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Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique

Birgit Schmidt am Busch

Rights of a Battered Woman

I have the right not to be abused.
I have the right to anger over past beatings.
I have the right to choose to change the situation.
I have the right to freedom from fear of abuse.
I have the right to request and expect assistance from police and social agencies.
I have the right to share my feelings and not be isolated from others.
I have the right to want a better role model of communication for my children.
I have the right to leave the battering environment.
I have the right to privacy.
I have the right to express my own thoughts and feelings.
I have the right to develop my individual talents and abilities.
I have the right to legally prosecute the abusing person.
I have the right to be and I have the right to be me.

Charlotte Fedders

* Dr. Jur., University of Munich; LL.M. in International and Comparative Law, University of Iowa College of Law (August 1993). I would like to thank Professor Martha Chamallas and Professor Linda Kerber and the participants of the Feminist Legal Harmworkshop at the University of Iowa College of Law for their valuable assistance in the preparation of this article. Also, I wish to acknowledge with gratitude the help received from Professor Linda McGuire, Deb Bjornstad, LL.M. and Ulrike Bumke.

Introduction

A. A Story²

Peggy married Mike in 1974 and she and her two daughters from a previous marriage moved in with him. Early in the marriage Mike started hitting and kicking Peggy. After the first year of marriage, Peggy showed severe psychological problems and as a result was hospitalized and diagnosed as having symptoms of paranoid schizophrenia, but was soon released after responding to treatment. It then appeared to the daughters that Mike was encouraging Peggy to take more than her prescribed dosage of medication.

In 1978, Mike began to taunt Peggy, stating that her 12-year-old daughter Carla was "more of a wife" to him than Peggy. When two social workers informed Peggy that they had received reports that Mike was abusing her daughters, Peggy eventually quit her job in order to prevent her husband from being alone with the two girls. Later, Carla was placed in a detention center, and Mike stopped Peggy and her other daughter Laura from visiting her. When Mike finally allowed his stepdaughter Carla to return home, he forced her to do all the housework and forbade Peggy and Laura to speak with her. When Peggy begged to be allowed to talk to Carla, Mike threatened her with a shotgun. As the situation with Carla escalated, so did Mike's violence toward his wife. He once kicked her so violently in the chest that she needed medical treatment. Finally one night, Mike threw Carla out of the house and forbade Peggy to contact Carla or even talk about her.

When Laura eventually left the house, as well, Peggy became even more isolated. Once when Peggy was working at a cafe, Mike showed up with a gun and forced all the customers to leave because he wanted Peggy to come home with him immediately and have sex. Another time, Mike shot one of Peggy's pet cats, then turned the gun on her and threatened to pull the trigger.

In May 1986, Peggy tried to leave and ran away to her daughter Laura's home. Her daughter had her hospitalized because she was suicidal. But, Mike checked her out of the hospital telling the hospital staff that he "needed his housekeeper." He threatened to kill her if she ever ran away again. As soon as they arrived home, he repeatedly forced her to have oral sex with him. The following day Mike's parents came to visit them. According to his parents, Peggy and Mike were affectionate with each other.

² This story is taken from a real case. See State v. Peggy Stewart, 763 P.2d 572 (Kans. 1988).
during the entire visit. Later, after his parents had gone, Mike forced his wife to perform oral sex.

B. Spousal Abuse — A Legal Harm?

Peggy’s story is far from unusual. In the United States alone more than 1.1 million women every year are victims of reported domestic violence. As many as 3 million more domestic violence crimes go unreported every year. Women are at risk in their homes. If they choose to go to the police or other authorities, they are often treated with ridicule and disbelief. The victims are blamed and seen as having provoked the outburst of violence by their partners. The police, prosecutors and the court system contribute to the problems of domestic violence by treating it essentially as a “personal problem.” Battered women often remain, feeling trapped; they are reluctant to leave their partners knowing that they might not find jobs or housing or because of guilt for the children. Many still believe that the partner will change. Quite often, battered women are in fact trapped, kept from leaving by threats of further violence or death if they attempt to leave their abusers.

Spousal abuse is not new. Two centuries ago, in his Commentaries on the Laws of England, William Blackstone described the husband’s right to moderately chastise his wife in order to enforce obedience to his lawful command. The common law criterion for measuring moderate chastisement, the “rule of thumb,” permitted a husband to discipline his wife by beating her, so long as the stick he used was no thicker than his thumb. That legal response reflected society’s acceptance of wife-beating as a lawful and perhaps desirable, or at least necessary practice. Violence has always been directed towards women and children, but the first family violence agencies in the late nineteenth century focused mainly on child abuse; the movement against cruelty to children was highly influenced by the temperance movement and blamed drinking for almost all family problems. Not until the Progressive Era was wife-beating considered a form of family violence. The prevailing view was that wife-beating

5. Id. at 158 (quoting James Bannon, Commander of the Detroit Police Department).
6. See Lenore E. Walker, Battered Women and Learned Helplessness, 2 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 525, 530 (1977-78); see also SCHECHTER, supra note 4, at 26.
7. WILLIAM B. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 432/433 (1765).
resulted from environmental stress, lack of education, or lack of mental hygiene. During the Depression, male violence was radically de-emphasized as a grave family problem. In fact, society sympathized with the poor unemployed husband. Violence was excused as an unfortunate result of stressful circumstances. In these times of economic hardship, women were expected to make sacrifices and reconcile with their husbands. In the 1940s and 1950s wife-beating was perceived as an interpersonal problem. Because of the psychiatric influence in family-violence work, women were blamed for their abuse by their husbands. Abused women were considered to be neurotic: they had failed to accept their own femininity; they were frustrated as the result of their frigidity. As a result they were deemed to need professional help.

The feminist movement in the 1960s and 1970s "rediscovered" spousal abuse. This movement challenged the ideology of public and private sphere and raised critical questions about "family values." Self-help organizations gained importance and the first shelter houses were founded.

As the battered women's movement grew, the federal government, although reluctantly, responded to the problem of domestic violence. During the Carter Administration, various offices were set up to serve as central agencies for policy planning, information, dissemination and interagency coordination. However, it was not until some twenty years later, in 1990, that a federal bill was introduced in Congress that contained the first federal legislation against spousal abuse. The Judiciary Committee held three hearings on S. 2754 during the 101st Congress; the third hearing, held on December 11, 1990, concentrated on crimes of domestic violence. The bill did not come to the floor before the close of the 101st Congress; Senator Joseph Biden reintroduced a similar bill, S. 15, on January 14, 1991. Shortly after, then Representative Barbara Boxer introduced a companion bill, H.R. 1502, in the House of Representatives. During the 102d Congress, the Judiciary Committee held another hearing on S. 15 on April 9, 1991, which focused on the bill's civil rights remedy

10. Id. at 21-22.
11. Id. at 22-23.
12. Id. at 23, 270.
13. SCHECHTER, supra note 4, at 192.
14. GORDON, supra note 9, at 25; SCHECHTER, supra note 4, at 53-79.
15. The central agencies were the Interdepartmental Committee on Domestic Violence and the Office on Domestic Violence. With the election of President Reagan, the Office on Domestic Violence was dismantled and all the funding for regional technical assistance withdrawn. For more details see SCHECHTER, supra note 4, at 192-195. See also Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973, 980 (1991).
17. December Hearing, supra note 1.
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for gender-motivated crime. After several amendments the bill was reported favorably out of committee, but again was not acted upon in the 102d Congress. On January 21, 1993, Senator Biden, with the support of forty-three other senators, reintroduced the Violence Against Women Act of 1993. The bill also has the support of President Clinton who pledged to sign it during his election campaign.

Title II of the 1993 Violence Against Women Act (VAWA) recognizes that domestic violence is a national issue: for example, the bill declares that it is a federal crime for an abuser to follow his spouse across state lines and continue to abuse or violate a stay-away order. It protects women who flee their abusers by making protective court orders issued by one state valid in the forty-nine other states so that women do not lose protection if they happen to cross state lines. But this title contains other provisions as well: it encourages arrest policies by granting funds to the states for implementing pro-arrest programs and policies; it triples funding to shelter abused women; it provides educational programs in which young people are taught about domestic violence and violence among intimate partners; it secures the confidentiality of domestic shelters and abused persons' addresses; it provides for cooperation with local domestic violence programs; and provides for research and data collection on this issue. In its latest version the bill now also provides federal funds for a national domestic violence hotline; this national, toll-free telephone hotline is designed to provide information and assistance to victims of domestic violence. Former drafts authorized national media campaigns against spousal abuse, but these provisions were dropped in the 1993 Bill.

Furthermore, the bill would create a civil rights cause of action for the victims of gender-based violence. Title III of the Act allows women to

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21. THE PLAIN DEALER, Jan. 24, 1993, at 1C.
23. Id.
24. Id.
25. Id., § 231.
27. Id., § 261.
28. Id., § 271.
29. Id., § 281.
30. Id., § 291.
31. Id., § 211.
vindicate their right to be free of gender-based violence through a civil suit for monetary or other relief. Thus, Congress recognizes that the current civil rights legislation fails to address the problem of violent gender-based discrimination. Congress has already provided civil remedies for victims of race-based violence, and in 1964 Congress provided civil rights remedies for victims of sex discrimination in the workplace, but these statutes leave women unprotected against most gender-motivated crimes. The creation of a federal civil rights cause of action for victims of gender-motivated violence would play a significant role in recognizing violence against women as a compensable form of discrimination. Civil rights litigation has often served as an effective tool, sending a clear message to the public that violence against women will no longer be tolerated. This Article argues, however, that Title III of the Violence Against Women Act, in its present form as amended by the 103d Congress, will not be an effective response to problems of domestic violence. Part I briefly introduces Title III and its goals. Part II then demonstrates the weaknesses of Title III in its present form with respect to domestic violence. First, Title III does not address all forms of abuse present in domestic violence cases. In addition, the bill does not acknowledge that most acts of violence against women in their homes are gender-motivated. Lastly, Part III suggests ways to ensure the effective application of Title III in cases of spousal abuse.

I. Title III of the Violence Against Women Act — its Goals and Provisions —

Title III of the Violence Against Women Act would allow victims of gender-based crimes to bring a federal civil action against their attacker. The conduct covered under this section includes any crime of violence motivated by gender as defined in Title III. Compensatory and punitive damages, where appropriate, may be recovered along with other relief.

35. See April Hearing, supra note 18, at 34 (testimony of Bonnie J. Campbell, Att’y Gen. of Iowa).
36. This Article looks at Title III in its version of May 1994. Title III had then been amended by the 103d Congress in two major ways by restricting crimes of violence to “felonies” and requiring “an animus based on the victim’s gender.” See infra.
37. See also Brenneke, supra note 34, at 53. For a very critical analysis of Title III with regard to sexual assault, see Wendy Rae Willis, The Gun is Always Pointed: Sexual Violence and Title III of The Violence Against Women Act, 80 GEO. L.J. 2197 (1992).
A. THE GOALS OF TITLE III

In proposing a civil rights remedy for victims of gender-based crimes, supporters of the Act have stated three major goals.

First, Title III is intended to influence the public's attitude about violence against women. An articulated objective of Title III is to communicate the message that violence based on gender violates women's civil rights and cannot just be perceived as a "family" problem, a "private" matter or a sexual "miscommunication."38

Second, the bill is intended to bring the treatment of gender-motivated violence in line with that of other bias-motivated attacks. According to testimony at the Senate hearing, "[t]he Violence Against Women Act aims to put gender-motivated bias crimes against women on the same footing as other bias crimes. Whether the attack is motivated by racial, ethnic or gender bias, the results are often the same. The victims are reduced to symbols of group hatred which they have no individual power to change or escape. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated."39

Finally, Title III intends to provide federal remedies for victims of gender-motivated crime not presently available in state courts.40 The drafters found this necessary because the "combination of local prejudices, legal barriers, and legally recognized disbelief of women victims argues strongly for a Federal, not a State, remedy for gender-biased crimes. In an alternative Federal forum, antiquated State procedural rules are irrelevant and local immunities inapplicable. Damage questions will not revolve around the victim's 'sex life,' her dating history, or clothing, but the harm to her interest in equality.... Federal judges and juries are better insulated from the kind of local pressures that frequently put the victim, not the offender, on trial."41

B. THE PROVISIONS OF TITLE III42

Along with extensive findings about violence against women, Title III43 contains four major subsections.

42. See supra note 36 (version from May 1994).
43. Since the language of the statute is gender-neutral, the Title III remedy is available to men as well as women whose civil rights are violated on the basis of gender.
Section 302 subsection (b) affirms that every person within the United States has the right to be free from crimes of violence motivated by gender. Subsection (c) defines the cause of action:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court may deem appropriate.

Subsection (d) defines "crime of violence motivated by gender:" A "crime of violence" is considered to mean an act 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. Title 18 includes two possible categories of "crime of violence." The first is "an offense that has an element of use, attempted use, or threatened use of physical force against the person or property of another.

The second is "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." It is not necessary that the plaintiff has pursued a prior criminal action against the defendant.

Such crime of violence is "motivated by gender," if it is "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender."

Finally, subsection (e) limits claims under Title III:

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

Thus, Title III differs from analogous federal statutes that provide civil remedies in cases of racially motivated violent assaults in two significant ways. First, Title III creates a remedy against violent gender-motivated

44. 18 U.S.C. § 16(a).
45. Id., § 16(b).
46. For a detailed comparison between Title III and analogous existing federal statutes see April Hearing, supra note 18, at 91 (testimony of Burt Neubome, New York University School of Law).
assaults carried out by private individuals. Federal statutes like 18 U.S.C. §§ 241 and 242 and §§ 1983 and 1985 (3), dating from the post-Civil War Reconstruction period, provide relief against certain private “conspiracies” and unlawful actions by government officials, but do not provide relief against individual attackers. Title III builds on the model of 18 U.S.C. § 245, enacted in 1975, to provide relief against individuals. Thus, the drafters of Title III acknowledged that the majority of violent crimes against women are perpetrated by individuals. Second, unlike the existing federal statutes that provide remedies in cases of racially motivated crimes, Title III is not merely a means to enforce the rights established by other provisions of law, but by itself creates a federal right to be free from gender-motivated violent assault and thus avoids confusion about what rights are protected.

II. Limited Applicability of Title III in Cases of Domestic Violence

Title III of the Violence Against Women Act is a meaningful attempt to give victims of domestic violence a remedy for the gender-motivated element of their injury. However, by its definition of “crime of violence” and by requiring plaintiffs to prove the gender motivation of the violence, Title III will exclude many of the victims it hopes to assist.

A. THE “CRIME OF VIOLENCE” REQUIREMENT

By defining a “crime of violence” as an act or series of acts that would constitute a felony and would come within the meaning of State or Federal offenses described in section 16 of Title 18 of the United States Code, Title III fails to effectively address all forms of abuse present in cases of

47. 18 U.S.C. § 245 states in relevant part:
(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . .
(2) any person because of his race, color, religion or national origin and because he is or has been (a list of protected activities follows), . . . shall be fined. . . .

48. See Hallock, supra note 34, at 595.
49. See, e.g., 18 U.S.C. § 241 which states: “If two or more persons conspire to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . .”
51. See Brenneke, supra note 34, at 58.
domestic violence. This narrow definition may jeopardize many women's use of the remedy in the context of domestic violence.52

1. Limited Application to Forms of Abuse Constituting Criminal Behavior

The requirement in Title III that all civil rights deprivations motivated by gender be limited to occasion of "crimes" ignores that many forms of domestic abuse do not violate the criminal law. One ordinarily thinks of domestic abuse as the commission of a battery or an assault.53 But this perception is too narrow. "[D]omestic violence is forceful, controlling behavior that coerces a woman to do what the abuser wants without regard to her rights, her body or her health. Battering is a pattern of behavior that includes the use or threat of violence for the purpose of gaining power and control over the victim. Abuse includes physical, psychological, sexual or economic violence inflicted upon the woman."54 Criminal law has proven to be inadequate to address these various forms of abuse since it is structured in a highly patriarchal way.

Existing criminal law uses predominantly male standards to determine what behavior constitutes a crime and what does not.55 Male concerns and interests have governed the definition of offenses. The interests presently protected under criminal law are predominantly male interests: the preservation of the state; property; life and physical safety.56 Offenses protecting the state include contempt, causing a disturbance, public mischief, assaulting a police officer and riot and unlawful assembly — offenses all of which work to deny women the opportunity to dissent and thus reinforce the subordinate status of women in society.57 While traditional property interests are carefully protected, inadequate protection is provided for new property interests most important to women: access to the workforce; a safe, non-sexist work environment or protection from employment discrimination.58

52. In her analysis, W.H. Hallock does not seem to be aware of this problem. Hallock, supra note 34, at 603.
53. Depending on the jurisdiction, the intentional bodily injury or offensive touching of another can constitute a battery or an assault. See ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 57 (1987).
54. See December Hearing, supra note 1, at 139 (written statement by Susan Kelly-Dreiss, Executive Director of the Pennsylvania Coalition Against Domestic Violence). For a more comprehensive description of domestic violence, see SCHECHTER, supra note 4, at 11-20. Also see December Hearing, supra note 1, at 88, 99 (testimony of former victims Charlotte Fedders and Tracy Motuzick).
56. Id. at xvii.
57. Id. at 7, 8.
58. Id. at 8.
Finally, the many offenses protecting life and "physical" safety are inadequate to protect women from the more subtle forms of coercion they suffer, such as sexual harassment, street harassment and economic abuse. By looking only at discrete acts, criminal law fails to address patterns of abuse. Thus, if a woman kills or harms her abuser while he is sleeping, the jury is not allowed to consider self-defense. Where self-defense is asserted, the traditional view requires the showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor. Furthermore, it must be shown that a reasonable person in the defendant's circumstances would have perceived self-defense as necessary. Present law does not acknowledge that a woman who has been abused for years may reasonably perceive herself in danger when a man might not. The law only permits the jurors to focus on the facts immediately associated with the death to the exclusion of all the facts which make plausible the fear of the woman.

The effect of this patriarchal structure of criminal law is exemplified in domestic abuse cases. For example, Peggy would be left without remedies for most of the abusive behavior inflicted upon her by her husband. During their marriage, Mike not only kicked and hit Peggy, but he also terrorized her in many ways, which did not violate criminal law. For example, Mike humiliated his wife in front of other people by calling her his "housekeeper." He put her health at risk by encouraging her to take more than her prescribed dosage of medication. He tormented Peggy by throwing her daughter out of the house and forbidding her to contact her or even talk about her. Mike's abusive behavior forced Peggy to give up her job and stay at home and thus prevented her from pursuing a professional career. These forms of abuse would not necessarily fall within the scope of criminal law.

The inadequacy of criminal law to protect women is seen, above all, in current rape laws. In some states, marital rape is still not considered a crime or demands proof of additional elements. For example, most states still allow marital rape to be charged only where there is evidence of physical injury or where other requirements are met. In cases of both

59. Id. at xxii.
60. See State v. Stewart, supra note 2.
61. Women are now developing a new definition of self-defense for battered women who kill, different from the legal precedents which focus on a man preserving his life. For more details see Schechter, supra note 4, at 170-174; Boyle, supra note 55, at 38-42.
62. For a general critique with regard to rape see Willis, supra note 37.
marital and nonmarital rape, many states still require the prosecution to prove that the sexual contact was not only nonconsensual, but the product of force, before classifying forced sexual intercourse as criminal.\textsuperscript{64} In these states, physical force is required primarily as evidentiary confirmation that the victim did not, in fact, consent to sexual contact. According to one judge "[t]he absence of consent necessarily implies resistance on the part of the female to preserve and protect her honor and the use of force on the part of the man to accomplish his purpose. The very nature of rape connotes forcible and unpermitted physical contact and an overt demonstration of resistance by the unwilling female."\textsuperscript{65} However, in abusive relationships, physical violence is at times not the way in which the man overcomes the woman's nonconsent to sex. Battered women, after years of physical and psychological terror, are so frightened and intimidated that they often succumb to pressure without the immediate threat of violence. Battered women will often think, "if I reassure him or if I make more of a commitment, then this will be OK, this will be better."\textsuperscript{66} In these cases, the forced sexual contact does not violate the criminal law and the woman would not be able to seek a remedy under Title III.

2. \textit{Limited Application to Forms of Abuse Involving Physical Force or a Substantial Risk Thereof}

Even if the abuse constitutes criminal behavior, Title III only provides a remedy in cases containing the "use, attempted use, or threatened use of physical force." This provides a gap for forms of abuse which would fall within the scope of criminal law, but may not necessarily involve the use or threatened use of physical violence. Thus, where a husband or a boyfriend prevents the woman from running away, by locking her in the home (i.e., false imprisonment) but does not use or threaten to use physical force, Title III would not apply. Theft and fraud would also be excluded. Where, as is common, the abuser takes his wife's money, leaving her without any financial resources, he could be charged with theft, but Title III would not provide a remedy for the victim.

3. \textit{Limited Application to Forms of Abuse Constituting "Felonies"}

Finally, Title III limits the use of the remedy to victims of "felonious" crimes.\textsuperscript{67} However, where a lesser offense applies simply because of the

\textsuperscript{64} See, e.g., Drake v. State, 236 S.E.2d 748, 749 (Ga. 1977) ("'Forcibly' and 'against her will' are not synonymous").

\textsuperscript{65} State v. Dizon, 390 P.2d 759, 764 (Haw. 1964). For a detailed analysis of the requirements in rape cases, see Susan Estrich, Rape, 95 YALE L.J. 1094-1132 (1986).

\textsuperscript{66} See December Hearing, supra note 1, at 166 (testimony of Dr. Angela Browne, Department of Psychiatry, University of Massachusetts).

\textsuperscript{67} The felony crime provision has only recently been included in Title III of the Senate VAWA.
relationship of the parties, Title III would apply if the crime would constitute a felony if it were between strangers.\textsuperscript{68} The felony requirement restricts the scope of the VAWA even further in the context of domestic violence because prosecutors bring misdemeanor charges for most crimes.\textsuperscript{69} Many forms of abuse — assault and battery — that women face in an abusive relationship would not be covered by the provisions of Title III.\textsuperscript{70}

4. Conclusion

For the purposes of Title III of the Act, Congress should not define, as it has, “crime of violence” as a felony that comes within the meaning of section 16 of Title 18 of the United States Code. This unnecessarily limits the scope of behavior covered by the Act, and causes the scope of the Act to vary from state to state.\textsuperscript{71} The defendant is not facing criminal penalties for violating the bill. Since the bill is concerned with remedying the injury to the plaintiff, it contains a civil rather than criminal focus. Moreover, “because the bill comes under the auspices of civil rights, the remedy should be tied to the assault on the plaintiff’s personal dignity and autonomy,” not to criminal charges and the use of physical force.\textsuperscript{72} Limitations on civil rights based on the categorization as a violent felony, serve to perpetuate violence motivated by gender. If Congress adopts Title III in its present form, it will undermine the drafters’ intent to provide remedies to victims who would be unable to press criminal charges in the state courts.

B. THE REQUIREMENT OF “GENDER MOTIVATION”

Title III requires the plaintiff to prove by a preponderance of the evidence that the crime was gender-motivated. A gender-motivated crime is defined as “a crime of violence committed because of gender or on the basis of gender; and due, at least in part, to an animus based on the victim’s gender.” Thus, while in a former draft it was sufficient to prove discriminatory motive, Title III in its latest version by including the animus mens rea additionally requires discriminatory intent. In essence, the remedy of Title III is limited to purposeful violent crimes against women. Furthermore, the requirement of proving discriminatory intent would pose a harmful burden on most battered women since they will have to overcome the cultural myths about woman battering.

\textsuperscript{68} Title III subsection (2)(B).
\textsuperscript{69} Brenneke, \textit{supra} note 34, at 59.
\textsuperscript{70} \textit{ld.} at 64.
\textsuperscript{71} \textit{ld.} at 59.
\textsuperscript{72} See Willis, \textit{supra} note 37, at 2214.
1. Limited Application to "Intentional" Violent Sex Discrimination

While earlier versions of Title III permitted demonstration of discriminatory motive, Title III has been amended by the 103d Congress to additionally require that the crime is "due, at least in part, to an animus based on the victim's gender." In its amended form — and this seems to have been overlooked by the drafters — Title III requires proof of discriminatory intent and discriminatory motive, although the two standards partly exclude each other as controlling concepts: acts cannot be intentional and unconscious at the same time. 73 Despite this technical problem, it is clear that intent is to be the gender-motivation standard. The intent standard was included to assure the critics that Title III will not be an overused provision.

By requiring discriminatory intent, the application of Title III is limited to cases where the victim can demonstrate that her abuser intentionally engaged in the violent acts because of her sex. Thus, Title III largely misses the unconscious forms of violent discrimination against women in their homes. 74 As has sufficiently been shown, 75 existing stereotypes about family and women are the underlying cause for abusive behavior in intimate relationships. Many men still believe that a woman has to obey her husband's wishes and as a consequence consider themselves justified to use violence to exercise their control. The intent standard would fail to address civil rights deprivations coming from such stereotypes. 76 In its present form Title III would create a fault-based tort scheme rather than a remedy for violations of women's fundamental rights.

2. The Problem of "Proving" Gender-Motivation

Furthermore, the burden of demonstrating gender-motivation as defined in Title III would jeopardize the use of the remedy for many battered women. How would a battered woman establish that her abuser intention-

73. D. Don Welch, Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent, 60 S. CAL. L. REV. 734 (1987), clearly delineates the nature and importance of the legal distinction between "motive" and "intent" in discrimination theory: While motive addresses the factors that lead into a decision, intent is the conscious purpose with which one acts to achieve a desired result. One's motive can be conscious or unconscious; the person may or may not be aware of the reasons upon which he or she acts. Intent is conscious—the person knows what he or she intends.
74. See also Brenneke, supra note 34, at 46.
75. See, e.g., SCHECHTER, supra note 4, at 209.
76. With respect to race-based deprivations of civil rights, many commentators have argued for the abandonment of the intent requirement in 42 U.S.C. §§ 1981 and 1982 in order to effectively address the subtlety and disguise of racial discrimination in today's society. See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Welch, supra note 73, at 740, suggests waiving the intent requirement in Title VII disparate treatment cases.
ally engaged in abusive behavior because of her sex? Even if she were only required to show discriminatory motive, as required in former versions of Title III, the burden of proof would still be difficult.77

The drafters of Title III drew heavily upon the country’s experience with race-based violence. The drafters envisioned the Title III plaintiff’s burden of demonstrating by a preponderance of the evidence that the assault was “motivated by gender” as being identical to the plaintiff’s burden in a racially motivated assault case. The Committee report states:

Proof of “gender-motivation” under title III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights law. Judges and juries will determine “motivation” from the “totality of the circumstances” surrounding the event. Consider existing law, which prohibits racially motivated attacks. In such cases, if a black civil rights worker is beaten by a Ku Klux Klan member who has been terrorizing a predominantly African-American neighborhood, the chances are good that the attack is “motivated by racial bias.” At trial, the victim’s lawyers will prove all the circumstances showing the bias: that the victim was of one race (black) and the attacker from another (white); that the attacker does not typically assault white persons and has a history of assaulting black persons; that the attacker belonged to a white-supremacist organization; and that the attacker shouted racial epithets during the assault. None of these circumstances taken individually would prove that the attack was racially motivated, but taken together they show racial bias.78

Gender-motivated crimes should be viewed in precisely the same way. Consider the case of a serial rapist who violates his victims as he hurls misogynist slurs. The victim’s lawyers would prove exactly the same type of “circumstances” that the lawyer in the “race” case proved: that the victim was of one sex (female) and the attacker a different sex (male); that the attacker did not kidnap and rape men, but had a long history of attacking women; and that the

77. Hallock, supra note 34, at 611, argues that it is possible for a victim of spousal abuse to prove gender motivation. However, Hallock’s potential scenario of domestic violence constitutes an unrealistically clear case: in her example a man with a prior history of abusing his girlfriends gets married and regularly beats up his wife during the marriage. In such a case, the courts surely will not find it difficult to conclude that the man’s acts were gender-motivated. But her bias indicators would not apply in a case where a man who has no prior history of abusing women beats up his wife occasionally. Thus, Title III would give an effective remedy only to women who have been suffering from spousal abuse for years. Title III would fail to convey that any form of abuse, be it the first, the second or the hundredth time, deprives the woman of her right to be free from gender-motivated violence.

attacker shouted antiwoman epithets during the assault. Again, the jury might not be convinced by any one of these circumstances individually — but all together show gender bias.

In other words, the drafters of Title III consider the generally accepted guidelines for identifying hate crimes useful in assessing whether the circumstances show gender-motivation. Thus, they recommend the use of the following factors to determine whether a crime is gender related:  

79. Language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense (using common sense to detect indications of gender relatedness).

80. These characteristics will be useful in extreme cases of gender-motivated crime. The testimony of Roland W. Burris, Attorney General, State of Illinois, clearly shows what cases the drafters — many of them men — had in mind: cases like the one in Montreal where a gunman walked into a university classroom screaming that feminists had ruined his life and proceeded to kill fourteen of the young women who were present. Or like the incident in Berkeley, where a man walked into a campus bar, segregated the men from the women, and after abusing the women, shot and killed one of them.

81. However, in domestic violence cases the generally accepted guidelines for identifying hate crime will often not work. It is incorrect to assume that the situation of a battered woman is substantially similar to that of other hate crime victims. What makes wife abuse different from hate crimes based on religion, race, ethnicity or sexual identity is the intimacy of the relationship between the woman and her abuser. The battered woman is married to her abuser, she lives with him and in many cases they have children together. Because of the personal interaction and the daily contact, the woman will often not be able to prove that the violence was gender-motivated and not just a “family dispute.”

82. Again, Peggy’s case can serve as an example. Mike’s attorneys would probably argue that Peggy provoked the outburst of violence: She resisted having sex with him (implying that she might be frigid), she ran away and caused him to drive all the way from Kansas to Oklahoma to get her. She


80. For the same approach see April Hearing, supra note 18, at 57 (testimony of Bonnie J. Campbell, Att’y Gen., State of Iowa).

81. See April Hearing, supra note 18, at 63.

82. Id.

83. Id.
suffered from severe psychological problems and was thus responsible for their marriage difficulties. Of course, Mike's parents and friends would testify that in their presence Peggy and Mike were very affectionate with each other. Finally, it would be no surprise if Mike's friends and colleagues testified that he was extremely nice to women and treated them with much respect.

Although the language used by an abusive husband sometimes will be sex-based, abusers, typically, are normal in their relationships with other women. During the December hearing, Charlotte Fedders testified:

Five years ago when my life as a victim of violence in my home became public, people seemed so surprised that a man of my former husband's prominence could be guilty of physically or emotionally abusing his wife and children.84

Leaving the burden of proof with the victim means that the battered woman has to overcome the stereotypes of judges and jurors that domestic violence is a "family dispute" or a "personal conflict." How can a married woman prove that her husband hates her not as an individual person, but as a woman?

From this a telling analogy can be drawn between the problems women encountered in the early sexual harassment cases before the courts.85 The relationship between the woman and her employer was considered personal, the behavior of the man was individualized: "Mr. Price's conduct is nothing more than a personal proclivity, peculiarity, or mannerism."86 Sexual advances were conceived as advances toward an individual person. They were perceived as lacking the necessary group referent to come within the classification "based on sex."87

3. Conclusion

By requiring discriminatory intent and at the same time placing the burden of proof with the woman, Congress fails to recognize the specificity of the injury inflicted on battered women. Title III of the Violence Against Women Act, in its present form, will only manifest the cultural myths about woman battering. These myths suggest that woman battering is a "crime of passion," that wife abuse is a private family affair, and that women who are battered "had it coming" because of some fault or error of

84. See December Hearing, supra note 1, at 88 (testimony of Charlotte Fedders, former wife of John M. Fedders (former chairman of the Securities and Exchange Commission)).
85. For a detailed critique of the first cases, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 83-90 (1979).
87. MACKINNON, supra note 85, at 85.
their own. Congress aims at attacking the existing prejudices that view domestic violence as a personal affair, but by applying the same standards as in other hate/bias crimes, it will only perpetuate them.89

III. Suggestions for Amendments to Ensure the Effective Application of Title III in Domestic Violence Cases

Title III of the Violence Against Women Act as it exists now will not fully achieve its goals. However, it can be salvaged. By setting clear standards for the courts to apply, Congress could make significant progress toward changing societal conceptions of wife battering and rape and toward providing civil remedies for victims of domestic violence. This paper suggests the following amendments to Title III which could ensure its effective application in domestic violence cases. First, Title III should not be tied to federal and state criminal laws, but should itself define and enumerate the forms of abuse against women that it aims to address. Second, Title III should waive the intent requirement. With respect to “proving” gender-motivation it should contain a presumption that all forms of domestic violence are gender-motivated and provide for the defendant to rebut this presumption by proving that he acted in self-defense.

A. FEMINIST DEFINITION OF VIOLENCE AGAINST WOMEN

Title III should not be tied to federal and state criminal laws which do not address all forms of abuses against women. Rather, it should list and define the sort of acts of violence it aims to prevent.90 The first draft of

88. See April Hearing, supra note 18, at 253 (written statement submitted to the Senate Judiciary Comm. by Leslie R. Wolfe, Executive Director, Center for Women Policy Studies). For a detailed analysis of the myths about wife abuse see SCHECHTER, supra note 4, at 20-27.

89. This problem was overlooked by Leslie R. Wolfe, Center for Women Policy Studies, in her Statement submitted to the Senate Judiciary Committee. She, on the one hand, suggested to apply the guidelines for identifying an act of violence as a hate crime to wife abuse, and, on the other hand, emphasized the uniqueness of the victim's situation because of her having an intimate relationship with her abuser. She even stated: "But as we have seen, hate crimes are usually defined as crimes perpetrated against an unknown victim who represents a hated "minority" group. Yet women are often victimized by close associates, close to home, as well as by hate-filled strangers," April Hearing, supra note 18, at 270. Yet she did not see that exactly because of this difference from other hate crime bias, the battered woman will often not be able to show the gender motivation of the violence.

90. Not much would be gained by tying Title III to civil torts actions. It is true that many forms of abuse against women do not constitute criminal behavior, but would constitute a tort. Examples are tort actions for intentional infliction of emotional injury in situations of extreme misconduct that causes severe emotional distress, the tort of false arrest and imprisonment which protects the personal interest in freedom from restraint of movement and the tort of defamation protecting the interest in reputation and good name. For a detailed analysis of domestic torts see KARP & KARP, supra note 8, at 43-51. However, many forms of violence would still go unremedied. The tort action for intentional infliction of mental distress, for example, arises only in situations involving conduct which is “so
the Violence Against Women Act enumerated various abuses: "For purposes of this section, a 'crime of violence motivated by the victim's gender' means any rape, sexual assault or abusive sexual contact motivated by gender based animus." This language was later eliminated from the definition of a gender-motivated crime to avoid the negative implication that only these crimes would give rise to a cause of action under Title III.

This first version should be used and amended to include domestic abuse. In order to prevent Title III from unconstitutional vagueness, Title III will need to include feminist definitions of the various forms of violence against women. While it is easy to define rape and other forms of sexual assault, it will be more difficult to come up with a workable definition of domestic violence. How can domestic violence be identified in an individual case? When does a relationship become abusive — after the first, after the fifth or after the tenth outburst of violence?

As in the case of sexual harassment, where sexual harassment, the experience, became "sexual harassment", the legal claim, domestic violence can also develop into a legal harm. Family violence was perceived as a serious societal problem about twenty years ago. Since then, many studies have been done which reveal the dynamics of domestic violence. Simply stated, domestic abuse is a pattern of behavior that includes the use or threat of violence for the purpose of gaining power and control over the victim. Abuse includes physical, sexual, psychological and economic violence and violence toward objects or pets that belong to the abused person. Physical abuse involves the use of weapons, such as outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

93. MACKINNON, supra note 85, at 25-100.
94. Although it seems to have existed at all times. See supra.
96. For a more detailed analysis of the following characteristics of domestic violence listed in the text, see MARY S. WINTERS, LAWS AGAINST SEXUAL AND DOMESTIC VIOLENCE 4-5 (1988).
guns and knives, and/or the abuser's body, such as hitting, spanking, choking, shoving, biting, slapping, and kicking. Sexual abuse is related to physical violence, but it has specifically sexual characteristics. Rape, for example, belongs in this category. Psychological abuse takes the form of verbal abuse, coercion, and threats; intimidation; public humiliation; being locked out of the house; being left without money or car keys; being refused help in cases of sickness, injury, or pregnancy. Any act or words that create a climate of fear and psychic pressure constitute psychological abuse. An accompanying behavior is often enforced isolation. The victim's freedom is restricted such that her ability to contact those who could help is reduced. Economic abuse includes actions such as hoarding and withholding family financial information from the abused. Destruction of the abused's pets or property by the abuser, finally, implies a threat to the victim and a devaluation of things meaningful to the victim.

For purposes of Title III domestic violence should be defined as "acts by one partner of an intimate relationship against the other causing physical, sexual, or psychological damage committed with the intent to cause these damages." By referring to the abuser's intent this definition encompasses the above mentioned forms of abuse. It makes clear that there is no "scale" of violence, since violence cannot be accurately defined as "mild" or "severe." A "gentle" shove down the stairs can be fatal. Referring to "acts" permits consideration of the entire pattern of domestic abuse and excludes single incidents of violence which might occur in any relationship. Because women who are not legally married are also abused, the definition uses the term of "intimate relationship" instead of "marriage."

It is the opinion of the author that including psychological damage in the definition is crucial in order to fully address issues of domestic violence which a male-oriented criminal law system has failed to address. Of course, for many given the traditional reluctance to intrude on family affairs, this definition will go too far. The opponents of a broad definition will argue that Title III in its suggested form can easily be misused (for example, in divorce cases) and that government intervention in cases of psychological abuse is not justified. However, the argument that Title III in the form suggested by the author could be misused does not mean that it will in fact be misused. There is no reason to believe that women — any more than any other group — will file frivolous civil rights claims for ulterior purposes. Furthermore, psychological abuse is almost always part of a pattern that includes physical, sexual and economic abuse, so that it seems unlikely that the victim will seek a civil rights remedy only for psychological abuse. More importantly, it should be pointed out that it is the victim who decides when to initiate an action under Title III. She will

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97. Borrowed in part from KARP & KARP, supra note 8, at 6.
hardly be likely to do so in cases of minor psychological abuses since seeking a remedy under Title III means a significant sacrifice of privacy. Furthermore, Title III in its suggested form would not criminalize psychological abuse, but would recognize it as a violation of civil rights — therefore different standards apply. Distinct criteria apply in order to identify a person’s behavior as discriminatory or as criminal. It should be noted that in sexual harassment cases, psychological abuse can be remedied under Title VII. In Meritor Savings Bank v. Vinson, the Supreme Court identified both quid pro quo harassment and hostile working environment as sex discrimination. The Court decided that Title VII grants employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult — in other words: free from psychological abuse. Thus, courts have recognized psychological abuse of women to constitute a form of sex discrimination.

Nevertheless, in the alternative the author suggests including domestic violence in Title III by listing examples of physical, sexual and economic abuses experienced in abusive relationships (leaving out psychological abuses), while making clear that the given list is not exhaustive. Thus, Title III would address forms of violence it so far fails to address, but at the same time have a limited scope. Including an illustrative list of forms of abuses would enable the courts to take into account the whole relationship of the partners, including psychological harm.

B. PRESUMPTION OF GENDER-MOTIVATION

Including a feminist definition of domestic violence, however, does not suffice. A burden shifting scheme should be created: “If the plaintiff can prove by a preponderance of evidence that she was the victim of domestic abuse as defined above, a rebuttable presumption should arise that the violence directed towards her was gender-motivated.” As will be shown, domestic violence is gender-based according to both legal doctrines currently discussed in sex discrimination cases: the inequality approach and the differences approach. Thus, by proving that she was the victim of domestic violence, the plaintiff has proved prima facie that the violence inflicted upon her was gender-motivated. The defendant should be allowed to rebut the presumption by proving that he acted in self-defense.

99. Id. at 65.
100. This presumption has already been suggested with respect to rape by Willis, supra note 37, at 2221-22.
101. For a burden shifting scheme in Title III, especially when a burden of proving intent to discriminate is imposed, see Brenneke, supra note 34, at 75.
1. Domestic Violence is Gender-Motivated

Domestic violence is clearly gender-motivated, according to both the inequality approach and the differences approach. Currently dominant in sex discrimination law, the differences approach is based on the assumption that equals should be treated equally. In the law, this has led to the formula that “similarly situated” persons should be treated the same, meaning that persons in “substantially similar circumstances should be treated the same.” Less frequently adopted by the courts, the inequality approach centers upon the view that discrimination consists of the systematic disadvantagement of social groups. The view that sex discrimination is a system that defines women as inferior to men underlies this approach.

a. An Inequality Argument

Under the inequality approach, “practices which express and reinforce the social inequality of women” are perceived as gender-based. Domestic violence is clearly gender-based in this view. Women are abused by their partners because they are women. Domestic violence is a means to preserve male domination in the family.

Throughout history, the laws and practices of the larger society supported the patriarchal family. Marriage laws explicitly recognized the family as the domain of the husband.

To be a wife meant becoming the property of a husband, taking a secondary position in a marital hierarchy of power and worth, being legally and morally bound to obey the wishes and the will of one’s husband, and thus quite logically subject to his control even to the point of physical chastisement or murder.

Over the decades the laws changed when women demanded rights to divorce, separate, control their own property, and take custody of their children. Despite these breakthroughs violence persisted. Although men no longer legally “own” women, they use violence to exercise their control of them. Thus, violence reinforces women's subordinate status in the

102. For a detailed description of the two doctrines, see MACKINNON, supra note 85, at 101-18.
103. Id. at 107.
104. Id. at 116-17.
105. Id. at 174.
106. Brenneke, supra note 34, at 22.
family. Beating keeps women from leaving; it keeps them providing sexual
services, housework and child care services.\textsuperscript{108}

b. A Differences Argument

The basic question the differences approach suggests is: was the
practice directed towards a woman or rather towards a person who just
happens to be a woman? A practice is discriminatory if the answer is: “a
man in her position would not have been so treated.”\textsuperscript{109} Under this
approach, domestic violence is gender-based because spousal abuse
disparately injures one gender-defined group in a sphere — intimate
relationships — in which the treatment of men and women can be
compared. Both men and women are involved in intimate relationships.
But women, not men are disproportionately abused by their spouses. Since
men are not abused and women are, unequal treatment by gender is
demonstrated.

Domestic violence disproportionately injures — in its primary meaning
— women in the family.\textsuperscript{110} Acts of violence against women in their
homes are not random, isolated acts, but rather are actions that are meant
to intimidate and terrorize all women. The very pervasiveness of violence
against women in their homes — reflected in available statistics —
documents that violence against women is a societal phenomenon:

* Every 15 seconds a woman is beaten by her husband or boy­
friend.
* Thirty percent of women who are homicide victims are killed by
their husbands or boyfriends.
* Each year, 4,000 women are killed in the context of domestic
violence situations — by husbands or partners who have abused
them.
* One in four — 25 percent — of women who attempt suicide
have been victims of family violence.\textsuperscript{111}

“While 91 per cent of all violent crimes between spouses in 1982 were
victimization of women by husbands and ex-husbands, only 5 per cent
were victimizations of husbands by wives or ex-wives.”\textsuperscript{112} The statistics

\begin{footnotes}
\item 108. See Schechter, supra note 4, at 216; Dobash & Dobash, supra note 107. See also
Gordon, supra note 9, at 3, 251, 285-88, and Brenneke, supra note 34, at 11, 16.
\item 109. Mackinnon, supra note 85, at 192.
\item 110. See Brenneke, supra note 34, at 6.
\item 111. For the following statistics see April Hearing, supra note 18, at 259 (written
Statement submitted to the Senate Judiciary Comm. by Leslie R. Wolfe, Executive Director,
Center for Women Policy Studies). Similar statistics were presented by the Majority Staff
of the Senate Judiciary Comm., Violence Against Women: A Week in the Life of America,
\item 112. Angela Browne, When Battered Women Kill 7 (1987).
\end{footnotes}
clearly convey that family violence is directed toward a specific class of people — women.

The structure of today's society explains the prevalence of males as abusers and females as victims. Battering is supported by the belief that the father is the head of the family. The disproportionate degree to which women are objectified in society is another factor. The increasing use of pornography and the use of women's bodies to sell products, from cars to charge cards, reinforce the abuser's perception of women as property or subhuman. The ability of men to control women's education and employment further facilitates the use of violence against women. Women are financially unable to provide for themselves and the children without the abuser. These so-called cultural facilitators: the belief in a natural order of power within families, the objectification of women and the economic power of men — explain the disproportionate number of victims and indicate that family violence is overwhelmingly gender-motivated.

In domestic violence cases, a woman would not have been abused had she been a man. This argument can be made despite the fact that in many cases violence is also directed towards the children, both girls and boys. In many of these cases, the father turns to the children to terrorize his wife. Mike, for example, taunted Peggy by stating that 12-year-old Carla was "more of a wife" to him than Peggy. Carla can be assumed to be the victim of incestuous abuse. The most common type of incestuous abuse is father-daughter incest. Statistics show that girls are more often the victims of child abuse than boys.

2. Rebuttable Presumption

To overcome the difficulties of proving gender bias, the author suggests that if the plaintiff can prove by a preponderance of evidence that she was the victim of domestic abuse as defined above, a rebuttable presumption would arise that the violence directed toward her was gender-motivated. Such a presumption is justified even in cases where the defendant can articulate specific motivations for his use of violence. "I beat her up because dinner was not ready when I came home. I was furious." Under Title III in its suggested form, it would not be necessary to prove that gender was the sole motivating factor. With respect to employment

113. For a detailed analysis of the "so-called cultural facilitators of battering", see ELLEN PENCE, MADELINE DUPREY, MICHAEL PAYMAR & CORAL MCDONNELL, THE JUSTICE SYSTEM'S RESPONSE TO DOMESTIC ASSAULT CASES: A GUIDE FOR POLICY DEVELOPMENT at 1-8 (Publication by the Minnesota Program Development, Inc., Domestic Abuse Intervention Project in Duluth, Minnesota 1985). See also Brenneke, supra note 34, at 12.

114. Unfortunately, the correlation between wife beating and child abuse awaits further research. But from existing statistics, it appears that only about 40% of wife-beaters are also child abusers. See, e.g., GORDON, supra note 9, at 261.

115. KARP & KARP, supra note 8, at 162.
discrimination cases, Title VII now contains a provision explicitly stating
that an employment practice is unlawful if sex was a motivating factor for
that practice even though other factors also motivated the practice. This
principle should also be applied in Title III cases. Whatever
motivations the defendant puts forward, as was shown above, gender per
se is a relevant factor in abusive relationships. Applying the standard of
Title VII, a woman who has proven domestic abuse has also proven that
the violence was gender-motivated.

The burden should then shift to the defendant to prove that his
particular act of violence was not motivated by gender. Since motivation
is an issue of fact peculiarly within the knowledge of the defendant,
shifting the burden of proof to him gives him a powerful incentive to
divulge as much relevant information as possible.

The presumption of gender motivation recognizes the experience and
psychology of both victims and perpetrators. At the same time, it gives the
defendant an opportunity to rebut the presumption if his case was an
exception from the norm. Title III should not provide a plaintiff with a
remedy if the abuse inflicted by the defendant was done in self-defense.
Since it happens that women out of fear sometimes attack their abusers
before they are attacked, the defendant must be allowed to rebut the
presumption in such cases.

**Conclusion**

Domestic violence is a serious societal problem. Congress’ attempt to
create a civil rights remedy for victims of family violence attests to the
seriousness of this problem. By recognizing and providing legal remedies
for a harm which has long been present in our society, Congress is
attempting to accomplish with the Violence Against Women Act what has
already been achieved in the area of sexual harassment. Harms which

116. 7 U.S.C. § 2000e-2(m) states: “Except as otherwise provided in this subchapter, an
unlawful employment practice is established when the complaining party demonstrates that
race, color, religion, sex, or national origin was a motivating factor for any employment
practice, even though other factors also motivated the practice.”
117. See also Brenneke, supra note 34, at 77.
118. Brenneke, supra note 34, at 94, suggests an interesting but hardly practicable threetier,
victim-oriented approach. She proposes to provide three alternative ways of proving a
prima facie case, electable by the plaintiff and arguable in the alternative. The first alterna-
tive would create a presumption of gender-motivation for certain acts of violence occurring
in an abusive relationship. The second alternative would allow a rebuttable presumption for
crimes which have, as an element, the actual, attempted, or threatened use of physical force
against a person. Finally, the third approach would incorporate an individualized, victim-
perspective standard. The claimant would be permitted to admit evidence that the conduct
created, in the totality of the circumstances judged from her perspective, a threat of physical
injury.
society has chosen to ignore are finally being addressed by the legal system.

Unfortunately, in its present form, the Violence Against Women Act fails to meet its educational and remedial goals. By referring to patriarchal federal and state criminal laws, and by requiring victims to prove gender-motivation, the bill fails to recognize that violence against women in their homes is gender-motivated and reflects societal misogynist attitudes. Many victims of domestic violence will not find relief under the Act. This is especially true for the latest version of Title III as amended by the 103d Congress.

In order to ensure the effective application of Title III, its provisions should be amended in two ways. First, a definition of domestic violence should be included which encompasses not only physical, but also sexual, economic and psychological forms of abuses. Second, if the plaintiff proves that she was the victim of a form of domestic violence by her partner, a rebuttable presumption should arise that the acts of violence directed against her were gender-motivated. The defendant should be allowed to rebut the presumption by showing that the particular act was not gender-motivated.

If Congress adopts these proposals, Title III of the Violence Against Women Act will create real remedies for Peggy and other battered women. Thus, Congress would send a strong message that violence against women is a civil rights violation and will not go unheeded. As one former victim has said: “I have the right to be and I have the right to be me.”