesses will be collected, thereby increasing the possibility of a conviction.

Although many women's groups disagree with this type of policy,\textsuperscript{424} it is achieving results in the area of domestic violence. In developing effective prosecutorial policies concerning domestic violence, there is no way to satisfy all parties. Despite the arguments against it, "no-drop prosecution policies have moved domestic violence criminal prosecutions to a position of rough parity with crimes perpetrated by non-intimates and have greatly expanded the tools available to battered women seeking to escape abuse."\textsuperscript{425} This statement is true because in no other area of criminal law does a state defer its decision of whether to prosecute a defendant to the victim. Accordingly, for domestic violence to be treated as a serious crime, it must be treated the same as any other crime against the state.

Some states have gone beyond encouraging prosecution by creating domestic violence task forces that consist of specially trained prosecutors, victim advocates, and investigators who deal with the recurring

\textsuperscript{419} See Epstein, supra note 15, at 15 (discussing the adoption of "no-drop" policies and the benefits of such policies).

\textsuperscript{420} See generally Hanna, No Right to Choose, supra note 359 (discussing the importance of mandatory participation policies).

\textsuperscript{421} Epstein, supra note 15, at 15.

\textsuperscript{422} See supra note 15 and accompanying text.

\textsuperscript{423} See Epstein, supra note 15, at 15-17 (citing to statistics that show that no-drop policies have resulted in a decrease in domestic homicides, as well as "lower recidivism").

\textsuperscript{424} The majority of criticism concerning "no-drop" prosecutorial policies centers on the further helplessness of the victim. According to many critics, this type of policy further victimizes the woman by taking away her choice of whether to prosecute her abuser. See supra note 364.

\textsuperscript{425} Epstein, supra note 15, at 16.
cases, as well as the more serious incidents of domestic violence. The idea of the domestic violence task force stems from federal funding provisions and represents the most aggressive and proactive stances against domestic violence seen in this country, focusing not only on deterrence and punishment, but also in helping the victim and rehabilitating the abuser. This complete approach to domestic violence situations is an attempt by the states to address the problem at its root, while still holding the batterer responsible for his actions. In these situations, the prosecutor becomes adept at dealing with both parties, as well as overcoming any problems with the judiciary.

From proactive prosecutorial policies to task forces focused on domestic violence, states have taken the appropriate steps in beginning to address the seriousness of the domestic violence epidemic. Although the system is far from operating in the best interest of the victim at all times, it is apparent that the states have finally begun to take the problem of domestic violence seriously. The damage created by the historical inaction of the state legal system cannot be undone in a few years. These policies and reactions are important steps in the right direction, but the states must continue to implement aggressive policies and ensure that they are enforced. Perhaps the most important element of the system that requires the most improvement is the state judicial system.

d. Judicial Response

When enacting legislation, the states did not forget the judiciary and the inherent gender bias that still lingers within courtrooms. Many states, taking advantage of the funding made available through the VAWA I, have created task forces to study the gender bias in the courts and have made recommendations concerning the issue. As a result of these findings, which have shown that gender bias is still rampant, educational programs and training sessions concentrating on

426. Cook County, Illinois, had created such a task force. The personnel in charge of the task force considers their job a promotion, rather than a demotion as those who have traditionally dealt with domestic violence have felt. (information on file with author).
429. For a discussion of specialized domestic violence courtrooms, see infra note 437 and accompanying text.
430. See supra note 368; Amrit K. Sidhu, More Gender Fairness Needed in Law, 25 Mont. Lawyer 30 (Nov. 1999) (discussing the findings of gender bias in the Montana judicial system by its task force).
431. See Swent, supra note 368, at 55-59 (discussing the gender bias found in the judicial system by state task forces concerning domestic violence victims).
remedying judicial bias have been implemented by the states. Many of these programs are specifically targeted to the treatment of domestic violence crimes and its victims.\textsuperscript{432} This in turn not only improves the way victims are treated, but also enhances the judge’s ability to understand the situation that he or she encounters in the courtroom.\textsuperscript{433}

These education and training programs, created by the states, represent the future of the justice system. The states that have enacted these programs have utilized different methods and philosophies in their implementation, resulting in a need for a more cohesive and blanket training model. The Violence Against Women Office has been active in helping states develop programs and has created criteria that education programs should address.\textsuperscript{434} Despite all of these efforts, change is difficult; the concern still remains that members of the judiciary will be resentful of the required participation in these programs. It is too early to see the actual results of these programs and whether they are making any real difference, however, they can only help.\textsuperscript{435}

Along with increased training, many states have created domestic violence courtrooms that, similar to the domestic violence task force, addresses only domestic violence cases. These types of courtrooms are beneficial because they create an environment where the judge and the courtroom personnel handle this type of situation on a day to

\textsuperscript{432} For an analysis of the historical treatment of domestic violence victims in the state court systems, see \textit{supra} notes 143-163 and accompanying text.

\textsuperscript{433} Many times the victim might seem disassociated from her injuries or the situation, telling her story in a flat voice, while the defendant seems calm and collected. Other times the victim might seem more angry than upset, or they might even seem bizarre. These emotions are often tied to the psychological effects of the abuse and it is important that the judge understand that it has nothing to do with the credibility of the victim’s story. For a discussion of these symptoms, as well as other factors of Battered Woman Syndrome, see Stark, \textit{supra} note 347, at 997-1004.

\textsuperscript{434} VAWO website, \textit{supra} note 360.

\textsuperscript{435} It is important that the judges who sentence domestic violence defendants and deal with domestic violence victims understand the ramifications of their sentences to both parties. The goal of the state criminal justice system should be twofold: first, to hold the abuser accountable for his actions and second, to end the cycle of abuse. For these reasons, judges need to have a better understanding of the batterer programs that are available and the advocacy groups that can help. See Kerry Murphy Healey & Christine Smith, \textit{Batterer Programs: What Criminal Justice Agencies Need to Know}, NATIONAL INSTITUTE OF JUSTICE (1998), at http://www.ncjrs.org/pdfsfiles/171683.pdf (last visited March 23, 2001) (reporting on the different types of battering programs that are implemented across the country and discussing the need for judges and probation officers to be educated about the program goals and methods). For a thorough study on the effectiveness of the different types of batter intervention programs, see \textit{generally} Kerry Healey, Ph.D., Christine Smith & Chris O’Sullivan, Ph.D., \textit{Batterer Intervention: Program Approaches and Criminal Justice Strategies}, in \textit{Issues and Practices in Criminal Justice}, NATIONAL INSTITUTE OF JUSTICE, NCJ 168638 (February 1998).
day basis, and are therefore more likely to understand the nuances of a domestic violence situation. These courtrooms also serve as an enforcer, they have the ability to trace multiple offenders, enforce protection orders, and deal with situations before they become fatal. These courtrooms usually provide access to victim advocacy groups and are better suited to provide additional information to a victim who is looking for assistance.

Many states that have created domestic violence courtrooms and task forces have begun to create databases that make it easier to track and identify repeat abusers. The Violence Against Women Office has made the creation of such databases easier by providing additional funding to the states that implement these systems. The databases make it more likely that intervention will occur and increase the state's ability to enforce civil protection orders.

In addition to implementing fundamental changes in the legal system, many states have implemented programs that require the legal system to coordinate its efforts with the community when dealing with domestic violence crimes. This is a large step in dealing with domestic violence, as it requires the state to acknowledge that the criminal justice system is not equipped to remedy domestic violence alone.

e. Advocacy Programs and Community Response

One aspect of the criminal justice system that has been ignored is the need for community support, especially in the context of domestic violence. Only recently have states and communities begun to coordinate their actions in fighting domestic violence. These coordinated programs have been encouraged by the Violence Against Women Office, which allocates money to states who focus on a comprehensive domestic violence plan that incorporates community agencies and victim advocates.

This new approach to dealing with domestic violence sends a powerful message; that society is not only concerned with domestic violence, but also that it will no longer look the other way. This

---

436. Some critics of this response claim that judges who deal only with domestic violence cases are unable to be neutral in their dealings with defendants.

437. See Epstein, supra note 15, at 28-34 (discussing the benefits to the integrated domestic violence courtrooms).

438. For example, the STOP grants are awarded to states that develop and strengthen their criminal justice system’s response to violence against women and are used to support and enhance services for victims. The grant is conditioned upon the state allocating twenty-five percent to law enforcement, prosecution and victim services respectively. Violence Against Women Office, Violence Against Women Office-Application Kits, at http://www.ojp.usdoj.gov/vawo/applicationkits.htm (last visited Sept. 14, 2000).
comprehensive program acknowledges that domestic violence affects its victims in an individual and traumatic way, and the only way to end the cycle of abuse is to intervene on both sides. Through these programs, victim advocates now have an integral role in the criminal justice process and the well being of the victim becomes a priority.

Victim advocates may call the victim before the court's proceedings to explain the process or to field any of the victim's questions. Advocates provide the victim with someone who will listen to her story and provide her with an unbiased opinion. They are there to encourage, counsel, and most of all, represent the victim's needs. Advocates also provide victims with information about civil protection orders in the event the criminal charges are unsuccessful, they provide victims with information about community services, as well as contacts that a victim might need in order to escape the abuse.

Victim advocates and community organizations provide invaluable services to domestic violence victims and, in collaboration with the criminal justice system, have enhanced the states' roles in protecting the victim's interests. The states' legislation dealing with each phase of the criminal justice system, as well as their encouragement of advocacy programs through supplemental funding, have resulted in great advances in the way domestic violence situations are handled. Beyond these improvements, the states have also responded by implementing legislation that recognizes domestic violence, and other gender-motivated violence, as bias crimes.

2. Hate Crimes and Civil Remedies in State Law

Contrary to what Congress found in 1990, many states have responded to the epidemic of gender-motivated violence, as a result of political and social concerns, by enacting statutes that provide civil rights remedies for victims of gender-motivated violence, including domestic violence. For example, many state codes include "hate crime" or malicious harassment provisions that recognize gender bias in their criminal laws. Similar to Title III, these types of statutes provide an important tool to fully address the bias element of gender-motivated violence and the civil rights harm that results from such

---

LOSE THE BATTLE AND WIN THE WAR?

Accordingly, these types of statutes also provide an alternative to Title III.

Currently, over nineteen states include gender in their bias crime laws, yet there is a notable lack of reported cases involving gender-based crimes. The lack of use does not mean that these laws should be considered any less meaningful, as their presence illustrates that the states recognize gender-motivated violence as an issue and they provide potential remedies for battered women.

Under these types of statutes, just as under Title III, a battered woman can control her own case and in turn may collect damages from her abuser. Since Title III has been found unconstitutional, Congress should consider providing further incentives to the states for enacting gender-bias statutes. Although these statutes are not national legislation, they still provide domestic violence victims with a civil right to be free from gender-motivated violence.

For example, California represents one of the many states that provides a civil law cause of action for gender-motivated violence. A quick look at its statute illustrates how a state could address the problem. The California statute is based on a hate crime model, however, similar to Title III, it also provides potential remedies for battered women. California was one of the first states to recognize a right to be free from gender-motivated violence declaring that "[a]ll persons . . . have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their . . . sex." A civil cause of action further enforces this recognizable right:

440. Beyond these types of civil remedies, domestic violence victims may still bring a civil tort action against their abusers to collect damages. Historically, tort actions were precluded in many domestic situation based on marital privilege. Over the last twenty years, almost all of the states have done away with the marital privilege. For a discussion of the tort actions available to domestic violence victims, see American Bar Association, Marital & Parental Torts: A Guide to Causes of Action, Arguments and Damages 3-4 (1990); Daniel G. Atkins et al., Striving for Justice With the Violence Against Women Act and Civil Tort Actions, 14 Wis. Women's L.J. 69, 69-99 (1999) (exploring the possibility of using civil tort actions on behalf of domestic violence victims through one woman's story); Mary Alice Cleve, Comment, Is There Liability for a "Stinger in the Tongue"? Psychological Spousal Abuse Defined, 3 Widener J. Pub. L. 895, 909-915 (1994) (calling for psychological domestic abuse to be adopted as a civil tort action).


443. Id. (providing that a victim who brings a cause of action under this section is entitled to actual damages, as well as attorney fees).

444. See Brenneke, supra note 49, at 36.

445. Id. at 37 (citing Cal. Civ. Code § 51.7 (West 1992)).
Whoever denies the right provided by § 51.7, or whoever aids, incites, or conspires in such denial, is liable for each and every such offense for the actual damages, . . . suffered by any person denied that right and in addition, . . . exemplary damages, . . . a civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied that right and attorney’s fees.\textsuperscript{446}

Actual damages include general and special damages.\textsuperscript{447} The person aggrieved by the conduct, as well as the state attorney general, district attorneys, or city attorneys, can bring complaints pursuant to this section.\textsuperscript{448}

The primary advantage of the civil rights statutes that have been enacted by the states is that they do not require state action, which can be difficult to prove, and the plaintiff need not demonstrate deprivation of any independent underlying right. The language of the existing statutes, such as the California statute illustrated above, has broad applicability in practice and provides excellent tools that battered women may use to gain justice through the state court system.

3. Equal Rights Amendments to State Constitutions

Some states have addressed gender-bias by amending their state constitutions to protect women. When discussing the Equal Rights Amendment (ERA), the first thing that comes to mind is the failed attempt to amend the United States Constitution on behalf of gender in the late 1970s and early 1980s.\textsuperscript{449} In the wake of the failed amendment, many states began to amend their own constitutions with an ERA focusing on gender equality. Similar to the bias crime statutes in other states, state ERAs protect women and provide domestic violence victims with a cause of action for damages. One problem with relying on ERAs, similar to the problems with bias crime statutes, is that not all states have amended their constitutions to include such a provision. Consequently, not all women in the country are protected.

One state that does have an ERA, as well as other civil rights laws, is Massachusetts. Massachusetts protects women from discrimination in contract and property rights.\textsuperscript{450} Deprivation of these rights could be shown in the context of a battered woman who has been kept out

\textsuperscript{446} CAL. CIV. CODE § 52(b) (West 1992).
\textsuperscript{447} Id. at § 52(h) (West 1992).
\textsuperscript{448} Id. at § 52(c) (West 1992).
\textsuperscript{449} The proposed Equal Rights Amendment to the Constitution would have required that the government treat all people alike, irrespective of sex, just as the Equal Protection Clause of the Fourteenth Amendment required that people be treated alike irrespective of race. For an in-depth look at the ERA and the controversy that kept it from being passed see MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 22-24 (1st ed. 1994).
\textsuperscript{450} See Brenneke, supra note 49, at 38.
of her house as punishment and humiliation. The Supreme Judicial Court of Massachusetts found that

[s]exual harassment by a person not acting under color of law may violate secured rights within the meaning of the Massachusetts Civil Rights Act . . . . Sexual harassment accomplished by threats, intimidation, or coercion constitutes precisely the kind of conduct prescribed by the act, and is similarly directed toward a class explicitly protected by Article 1 of the Massachusetts Declaration of Rights, including its Equal Rights Amendment.\footnote{451} Under Massachusetts' law, violence by a man against a woman in the domestic context may also qualify as coercion on the basis of sex.\footnote{452}

Massachusetts' ERA is representative of the ERAs found in many states. A disadvantage to using an ERA as a basis for damages resulting from domestic violence, rather than a bias-crime statute, is the ever-evolving definition of "sex" and the lack of case law establishing guidelines for courts dealing with claims under ERAs. Despite this limitation, the ERAs implemented in many states represent another opportunity for a victim of domestic violence to recover damages and serve to recognize the harms gender-motivated violence can have on society.\footnote{453}

4. The Battle Should Continue

The efforts of the states to address the problems associated with gender-motivated violence, particularly domestic violence, have come a long way with the short-lived enactment of Title III. Pursuant to incentives provided by the provisions of the VAWA I and the increased public awareness on the issue of domestic violence, many states have begun to implement fundamental changes in how they deal with domestic violence and its victims.

However, since Title III has been held unconstitutional and the Thirteenth Amendment may not provide a constitutional basis for its reenactment, it is imperative that the federal government continue to support and encourage the states in improving the lives of domestic violence victims. State action cannot substitute the impact that federal civil rights legislation would have on society's views concerning gender-motivated violence, however, in this situation it serves as an adequate alternative. The VAWA I and Title III represent the begin-

\footnote{452} Brenneke, \textit{supra} note 49, at 37-38.
\footnote{453} According to the Massachusetts law, a plaintiff who litigates under the Massachusetts Civil Rights Act and wins may collect reasonable costs and attorney fees. \textit{Mass. Gen. Laws} ch. 12, §11H (1992).
ning of the war against domestic violence, and despite the setback, all is not lost.

IV. IMPACT

The impact of the VAWA I is apparent in the changes that the states have made in dealing with domestic violence and the priority it has become in the legislative context. At this time, the impact of losing Title III on future legislation is unknown, yet it was already effecting legislation before Morrison. Before the Supreme Court decided the fate of Title III, the mere threat that Title III might be lost created roadblocks for further legislative efforts to battle domestic violence. Thus, if the current situation is an indicator, the loss of Title III could possibly have more devastating effects than anyone could have imagined.

A. The Proposed Violence Against Women Act of 1999

Thanks to the great success of the original Act, women and children now have access to shelters that provide a safe haven from abuse; police officers are trained to identify abusers and help victims; and victims of domestic violence and assault have access to counseling and legal assistance.

In 1999, as a result of the dramatic changes documented since the VAWA I, Congress proposed the second Violence Against Women Act (the VAWA II). The VAWA II, which has yet to be passed, includes provisions that reauthorize the funding available to the states pursuant to the VAWA I, as well as provisions that attack domestic violence more aggressively.

The tremendous support for the VAWA II dispels the notion that the VAWA I might have been a singular effort; the new act represents Congress' continued commitment to making the United States safer for women. The VAWA II was introduced as a way of indicating that despite great advancements in the fight against gender-motivated violence, specifically domestic violence, there are still many issues that

456. See 145 CONG. REC. E78-03 (Jan. 19, 1999) (statement of Rep. John Conyers, Jr.) (discussing the need for reauthorization of funding from the VAWA I and the new provisions that are included in the VAWA II).
must be addressed. The challenge the act now faces, passage by the required number of votes in Congress, ironically, is the result of the debate over Title III of the VAWA I, the very legislation that led to its proposal.

1. **Provisions of the VAWA II**

The VAWA II contained provisions that varied in content from reauthorization of existing funding, to creating new grants for community groups and amending the Federal Hate Crimes and Prevention Act to include gender. The main provision of the VAWA II was "The Violent Crime Reduction Trust Fund," which provided for the reauthorization of the funding to states dictated by the VAWA I. The funding provision was set to expire at the end of the 2000 calendar year, thus the passing of the VAWA II was essential to maintain funding.

Beyond reauthorization of the original funding, the VAWA II focused on victim rights in domestic violence situations, and required that states fulfill stringent requirements to acquire federal grants. For example, it amended STOP Violence Against Women Formula Grants by increasing funding to "ensure that domestic violence and sexual assault advocates are involved in planning and implementation of programs . . . ." The VAWA II also mandated that the states which received these funds give at least thirty-five percent to victim services.

Another funding provision that illustrated the commitment to the needs of domestic violence victims was the "Battered Women's Shel-
ters and Services” provision. This provision authorized over one billion dollars to battered women’s shelters across the country. This idea represented one of the first entirely community based steps in the fight against domestic violence. These grants were to be allocated over the next five years and included “caps [on] spending for training and technical assistance by State coalitions . . . .” The grants also allowed more victims to be helped through community programs, enhanced existing services, and gave shelters the financial boost they needed to provide more meaningful services. This provision also provided more money to domestic violence programs, other than shelters, by instructing that any money remaining from the grants was to be directed to domestic violence programming.

The VAWA II also made additional funding available to the states for the purpose of promoting intervention and accountability of the abuser. These provisions provided funds for “the improvement of local, state and national crime databases for tracking stalking and domestic violence.” The proposed legislation was incredibly important because the resulting databases allow states and communities to track abusers and their activities regardless of where they move. These databases also promote and facilitate communication between different states and communities about the treatment of repeat offenders and the protection of victims. The greatest advantage of these databases is the resulting validity given to protection orders, since other agencies have knowledge of the previous actions taken and, therefore, are more likely to make sure these orders are enforced.

In addition, the VAWA II served to strengthen stay-away orders in other ways, by providing victims of domestic violence more security when attempting to leave an abuser. This provision ensured that when a domestic violence victim crosses state lines she still has the protection of her original protection order. Although this “Full Faith and Credit” provision was included in the VAWA I, the VAWA II “clarifie[d] this provision to ensure meaningful enforcement.” The new provision further imposed a penalty upon law en-

---

467. See supra note 458 and accompanying text.
469. Id.
470. See id. This funding provision is titled the “National Stalker and Domestic Violence Reduction” provision. Id. See supra note 457 and accompanying text.
471. Id.
472. See id.
473. See supra note 459, at E79.
forcement agencies that have received funding, and yet have failed to comply with the provision. In strengthening the original provision of the VAWA I, Congress publicly required states to take protection orders more seriously.

Further, the VAWA II contained provisions that acknowledged the need for victims to receive support from all facets of their individual communities. The act specifically encourages job providers to establish intervention programs and provide education programs by directing grant money and tax credits to businesses which implement programs. In creating a “Victim’s Employment Rights” provision and a “Battered Women’s Employment Protection” provision, Congress ensured that abused women will have the opportunity to attend court and participate in the prosecution of their abusers. These provisions address the difficult decisions many victims have faced in the past, such as the choice between whether to proceed with charges against their abusers or to keep their jobs.

Along with each of these notable provisions helping abused women, the VAWA II also contained a provision that might be the answer to the loss of Title III. This provision entitled the “Hate Crimes Prevention Act” (Act) amended federal hate crimes legislation to finally include gender-motivated crime as bias crime and would further permit federal prosecution for bias crimes based on gender, as well as sexual orientation and disability. In June of 2000, the Act was passed in the Senate under the name “Local Law Enforcement Enhancement Act.” If the act is passed by the House, it will also provide for funding for the Federal Bureau of Investigation and federal law enforcement personnel to encourage assisting state and local law enforcement. This provision not only creates a federal and state comprehensive attack on gender-motivated crime, but it also takes the much needed step of equating gender with characteristics such as race and religious affiliation.

These aggressive provisions are only a few of the legislative changes that the VAWA II offers. The Act denotes dynamic legislation that continues the fight to educate and inform society about the harm of

474. Id. The provision does allow law enforcement agencies to attempt to come into compliance before a penalty is assessed.
476. Id. at Subtitle F.
479. Id.
domestic violence. Each of the provisions were designed to further the efforts of the states in dealing with the problem of domestic violence. The VAWA II has one simple goal, to "make more women and children safe."480

2. Brzonkala and the Threat to the VAWA II

The VAWA II represents heavy artillery in the war against domestic violence; artillery that will remain useless as long as it remains a proposal and not enacted legislation. Despite being introduced in January of 1999, the VAWA II has yet to garner the number of necessary votes, despite widespread support, to be passed by Congress.481 Ironically, it seems that the legislation that led to the creation of the VAWA I, might present constitutional concerns that jeopardize the enactment of the VAWA II.

Although the Morrison482 decision only applies to the constitutionality of Title III, many senators have used the decision to block the enactment of the VAWA II. Members of Congress have voiced concern that the decision which held Title III unconstitutional in effect jeopardizes the remaining provisions of the VAWA I, and in turn, jeopardizes the reauthorization of the VAWA I funds through the VAWA II. This presents a severe setback in the movement to eradicate domestic violence, because without the enactment of the VAWA II, the funding provided to the states pursuant to the VAWA I would not be reauthorized.

This dilemma represents the ultimate irony; the death of Title III could ultimately destroy its only effective alternative, comprehensive state action. Without the reauthorization of funding, it is possible the many states that have implemented drastic changes in their legal system might not be able or willing to financially support these programs. Regardless, these incentives are necessary to continue the fight in the war against domestic violence.

The question that remains is whether we can lose the battle over Title III and still win the war against domestic violence? It is evident by the proposal of the VAWA II and the continued state action that victory is a definite possibility. Congress must realize that the Supreme Court's decision concerning Title III in Morrison483 affects only a small portion of the VAWA I, not the constitutionality of the VAWA

480. Biden Webpage, supra note 455.
481. See NOW Website, Legislative Update, at http://www.now.org/issues/legislat/07-06-00.html (last visited Nov. 16, 2000).
483. Id.
I as a whole. The other provisions of the VAWA I are constitutionally safe and sound, and they remain effective tools in the war against domestic violence. Accordingly, the enactment of the VAWA II is imperative for the fight to continue.

V. Conclusion

Domestic violence presents this country's legal system with a perplexing dilemma of how to end the cycle of abuse while still protecting the victim. In the case of Carrie Culberson, the system tragically failed, as it so often does. In her case, the gender bias she experienced in the legal system resulted in her death. There is no way to bring Carrie back, yet there is a way to honor her memory, as well as all of the other victims of domestic violence, by maintaining the aggressive measures against domestic violence founded by the VAWA I.

Despite Title III's importance in spurring the battle against domestic violence, losing Title III does not mean that the war against domestic violence is lost. The Supreme Court cannot completely tie Congress' hands, and accordingly the fight must continue. From reenacting Title III pursuant to the Thirteenth Amendment, to providing further incentives to the states for comprehensive domestic violence plans, or proposing further federal legislation, the federal government must continue to target this pervasive problem. Although domestic violence will never be eradicated simply by passing legislation, it denotes the most fundamental way to begin changing attitudes and behaviors, as well as recognizing domestic violence for the serious crime that it has become.

Jennifer R. Hagan

---

484. See supra notes 52-53 and accompanying text (discussing the other provisions of the VAWA I).
485. See supra note 2.