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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2000; B.A., cum laude, Political Science, Purchase College, State University of New York, 1995. The author thanks Professor Katherine Franke for her guidance and suggestions on this Note, Ellen Gesmer for providing the opportunity to research the Violence Against Women Act's civil rights remedy, which was the inspiration for writhing this Note, and her family and friends for their support.

GENDER DIFFERENCE IN PERCEIVING VIOLENCE AND ITS IMPLICATION FOR THE VAWA'S CIVIL RIGHTS REMEDY

Renée L. Jarusinsky*

INTRODUCTION

What is violence? A typical dictionary definition of violence defines it as “swift and intense force,” “rough or injurious physical force, action, or treatment,” and “an unjust or unwarranted exertion of force or power.”¹ A legal dictionary defines violence as “[u]njust or unwarranted exercise of force” and “the exertion of any physical force so as to injure, damage or abuse.”² Interestingly, studies show that men and women perceive violence differently, with women perceiving more acts as violent.³ The results of these studies call into question the accuracy of these definitions and beg the question: What is violence in the context of violence against women?

In accordance with the results of the studies described above, social scientists who study violence against women have expanded the definition of violence when perpetrated against women to include not only physical acts, but also “visual, verbal, or sexual acts that are experienced by a [female] as a threat, invasion, or assault and that have the effect of hurting her or degrading her”⁴ The

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1. WEBSTER'S NEW WORLD DICTIONARY 1585 (2d ed. 1984).

2. BLACK'S LAW DICTIONARY 1570 (6th ed. 1990) (citations omitted). The legal dictionary also notes that, in some contexts, violence can be more than a physical act; it may also include “false statements . . . and veiled threats by words or acts.” *Id.*

3. *See infra* Part II.A.2.

4. MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY xvi (1994); *see also* Rebecca Emerson Dobash & Russell P. Dobash, *Cross-Border Encounters*, in *RETHINKING VIOLENCE AGAINST WOMEN* 4 (R. Emerson Dobash & Russell P. Dobash eds., 1998) (defining violence against women as “verbal abuse, intimidation, physical harassment, homicide, sexual assault, and rape”); *Introduction to UNDERSTANDING VIOLENCE AGAINST WOMEN* 9-11 (Nancy A. Crowell & Ann W. Burgess eds., 1996). Supporters of broader definitions argue that such definitions more accurately represent victims' experiences. *See id.* at 10.

differences between men's and women's perceptions of violence contribute to the confusion surrounding violence against women. For example, is an act that does not include physical force violent or is an unwanted sexual touching unaccompanied by a slap or a punch violent?

Courts are often faced with these types of questions when determining what constitutes violence in cases brought under the Violence Against Women Act of 1994 ("VAWA"). Under the VAWA, victims are afforded a civil rights cause of action ("civil rights remedy")⁵ that allows a woman to sue the perpetrator in federal court for money damages and injunctive and declaratory relief.⁶ The VAWA's civil rights remedy has two requirements: 1) that the plaintiff be a victim of a "crime of violence;" and 2) that the "crime of violence" be motivated by the victim's gender.⁷

The first requirement, a "crime of violence," is defined in the VAWA's civil rights remedy as an act that 1) constitutes a felony under criminal law ("predicate offense");⁸ and 2) comports with 18 U.S.C. § 16 ("section 16").⁹ Section 16, a definition that was origi-

5. See 42 U.S.C. § 13981 (1994). The VAWA is part of the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322; 108 Stat. 1941 (1994). The VAWA itself contains several provisions, one of which is the civil rights remedy. See *id.* Before and since its passage, the VAWA's civil rights remedy has been attacked on constitutional grounds. Recently, the U.S. Supreme Court granted certiorari to decide whether the VAWA's civil rights remedy is constitutional. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), *aff'd en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 11 (1999).

6. See 42 U.S.C. § 13981(c). While the VAWA's civil rights remedy is gender-neutral, this Note will address male violence against women. Also, the statute explicitly states that a VAWA civil rights claim may be brought in either federal or state court. See *id.* § 13981(e)(3). The vast majority of VAWA civil rights cases, however, have been brought in federal court, such as the cases discussed herein. See cases discussed *infra* Part I.B. In addition, the legislative history of the VAWA's civil rights remedy suggests that "legislators contemplated federal courts as the primary forum for determination of VAWA civil rights claims." Julie Goldscheid and Susan Kraham, *Litigating Violence Against Women Act Civil Rights Claims: Procedural Concerns*, in *VIOLENCE AGAINST WOMEN* 11-1 (David Frazee et al. eds., 1998).

7. See 42 U.S.C. § 13981(c). The "motivated by gender" requirement raises a host of complex issues that will not be addressed in this Note. For analyses of the "motivated by gender" requirement, see *Kuhn v. Kuhn*, No. 98-C2398, 1998 WL 673629, at *4-7 (N.D. Ill. Sept. 16, 1998); *Anisimov v. Lake*, 982 F. Supp. 531, 540-41 (N.D. Ill. 1997); *Brzonkala*, 935 F. Supp. at 783-85; see also Jennifer Gaffney, Note, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247 (1997).

8. See 42 U.S.C. § 13981(d). The statute allows for the predicate offense pleaded by the plaintiff to be either a federal or state criminal felony, and the statute does not require that the defendant had criminal proceedings brought against him under these predicate offenses. See *id.*

9. See *id.*

nally used in the Federal Sentencing Guidelines,¹⁰ defines a “crime of violence” as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or*
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.¹¹

In some VAWA civil rights cases, plaintiffs have alleged predicate offenses that do not contain an element that requires “the use, attempted use, or threatened use of physical force,” pursuant to section 16(a).¹² In such cases, courts must determine whether the predicate offense is one that involves a “substantial risk [of] physical force,” pursuant to section 16(b).¹³ In the absence of statutory guidance, courts have developed various and often inconsistent approaches to determine what constitutes a substantial risk of physical force to women alleging civil rights violations pursuant to the VAWA.¹⁴

This Note focuses on what acts pose a substantial risk of physical force to women for purposes of the VAWA’s civil rights remedy. Specifically, this Note addresses the interpretation of section 16(b) in VAWA civil rights cases. Part I provides a general history and background of the VAWA’s civil rights remedy. First, Part I details the evolution of the “crime of violence” requirement, and second presents the congressional intent behind the civil rights remedy. Part I also provides case illustrations of how federal courts have interpreted section 16(b) in VAWA civil rights cases. Part II discusses traditional understandings of violence against women in the law and presents social science data showing perceptual differences of violence between men and women to provide a contemporary understanding of violence against women. Part II then discusses the different legal approaches utilized by federal courts to interpret section 16(b), which often echo the difference between the traditional and contemporary notions of violence against women. Part III argues that utilizing traditional notions of violence against women to interpret section 16(b) rids the VAWA’s civil rights remedy

10. See discussion *infra* Part II.B.

11. 18 U.S.C. § 16 (1998) (emphasis added).

12. See cases discussed *infra* Part I.B.

13. See *id.*

14. See 42 U.S.C. § 13981; cases discussed *infra* Part I.B.

of any positive effect. Part III proposes that courts employ a broad, uniform approach to determine what acts pose a substantial risk of physical force. This Note concludes that utilizing such an approach would make the VAWA's civil rights remedy the powerful tool for which it was created — a tool to benefit both women and society.

I. GENERAL BACKGROUND AND HISTORY OF THE VAWA'S CIVIL RIGHTS REMEDY

A. Legislative History¹⁵

1. *The Evolution of the "Crime of Violence" Language*

On June 19, 1990, Senator Joseph Biden introduced the first version of the VAWA in the Senate.¹⁶ Senate Bill 2754 included a civil rights cause of action under Title III, which provided that "[a]ny person . . . who deprives another of the rights, privileges or immunities secured by the Constitution and laws as enumerated in subsection (b) . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages."¹⁷ Subsection (b) enumerated the rights referred to above as freedom from "crimes of violence motivated by the victim's gender."¹⁸ This substantive right was defined as freedom from "any crime of violence . . . including rape, sexual assault, or abusive contact, motivated by gender."¹⁹

On October 4, 1990, Senator Biden introduced a substitute bill of the VAWA at an executive committee meeting of the Judiciary Committee (the "Committee").²⁰ This version included significant changes from the prior bill,²¹ increasing coverage from only sex crimes to all crimes of violence motivated by gender.²² After the Department of Justice complained about the vagueness of what

15. For a comprehensive review of the legislative history of the VAWA's civil rights remedy, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

16. See S. REP. NO. 101-545, at 29 (1990); S. 2754, 101st Cong. § 301 (1990) (as introduced).

17. S. 2754, 101st Cong. § 301(c) (as introduced). The language of the civil rights cause of action in this version was akin to the language of 42 U.S.C. § 1983, but without "an under color of state law" requirement. See Nourse, *supra* note 15, at 8.

18. S. 2754, 101st Cong. § 301(b) (as introduced).

19. *Id.* § 301(d).

20. See *id.* § 301(d) (substitute bill), reprinted in S. REP. NO. 101-545, at 43.

21. See *id.*

22. Compare S. 2754 § 301(d) (as introduced), with S. 2754 § 301(d) (substitute bill); see also Nourse, *supra* note 15, at 12.

acts of violence would be covered, however, the Committee incorporated a reference to section 16, which was the federal criminal code's primary definition of "crime of violence."²³ Later that day, the substitute bill, which incorporated the federal definition, was adopted by voice vote in the Committee.²⁴

Against strong opposition, Senator Biden re-introduced the VAWA as Senate Bill 15 on January 14, 1991.²⁵ In response to concerns about the wide range of acts that would be covered under the civil rights remedy,²⁶ Senator Biden attempted to clarify the "crime of violence" requirement in this bill.²⁷ By adding reference to section 16, the major issue in the "crime of violence" analysis is whether the defendant's alleged acts can be associated with a criminal offense.²⁸ Senate Bill 15 also contained language stating that a plaintiff need not file criminal charges nor show a criminal conviction in order to prove that the defendant's acts amounted to a "crime of violence" under the VAWA's civil rights remedy.²⁹ The addition of this language was intended to emphasize that a VAWA civil proceeding was to be governed by civil law, rather than criminal law.³⁰

During the term of the 103rd Congress, the VAWA gained considerable support in the House and the Senate.³¹ Supporters were

23. See *supra* note 11 and accompanying text; see also discussion *infra* Part II.B.

24. See Nourse, *supra* note 15, at 12-13.

25. See *id.* at 13; S. 15, 102d Cong. § 301 (1991). Shortly thereafter, Congresswoman Barbara Boxer sponsored a companion bill in the House. See Nourse, *supra* note 15, at 13.

26. See Nourse, *supra* note 15, at 13. Opposition came from both state and federal judges over the fear that cases brought pursuant to the VAWA's civil rights remedy would "flood the federal courts." See *id.* Chief Justice Rehnquist publicly stated that the VAWA's "definition of a new crime is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes." 138 CONG. REC. 583 (1992) (statement of Chief Justice William Rehnquist). The ACLU shared the concerns of the Chief Justice. See *Crimes of Violence Motivated by Gender: Hearing on S. 15 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary House of Representatives*, 103d Cong. 20 (1993) [hereinafter *Crimes of Violence Hearing*]. In response, Sally Goldfarb pointed out the "sexism" behind the floodgates argument, noting that the introduction of civil rights causes of action in other legislation, such as the Americans with Disabilities Act, only met opposition from staunch civil rights opponents, and not from the federal judiciary. See *id.* at 12 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund ("NOWLDEF")).

27. See Nourse, *supra* note 15, at 14.

28. See *id.* at 16.

29. See S. 15 § 301(d). This language was added to prevent a mini-criminal trial within a civil case. See Nourse, *supra* note 15, at 15.

30. See Nourse, *supra* note 15, at 14.

31. See *id.* at 27.

concerned, however, that the VAWA would be stalled if brought to the Senate floor for debate and “would become a vehicle for unrelated, and extremely controversial, crime amendments such as the federal death penalty, habeas corpus reform, or gun control legislation.”³² As a result, Senators Biden and Hatch decided to negotiate a bipartisan compromise bill that would deter “hostile floor amendments.”³³

The Biden/Hatch compromise, embodied in Senate Bill 11, made several changes to the “crime of violence” requirement.³⁴ Prior versions of the civil rights remedy contained a reference only to section 16(a), which covers acts classified as either misdemeanors or felonies.³⁵ Senate Bill 11 now contained new language limiting the VAWA’s civil rights remedy only to offenses serious enough to warrant classification as felonies.³⁶ Also, the predicate offense had to include a risk of personal injury.³⁷

In addition to these limitations, the drafters added language broadening the “crime of violence” definition to include “acts that would constitute a felony . . . but for the relationship between the person who takes such action and the individual against whom such action is taken.”³⁸ The purpose of this language was to provide coverage to victims of relationship-based crimes because the drafters recognized that many states “downgrade” crimes committed by and against parties in a relationship, such as domestic violence and acquaintance rape.³⁹ This new language required that the alleged act be determined by the seriousness of the offense and not by the relationship between the victim and the perpetrator.⁴⁰ The addition of this language embodied one of the substantive goals of the VAWA — that state and local applications of the term “felony” not govern the civil rights remedy.⁴¹

The limits on the “crime of violence” requirement were sufficient to garner majority support for the VAWA in the House and

32. *Id.*; see also S. 11, 103d Cong. § 301 (1993).

33. Nourse, *supra* note 15, at 27.

34. See *id.* at 27-29.

35. See *id.* at 28; see also *supra* note 11 and accompanying text.

36. See S. 11 § 301(d)(2)(A); see also Nourse, *supra* note 15, at 28.

37. See S. 11 § 301(d)(2)(A).

38. *Id.* § 301(d)(1)(A).

39. See Nourse, *supra* note 15, at 28-29. Crime “downgrading” occurs when a crime is committed by a party in a relationship against the other party, and the act is prosecuted as a misdemeanor even though the same crime committed against a stranger would be classified as a felony. See *id.*

40. See Nourse, *supra* note 15, at 28.

41. See *id.*

Senate.⁴² On September 13, 1994, President Clinton signed the VAWA into law.⁴³ Consistent with Senate Bill 11, the VAWA's civil rights remedy does not reach all injurious actions motivated by gender. Rather, in its final form, the statute defines "crimes of violence" as:

act[s] or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, *and* that would come within the meaning of State or Federal offenses described in section 16 of Title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction⁴⁴

2. Congressional Intent

In his opening remarks at the first "Women and Violence" hearing before the Committee in October 1990, Senator Biden stated that "no matter how much we say we have changed as a society, there is something terribly wrong when, over the last 15 years, violence against young men in America has dropped by 12 percent, while violence against young women in America has increased [by] 50 percent."⁴⁵ In recognition of society's pervasive "violent sexism," Senator Biden stated that his overarching intention in creating the VAWA's civil rights remedy was "to change the Nation's attitude."⁴⁶

Along with this ambitious goal, Senator Biden and the drafters identified at least three additional goals of the VAWA's civil rights remedy. First, the VAWA's civil rights remedy was intended to recognize gender-based violence as discrimination and a violation of an individual's civil rights.⁴⁷ Congress cited a tradition of fighting

42. *See id.* at 36.

43. *See id.*

44. 42 U.S.C. § 13981(d)(2)(A) (emphasis added). The final form also retains the requirement that the alleged act be determined by the seriousness of the offense and not by the relationship between the victim and the perpetrator. *See id.* § 13981(d)(2)(B) (stating that a crime of violence "includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken").

45. *Women and Violence: Hearing on S. 2754 Before the Senate Judiciary Comm.*, 101st Cong. 2 (1990) (statement of Senator Joseph R. Biden, Jr.) [hereinafter *Women and Violence Hearing I*].

46. *Id.*

47. *See id.* at 2-5; *see also* Symposium, *The Violence Against Women Act of 1994: A Promise Waiting to be Fulfilled*, 4 J.L. & POL'Y 427, 430-31 (1996) ("The premise of

race-based and religion-based violence with civil rights laws and noted the 1986 U.S. Supreme Court holding that gender-based violence may constitute discrimination as support for creating the civil rights remedy.⁴⁸ Furthermore, Congress recognized the devastating effects that gender-based violence has on society and the economy.⁴⁹ Congress also noticed that existing civil rights laws provided protection for gender-based discrimination only in the workplace.⁵⁰ Thus, Congress sought to fill the gender gap in current civil rights laws and to spearhead a "national commitment" to fight discriminatory gender-based violence.⁵¹

Another goal of the VAWA's civil rights remedy was to supercede discriminatory state criminal and civil laws and to provide a civil forum for women who might otherwise be barred from legal redress.⁵² In the criminal context, for example, Congress noted that states often "downgrade"⁵³ rape in marriage, and until quite recently, many states did not even consider marital rape a

the [VAWA] is that gender-based violence has a systematic impact on women's equality.").

48. See S. REP. NO. 101-545, at 40-42 (referring to the Court's holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). The VAWA's civil rights remedy "makes explicit what the Court has already held: that an assault against a woman simply because she is a woman is no different than an assault against a black person because that person is black." *Id.* at 42-43.

49. See S. REP. NO. 101-545, at 32-33. Regarding the economic and societal costs of violence against women, Congress noted that

It is not a simple matter of adding up medical costs, or law enforcement costs, but of adding up all those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems. Partial estimates show that violent crime against women costs this country at least 3 billion . . . dollars a year. . . . [G]ender-based crimes and women's fears of those crimes . . . restrict the enjoyment of federally protected rights like the right to employment, the right to public accommodations, and the right to travel. . . . Gender-based crimes violate our most fundamental notions of equality—that no person's physical security should be at risk because of an immutable trait, because of race, religion, or gender.

Id. at 33, 43.

50. See S. REP. NO. 101-545, at 40-42; see also Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 LAW & INEQ. J. 1, 44-53 (1992). Title VII of the Civil Rights Act of 1964 provides a civil rights remedy to victims of sex-based discrimination only in the workplace. See *id.* at 50-52; 42 U.S.C. § 2000e (1994). The VAWA's civil rights remedy aims to attack sex-based violence outside of the workplace, such as violence that occurs in the home and on the streets. See S. REP. NO. 101-545, at 40.

51. S. REP. NO. 101-545, at 41.

52. See S. REP. NO. 102-197, at 43-48 (1992).

53. See *supra* note 39 and accompanying text.

crime.⁵⁴ Although marital rape is now a crime in all fifty states, thirty-three states still only allow prosecutions under limited circumstances, i.e., where there is evidence of physical injury or under other restrictions.⁵⁵ Furthermore, Congress recognized that many states also “downgrade” rape and assault between unmarried acquaintances.⁵⁶ In the civil context, for example, Congress noted that many states still enforce interspousal immunity doctrines, which often bar women from suing their abusive husbands in civil court for money damages.⁵⁷

A third goal of the VAWA’s civil rights remedy was to avoid specific discriminatory practices at the state criminal level, often termed the “double victimization” problem, by providing access to federal court.⁵⁸ “Double victimization” refers to the harm that a victim sustains first by her attacker and second by the criminal justice system, a system that often falls short of ensuring justice for her.⁵⁹ While many states have passed law reforms to address this issue, these efforts have failed to eradicate gender bias from affecting criminal proceedings in those states.⁶⁰ Because federal court is considered to be less biased than state court, allowing VAWA civil

54. See S. REP. NO. 102-197, at 45; see also UNDERSTANDING VIOLENCE AGAINST WOMEN, *supra* note 4, at 127 (“For most of Western history, marital rape was not considered a crime. Its recognition as a crime today is by no means universal and remains controversial, despite evidence that rape within marriage is often repeated and extremely brutal.”).

55. See S. REP. NO. 102-197, at 45 n.50 (citations omitted); *Women and Violence Hearing I*, *supra* note 45, at 64 (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb); RAQUEL KENNEDY BERGEN, WIFE RAPE 4, 150 (1996). In many states, a husband is exempt from prosecution for marital rape when his wife is legally unable to consent (i.e., mentally or physically impaired, unconscious or asleep). See BERGEN, *supra*, at 150.

56. See *Women and Violence, Part 2: Hearing on S. 2754 Before the Senate Judiciary Comm.*, 101st Cong. 2 (1990) (intending to “debunk the myth” that acquaintance rape is not as violent as stranger rape) [hereinafter *Women and Violence Hearing II*]; see also BERGEN, *supra* note 55, at 150-51.

57. See *Women and Violence Hearing I*, *supra* note 45, at 64 (1990) (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb).

58. See S. REP. NO. 101-545, at 33-41; S. REP. NO. 102-197, at 39.

59. See *id.* at 40-41.

[W]hen the assault is gender-motivated and it takes place in the home or is sexual in nature, the criminal justice system, in many instances, has not recognized the crime or has refused to believe its victims. . . . Despite much reform, witnesses explained to the committee that vestiges of this legal discrimination remain.

Id.; see also *Women and Violence Hearing I*, *supra* note 45, at 29-33 (testimony of Marla Hanson); ELIZABETH A. STANKO, INTIMATE INTRUSIONS: WOMEN’S EXPERIENCE OF MALE VIOLENCE 83-102 (1985).

60. See S. REP. NO. 101-545, at 41; S. REP. NO. 102-197, at 45-46. Studies indicate that gender bias affects not only juries, but also judges, prosecutors and court employ-

rights plaintiffs to sue in federal court is an important facet of the civil rights remedy aimed at avoiding the “double victimization” problem.⁶¹ Indeed, Senator Biden described the federal judicial system as the “best court system in the world, with the most educated judges . . . and with a set of rules and regulations and a degree of sensitivity that is uniform.”⁶²

ees. *See* S. REP. NO. 101-545, at 41; S. REP. NO. 102-197, at 46-48. NOWLDEF reported that:

Instead of focusing on why men batter and what can be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence. Several state task forces have cited judges who disbelieve female petitioners unless there is visible evidence of severe physical injury, trivialize domestic violence complaints by their demeaning and sexist comments . . . and tell the victim seeking relief in criminal court that this is merely a domestic problem that belongs in family court. The New York task force found that in some communities judges shunt victims back and forth between police and family court until they give up seeking protection.

Women and Violence Hearing I, supra note 45, at 65 (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb). A rape survivor testified that the police accused her of fabricating her story, even though she had knife wounds and her underwear was missing; they asked her probing questions about her sexual past and forced her to take a lie detector test. *See Women and Violence Hearing II, supra* note 56, at 23 (testimony of Christine Shunk).

61. *See* S. REP. NO. 101-545, at 41; *see also Women and Violence Hearing I, supra* note 45, at 68 (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb). Congress noted that federal judges are insulated from the political pressures that state and local judges face and they have more control of the jury selection process because they can “screen out jurors who harbor irrational prejudices” against women victims. *See* S. REP. NO. 101-545, at 42. Congress also intended to give female victims of gender-motivated violence control over their own civil actions. *See id.* During her testimony before the Committee, one rape victim expressed frustration with the criminal justice system because she did not have “the benefit of an advocate who could have spoken to [her about] the [criminal justice] system, and spoken to the system on [her] behalf.” *Women and Violence Hearing I, supra* note 45, at 26 (statement of Nancy Ziegenmeyer). Also, in a civil trial, the plaintiff may compel the defendant’s testimony, whereas in a criminal trial, the defendant is afforded constitutional protections that shield him from testifying, should he so choose. *See* S. REP. NO. 101-545, at 42. Lastly, in a civil action, the plaintiff’s evidentiary burden is to prove the defendant’s actions by a preponderance of the evidence, which is a lower standard than the criminal standard of proving a defendant’s guilt beyond a reasonable doubt. *See id.* Congress also noted that the VAWA’s civil rights remedy provides for monetary damages, as well as injunctive and declaratory relief. *See* 42 U.S.C. § 13981(c). Some may question whether monetary damages are collectible against most private defendants. Because violence against women cuts across all socioeconomic levels in the United States, however, not all defendants lack resources to pay damages. *See Crimes of Violence Hearing, supra* note 26, at 8 (statement NOWLDEF by Sally Goldfarb) (“For some victims, even a damages judgment that cannot be collected (or a [declaratory judgment] or injuncti[on]) will be seen as an immensely valuable vindication of their rights.”).

62. *Women and Violence Hearing I, supra* note 45, at 2 (statement of Senator Joseph R. Biden, Jr.).

As explained above, the VAWA's civil rights remedy was intended to fill "the gender gap in current civil rights laws," and to avoid discriminatory state laws and practices.⁶³ Equally important as these intentions is how courts interpret the VAWA's civil rights remedy in actual cases.⁶⁴ Part B provides three examples of how courts have interpreted section 16(b) in VAWA civil rights cases.

B. Current Interpretations of Section 16(b) – Case Illustrations

Without clear enumeration of what constitutes a substantial risk of physical force pursuant to section 16(b) in VAWA civil rights cases, federal district courts have employed different modes of analysis to interpret section 16(b), often with disparate impact.

1. *McCann v. Rosquist*⁶⁵

Melanie McCann, Noele Nelson and Lisa Nielson were employees of Bryon Rosquist, a chiropractor.⁶⁶ Without their consent, Rosquist sexually assaulted⁶⁷ each of them by fondling them repeatedly and rubbing his genitals against their bodies.⁶⁸ McCann, Nelson and Nielson filed a joint lawsuit in federal court against

63. David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163, 165 (1993).

64. *See id.*

65. 998 F. Supp. 1246 (D. Utah 1998), *rev'd*, 185 F.3d 1113 (10th Cir. 1999). Throughout this Note, the district court's opinion in *McCann v. Rosquist* will be referred to as "*McCann I*", whereas the Tenth Circuit's opinion will be referred to as "*McCann II*."

66. *See McCann I*, 998 F. Supp. at 1247.

67. The term "sexual assault" throughout this Note refers to any nonconsensual touching of or contact with the breasts, genitals or buttocks of another.

68. *See McCann I*, 998 F. Supp. at 1248. Each of the three plaintiffs made similar allegations against Rosquist. Melanie McCann alleged that Rosquist touched her "breasts, hips, buttocks, thighs, crotch, and pubic bone — sometimes clothed and sometimes not — on numerous occasions . . ." Brief for Appellant at 2, *McCann v. Rosquist*, 185 F.3d 1113 (10th Cir. 1998) (No. 98-4049). Specifically, McCann alleged that Rosquist

unzip[ped] [McCann's] wet suit at a company water skiing party to expose [her] breasts, pull[ed] out the elastic waist band on McCann's stretch pants to look down her pants, rubb[ed] his genitals along McCann's body while 'adjusting' her, ma[de] lewd and suggestive comments, talk[ed] constantly about sex, fondl[ed] her unclothed pubic area while 'adjusting' her, and pull[ed] McCann's pants down while 'adjusting' her so that he could fondle her buttocks.

Id. at 3. Noele Nelson alleged that Rosquist "repeatedly patted and fondled [her] buttocks, thighs, and shoulders [and] . . . once rubbed his penis back and forth along [her] leg [while] adjusting her." *Id.* Lisa Nielson alleged that Rosquist "touched [her] breasts" clothed and unclothed. *Id.* He also "fondled Nielson's hips, thighs, and buttocks, and rub[bed] his hand up Nielson's leg near her crotch." *Id.*

Rosquist alleging civil rights violations pursuant to the VAWA's civil rights remedy.⁶⁹

The district court found that while Rosquist's acts were "offensive and repulsive," those acts were not "crimes of violence" under the VAWA's civil rights remedy.⁷⁰ The court found that the alleged acts fell within the purview of the predicate offense pleaded by the plaintiffs.⁷¹ Nonetheless, the court determined that the acts were not of the violent nature required to state a VAWA cause of action because such acts do not constitute criminal offenses that, by their nature, involve a substantial risk of physical force as required by section 16(b).⁷² Moreover, the court stated that "the time, place, [and] manner . . . alleged are not such that the situation could escalate into one where there would be a substantial risk that physical force would be used."⁷³ Thus, the district court dismissed the plaintiffs' case.⁷⁴

2. *Palazzolo v. Ruggiano*⁷⁵

Donna Palazzolo was a regular patient of Dr. Ruggiano, a psychiatrist, between 1992 and 1995.⁷⁶ During counseling sessions, Ruggiano allegedly sexually assaulted Palazzolo on three separate occasions.⁷⁷ On one occasion, while Ruggiano was reviewing Palazzolo's file, he "asked her if there was anything in the file indicating that she did not need a kiss and a hug."⁷⁸ Palazzolo responded "No," yet Ruggiano proceeded to put his arms around her shoulders and "pressed his genital area against hers."⁷⁹ Palazzolo filed

69. See *McCann I*, 998 F. Supp. at 1247.

70. *Id.* at 1252.

71. See *id.* at 1251-52.

72. See *id.* at 1252.

73. *Id.* The court further stated that "[a]ll of the acts alleged appear to have occurred at work or at social activities under circumstances that would have greatly discouraged any escalation of contact of the type of violent conduct required within the meaning of section 16(b) and [the VAWA]." *Id.*

74. See *id.* On appeal, however, the Tenth Circuit reversed the district court's dismissal, holding that the predicate offense alleged does involve a substantial risk of physical force pursuant to section 16(b). See *McCann II*, 185 F.3d 1113, 1121 (10th Cir. 1998). For discussion of the Tenth Circuit's analysis, see *infra* Part II.B.1.

75. 993 F. Supp. 45 (D.R.I. 1998).

76. See *id.* at 46.

77. See *id.* On the first occasion, Ruggiano placed his arms around Palazzolo's body while she was being weighed. See *id.* On the second occasion, Ruggiano "placed [his] hand on [Palazzolo's] shoulder and pressed his genitals against her buttocks." *Id.*

78. *Id.*

79. *Id.*

suit in federal court alleging that Ruggiano's acts violated her civil rights pursuant to the VAWA's civil rights remedy.⁸⁰

The district court determined that Ruggiano's acts did not amount to "crimes of violence."⁸¹ Palazzolo relied on the state law criminal felony of second degree sexual assault as her predicate offense.⁸² The court stated that Palazzolo did not allege that Ruggiano used force or coercion, an element of the predicate offense she alleged.⁸³ Further, the court found that Ruggiano did not use force or coercion during any of the three incidents because Palazzolo did not manifest a lack of consent.⁸⁴ The court also found that the section of the predicate offense alleged by Palazzolo that refers to engaging in medical treatment of the victim for the purpose of sexual arousal does not pose a substantial risk of physical harm.⁸⁵ Thus, according to the district court, Ruggiano's actions did not pose the substantial risk of physical force required by the civil rights remedy.⁸⁶ Accordingly, Palazzolo's case was dismissed.⁸⁷

80. *See id.*

81. *See id.* at 47-49.

82. *See id.* at 47. This statute states, in pertinent part, that "[a] person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person and if . . . [t]he accused uses force or coercion" or "[t]he accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification or stimulation." R.I. GEN. LAWS § 11-37-4 (2) & (3) (1998).

83. *See Palazzolo*, 993 F. Supp. at 48. Rhode Island law requires that the force or coercion used by the accused in committing second degree sexual assault must "overcome the victim" and "must be something more than the sexual contact itself." *Id.* (citations omitted). "Force that 'overcomes' the victim" means "physical force or contact taking place after the lack of consent has been manifested Any conduct making it clear that the victim does not consent to the contact is sufficient." *Id.* (citations omitted).

84. *Id.* Regarding the first two incidents, the court noted that these incidents were "unexpected and lasted only a few seconds," that "Palazzolo herself does not claim that she expressed any disapproval or otherwise reacted to the contact," and that Palazzolo did not "allege that Ruggiano made any further advances." *Id.* Therefore, the court reasoned, "there is no evidence that any such force or coercion was employed." *Id.* Regarding the third incident, the court based its determination on the fact that Ruggiano did not know that Palazzolo was not consenting to his advances until she pushed him away *after* he embraced her. *See id.* Also, the court noted that "Ruggiano made no further advances after that manifestation of resistance." *Id.*

85. *See id.* at 49. The court noted:

[T]here would be little reason for a doctor to employ physical force in such a situation. Patients who see doctors for medical treatment commonly recognize the likelihood that an examination and perhaps some physical contact will take place and they readily consent. Having obtained such consent, albeit under false pretenses, a doctor who conducts the examination for improper reasons would have little need to resort to physical force.

Id.

86. *See id.*

87. *See id.* at 47-49.

3. *Smathers v. Webb*⁸⁸

At a party, Debra Smathers witnessed Daniel Webb sexually assault her thirteen-year-old niece.⁸⁹ Later, Smathers told the young girl's mother, who is Smathers' sister, about the incident and encouraged her to contact the authorities.⁹⁰ Smathers' sister told Webb about this conversation.⁹¹ As a result, Webb left "five harassing, intimidating, and threatening phone messages on Ms. Smathers' answering machine," in an effort to keep Smathers from reporting him to the authorities for the sexual assault he committed upon her niece.⁹² In one message, Webb stated, "I have nothing else to do but fuck with you for the rest of my life and rest of yours. Just to give you a hard god damned time, bitch."⁹³

Smathers pleaded two predicate felonies in her complaint: (1) malicious harassment; and (2) the crime of civil rights intimidation.⁹⁴ In its memorandum opinion, the district court examined Webb's messages and found that the messages did not "threaten the use of physical force against the plaintiff, nor did any of the alleged messages present a risk of serious physical injury to the plaintiff."⁹⁵ Accordingly, the court dismissed Smathers' VAWA

88. No. 3:98-CV-124 (E.D. Tenn. Mar. 2, 1998).

89. See Complaint at 2, *Smathers v. Webb* (E.D. Tenn. Mar. 2, 1998) (No. 3:98-CV-124) [hereinafter *Smathers Complaint*]. At a social gathering at Webb's residence, Webb allegedly "intentionally and forcibly placed his hand upon the breast of Smathers' niece." *Id.*

90. See Proposed Amici Curiae Brief of NOWLDEF at 5, *Smathers v. Webb* (6th Cir. 1998) (No. 98-5806) [hereinafter "NOWLDEF's Smathers Brief"].

91. See Proof Brief for Appellant at 7, *Smathers v. Webb*, 1999 WL 1046625 (6th Cir. 1998) (No. 98-5806).

92. *Id.*

93. *Id.* Other portions of these messages are as follows:

You're still a god damned queer bitch and you know it and I know it. . . .
Now you want to say anything else about me, we gonna get it right on.
Give me a call by eight o'clock, and I mean now or I'm gonna take a check
somewhere you don't want it to go.

. . . .

[M]y intentions are to harass the fuck out of you from now to hell on. And
you're gonna get your god damned mouth off of me now, and I mean you're
gonna get your god damned mouth off of me, because I won't get mine off
you.

Id. at 7-8.

94. See *Smathers Complaint*, *supra* note 89, at 4-5. The crime of civil rights intimidation under Tennessee law is a felony offense when one injures or coerces "another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee . . . [or] of the United States." TENN. CODE ANN. § 39-17-309 (1999).

95. See Memorandum Opinion at 2, *Smathers v. Webb*, No. 3:98-CV-124 (E.D. Tenn. 1998).

claim.⁹⁶ In addition, the court treated the predicate offense of malicious harassment as a claim separate from the VAWA claim.⁹⁷ The court refused to exercise supplemental jurisdiction, and dismissed that claim as well.⁹⁸

These cases each demonstrate that how a court interprets section 16(b) determines whether a plaintiff will survive a motion to dismiss at the district court level.⁹⁹ How each court defines and understands violence against women will shape its respective interpretation of section 16(b).

II. INTERPRETING SECTION 16(B) OF THE “CRIME OF VIOLENCE” REQUIREMENT

Traditional understandings of violence against women in the law often conflict with how women perceive violence. Part A first discusses how force, or a risk thereof, has been traditionally defined in the law in the context of violence against women. Part A then presents social science data that shows perceptual differences between men and women in determining what constitutes violence and what acts pose a substantial risk of physical force. Part B identifies approaches that courts have adopted to determine “crimes of violence” pursuant to section 16(b) in VAWA civil rights cases and other contexts where section 16(b) is implicated.

A. Traditional Notions of Violence and Gender Difference in Perceiving Violence

In VAWA civil rights cases, whether an act poses a substantial risk of physical force is to be determined objectively by a court as a matter of law.¹⁰⁰ How a court defines violence or risk of force will shape that court’s determination. Part 1 discusses how violence against women has been defined traditionally in the law. Part 2 addresses the contemporary understanding of violence against women, showing that there are fundamental perceptual differences in what acts pose a substantial risk of physical force between men and women.

96. *See id.* at 2-3.

97. *See id.* at 3.

98. *See id.* (“To the extent that the plaintiff also claims a violation of [malicious harassment], the court declines to exercise its supplemental jurisdiction over this claim, and this claim will be dismissed, also.” (citation omitted)). The Sixth Circuit affirmed the district court’s dismissal of Smathers’ case. *See Smathers v. Webb*, No. 98-5806, 1999 WL 14046625 (6th Cir. Nov. 10, 1999).

99. *See supra* notes 73, 85 and 95 and accompanying text.

100. *See Doe v. Hartz*, 970 F. Supp 1375, 1402-03 (N.D. Iowa 1997).

1. *Traditional Notions of Violence Against Women*

To understand traditional notions of violence against women, it is important to understand the historical underpinnings of rape and domestic violence laws. A review of the history of the law in these areas explains the evolution of the law regarding violence against women and the thinking behind current, albeit traditional, policies and practices.

Rape law, for example, originated from legal codes that construed rape as a property crime of man against man, where the violated woman is the property.¹⁰¹ Moreover, the common law definition of rape states that a "man commits rape when he engages in intercourse with a woman not his wife; by force or threat of force; against her will and without her consent."¹⁰² Implicit in this definition, a victim must physically resist the attacker and the attacker must use substantial force during the attack for the act to be considered rape.¹⁰³ Every jurisdiction in the United States has traditionally made "force" or "threat of force" an element of the crime of rape.¹⁰⁴

Even in the last two decades, courts have commonly drawn a distinction between the "force" incidental to the act of intercourse and the "force" required to convict.¹⁰⁵ To convict, courts have typically focused on force used to overcome the victim, and have not considered the act of nonconsensual penetration or touching as force.¹⁰⁶ This distinction was made in *State v. Alston*,¹⁰⁷ in which the North Carolina Supreme Court reversed a rape conviction.¹⁰⁸

101. See Charlene L. Muehlenhard et al., *Definitions of Rape and Their Implications*, 48 J. SOC. ISSUES 40 (1992). A famous statement of seventeenth-century English lord chief justice Matthew Hale explains early perceptions of rape: rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." SUSAN ESTRICH, *REAL RAPE* 5 (1987). According to Hale's definition, because rape is very difficult to prove, the victim "must first prove her own lack of guilt." *Id.*

102. ESTRICH, *supra* note 101, at 8.

103. See *id.* at 5.

104. See *id.* at 59.

105. See *id.* at 60.

106. See *id.*

107. 312 S.E.2d 470 (N.C. 1984) (*cited in* ESTRICH, *supra* note 101, at 60).

108. See *id.* at 471. In *Alston*, the defendant was the victim's ex-boyfriend when the alleged rape occurred. See *id.* The court noted that during their relationship the defendant had been physically abusive and that his girlfriend often had sex with the defendant just to accommodate him. See *id.* ("On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her."). The relationship ended when the defendant struck his girlfriend, after which she moved out. See *id.* at 472-73.

One month after their relationship ended, the defendant went to his ex-girlfriend's school, grabbed her arm, stated that she was coming with him and threatened to physically assault her.¹⁰⁹ After she told him she did not want to have sex with him, he pulled her up, undressed her, pushed her legs apart, and penetrated her.¹¹⁰ The North Carolina Supreme Court held that the element of force had not been established by substantial evidence, although the court found that the act of sexual intercourse was nonconsensual.¹¹¹ This decision shows that a legal definition of rape requires more than the forceful acts displayed by the defendant, such as grabbing the victim's arm, threatening to hit her, undressing her, pushing her legs apart and penetrating her, thereby demonstrating how the common law definition has affected current rape law.¹¹²

Sentencing proceedings can also be affected by how a court chooses to define "force." When sentencing rapists, judges often remark about the type of force that was used by the defendant in particular cases. For example, in 1992 Ernesto Garay was convicted of anally raping and sexually abusing a retarded woman.¹¹³ At the sentencing hearing, the judge stated that "'there was no violence here. There was an act.'"¹¹⁴ In 1991, a judge "imposed a suspended sentence on a prominent businessman convicted of rape, stating that the victim had sustained no physical injuries."¹¹⁵

Like the origins of rape law, legal understandings of domestic violence also originate from the concept of women as property of men.¹¹⁶ Under British common law, the wife legally became the

109. *See id.* at 472-73. In particular, the defendant told her that he was going to "fix" her face to show he "was not playing," and stated that he had a "right" to have intercourse with her again. *Id.*

110. *See id.*

111. *See id.* at 471.

112. *See* ESTRICH, *supra* note 101 at 61-63.

113. *See* Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 *FORDHAM URB. L.J.* 439, 439 (1993). The victim was a twenty-three-year-old retarded woman with an I.Q. of 51 who behaved as a young child. *See id.* Garay raped the young woman in a bathroom of the building where she lived and where Garay worked as a custodian. *See id.* at 441. A carpenter discovered them while Garay was pinning the victim's hands to the wall and anally raping her. *See id.* at 441-42.

114. *Id.* at 440 (quoting the transcript of *New York v. Ernesto Garay*, No. 669/91 (Sup. Ct. Mar. 11, 1992)). The judge agreed with the defense attorney's characterization of this rape as non-violent because the medical evidence showed no bruises, scratches or lesions on the victim's vagina or anus. *See id.* at 442.

115. *Id.* (The judge stated, "I think it was obvious it was non-consensual sex, but I don't believe it was a violent act as most people think of rape.").

116. *See* Brenneke, *supra* note 50, at 22.

property of her husband upon marriage.¹¹⁷ The implication of this phenomenon was “legal non-intervention in marital relationships.”¹¹⁸ Because wives became property of their husbands upon marriage, British common law allowed husbands to discipline their wives, but “only blows with a switch no wider than a man’s thumb were allowed.”¹¹⁹ This rule came to be known as the “rule of thumb.”¹²⁰

The “rule of thumb” and a husband’s right to discipline his wife were also recognized in the United States.¹²¹ While the “rule of thumb” is an “increasingly outdated misconception,” domestic violence continues and is often met “with little social or governmental intervention.”¹²² Moreover, although advocacy efforts have been successful in enforcing criminal laws against domestic violence and have improved law enforcement policies toward domestic violence, the notion of domestic violence as a “private” matter remains.¹²³ For example, in 1995, a New York jury acquitted a man who clubbed his ex-girlfriend with a length of four-inch wire cable and

117. *See id.*

118. *Id.* At British common law, the state did have an obligation to protect the civil rights of its citizens, but this obligation did not reach relations between married couples. *See id.* British common law did reach domestic violence, however, but only when such violence “extended beyond the wife.” *Id.* at 23. For example, when a pregnant woman was beaten, a crime was committed only if the baby died in her body, while no crime was committed if the pregnant woman was personally injured. *See id.*

119. *Id.* at 22-23. Specifically, husbands were expected to answer for their wives’ misbehavior. *See id.* Thus, the common law afforded husbands the right to give their wives “‘moderate correction,’” and the right to restrain their wives by “‘domestic chastisement.’” *Id.* (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, FIRST BOOK 432 (Dawsons of Pall Mall ed., 1966)).

120. *See id.* at 23. (“This ‘rule of thumb’ created a distinction between single blows with large sticks and repeated blows with small sticks irrespective of the damage.”).

121. *See id.* For the first time in the United States, the Mississippi Supreme Court recognized the “rule of thumb” and its rationale in 1824, and supported a husband’s defense on charges for assault and battery of his wife. *See id.* at 23-24; *Bradley v. State*, 1 Miss. 156 (1824). Later, in 1864, a North Carolina court also followed the “rule of thumb” and stated that “a husband is responsible for the acts of his wife, and . . . the law permits him to use . . . a degree of force as is necessary to control an unruly temper and make her behave herself.” Brenneke, *supra* note 50, at 24 (quoting *State v. Black*, 60 N.C. 262 (1864)). While both of these holdings were later overturned, the stigma against a “public display of familiar strife remained strong.” Brenneke, *supra* note 50, at 24. Domestic violence was rarely spoken about in the nineteenth and early twentieth centuries, and legal support was unavailable for victims of domestic violence because of interspousal immunity doctrines and marital rape exceptions. *See id.* at 24-25. *See also* discussion *supra* notes 55-59 and accompanying text.

122. *See* Brenneke, *supra* note 50, at 25-26.

123. *See id.* at 26.

stabbed her in the head with four different knives for ending their relationship.¹²⁴ After the verdict, one juror stated, "Hey – men and women fight."¹²⁵

2. *Contemporary Understandings of Violence Against Women and Social Science Data*

Social scientists, psychologists and feminists have argued that traditional notions of violence against women perpetuate myths, not realities. Scholars have argued that one of the common myths about male violence against women is that certain acts are not actually harmful.¹²⁶ For example, if a woman was sexually assaulted, but that assault did not result in physical markings such as bruises, the cultural myth is that the woman was neither culturally nor legally wronged.¹²⁷ Similarly, if a wife was battered by her husband but no bones were broken, the myth is that she was not wronged.¹²⁸ Scholars argue that such myths often minimize or cover up the harmful effects of violence against women, and prevent "the development of effective policies and programs designed to prevent such violence."¹²⁹

Moreover, as can be seen from the cases described previously, such myths "pervade our legal system."¹³⁰ Indeed, some feminist legal scholars have recognized that women's perspectives on important legal issues surrounding sexuality, work, family and violence against women have been ignored in the law.¹³¹ Traditionally, a legal understanding of violence against women in the law came from the male perspective because legal definitions of rape and other crimes against women "have been written almost

124. See Stasi, *Men & Women Fight*, N.Y. POST, May 15, 1995, at 4.

125. *Id.*

126. See Koss, *supra* note 4, at 9.

127. See *id.*

128. See *id.*

129. *Id.* ("It is through gender-related roles that specific cultural norms related to gender and violence are patterned, learned, and transmitted from generation to generation.")

130. See Koss, *supra* note 4, at 9 (citation omitted); see also *supra* Part I.B.

131. See Leslie Bender, *From Gender Difference to Feminist Solidarity*, 15 VT. L. REV. 1 (1990); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985). Such scholars have suggested a new approach to lawmaking that would eradicate the "tradition of perspectivelessness in legal thinking with a broadened concept of objectivity including multiple perspectives—the views of women, African-Americans, Native Americans, Asian-Americans, and others." MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 60 (1994).

exclusively by male legislators.”¹³² Thus, feminist legal scholars have argued that such “[c]onventional definitions . . . tend to be too narrow” and “serve to advantage men over women.”¹³³

One commentator has argued that women’s experiences of sexual and physical violence are often “[c]ast in a mould constructed within a male-dominated society,” and as a result, such experiences “take on an illusion of normality [and] ordinariness.”¹³⁴ What some men may see as normal and ordinary behavior, many women consider potentially violent.¹³⁵ Social science research confirms this disparity.¹³⁶

A recent study of heterosexual couples examined and compared male and female accounts of specific incidents of male violence against women.¹³⁷ The researchers found a “pronounced discordance” between what men and women perceive as violent (or po-

132. See Muehlenhard, *supra* note 101, at 23-24. This psychology professor has argued that, “In patriarchal social systems, men have controlled oral and written production of language. This ‘man-made language’ reflects and reifies the experiences of men. To the extent that this language does describe the experiences of women, it does so from the perspective of men.” *Id.* at 40. Moreover, “a male-defined concept of violence – [one] premised on a school yard fist fight or a barroom brawl – and lack of knowledge about rape trauma produce erroneous assessments of rape and erroneous sentences for rapists.” Schafran, *supra* note 113, at 441.

133. See Muehlenhard, *supra* note 101, at 40. Professor Muehlenhard continues that

[i]t is in the patriarchy’s best interest to promote images of ‘real rape’ by strange men. These images keep women frightened and act as a form of social control, keeping women off the streets and out of male territory, and thus limiting women’s freedom. They also promote the idea that women need to attach themselves to one man who will protect them from others (even though women are more likely to be raped by dates and husbands than by strangers). They promote the idea that women need to do whatever it takes to maintain relationships with their male protectors. If women become less wary of stranger rape and more wary of acquaintance rape, this would decrease the social control of women as well as men’s sexual access to reluctant women.

Id. at 40-41.

134. STANKO, *supra* note 59, at 9.

135. See *id.* at 10.

136. Most courts have been unwilling to rely on social science research in support of holdings. One exception has been in the area of sexual harassment where some courts have relied on “perceptual difference research,” which is the type of research presented herein, to support a reasonable woman standard. See Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Women Standard*, 51 J. SOC. ISSUES 151, 160 (1995); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

137. See Russell P. Dobash et al., *Separate and Intersecting Realities: A Comparison of Men’s and Women’s Accounts of Violence Against Women*, 4 VIOLENCE AGAINST WOMEN 382 (1998).

tentially violent).¹³⁸ The findings indicated that three-fourths of the women reported incidents of serious violence, while less than half of the men reported such incidents.¹³⁹ Moreover, thirty percent more women characterized incidents of choking, demanding sex and threats on their lives as serious violence.¹⁴⁰ One-third of the women sampled reported being kicked or punched in the stomach when pregnant, while approximately one-tenth of the men sampled reported engaging in such acts.¹⁴¹

Studies also show that women often perceive certain non-physical acts as posing a substantial risk of physical force. In one study, women described flashing (exposure of the male genitals) as potentially violent.¹⁴² Such behavior, especially when it occurs in a deserted place, “may engender fears of injury and death because of the uncertainty about what may happen next.”¹⁴³ In addition, “[a]ggressive forms of demeaning and intimidating behaviors—such as threatening violence, feigning to strike, and aggressive pointing—when used by someone who is larger, stronger, and more aggressive” are often experienced as frightening and potentially violent.¹⁴⁴

Disparities also arise between male and female perceptions of sexual assaults.¹⁴⁵ Studies show that men interpret certain behaviors more sexually than do females.¹⁴⁶ There are also significant differences between male and female views of sexual touching.¹⁴⁷

138. *Id.* There were also striking differences between men’s and women’s perceptions of the effects of violent acts. See DOBASH & DOBASH, *supra* note 4, at 157-58. Over one-half of the women reported feeling nauseous or vomiting after a violent incident, whereas only seven percent of men reported inflicting such harm. See *id.* Forty percent of women reported being knocked unconscious on at least one occasion, while only 14% of men reported inflicting such an injury. See *id.* at 158.

139. See Dobash, *supra* note 137, at 395. For the purposes of this study, “serious violence” included punching of the face and/or body, kicking and dragging by the hair. See *id.*

140. See *id.*

141. See *id.* In regards to controlling and coercive behaviors, men reported that they rarely “attempt[ed] to intimidate and coerce their partners.” *Id.* at 404. Most of the women in the survey, on the other hand, reported that intimidating and controlling behavior was “nearly continuous” and “repetitive,” and an “integral aspect of their relationships.” *Id.*

142. See STANKO, *supra* note 59, at 11.

143. *Id.* (citation omitted).

144. Dobash, *supra* note 137, at 404.

145. See *id.*

146. See Muehlenhard, *supra* note 101, at 29-30.

147. See Gutek & O’Connor, *supra* note 136, at 154.

Eighty-four percent of women defined sexual touching as sexual harassment, as opposed to fifty-nine percent of men.¹⁴⁸

In the context of rape, studies show that acquaintance rape accounts for eighty percent of all rapes.¹⁴⁹ The element of force that is required in many criminal definitions of rape implies that the penetration itself is neither forceful nor violent.¹⁵⁰ While the myth is that acquaintance rape is a non-violent act, studies show that the effects of sexual assaults between acquaintances are profound.¹⁵¹ One study showed that seventy percent of rape victims reported no physical injuries, twenty-four percent reported only minor physical injuries and just four percent sustained serious physical injuries.¹⁵² However, half of rape victims, whether they suffered physical injury or not, became fearful of death or serious injury during the rape.¹⁵³

Moreover, many rape survivors suffer from psychological injuries.¹⁵⁴ Approximately one-third of victims developed Rape-Related Post Traumatic Stress Syndrome, one-third experienced major depression and one-third contemplated suicide.¹⁵⁵ Rape victims from that study were thirteen times more likely to have serious alcohol problems and twenty-six times more likely to have major drug abuse problems than non-victims "because they turned to substance abuse to medicate their psychic pain."¹⁵⁶ Moreover, a study of approximately five hundred female college student rape victims, a vast majority of whom were victims of non-stranger rape, found no difference between victims of stranger rape and victims of non-stranger rape regarding psychological trauma symptoms such as depression and anxiety.¹⁵⁷ One scholar has argued that because of the profound psychological injury suffered by all rape victims,

148. *See id.*

149. *See* Schafran, *supra* note 113, at 443.

150. *See* STANKO, *supra* note 59, at 44 ("Force, perhaps the most the crucial factor of raped women's experiences, has many forms but its effect is much the same. Physical or verbal threats are demands, not invitations.").

151. *See* Schafran, *supra* note 113, at 443, 446.

152. *See id.* at 443-44.

153. *See id.* This national study, entitled "Rape in America," was performed by the National Victim Center and the Crime Victims Research and Treatment Center of the Medical University of South Carolina over a four-year period and its results were released in April 1992. *See id.* at 443.

154. *See id.* at 443, 446 ("The carving up of a rape victim's soul is an invisible crime, but the victim [of acquaintance rape] is no less maimed than the victim of a physical assault.").

155. *See id.* at 444. Thirteen percent of victims actually attempted suicide. *See id.*

156. *Id.*

157. *See id.*

judges should “recognize that all rapes, by definition, are violent.”¹⁵⁸

This social science data shows that traditional notions of violence against women are often at odds with women’s experiences. That is because traditional notions of violence against women are based on male rather than female perceptions. In the context of the VAWA’s civil rights remedy, how a court determines when an offense poses a substantial risk of physical force will depend on whether the court has a traditional understanding or a contemporary understanding of violence against women.

B. Approaches to Interpreting Section 16(b)

The “crime of violence” definition of section 16 as incorporated into the VAWA’s civil rights remedy was originally used for federal criminal sentencing purposes.¹⁵⁹ When Congress created this statutory definition in 1984, its intent was to “expand the ‘crime of violence’ concept while creating a universally applicable definition of the term.”¹⁶⁰ In 1989, the Sentencing Commission eliminated reference to section 16 in the guidelines, and redefined the term “in a more inclusive fashion.”¹⁶¹ The new definition was intended to give “federal courts the ability to use a low threshold of force in determining whether acts constitute crimes of violence.”¹⁶²

The language of the new definition is substantially similar to section 16(b),¹⁶³ although the new definition has no binding effect on the interpretation of the VAWA’s civil rights remedy.¹⁶⁴ However, courts interpreting section 16(b) in VAWA civil rights cases have

158. *Id.* at 453.

159. See David Frazee, *Crime of Violence Requirement*, in *VIOLENCE AGAINST WOMEN* 9-7 (David Frazee et al. eds., 1998) (citing Brenneke, *supra* note 50, at 60). This definition has been largely dropped in the criminal sentencing context, and is rarely used. See *id.* at 9-7 to 9-8.

160. *United States v. Johnson*, 704 F. Supp. 1398, 1400 (E.D. Mich. 1988) (citing 1984 U.S.C.C.A.N. 3182, 3486-87).

161. Brenneke, *supra* note 50, at 60; see also Frazee, *supra* note 159, at 9-5, 9-8, 9-10.

162. Frazee, *supra* note 159, at 9-5.

163. The current sentencing guidelines definition of “crime of violence” is as follows:

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included . . . if . . . the conduct set forth . . . in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another.

18 U.S.S.G. § 4B1.1 app. n.2 (1998).

164. See Brenneke, *supra* note 50, at 60.

attempted to follow approaches taken by courts in the sentencing guidelines context.¹⁶⁵ These perspectives include the “categorical” approach and the “actual conduct” approach.¹⁶⁶

1. *The “Categorical” Approach*

Under the “categorical” approach, a court examines the predicate offense only as it is set forth in the criminal code and does not consider the actual conduct of the defendant.¹⁶⁷ The purpose of the categorical approach was “to create certain categories of crimes that would be evaluated the same regardless of the state of origin.”¹⁶⁸ Two questions emerge in VAWA civil rights disputes with regard to this approach: 1) whether VAWA courts should apply determinations of whether an offense poses a substantial risk of physical force from the sentencing guidelines context; and 2) whether VAWA courts should apply the categorical approach without relying on precedent from the sentencing guidelines context, thereby creating a separate set of jurisprudence to define what offenses pose a substantial risk of physical force.

As previously stated, the new definition of “crime of violence” under the sentencing guidelines does not bind courts deciding VAWA civil rights cases.¹⁶⁹ Some commentators and practitioners have argued, however, that courts should follow sentencing guidelines cases, “especially when the caselaw interprets Sentencing Commission language which mirrors the language of section 16.”¹⁷⁰ For example, in its amicus brief to the Sixth Circuit Court of Appeals in *Smathers v. Webb*, the NOW Legal Defense and Education Fund (“NOWLDEF”) argued that the predicate offense of malicious harassment pleaded by the plaintiff is a “crime of violence” because such an act poses a substantial risk of physical force.¹⁷¹ NOWLDEF’s argument was premised on the fact that in the sentencing guidelines context “[c]ourts have consistently held that

165. See, e.g., cases discussed *supra* Part I.B.

166. See Frazee, *supra* note 159, at 9-1, 9-15, 9-20.

167. See *id.* at 9-15. (“In other words, the ‘question is not whether the particular facts constitute a crime of violence, but whether the crime . . . as defined by [state or federal] law is a crime of violence.’” (citations omitted)).

168. *McCann v. Rosquist*, 998 F. Supp. 1246, 1250 (D. Utah 1998) (citing *Taylor v. United States*, 495 U.S. 575 (1990)).

169. See *supra* note 164 and accompanying text.

170. Frazee, *supra* note 159, at 9-10 (noting that Congress chose not to use the new Sentencing Commission definition, but chose to incorporate section 16, a “mostly unused statute”); see NOWLDEF’s *Smathers* Brief, *supra* note 90, at 8.

171. See NOWLDEF’s *Smathers* Brief, *supra* note 90, at 8.

making threats are ‘crimes of violence.’”¹⁷² Similarly, in *McCann II*, the appellants argued that because sexual assault has been categorically deemed a “crime of violence” pursuant to language mirroring section 16(b) in the sentencing guidelines context, the defendant’s acts of sexual assault should also be deemed “crimes of violence.”¹⁷³

The Tenth Circuit Court of Appeals agreed with the appellants’ argument and reversed the district court’s dismissal of the case.¹⁷⁴ Utilizing the categorical approach, the *McCann II* court held that Utah’s criminal offense of forcible sexual abuse, the predicate offense alleged by the plaintiffs, by its nature poses a substantial risk that physical force will be used in carrying out the offense, “even when unaccompanied by rape, bodily injury, or extreme forms of coercion.”¹⁷⁵ In so holding, the court followed *United States v. Reyes-Castro*,¹⁷⁶ a sentencing guidelines case, as advanced by appellants. The Tenth Circuit in *Reyes-Castro* held that sexual abuse of a child, the “analogous statutory counterpart” to the predicate offense alleged by appellants, is a “crime of violence” pursuant to the part of the new sentencing guidelines definition that mirrors section 16(b).¹⁷⁷ The *McCann II* court noted that the *Reyes-Castro* court focused its holding on the fact that the offense was noncon-

172. *Id.* In support, NOWLDEF cited cases applying the “categorical” approach in the federal sentencing context. *See id.* at 8-9 (citing *United States v. Bonner*, 85 F.3d 522, 527 (11th Cir. 1996) (concluding that “making a threatening telephone call is a crime of violence” under the “categorical” approach)); *United States v. Left Hand Bull*, 901 F.2d 647, 648 (8th Cir. 1990) (holding that mailing a threatening letter to a person is a “crime of violence” under section 16 even though the defendant did not carry out the threat).

173. *See* Brief for Appellant at 12, *McCann v. Rosquist*, 185 F.3d 1113 (10th Cir. 1998) (No. 98-4049) (citing *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993)).

174. *See* *McCann II*, 185 F.3d at 1113.

175. *Id.* at 1121. Utah’s criminal offense of forcible sexual abuse provides that:

[a] person commits sexual abuse if . . . under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another . . . without the consent of the other

UTAH CODE ANN. § 76-5-404(1) (1999). The *McCann II* court noted that it is irrelevant that the statute is labeled as “forcible” in making its determination of whether this offense poses a substantial risk of physical force, and that the analysis requires an examination of the elements of the statutory definition of the crime. *See McCann II*, 185 F.3d at 1119 n.5.

176. 13 F.3d 377, 379 (10th Cir. 1993) (holding that sexual abuse of a child is a “crime of violence” pursuant to language in the new sentencing guidelines definition that mirrors section 16(b)).

177. *See McCann II*, 185 F.3d at 1119-20.

sensual, and not that the victim was a child.¹⁷⁸ Because the predicate offense before the court requires that the act be without consent, the *McCann II* court reasoned that the *Reyes-Castro* holding is applicable to the *McCann II* case, albeit in a different context.¹⁷⁹ Further, the *McCann II* court rejected the district court's "assumption" that section 16 of the VAWA's civil rights remedy "is restricted to a certain 'type' of physical force."¹⁸⁰ The court stated that

[t]he very act of nonconsensual sexual contact, which by its nature evinces a clear intention to disregard the victim's dignity and bodily autonomy, both demonstrates and creates a substantial risk of more serious physical intrusion or the application of force to ensure compliance.¹⁸¹

Lastly, the *McCann II* court recognized that a restrictive definition of "crime of violence" was not intended by Congress when incorporating reference to section 16 into the VAWA's civil rights remedy.¹⁸²

178. See *id.* at 1119. In *Reyes-Castro*, the Tenth Circuit "addressed the relationship between lack of consent . . . and the risk of physical force" and stated that:

[b]ecause the crime [of rape] involves a non-consensual act upon another person, there is a substantial risk that physical force may be used in committing the offense. It does not matter whether physical force is actually used. "Our scrutiny ends on a finding that the risk of violence is present."

Reyes-Castro, 13 F.3d at 379 (citations omitted).

179. See *McCann II*, 185 F.3d at 1119-20.

180. *Id.* at 1120 (citing *McCann I*, 998 F. Supp. 1246, 1252 (D. Utah 1998)). The *McCann II* court stated that

Section 16 only refers to "physical force"; it does not qualify that reference by requiring physical force of a particular nature or severity. In fact, the imposition of nonconsensual sexual contact, whether brought about by brute force or, as alleged here, by trick and abuse of authority, might itself be considered a form of violence, capable of causing mental and emotional injury no less severe than the physical injury caused by a blow.

Id.

181. *Id.*

182. See *id.*

In enacting the VAWA, Congress recognized the degree to which our nation's systems of law enforcement and adjudication have been complicit in perpetuating the epidemic of violence against women, in part by failing to recognize crimes of gender-motivated violence as serious crimes. . . . We will not compound that failing today by restricting, in contravention of the language of [section 16], the definition of "violence" to only those forms of violence most traditionally feared by men – murder and serious bodily injury. To adopt such a restriction would be to exclude much of the "widespread incidence of physical assault against women" from coverage of the VAWA. . . . It is simply not permissible for us to create, contrary to clear legislative intent, a special narrower construction of [section 16] for purposes only of the [VAWA]

Arguments against application of “crime of violence” determinations in the sentencing guidelines context to VAWA civil rights cases also rely on the congressional intent behind the passage of the VAWA’s civil rights remedy.¹⁸³ For example, in *Smathers v. Webb*, the defendant argued that the congressional intent behind the VAWA’s civil rights remedy was “to protect the civil rights of victims of gender-motivated violence,” and not to protect such victims from non-violent behavior.¹⁸⁴ One commentator has suggested that perhaps Congress’s choice of reference to section 16, rather than the new sentencing guidelines definition, indicates that Congress “believed that the two situations differed such that each should develop an independent definition of ‘crime of violence.’”¹⁸⁵

Even if sentencing guidelines rulings should not apply in the VAWA context, it has been argued that the categorical approach should be used to determine what offenses pose a substantial risk of physical force for purposes of the VAWA.¹⁸⁶ The district court in *McCann I* concluded that, in accordance with congressional intent, “a policy furthering uniformity can and should be applied” in the context of the VAWA’s civil rights remedy.¹⁸⁷ The court stated further that “in order to effectuate the policy of uniformity,” a categorical inquiry should be used whenever possible.¹⁸⁸ Paradoxically, on appeal, the Tenth Circuit court noted that the district court did not follow the categorical approach, but instead erroneously “based its analysis on the particular circumstances of the alleged acts in this case.”¹⁸⁹ The *McCann II* court found that the

Id. at 1122 (citations omitted).

183. See Proof Brief for Appellee at 4, *Smathers v. Webb*, No. 98-5806, 1999 WL 1046625 (6th Cir. Nov. 10, 1999).

184. *Id.* at 4 (citing 42 U.S.C. § 13981 (1994)).

185. Frazee, *supra* note 159, at 9-10. This commentator notes that:

The purposes of the Sentencing Commission is [sic] to ensure uniform and proportional sentences for convicted criminals. The purpose of the VAWA is to provide a minimum threshold for a broad, remedial civil rights statute. Many of the concerns that arise in the context of criminal sentencing and punishment simply do not arise in the civil rights arena.

Id. at 9-10, 9-11. He also points out that the legislative history of the VAWA “indicates that Congress merely sought a statutory reference in the U.S. Code and actually gave no thought to daunting problems of interpreting 18 U.S.C. § 16.” *Id.*

186. See *McCann I*, 998 F. Supp. 1246, 1251 (D. Utah 1998).

187. *Id.* at 1251.

188. *Id.*

189. *McCann II*, 185 F.3d 1113, 1116 (10th Cir. 1999). The Tenth Circuit noted that the district court relied on *Taylor v. United States*, 495 U.S. 575 (1990), a case in the sentencing guidelines arena. In *Taylor*, the Court for the first time established the categorical approach for determining whether acts are “crimes of violence” pursuant

categorical approach should be used to determine whether acts are “crimes of violence” pursuant to section 16 in the VAWA civil rights context and applied that approach in its analysis.¹⁹⁰

2. The “Actual Conduct” Approach

Under the “actual conduct” approach, a court examines the facts of each case to determine whether the defendant’s acts created a substantial risk of physical harm.¹⁹¹ This approach differs from the categorical inquiry because the actual conduct approach requires a court to focus on the defendant’s acts rather than on the abstract nature of the predicate offense alleged.¹⁹²

One of the dangers of the categorical approach is that if a court rules that an offense does not pose a substantial risk of physical injury by its nature, then subsequent courts may follow that precedent in cases where the defendant’s acts may actually pose such a risk.¹⁹³ To avoid this danger, proponents of a broad interpretation of section 16(b) in VAWA civil rights cases have argued that when a categorical inquiry fails to result in a “crime of violence” determination, courts should perform an actual conduct inquiry.¹⁹⁴

to the new sentencing guidelines definition. See *McCann II*, 185 F.3d at 1117 (citing *Taylor*, 495 U.S. at 600). However, the *Taylor* Court also noted that the categorical approach “may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases,” which is called the *Taylor* exception. *Id.* (citing *Taylor*, 495 U.S. at 602). The *McCann II* court noted that pursuant to the *Taylor* version of the categorical approach, the district court erroneously concluded that “[the defendant’s] particular acts, in context, did not involve a substantial risk of physical force.” *Id.* After a review of the *Taylor* exception, the *McCann II* court concluded that the *Taylor* exception only applies to a particular clause of the new sentencing guidelines definition that does not mirror section 16(b), and therefore does not apply to cases analyzing section 16(b). See *id.* Thus, according to the *McCann II* court, the district court applied the wrong approach and should have applied the categorical approach. See *id.* at 1116.

190. See *McCann II*, 185 F.3d at 1116 (“We conclude that the language of [section 16] and our precedents require that the crime of violence analysis be conducted at the level of the statutory definition.” (citing *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993))).

191. See *Frazee*, *supra* note 159, at 9-11, 9-23.

192. See *id.* at 9-20. In other words, while the categorical approach is a decontextualized approach, the actual conduct approach is a contextualized approach.

193. See *id.* at 9-23. For example, in *United States v. Fazio*, a sentencing guidelines case, the defendant was arrested for possession of a firearm by a convicted felon. See *id.* at 9-21 (citing 914 F.2d 950 (7th Cir. 1990)). In *Fazio*, the defendant struggled with the police over the weapon. See *id.* Because the struggle “involved force, danger, and violence, the defendant’s actual conduct sufficiently augmented the possession to bring it within the scope of crimes of violence” under section 16(b). *Id.*

194. See *id.* at 9-22, 9-23, 9-24. In an amicus brief to the Sixth Circuit, NOWLDEF urged the court first to make a categorical inquiry when interpreting section 16(b), and if that approach does not lead to a clear result, to then utilize the actual conduct

One such proponent has noted that the factual inquiry of the actual conduct approach “well suits the capabilities of a district court” because the court must find facts anyway.¹⁹⁵ In the sentencing guidelines context, one of the arguments against the use of the actual conduct approach has been that courts were required to examine offenses that occurred in the past “to determine whether to augment a current sentence for prior conduct,” posing practical difficulties such as unavailable witnesses and lack of evidence, among others.¹⁹⁶ In VAWA civil rights actions, this problem does not exist.¹⁹⁷ This proponent also has argued that “it would be anomalous to exclude actually violent felonious conduct from the scope of” the civil rights remedy “while protecting conduct that involves a risk that violence may be used.”¹⁹⁸ Moreover, he has noted that Congress, when deciding to make reference to section 16 in the VAWA’s civil rights remedy, chose not to resolve a split of the courts as to whether the actual conduct approach should be used in sentencing guidelines cases.¹⁹⁹ Thus, he has argued that because civil rights actions demand broad, remedial interpretations, “courts should favor the interpretation that gives the greatest effect” to the VAWA’s civil rights provision.²⁰⁰

Thus far, courts have adopted inconsistent standards for determining how the civil rights remedy’s “crime of violence” requirement should be interpreted. In *McCann I*, the district court stated that it was utilizing the categorical approach, but nevertheless, looked to the specific facts of the case to determine whether the

approach to determine whether such conduct constitutes a “crime of violence.” *See* NOWLDEF’s Smathers Brief, *supra* note 90, at 8.

195. *See* Frazee, *supra* note 159, at 9-23.

196. *Id.* When the Federal Sentencing Guidelines made reference to section 16, circuit courts split as to whether courts should use the actual conduct approach in the sentencing guidelines context. *See id.* at 9-23 to 9-24. Approximately half of the circuits allowed some form of the actual conduct approach. *See id.* at 9-21. These circuits recognized that some criminal statutory language embodies both violent and non-violent crimes, and have allowed an actual conduct inquiry in those instances. *See id.* Because the guidelines later eliminated reference to section 16, the Supreme Court has never needed to resolve this split. *See id.*

197. *See id.* (“In VAWA actions, courts will almost always make factual determinations from evidence before them. The problems of stale information in VAWA actions are no greater than in any civil trial.”).

198. *Id.* While this commentator admits that the VAWA’s civil rights provision was not intended to cover all acts of violence motivated by gender, but only “crimes of violence” motivated by gender, he argues that interpretation of the “crime of violence” requirement “should not exclude those violent felonies whose commission sparked the moral outrage which lies at the core of the [VAWA’s] passage.” *Id.*

199. *See id.*

200. *Id.* at 9-23, 9-24.

defendant's acts posed a substantial risk of physical harm.²⁰¹ On appeal, the Tenth Circuit applied the categorical approach.²⁰² In *Smathers*, the district court utilized the actual conduct approach, relying on the fact that the defendant did not explicitly threaten to injure the plaintiff physically in his messages.²⁰³ On appeal, the Sixth Circuit also based its decision on Webb's actual conduct.²⁰⁴ Finally, in *Palazzolo*, the district court also utilized the actual conduct approach, looking to the specific acts of the defendant in determining whether his acts were "crimes of violence" pursuant to the VAWA's civil rights remedy.²⁰⁵ These courts have taken approaches that often result in dismissals, thereby denying women a civil rights remedy and minimizing the significance of gender-motivated violence.

III. A SOLUTION

Reliance on traditional understandings of violence against women to interpret section 16(b) rids the VAWA's civil rights remedy of the effect intended by Congress. Thus, in VAWA civil rights cases, courts should interpret section 16(b) in such a way that takes into account the broad scope of violent acts that women routinely sustain in this country. Part A argues that a uniform standard should be adopted for all courts to apply when interpreting section 16(b). Part B describes what that standard should be. Part C revisits the cases presented in Part I.B to show how application of the suggested standard would lead to different results, results that would be in accordance with women's perceptions of violence.

A. Adoption of a Uniform Standard

Adopting a uniform standard for all courts to apply would be consistent with the congressional intent in enacting the VAWA's civil rights remedy. Congress intended to characterize the scope of violence against women as a problem facing young women throughout the United States.²⁰⁶ Congress also intended to equate violence against women with violence against other groups by recognizing gender-based violence as a form of discrimination and as

201. See *supra* Parts I.B.1. & II.B.1.

202. See *supra* note 190 and accompanying text.

203. See *supra* Part I.B.3.

204. See *Smathers v. Webb*, No. 98-5806, 1999 WL 1046625, at *2-3 (6th Cir. Nov. 10, 1999).

205. See *supra* Part I.B.2.

206. See *supra* text accompanying notes 45-46.

an affront to federally protected rights.²⁰⁷ Uniformity is also required in light of Congress's intent to supercede discriminatory state laws and practices.²⁰⁸ Indeed, these goals would be furthered by use of a single standard for all courts because such uniformity would entitle women from different states to the same protection under the civil rights remedy.

Perhaps even more important in adopting a uniform standard for VAWA civil rights cases is the definitional history of section 16. Because Congress created section 16 to provide a "universally applicable" definition of "crime of violence," albeit in the sentencing guidelines context, it is unreasonable and inefficient that courts in the VAWA context are left to their own devices to interpret section 16(b).²⁰⁹

B. The Need For A Broad Approach

Courts should adopt a broad approach to analyzing what constitutes a "substantial risk of physical injury" pursuant to section 16(b). Based on congressional intent and social science data, courts are not effectuating the purpose of the VAWA's civil rights remedy.

There has been disagreement over Congress's intent regarding the scope of acts that would be covered under the VAWA's civil rights remedy.²¹⁰ Proponents of a broad interpretation of what acts create a substantial risk of physical force under section 16(b) have argued that Congress intended for such a broad application.²¹¹ Opponents of a broad interpretation have argued that Congress intended a more limited application.²¹²

An analysis of the congressional intent behind the legislation reveals that the former interpretation is more plausible than the latter. Senator Biden's first version of the VAWA's civil rights remedy covered "any crime of violence . . . including rape, sexual assault, or abusive contact, motivated by gender."²¹³ Senator Biden's substitute version of the same bill included all crimes of violence motivated by gender.²¹⁴ After these definitions of "crime of vio-

207. See *supra* text accompanying notes 47-51.

208. See *supra* text accompanying notes 52-62; *supra* note 41 and accompanying text.

209. See *supra* note 160 and accompanying text.

210. See *supra* notes 180, 184 and accompanying text.

211. See *supra* note 180 and accompanying text.

212. See *supra* notes 183-184 and accompanying text.

213. See *supra* note 19 and accompanying text.

214. See *supra* note 22 and accompanying text.

lence” were regarded as controversial and withstood opposition from Chief Justice Rehnquist and civil rights groups, among others, only then were limitations imposed on the types of acts that the civil rights remedy would cover.²¹⁵ To ease the opposition against the VAWA’s civil rights remedy, supporters in Congress acted quickly to provide a statutory reference to section 16.²¹⁶ Furthermore, the Tenth Circuit has agreed with this reading of congressional intent.²¹⁷ Because the current “crime of violence” definition in the VAWA’s civil rights remedy was borne from political compromise, it is hardly fair to say that Congress intended to limit such causes of action to remedy only brutally violent attacks.

The underlying congressional intent behind section 16 for sentencing guidelines purposes also supports the argument for a broad approach. Congress’s intent when enacting section 16 was to provide a broad understanding of what constitutes a “crime of violence.”²¹⁸ In addition, the subsequent definition of “crime of violence” under the sentencing guidelines, containing language virtually identical to section 16(b), was created to be more inclusive.²¹⁹ Likewise, when Congress drafted the VAWA’s civil rights remedy, it sought to create a uniform statute guaranteeing civil rights protection to all victims of gender-motivated violence.²²⁰

Utilizing existing precedent from sentencing guidelines cases would also allow for a broad interpretation of section 16(b) since courts in those cases have held more acts to constitute “crimes of violence” pursuant to language that mirrors section 16(b).²²¹ In line with a broad approach, courts should apply “crime of violence” determinations from sentencing guidelines cases to VAWA civil rights cases.²²²

To understand what constitutes a substantial risk of physical injury under section 16(b), courts should consider the social science data presented above.²²³ The cases cited previously²²⁴ demonstrate a phenomenon documented in social science literature: men and

215. See *supra* notes 26-35 and accompanying text.

216. See *supra* note 185.

217. See *supra* note 182 and accompanying text.

218. See *supra* note 160 and accompanying text.

219. See *supra* notes 161-162 and accompanying text. Compare *supra* note 11 and accompanying text with *supra* note 161.

220. See generally *supra* Part I.A.2.

221. See *supra* notes 171-182 and accompanying text.

222. See *supra* Part II.A.1.

223. See discussion *supra* Part II.A.2.

224. See *supra* Part II.B.

women perceive the risk of physical harm differently.²²⁵ Two of these cases in particular, *McCann I* and *Palazzolo*, also demonstrate that some courts determine VAWA civil rights cases from the traditional perspective of sexual assault as non-violent, rather than the more realistic understanding of the harm that results from such acts.²²⁶ Because the traditional understanding of what poses a substantial risk of physical force does not account for how women perceive and experience certain acts,²²⁷ courts should consider nonconsensual sexual assaults as constituting a substantial risk of physical force irrespective of the particular facts of each case. To require a higher level of force is to ignore the problem of violence against women in this country. As it stands, courts are systematically thwarting the purpose of the VAWA's civil rights remedy, perpetuating the myth that certain acts taken against women do not cause harm or create a substantial risk of harm and ignoring the devastating effects that such violence has on society.²²⁸ Therefore, the social science data provided above should guide courts in interpreting section 16(b), by taking into account women's perspectives and experiences of violence.

With these concerns in mind, courts should seek to provide women with legal redress for a broad range of acts. To do so, courts should seek to deem an act a "crime of violence" by utilizing a two-step approach that includes both the categorical approach and the actual conduct approach.²²⁹ Because there is a gender gap in understanding what poses a substantial risk of physical force, this approach would allow for a broader range of acts to fall within the "crime of violence" requirement of section 16(b) thereby allowing for women's perspectives of violence to be included in the analysis. Accounting for women's perceptions of violence while utilizing the two-step process would result in "broad, remedial interpretations" that civil rights actions, such as the VAWA's civil rights remedy, demand.²³⁰

C. The Cases Revisited

In *McCann I*, *Palazzolo* and *Smathers*, the district courts misconstrued the nature of the acts alleged by concluding that such acts

225. See *supra* Part II.A.2.

226. See discussion *supra* Parts I.B.1 and I.B.2.

227. See *supra* notes 133-135 and accompanying text; see also generally Part II.A.2.

228. See *supra* note 49 and accompanying text.

229. See discussion *supra* Part II.B.

230. Frazee, *supra* note 159, at 9-23.

did not involve a substantial risk of physical force.²³¹ Had the district courts applied the two-step approach and precedent from sentencing guidelines cases and utilized a more contemporary understanding of the reality of violence against women, all of the plaintiffs would have survived motions to dismiss.

In *Palazzolo*, the court's reasoning that Ruggiano's acts did not amount to "crimes of violence" is flawed. The court stated that patients readily consent to some physical contact that is likely to occur during an examination between a doctor and a patient.²³² Indeed, the court trivialized Palazzolo's claims by stating that "[h]aving obtained such consent, albeit under false pretenses, a doctor who conducts the examination for improper reasons would have little need to resort to physical force."²³³ Furthermore, the court implied that unwanted sexual contact is not forceful by its nature, and does not pose a substantial risk of force, when it stated that "there would be little reason for a doctor to employ physical force" in this situation.²³⁴ Utilizing the two-step approach with a contemporary understanding of what constitutes violence against women, the court should have come to the determination that the elements of the Rhode Island statute of second degree sexual assault, by their nature, categorically pose a substantial risk of physical force. Moreover, if the court applied the holding in *Reyes-Castro*, which held that a sexual assault without consent constitutes a "crime of violence," Palazzolo would have survived the motion to dismiss.

Likewise, the court's reasoning in *Smathers* is flawed. Under the categorical approach, Webb's conduct would have been deemed a "crime of violence" pursuant to section 16(b) because courts in the sentencing guidelines context have deemed the making of threats "crimes of violence" pursuant to section 16(b).²³⁵ Even under the actual conduct approach, the court should have determined that the defendant's messages threatened violence,²³⁶ particularly when he said "I have nothing else to do but fuck with you . . ." and "you're gonna get your goddamned mouth off of me, because I won't get mine off you." This alone should be sufficient to pass muster under section 16(b).

231. See *supra* notes 85, 93, 106 and accompanying text.

232. See *supra* note 85 and accompanying text.

233. *Id.*

234. See *id.*

235. See discussion *supra* Part I.B.3; *supra* notes 163-164 and accompanying text.

236. See *supra* note 93 and accompanying text.

The Tenth Circuit's decision in *McCann II*, reversing the district court's dismissal, should stand as an example for courts when interpreting section 16(b). First, the Tenth Circuit demonstrated a contemporary understanding of what constitutes violence against women and what acts pose a substantial risk of physical force when it stated:

[t]he very act of nonconsensual sexual contact, which by its nature evinces a clear intention to disregard the victim's dignity and bodily autonomy, both demonstrates and creates a substantial risk of more serious physical intrusion or the application of force to ensure compliance.²³⁷

The Tenth Circuit recognized, in accord with the social science data, that nonconsensual sexual contact in and of itself poses a substantial risk of physical force.²³⁸ The Tenth Circuit recognized that a broader understanding of what constitutes violence against women is necessary to further the congressional intent in enacting the civil rights remedy.²³⁹ Stating that the categorical approach should be used in VAWA civil rights cases, the Tenth Circuit followed precedent from the sentencing guidelines context when it applied the holding that sexual abuse without consent is categorically a "crime of violence" because such an act poses a substantial risk of physical force.²⁴⁰ Thus, all courts should follow the Tenth Circuit's approach to interpreting section 16(b) in VAWA civil rights cases.

CONCLUSION

The enactment of the VAWA was viewed as "a potential vehicle of empowerment" for women, and was a long-awaited move toward gender equality in the United States.²⁴¹ By enacting the VAWA, Congress emphatically expressed a strong commitment to curb and attack the pervasiveness of sex-based violence.²⁴² In practice, however, the civil rights remedy has fallen short. In the few VAWA cases brought under the civil rights remedy, the "crime of violence" requirement has been interpreted in such a narrow way that it strips the remedy of any effect.

While there is confusion as to how a "crime of violence" should be interpreted, courts should adopt a uniform standard and "favor

237. *Supra* text accompanying note 181.

238. *See supra* note 180 and accompanying text.

239. *See supra* note 182 and accompany text.

240. *See supra* notes 176-179 and accompanying text.

241. Schneider, *supra* note 47, at 428.

242. *See supra* text accompanying note 46.

the interpretation that gives the greatest effect to a broad, remedial statute such as the VAWA.”²⁴³ Courts should do this by utilizing a definition of violence that does not ignore women’s experiences. Moreover, utilizing a two-step approach and applying precedent determining cases under section 16(b) would broaden the scope of violent acts that would pass muster under the statute. By broadening the types of acts that would constitute crimes of violence in these ways, courts would finally breathe some life into the VAWA’s civil rights remedy and give it the definitional teeth it requires.

243. Frazee, *supra* note 159, at 9-24.