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### VAWA @ 20: GENDER VIOLENCE AND CIVIL RIGHTS

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The civil rights remedy enacted as part of the 1994 Violence against Women Act (VAWA) was widely touted as holding the promise to transform views about gender violence, to fill gaps in existing laws, and to help meet the constitution's promise of guaranteeing equal protection of the laws. Although the law, which allowed survivors of gender violence to sue the perpetrator for money damages in federal court, had some critics, and although it did not reach as far as its drafters had hoped, many expressed outrage and disappointment when it was struck down by the Supreme Court as unconstitutional in *U.S. v. Morrison*.<sup>1</sup> Recent statements by Vice President Biden announcing his plan to convene a Summit on Civil Rights and Equal Protection for Women and calling for a new look at a civil rights remedy,<sup>2</sup> remind us that the decision striking the remedy need not end efforts to consider how new and existing civil rights laws and initiatives might advance survivors' options and shift cultural understandings of abuse.<sup>3</sup>

"Civil rights" continues to be a frame that holds expressive and symbolic value and can play a key role in advancing transformative change. Twenty years after the VAWA civil rights remedy was enacted, gender violence survivors' civil rights continue to be violated. Violations occur both through the commission of acts such as intimate partner violence and sexual assault, and through discriminatory treatment of actors throughout

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<sup>1</sup> 529 U.S. 598 (2000).

<sup>2</sup> The White House, *FACT SHEET: Standing Up for Women's Civil Rights, 20 Years After VAWA*, (Sep. 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/09/fact-sheet-standing-women-s-civil-rights-20-years-after-vawa>.

<sup>3</sup> Some of the arguments presented in this essay were presented and developed more fully in Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, GEO. J. GENDER & L. 43 (2013).

the civil and criminal justice systems, including police, prosecutors, court personnel and judges. Unfortunately, there is no shortage of examples. We can look to Jessica Lenahan, whose procedural due process claim was rejected by the U.S. Supreme Court after her children were killed, following local law enforcement authorities' refusal to follow up on her calls for help after her former husband took their children in violation of a protective order.<sup>4</sup> Or we can consider the challenges facing Marissa Alexander, who is threatened with 60 years in prison for defending her life from her estranged abusive husband.<sup>5</sup> And we need go no further than the events surrounding Ray Rice's abuse of his then-fiancé for a reminder that cultural norms still countenance abuse.<sup>6</sup> Innumerable examples of less high-profile cases mirror similar themes. Survivors' challenges are exacerbated by policies emphasizing criminalization and incarceration, vilification of those who are undocumented, and punitive policies towards the poor. VAWA's anniversary affords an opportunity to consider how civil rights laws and civil rights initiatives, broadly construed, might be used today.

The 1994 VAWA civil rights remedy provided a private right of action against a perpetrator of a crime of violence that was gender motivated.<sup>7</sup> It reflected multiple goals: it sought to provide an alternate to criminal justice remedies; to put a suit for redress in the hands of the survivor rather than the state; to afford a means of compensating for economic harms resulting from abuse; and to afford a federal remedy so that survivors could recover regardless of the state in which they lived.<sup>8</sup> It sought to fill gaps left by formal and informal failures of, and discrimination by, state law and practice, and to recognize the connection between gender violence and historic and enduring gender-based stereotypes and prejudices. The goals can be thought of as two-fold: practical, in terms of affording compensation and providing redress that otherwise would be unavailable; and symbolic, in that a law reframing gender-based violence as gender discrimination and a civil rights violation, would help transform stereotypes treating gender violence as a private matter, not worthy of public concern. Current proposals could advance both those goals.

The need for laws and policies that address survivors' practical and

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<sup>4</sup> *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>5</sup> See Free Marissa Now, <http://www.freemarissanow.org> (last visited Oct. 8, 2014).

<sup>6</sup> See, e.g., Natalie J. Sokoloff, *Ray Rice, Janay Rice, and DV*, <http://nataliesokoloff.wordpress.com/publications-2/ray-rice-janay-rice-and-dv/> (last visited Oct. 8, 2014).

<sup>7</sup> 42 U.S.C. §13981 (1994), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>8</sup> See, e.g., Sally F. Goldfarb, *Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57 (2002); 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).

economic concerns remains stark. Gender-based violence exacts an economic toll on its survivors and has a harsher impact on those with limited means. Ongoing work is needed to effect more widespread enactment and enforcement of laws and policies helping to ensure that survivors don't lose their housing or employment as a result of abuse. Although it seems anathema to the United States' current economic justice policies, economic relief could encompass broader availability of financial benefits, to help expand survivors' choices in the face of abuse.

A renewed civil rights initiative could address transformative goals through law reform and related initiatives. A revised civil rights remedy could revive a cause of action against a perpetrator; it could avoid the *Morrison* Court's concerns by incorporating a jurisdictional element requiring a connection with commerce in each case.<sup>9</sup> In addition, a renewed civil rights remedy could be directed to hold institutions accountable for responses to gender violence survivors that violate survivors' civil rights. The 1994 civil rights remedy was premised on the assumption that existing laws provided remedies for institutional actors' roles in committing and perpetuating abuse. But survivors' experiences in light of recent caselaw, suggests that it might be time to re-think that assumption. Take, for example, law enforcement accountability for responding to survivors' calls for assistance. The *Castle Rock* decision foreclosed procedural due process arguments; although substantive due process and equal protection theories remain available, requirements of proof either of intentional discrimination or of officers' affirmative acts that increased the danger of private violence, effectively preclude many suits.<sup>10</sup> Internationally, courts and other adjudicatory bodies increasingly recognize States' responsibility to do "all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."<sup>11</sup> We might consider how to lay a foundation for more meaningful accountability.

Renewed remedies might build on existing initiatives to use the power of the federal government to hold local officials accountable. Recent Department of Justice investigations have held police departments in New Orleans, Puerto Rico, and Maricopa County, and the prosecutors' office in Missoula, Montana, accountable for gender-biased law enforcement.<sup>12</sup>

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<sup>9</sup> In fact, legislative proposals introduced after the *Morrison* decision did just that. See Violence Against Women Civil Rights Restoration Act of 2003, H.R. 394, 108th Cong. (2003); Violence Against Women Civil Rights Restoration Act of 2001, H.R. 429, 107th Cong. (2001).

<sup>10</sup> See, e.g., Goldscheid, *supra* note 3, at 66-74.

<sup>11</sup> Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, CORNELL INT'L L.J. (forthcoming 2015), available at <http://ssrn.com/abstract=2494867> (citing cases).

<sup>12</sup> See, e.g., U.S. Dep't of Justice, *Special Litigation Cases and Matters*,

Legislation could confirm that the Department of Justice's civil rights investigatory authority applies to all state agencies involved in the investigation and prosecution of gender violence. An administrative guidance could confirm the Department of Justice's authority to investigate claims of gender-biased law enforcement practices and its conclusions that biased policing includes both over- and under-enforcement, as well as policies and practices that reflect compound forms of bias. Initiatives might replicate and regularize the court watch programs that have produced important reports documenting the injustices survivors face in family court in particular.<sup>13</sup>

Complementary initiatives can shine a spotlight on the multiple and enduring ways gender violence violates survivors' civil rights. Public education campaigns could be directed at challenging the ways deeply entrenched biases such as those based on race, national origin, immigration status, sexual orientation and gender identity, as well as gender, shape survivors' experiences of abuse and of the systems that purport to serve them. Summits could provide survivors an opportunity to share the ways their experiences with the civil and criminal justice systems violated their civil rights. Other education campaigns could let survivors know about available investigatory resources when local law enforcement fails.

The last twenty years confirm the compelling need to use all available strategies to assist survivors and to shift enduring cultural norms that allow gender violence and its attendant harms to persist. It behooves us to tap our collective creativity to consider the role civil rights law and policy can play in that critical project.

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<http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Oct. 8, 2014).

<sup>13</sup> See, e.g., National Center on Domestic and Sexual Violence, *National Court WATCH Programs and Projects*, available at <http://www.ncdsv.org/images/NationalListofCourtWatchProgramsUPDATEDMARCH08.pdf> (last updated Mar. 8, 2008).