

ENTRENCHING PRIVACY: A CRITIQUE OF CIVIL REMEDIES FOR GENDER-MOTIVATED VIOLENCE

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In 2000, the Supreme Court in United States v. Morrison struck down a provision of the Violence Against Women Act (VAWA) that enabled victims of gender-motivated violence to bring civil suits against their attackers in federal court. In the wake of that decision, several states and localities have created similar remedies, and there has been a great deal of scholarly discussion of ways to craft a federal civil rights remedy that comports with the Constitution. The decision to create the federal provision stemmed from Congress's recognition that violent crimes against women are systematically under-enforced or unenforced: presumably, the comparable state remedies were also intended to address this problem. Such remedies have received considerable scholarly support. In this Note, I argue that this continued emphasis on civil remedies for victims of gender violence is both pragmatically and normatively problematic. I argue that reliance on private civil remedies to address law enforcement failure reinforces the traditional separation of women from civil society and their relegation to the private sphere. This same relegation of women to the private sphere, I posit, also underlies the continued failure of the state to protect women from violent crime. As such, any serious efforts to address the continued prevalence of gender-motivated violence must focus not on private alternatives to inadequate law enforcement, but on changing the understanding of the relationship between women and the state that underlies the state's continued failure to protect them.

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INTRODUCTION

The Senate Judiciary Committee held a hearing on September 14, 2010 to discuss the systematic failure of law enforcement officials to investigate cases of rape.¹ The hearing was sparked by estimates that there were approximately 180,000 rape kits that remained untested throughout the country.² This failure to investigate violent crimes against women, or to enforce laws prohibiting such violence, is not a new problem; throughout much of the history of the United States, violent crimes that disproportionately affect women have been inadequately addressed by law enforcement, if addressed at all.³

This long-running under-enforcement of crimes against women is rooted in the historical relationship between women and the state, in which crimes against women were viewed as occurring in the private sphere, and thus beyond the reach of state regulation and not a matter for public concern.⁴ The divide between the public and private that long justified state abdication of protecting women from violent crimes has only recently begun to break down,⁵ but the problem of under-enforcement is persistent. Congress attempted to address this

¹ *Rape in the United States: The Chronic Failure To Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010).

² See Justice for Survivors of Sexual Assault Act of 2009, S. 2736, 111th Cong. § 2(5) (2009) (finding that “there was an annual backlog of 180,000 rape kits that had not been analyzed”). “Rape kit” refers to DNA evidence collected from the body of a rape victim that may be used to identify the perpetrator, as well as provide evidence of sexual contact between the victim and the alleged attacker. Estimates vary as to how many rape kits remain untested throughout the country, but range up to as high as 500,000. *Eliminate the Rape Kit Backlog*, HUMAN RIGHTS WATCH, <http://www.hrw.kintera.org/rape-kits>, (last visited Nov. 5, 2012).

³ See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 18 (2000) (“[F]or most of the history of this country, legal recourse for violence against women has been unavailable or narrowly circumscribed.”).

⁴ See *infra* Part I.A (outlining various policies that indicate women were viewed as existing within the private sphere, and that conduct against them was similarly private).

⁵ See *infra* Part II.A (describing legal changes of the past forty years that reflect the changing understanding of the role of the state in protecting women from harms that were previously viewed as private conduct).

failure through the 1994 Violence Against Women Act (VAWA), which was enacted in response to the recognition that law enforcement agencies were failing to protect women from gender-motivated violence on a massive scale.⁶ The Act created a private right of action that allowed victims of gender-motivated violence to bring private civil suits against their attackers in federal court.⁷

In 2000, the Supreme Court struck down the so-called Civil Rights Remedy of VAWA as exceeding Congress's power under the Commerce Clause.⁸ Advocates for women's rights widely criticized the decision in the case, *United States v. Morrison*, as reflecting continued indifference toward violence against women, and as seriously inhibiting women's ability to seek redress for gender-motivated crimes.⁹ In the wake of (and prior to) the *Morrison* decision, several states and localities crafted private litigation remedies for gender-motivated violence much like that stricken down by the *Morrison* Court.¹⁰

The *Morrison* decision, as well as the deeply troubling findings that gave rise to the federal Civil Rights Remedy, have led to a great deal of support for such private avenues for victims to seek redress, yet this support may be undue. In this Note, I argue that emphasis on private remedies for victims of gender-motivated violence is misplaced, for both pragmatic and normative reasons.¹¹ Specifically, I will

⁶ See *infra* notes 59–61 and accompanying text (describing the motivations behind VAWA).

⁷ 42 U.S.C. § 13981 (2006), *invalidated by* *United States v. Morrison*, 529 U.S. 589 (2000).

⁸ *Morrison*, 529 U.S. at 598.

⁹ See *infra* note 73 (listing several examples of scholarly criticism of the *Morrison* decision).

¹⁰ See generally Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157 (2005) [hereinafter Goldscheid, *Struck Down but Not Ruled Out*] (providing overview of state and other alternate civil remedies for gender-motivated violence).

¹¹ Gender-motivated violence, as the term is used in the 1994 VAWA, refers to crimes of violence that are 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." § 13981(d)(1). This definition was provided to ensure that recovery under the VAWA was limited to gender-motivated violence, rather than random acts of violence. I use the term throughout this paper to refer to violent crimes against women generally. While the statutory definition of the term and its more generally understood definition may not always be the same, they often are. See, e.g., Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 509 (1995) (proffering interpretation of statutory language for potential litigants). There was significant scholarly criticism of the animus requirement within the statute. See, e.g., William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1169 (1996) (criticizing the animus requirement); Christina E. Wells & Erin Elliott Mottley, *Reinforcing the Myth of the Crazy*

show that the availability of civil remedies has little effect in practice, and that the normative force of these remedies is to reinforce, rather than rupture, the public/private divide that has led to women's continued victimization. Civil remedies for gender-motivated violence are ineffective at best. At worst, pressing private remedies in the absence of adequate public enforcement reinforces the place of women in the private sphere, and the concomitant belief that it is not the responsibility of the state to protect against violent crimes that disproportionately affect women. Any serious efforts to address the continued prevalence of gender-motivated violence must focus not on private alternatives to law enforcement, but rather on changing the relationship between women and the state that underlies the state's continued failure to protect women.

Part I will discuss the long-running legal relationship between women and the state that has relegated women to the private sphere, thereby designating their protection from certain classes of harms as beyond the purview of state intervention. I will further discuss feminist theory critiques of the public/private model of the state, which contend that the public/private divide has either the purpose or the effect of perpetuating gender hierarchy. I will use those theorists' ideas about the role of privacy in perpetuating gender inequality as a backdrop against which I frame my criticism of private remedies for systemic, discriminatory acts of violence. Part II will discuss the changing legal landscape surrounding crimes against women and will shed light on the ways in which the theoretical links between privacy and gender inequality can be seen in practice. This will lead into a discussion of the role that private remedies are intended to serve in addressing gender-motivated violence. Part III will offer both normative and pragmatic critiques of private remedies in this context. I emphasize that the limited practical value of private remedies may serve to reinforce the root causes of under-enforcement of crimes of gender bias. I conclude with suggestions for how we should think about law when deciding how to best address pervasive problems of gender inequality.

I

WOMEN AND THE PUBLIC/PRIVATE DIVIDE

The liberal state is characterized by a divide between the public and private.¹² The public sphere is that of the market and of politics, the private sphere is that of the home and family.¹³ That which is public is intermingled with the state and open to state regulation; that which is private represents a zone of personal autonomy into which the state should not enter. Facially, this idea of a barrier between the public and private appears to be a neutral rule describing how society should be structured. In practice, however, the public/private divide has also portended a gendered divide, with women confined to the private sphere. I aim to show that women have been separated from the public sphere in two ways: First, women historically have not been allowed to act in the public sphere, and second, the institutions of the public arena have been kept out of the private sphere and out of women's reach. In this Part, I lay out the ways in which the public/private divide has served to both justify and reify gender hierarchy and inequality, and the ways in which this divide perpetuates the problem of inadequate state protection of women from gender-motivated violence.

A. The Legal Status of Women in the Private Sphere

The spheres of public and private historically were divided not just by conduct, activity, and permissibility of state regulation—they were also divided by gender. The public sphere of the market and politics was the domain of men, and the private sphere of the home and family was the domain of women. The relegation of women to the domestic sphere of the home was not merely a social organization; the private status of women was also enshrined in law.

The legal underpinnings of women's relegation to the private sphere are deeply rooted in Anglo-American law. This is perhaps best evidenced by the doctrine of "coverture," under which a married woman had no legal identity separate from that of her husband.¹⁴ As

¹² E.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982) (There is a "particular set of distinctions [that] taken together, constitute the liberal way of thinking about the social world. Those distinctions [include] state/society, public/private, individual/group . . .").

¹³ See Goldfarb, *supra* note 3, at 19–20 (describing the "separate spheres ideology," which emphasized the split between the public and private worlds).

¹⁴ See, e.g., Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 459–63 (2002) (describing doctrine of coverture). This doctrine was eroded through statutory reform that granted legal rights to married women, but its remnants continue to

William Blackstone described, the doctrine of coverture operated to make “the husband and wife [] one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing.”¹⁵ In effect, “a wife simply had no legal existence.”¹⁶ Wives lost their right to own property, to make contracts, or to bring legal actions to recover for injuries done to them.¹⁷

While coverture eventually was eroded through statutory reforms that granted legal rights to married women,¹⁸ remnants of the doctrine have continued to influence the law. One prominent example of such influence is law enforcement policies of non-intervention in domestic disputes on the basis of marital privacy. These policies formally continued well into the 20th century.¹⁹ Women’s de jure exclusion from the public sphere can also be seen in other areas, such as the prohibition on women exercising the franchise until the early 20th century,²⁰ and the exclusion of women from the legal profession.²¹ Furthermore, explicit legal bars to women’s entry to the public sphere have not been the only mechanisms by which women have been systematically excluded therefrom.²²

influence the law—as illustrated by the discussion *infra* notes 19, 27–30 and accompanying text regarding non-intervention in domestic disputes on the basis of marital privacy.

¹⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

¹⁶ Zaher, *supra* note 14, at 460.

¹⁷ HENDRIK HARTOG, MAN AND WIFE IN AMERICA 115–16 (2000).

¹⁸ See generally Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994) (describing development of statutory reforms providing distinct legal rights to married women).

¹⁹ See *infra* notes 28–30 and accompanying text (describing reasons for which police declined to intervene in cases of domestic violence).

²⁰ See *Minor v. Happersett*, 88 U.S. 162 (1875) (holding that the Constitution did not guarantee women the right to vote). Women’s right to vote was not constitutionally guaranteed until 1920 with the passage of the 19th Amendment.

²¹ See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding a state law that prohibited women from becoming lawyers).

²² Women have been excluded from participation in the public sphere in numerous ways that are not necessarily state-sanctioned, or that do not expressly have the intent to maintain the private status of women, but which nonetheless have that effect. Examples of the former include the informal barriers to entry women faced in the professional world, such as colleges and professional schools refusing to admit them and certain industries refusing to hire them. Examples of the latter include the so-called “marriage penalty” in the income tax, which often serves to punish dual wage-earner couples, and family leave policies that facilitate women’s child care responsibilities more so than those of men. These factors were further compounded by the lack of any mechanism for legal redress of gender discrimination, or even a concept of gender discrimination that the law might protect, until 1964. See generally DEBORAH L. RHODE, *JUSTICE AND GENDER* 9–43 (1989) (describing the history of sex discrimination in America).

The wall separating women from the public sphere was erected not only via barriers to women's entry into the public, but also through barriers that served to limit the reach of the state into the private, women's sphere. That is, not only have women been denied access to the public sphere, but the organs of the public sphere either have not been allowed, or have declined to seek, access into women's lives. As Professor Jeannie Suk describes, "[t]he modern home marks a literal boundary between private and public space . . . [and] also represents the metaphorical boundary between private and public spheres."²³ This boundary establishes the home as the quintessential space of the private sphere; a space that the state must protect from outside intruders, but that it may not or will not itself invade.²⁴

As a result of this boundary, the state has often refused to protect women from violence that is understood to be private. The unwillingness of the state to intervene to protect women from allegedly private violence has similarly deep historical roots as the legal barriers to women's entry in the public sphere. In his description of the doctrine of coverture, Blackstone also described the privilege of the husband to physically assault his wife for purposes of correcting her behavior.²⁵ Further, until the late 1970s every state in the country exempted a man from prosecution for rape of his wife, and such laws faced no opposition.²⁶ In fact, so ingrained in the law was the concept of marital privacy that "spousal rape" is somewhat of a misnomer. The law did not actually recognize the capacity of a husband to rape his wife: The crime of rape was defined as being committed against a victim to whom the perpetrator was not married.²⁷ Spousal abuse was treated as either a husband's privilege,²⁸ or as a private matter into which it was

²³ JEANNIE SUK, *AT HOME IN THE LAW* 2–3 (2009).

²⁴ *See id.* at 5 ("At least two related visions provide a foundation on which the legal architecture of the home rests. On the one hand, there is a traditional view of the home as the ultimate place of security from others. . . . On the other hand, the castle metaphor also refers to the home as the exemplary site of personal liberty from state intrusion and control.").

²⁵ BLACKSTONE, *supra* note 15, *444 (describing a husband's right to subject his wife to "moderate correction" for purposes of discipline and control). *See generally* Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996) (describing the legal permissibility of, and later failure to enforce laws against, spousal abuse and marital rape based on arguments of privacy).

²⁶ *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L. REV.* 1373, 1376 (2000) (highlighting the newness of the dispute over the marital rape exemption).

²⁷ *See* STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 20–21 (1998) (describing the so-called "marital exemption" under the original Model Penal Code).

²⁸ *See* Siegel, *supra* note 24, at 2123 (describing and providing a historical account of husband's right of "chastisement" in order to command obedience from his wife).

not appropriate for the state to intervene.²⁹ As such, police frequently ignored domestic violence complaints—and if they did respond the abuser was virtually never arrested. Police were often explicitly instructed not to make arrests because domestic violence was not considered a matter appropriate for criminal enforcement.³⁰

The conception of violence against women as a private matter has not been limited to violence that occurs within intimate or other marital relationships, and the idea of the private sphere has not been limited to acts that take place within the home. Rather, as the law regarding rape indicates, women themselves operate as a boundary between the public and private spheres. That is to say, because women are presumed to exist within the private sphere, gender-motivated violence has not been treated as an appropriate matter for public enforcement.³¹ This presumption is reflected in the myriad of shortcomings in rape laws that significantly inhibit women's ability to obtain legal redress when they are raped.

Traditional rape law, in addition to exempting the victim's spouse, limited rape to acts of male perpetrators against female victims, and the only act that would constitute rape was forcible penetration of the vagina by the penis. The "forcible" requirement meant perpetrators had to use physical force or violence, and women had to show that they had "resisted to the utmost."³² As to evidentiary rules, women often had to prove that they did not consent, which amounted to a requirement of third-party corroboration of their non-consent. Further, evidence of the victim's past sexual history could be used at trial to show that she was of poor moral character, which might indicate a "tendency to consent."³³ What's more, traditionally the harm of rape was viewed not as against the female victim, but rather as a property crime against the woman's husband or father.³⁴ While the law of rape has undergone significant reform since the 1970s, both in its substantive definition of the crime and in its evidentiary rules,³⁵ rape still

²⁹ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662–64.

³⁰ *Id.* at 1662.

³¹ See, e.g., CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 289 (2005) ("The place in public discussion of men's sexual treatment of women can be observed to be a sensitive indicator of women's entitlement to occupy public space.").

³² Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 74–75 (2001).

³³ *Id.* at 75.

³⁴ *Id.*

³⁵ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 469–70 (2005).

remains one of the most under-reported and under-enforced of all violent crimes.³⁶

The law has long operated to enforce the place of women in the private sphere, both through explicit legal restrictions on women's ability to participate in public life, and through failing to extend legal protections to women in that sphere. The pernicious effects of this gendered distinction between public and private can be seen in the privacy-based justifications for failing to protect women from violence in the home, or from sexual violence more broadly. As I will discuss in the next Subpart, the gendered nature of the public/private divide functions to entrench gender hierarchy and inequality. Women's privacy thus becomes a pivotal factor in their continued subordination.

B. *Theoretical Critiques of the Public/Private Barrier*

While law purports to be neutral, a central tenet of feminist legal theory is that it is not. The alleged neutrality of the law serves to mask the ways in which it both reflects and reinforces certain power structures.³⁷ Feminists have pointed out that laws affecting women's lives and their relationships with men were made without any consent or input from women;³⁸ thus, the law reflects male prerogatives, and protects male power and female subordination.³⁹ Professor Robin West suggests that, as a result of the law being shaped at its outset by

³⁶ RAPE, ABUSE & INCEST NATIONAL NETWORK, STATISTICS: REPORTING RATES, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Nov. 5, 2012).

³⁷ See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237–38 (1989) (“The state incorporates . . . facts of social power in and as law. Two things happen: law becomes legitimate, and social dominance becomes invisible. . . . In the liberal state, the rule of law—neutral, abstract, elevated, pervasive—both institutionalizes the power of men over women and institutionalizes power in its male form.”).

³⁸ See *id.* at 238 (“Those with power in political systems that women did not design and from which women have been excluded write legislation, which sets ruling values.”); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 169 (2000) (“To state the obvious, women were not the ‘we the People’ who decided to arrange the government [as it is]. Women had no voice in designing the doctrines or institutions that the Court wielded in *Morrison* to exclude them from access to court.”).

³⁹ Professor Stephen Schulhofer describes the way in which the law of rape protects male sexual prerogatives at the expense of female sexual autonomy:

Law has not simply opted for a neutral solution [L]aw has chosen sides. The law gives priority to the interest (the predominantly male interest) in seeking sexual gratification through advances backed by physical strength and social power. And the law gives priority to protecting sexually assertive individuals (predominantly men) from the risk of conviction without clear warning in advance. At the same time the law denies protection to women, whose sexual independence is so often at risk, and leaves them to fend off sexual pressure as best they can, with self-help their only remedy.

SCHULHOFER, *supra* note 26, at 67.

exclusively male voices, the entirety of the legal system is predicated on a presumption of a masculine subject, and thus on preserving male power.⁴⁰ As she puts it, “feminists take women’s humanity seriously, . . . the law does not.”⁴¹

The public/private framework is no exception. Feminist theorists have argued that the relegation of women to the private sphere operates to both create and simultaneously justify gender inequality, and that the divide between the public and private has in effect created a zone of impunity for men’s violence against women, which is also justified on the basis of gender hierarchy. In this regard, theoretical critiques map onto the two separate ways in which women are alienated from the public sphere: The removal of women from the public sphere serves as a justification for their subjugation, and that subjugation is accomplished because of the refusal of the state to intervene in the private sphere.

Simone de Beauvoir describes multiple ways in which the relegation of women to the domestic, private sphere both justifies and reinforces their inequality: Difference itself provides a justification for unequal treatment, and the nature of that difference is defined by those in power—men—in ways that will reify the disempowered status of the “Other”—women.⁴² She describes the way in which this process of establishing women as the Other, and then defining the parameters of otherness, enables gender hierarchy: “[T]he paternalism that claims woman for hearth and home defines her as sentiment, inwardness, immanence. . . . To identify Woman with Altruism is to guarantee to man absolute rights in her devotion”⁴³ Other theorists have similarly noted the ways in which difference is used to justify women’s inequality,⁴⁴ and the ways in which defining that

⁴⁰ See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

⁴¹ *Id.* at 4.

⁴² De Beauvoir relies on the concept of “the Other” to demonstrate that treating women as different and abberational serves as justification for their unequal treatment at the hands of men. See SIMONE DE BEAUVOIR, *THE SECOND SEX* xxii (H. M. Parshley ed. & trans., Vintage Books 1989) (1949) (“[Woman] is simply what man decrees She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute—she is the Other.”).

⁴³ *Id.* at 255.

⁴⁴ See, e.g., Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 43 (1988) (describing how “[d]iscrimination [has been] redefined as simply the recognition of ‘natural’ difference (however culturally or historically produced),” and challenging the dichotomy of equality and difference).

difference as occupying the domestic sphere operate to the benefit of men,⁴⁵ to the detriment of women.

Women's inequality is perpetuated through constructing the private sphere, particularly the home, as a space into which the state cannot reach.⁴⁶ Catharine MacKinnon suggests that gender inequality is not merely a consequence of the relegation of women to the private sphere, but rather that the public/private divide is in fact intended to enable this inequality. As she describes, to divide between public and private is to make it such that "the domain in which women are distinctively subordinated and deprived of power[] has been placed beyond reach of legal guarantees."⁴⁷ To locate both sexual violence and other physical violence against women as beyond the reach of legal guarantees exacerbates women's subjugation, insofar as sexuality⁴⁸ and violence⁴⁹ both operate to create and reinforce power relations.

These theorists' arguments evince the extent to which women's privacy operates as a pivotal aspect in their subjugation. The relationship between privacy and gender inequality is a self-reinforcing one: Relegating women to the private sphere provides a justification for their inequality, which is then reified and maintained through violence which notions of privacy allow to go unpunished. Women who seek safety from such violence are unable to receive it from public institutions, and so must become dependent on men for protection; this dependency further entrenches their privacy, continually justifying their inequality.⁵⁰ Thus, efforts to address gender inequality must seek

⁴⁵ See generally Marilyn Frye, *Some Reflections on Separatism and Power*, in FEMINIST SOCIAL THOUGHT: A READER 406 (Diana Tietjens Meyers ed., 1997) (describing male fear of female separation from domestic relationships due to male reliance on the emotional and domestic support and sexual gratification provided by women within such relationships).

⁴⁶ See generally SUK, *supra* note 23 (discussing the legal conception of privacy in the home and its relation to laws against domestic violence).

⁴⁷ MACKINNON, *supra* note 37, at 165 (1989).

⁴⁸ See *id.* at 130 (describing the relationship between socially constructed sexuality and gender inequality).

⁴⁹ Patricia Hill Collins, *The Tie that Binds: Race, Gender and US Violence*, 21 ETHNIC & RACIAL STUD. 917, 920 (1998) ("[T]he power to define what counts as violence is constitutive of . . . power relations. . . . [É]lite groups define violence in ways that legitimate their own power, use those definitions of violence to enforce hierarchical power relations, and then point to ensuing social inequality as proof of the veracity of the definitions of violence themselves.").

⁵⁰ See SCHULHOFER, *supra* note 27, at 25 ("[R]ape law. . . enhanced male opportunities for sexual aggression, increased women's dependence on a male protector, and reinforced the dominant position and social power of men as a class."). See also Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 173 (2000) ("[Some w]omen . . . give themselves to a monogamous relationship in order to avoid the danger of rape from others . . .").

to undo altogether the relegation of women to the private sphere, or to undo the parameters of the public/private dichotomy in order to successfully protect women from violence.

II

THEORY IN PRACTICE: FAILURE OF LEGAL REFORMS IN THE FACE OF PERSISTENT PRIVACY

The understanding of women as belonging in the private sphere is not merely a theoretical concern. As the previous Part illustrated, much of the law surrounding crimes like rape and domestic violence was shaped with this notion of privacy as a backdrop. And, as feminist theorists have contended, women's relegation to the private sphere is at the root of their subjugation. Women's privacy both enables and reinforces gender inequality, and consequently, gender-motivated violence. Any attempts to reform the law in order to reduce gender violence are likely to be unsuccessful if they continue to operate within the confines of the traditional public/private model, with women, and the acts of violence that uniquely affect them, still located within the private sphere.

In this Part, I will discuss attempts at legal reform that have sought to provide women with greater protection from gender-motivated violence. I will discuss the rise of VAWA's civil remedy, as well as its demise, to illustrate an attempt to redress the consequences of entrenched privacy and that attempt's failure to address gender-motivated violence in the face of the persistent ideology of women's privacy. Finally, I will provide a broader discussion of civil remedies and the function they are intended to serve in order to illustrate why they have received such broad support among feminist scholars.

A. The Changing Legal Landscape Surrounding Gender-Motivated Violence

In the past four decades, the law has significantly evolved to reflect changes in understanding about both the nature of violent crimes against women, and the proper role of law in preventing or protecting against such crimes. This is seen most prominently in legal changes surrounding sexual violence and violence in intimate relationships. Yet, while many positive steps have been made toward treating violence against women as a matter of public concern, changes in substantive law have been insufficient to protect women from gender-motivated violence; the law in books has not been able to incite action that would make those legal changes a reality for most women.

Feminist advocacy helped to bring about many changes in substantive law designed to protect women from sexual and domestic violence.⁵¹ Spousal rape is now illegal in all fifty states, though in some places it is still treated differently, and less severely, than non-spousal rape.⁵² The privilege argument for spousal abuse has been long abandoned,⁵³ and the privacy-based justification for nonintervention in domestic violence has been seriously eroded. As of 2003, nearly every state allows for warrantless arrest of perpetrators of misdemeanor domestic violence, and twenty-one states and the District of Columbia make arrest of perpetrators of domestic violence mandatory.⁵⁴

Reforms in the law around violence against women are not limited to intimate partner violence. Over the past several decades, rape has been substantively redefined in various jurisdictions to recognize male victims of rape, to encompass sexual assaults other than penile-vaginal penetration, and to no longer require force, either by the perpetrator or by the victim in resistance.⁵⁵ One of the most notable reforms in the law of rape has been the widespread enactment of so-called rape shield laws, which disallow evidence of a victim's past sexual history at trial.⁵⁶ Corroboration requirements have also been done away with.⁵⁷

Viewed together, these reforms could be seen to represent the beginnings of a shift in the relationship between women and the state. While traditionally women were relegated to the private, domestic sphere, the state's assumption of the obligation to protect women from violence—regardless of the sphere in which the violence occurs—may indicate its recognition of women as part of the public sphere. It is only when women are a part of the public that the crimes against them are seen as necessitating public enforcement. In other words, the legal commitment to the protection of women acknowledges women as full citizens within the state. Yet the effects of these changes of the law in books should not be overstated. Despite the fact that the law has enabled greater enforcement of crimes against women, such crimes have not actually been enforced to a meaningful

⁵¹ See, e.g., SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 157–83 (1982) (describing the battered women's movement's advocacy for greater legal protection for victims of domestic violence); SCHULHOFER, *supra* note 26, at 25 (describing feminist advocacy to change substantive law of rape).

⁵² THE NATIONAL CENTER FOR VICTIMS OF CRIME, *SPOUSAL RAPE LAWS: 20 YEARS LATER*, available at <http://www.njep-ipsacourse.org/PDFs/NCVCspousalrapelaws.pdf>.

⁵³ Sack, *supra* note 29, at 1662.

⁵⁴ *Id.* at 1669–70.

⁵⁵ Futter & Mebane, *supra* note 31, at 78.

⁵⁶ *Id.* at 78–79.

⁵⁷ *Id.*

extent. As I will discuss in the next section, the enactment of the VAWA reflected the fact that legal changes were insufficient to ensure that women were actually protected from gender-motivated violence. The reason for this, I posit, is that such legal changes were insufficient to undo the long-running and deeply-rooted understanding that women and the harms they suffer are not matters of public concern;⁵⁸ that is, changes to the law in books were not able to undo the persistence of privacy that has allowed for women's continued subjugation.⁵⁹

B. The Violence Against Women Act and the Original Civil Remedy

While these substantive legal reforms represented significant progress in terms of addressing violence against women, in practice crimes against women have remained systematically under-enforced or unenforced. Congress found, in the hearings leading up to the enactment of the 1994 VAWA, that:

An estimated 4 million American women are battered each year by their husbands or partners. . . . Between 2,000 and 4,000 women die every year from [domestic] abuse. . . . Arrest rates may be as low as 1 for every 100 domestic assaults. . . . [The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years. . . . Less than 1 percent of all [rape] victims have collected damages. . . . [A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense. . . . Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months.⁶⁰

The VAWA, and the Civil Rights Remedy in particular, were specifically intended to address the failure of states to adequately prevent gender-based violence.⁶¹ As the Senate report described, “[t]he Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system

⁵⁸ See, e.g., MACKINNON, *supra* note 37, at 239 (“[N]o rape law has ever seriously undermined the *terms* of men’s entitlement to sexual access to women.”) (emphasis added).

⁵⁹ See *supra* Part I.B.

⁶⁰ *United States v. Morrison*, 529 U.S. 598, 631–34 (1999) (alterations in original) (Souter, J., dissenting) (internal quotations omitted) (quoting various Senate reports).

⁶¹ *Id.* at 653 (“[T]he Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence.”).

to address such violence. It [sic] goals are both symbolic and practical”⁶²

There was a degree of symbolic value in the Civil Rights Remedy. Just as states’ legal reforms reflected changes in understanding about the relationship between women and the state, the recognition of gender-based violence as a civil rights violation reflected a significant change in understanding the nature of violent crimes against women.⁶³ To treat violence against women as similar to other crimes of bias recognizes that it is distinct from otherwise random incidents of violent crime, and specifically targets women as women. The VAWA was both powerful and unique in that it “was the first legislation anywhere to recognize that rape may be an act of sex inequality.”⁶⁴

While the Civil Rights Remedy thus provided potential benefits, it was nonetheless met with opposition based on grounds of federalism.⁶⁵ The constitutionality of the provision was challenged several times, but, with few exceptions, was consistently upheld.⁶⁶ One of the few instances in which a district court did find the provision unconstitutional was in *Brzonkala v. Virginia Polytechnic Institute*,⁶⁷ the case that would eventually be heard by the Supreme Court as *United States v. Morrison*.⁶⁸

The *Morrison* Court held that Congress exceeded its authority under the Commerce Clause in enacting the provision. Specifically, the Court found that gender-motivated violence did not substantially affect interstate commerce, stating that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁶⁹ In addressing the “mountain of data” assembled by Congress showing that violence against women created significant economic costs and substantially impeded women’s ability to participate in the economy,⁷⁰

⁶² S. REP. NO. 103-138, at 38 (1993).

⁶³ *Id.* (“It is time for attacks motivated by gender basis [sic] to be considered as serious as crimes motivated by religious, racial, or political bias. The provision’s purpose is to provide an effective anti-discrimination remedy for violently expressed gender prejudice.”).

⁶⁴ MACKINNON, *supra* note 36, at 138.

⁶⁵ See Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1853 (1997) (“[*United States v. Lopez* [a post-VAWA enactment decision by the Supreme Court limiting Congress’s power under the Commerce Clause] poses a number of troubling questions and casts some doubt on Congress’s authority to enact the VAWA Remedy”).

⁶⁶ See Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 9, at 164 n.39 (“Until the Fourth Circuit Court of Appeals ruled that the law was unconstitutional, all fourteen district courts to have considered the law’s constitutionality had upheld it as a permissible exercise of Congress’s Commerce Clause power.”).

⁶⁷ 169 F.3d 820 (4th Cir. 1999).

⁶⁸ 529 U.S. 598 (2000).

⁶⁹ *Id.* at 613.

⁷⁰ *Id.* at 628–29 (Souter, J., dissenting).

the Court stated that crime was an inherently local concern, such that some aggregate effect of crime on the economy was insufficient to allow for federal regulation thereof.⁷¹ The Court also declined to uphold the Civil Rights Remedy under Section 5 of the Fourteenth Amendment, because, the majority contended, the remedy did not address state action.⁷²

The decision was heavily criticized by feminists,⁷³ who argued that it reflected the traditional understanding of violence against women as a private concern.⁷⁴ This can be seen in both the Commerce Clause and Fourteenth Amendment holdings. Central to the Court's analysis under the Commerce Clause was the argument that, substantial effects to the economy notwithstanding, violence against women was not economic activity—i.e., it was not activity in the public sphere. Similarly, the Court was unwilling to treat abused women's inability to participate in the economy as economic activity,⁷⁵ perhaps indicating the limited extent to which the majority viewed women's contributions to the public sphere.⁷⁶ As to the Court's Section 5 holding, answering the question of whether the Civil Rights Remedy

⁷¹ *Id.* at 617–18 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”).

⁷² *Id.* at 621–24.

⁷³ See, e.g., Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000) [hereinafter Goldscheid, *The Civil Rights Remedy*] (arguing that the *Morrison* decision undermines Congress’s ability to legislate civil rights); MacKinnon, *supra* note 37 (arguing that the *Morrison* decision denies Congress the ability to address violence against women, effectively denying women equal protection of law); Jennifer R. Johnson, Comment, *Privileged Justice Under Law: Reinforcement of Male Privilege by the Federal Judiciary Through the Lens of the Violence Against Women Act and U.S. v. Morrison*, 43 SANTA CLARA L. REV. 1399, 1402 (2003) (arguing that the *Morrison* decision represents the continuation of long-running patterns of gender discrimination in the federal judiciary); see also *Morrison*, 529 U.S. at 628–29 (Souter, J., dissenting) (noting that the majority ignored a “mountain of data” assembled by Congress detailing the effects of violence against women on interstate commerce).

⁷⁴ The decision was also widely criticized on other grounds, perhaps because the VAWA and the Civil Rights Remedy had received broad support from states and scholars alike. Thirty-seven states filed an amicus brief in *Morrison* in support of the provision; prior to the enactment of VAWA, the attorneys general of forty-one states wrote a letter to the Senate in support of the measure. See Jil L. Martin, Note, *United States v. Morrison: Federalism Against the Will of the States*, 32 LOY. U. CHI. L.J. 243, 247 n.33, 250 (2000).

⁷⁵ *Morrison*, 529 U.S. at 617 (declining to aggregate the economic effects of violence against women for purposes of Commerce Clause analysis).

⁷⁶ See MacKinnon, *supra* note 37, at 148 (“[W]omen’s productive activity was so marginalized by the Court that home-bound growers and eaters of wheat [in *Wickard v. Filburn*] were more imaginably engaged in economic activity than were women removed from active roles in the national economy by sex-based violence.”) (discussing *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

addressed state action, MacKinnon argues that the Court itself drew a line between the public and private spheres by failing to take into account the long history of state abdication of responsibility for violence against women:

Morrison effectively defines the private as the location where effective redress for sex-based violence is unavailable, ignoring the destruction of women's freedom and equality in private by the lack of public limits on male violence. The private is thus constructed of public impunity. The jealous guarding of this specific line between public and private acts, under which exercise of state power is accountable to public authority but exercise of so-called private power is not, thus becomes one of the central public means of maintaining a system in which male power over women remains effectively without limit.⁷⁷

Thus, as MacKinnon describes, the *Morrison* decision was itself evidence of the extent to which legal reforms have failed to break the underlying mold of the public/private divide that perpetuates women's inequality.

C. *The Role of Civil Remedies in Addressing Gender-Motivated Violence*

The availability of a private remedy for victims of gender-motivated violence enjoyed broad support; critics generally have taken as a given that private remedies for victims of gender-motivated violence are a categorical good. In the wake of the *Morrison* decision, some states enacted statutes that mirrored the Civil Rights Remedy that the Court struck down.⁷⁸ Apart from these newly created remedies, many states already had laws on the books, which, while not necessarily directed at gender-motivated violence specifically, nonetheless potentially allowed for civil recovery for victims of such violence.⁷⁹ In states that lack such laws, victims are still able to sue under tort law, though there are some shortcomings to this approach.⁸⁰ On several occasions since the *Morrison* decision, legislation has been introduced in Congress to create a new civil rights remedy that would comport with the Court's Commerce Clause doctrine, though to date no such legislation

⁷⁷ *Id.* at 170.

⁷⁸ Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 9, at 165.

⁷⁹ *Id.* at 167 (noting that a number of states "provide civil as well as criminal remedies for bias-motivated violence").

⁸⁰ These include general tort statutes allowing recovery for battery or assault. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55, 71 (2006) (describing strengths and weaknesses of state law tort suits for victims of sexual violence).

has been passed.⁸¹ In addition, scholars have noted both the autonomy-based value of placing victims in charge of their own redress,⁸² as well as the practical benefits of tort remedies.⁸³ These claims have a particular salience, given that it is very difficult to compel further action on the part of law enforcement,⁸⁴ and similarly difficult to seek redress against law enforcement officials for their failure to protect women from violence.⁸⁵

⁸¹ Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 9, at 166.

⁸² MacKinnon, *supra* note 37, at 138 (arguing that civil remedies could “potentially interven[e] in the balance of power between the sexes by empowering rather than protecting the victims of sex-based violence”).

⁸³ See generally Bublick, *supra* note 80, at 73–75 (detailing the advantages of tort remedies such as the ability to seek either monetary or non-monetary damages).

⁸⁴ There are many serious legal barriers to encouraging greater action on the part of law enforcement. There is a consistent line of precedent indicating that state entities, including law enforcement actors, cannot be held responsible for failure to protect individuals. In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), the Court held that a state social services agency had not violated a young boy’s substantive due process rights in failing to protect him from his abusive father, even though the agency had effectively monopolized the ability to protect him. *Id.* at 208–10 (Brennan, J., dissenting). The majority noted that the state had no duty generally to protect individuals from harms committed by private actors, stating that “it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf . . . which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.” *Id.* at 200 (majority opinion). Similarly, in *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005), the Supreme Court ruled that a police department could not be sued under § 1983 for failing to enforce a restraining order. Despite evidence of the police department’s flagrant abdication of duty, the Court held that Gonzales had no protected entitlement in the enforcement of the restraining order. *Id.* at 766. Taken together, these two cases indicate that it is likely impossible to compel law enforcement officials to adequately enforce laws protecting women from violence. The Court made clear in *DeShaney* that individuals have no due process right in state protection from harms committed by private actors. And *Castle Rock* indicated that even involvement of the state, such as occurs through obtaining a restraining order, does not create a protected entitlement in law enforcement.

⁸⁵ There are certain legal avenues that victims could pursue in order to obtain redress from law enforcement officials, but none are particularly promising. Women could sue municipalities, or police departments, or individual officers on theories of substantive or procedural due process or equal protection, but such claims are very difficult to make. In order to succeed on a substantive due process claim, a woman would have to show that she had a substantive constitutional right to affirmative protection by the police, and that this right was violated by police action or inaction. *DeShaney*, 489 U.S. at 196–97. After *DeShaney*, however, such liability is likely limited to cases where the police create the situation of danger. See, e.g., Kapila Juthani, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 62 (2003). Under an equal protection theory, a woman would have to make the difficult showing of discriminatory intent in order to prevail. Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 750 (2007). For example, the Third Circuit Court of Appeals held in *Hynson v. City of Chester Legal Department*, 864 F.2d 1026 (3d. Cir. 1988), that in order to have a cognizable claim for violation of equal protection, a plaintiff would have to show that “it is the policy or custom of the police to provide less protection to victims of domestic violence than to

In the face of structural barriers to spurring greater law enforcement action, the emphasis on civil remedies appears warranted. These remedies have the advantage of, perhaps most importantly, providing a cause of action for victims who might otherwise have no method of redress if, for example, the statute of limitations on her claim had expired, or the state had declined to criminally prosecute her attacker.⁸⁶ Further, the standard of proof for a plaintiff to succeed is much easier to meet in civil suits, where a plaintiff must prove her claim based on a preponderance of the evidence, rather than the much more challenging beyond a reasonable doubt standard necessary for criminal prosecution.⁸⁷ There may be situations in which women voluntarily decline to seek criminal enforcement for many reasons;⁸⁸ private remedies provide an attractive alternative should those victims wish to seek them out.

Yet, when that is not the case, civil remedies often appear to be simply a second-best alternative that evinces a certain cynicism about the capacity of law enforcement to respond to gender-motivated violence. In this regard, civil remedies may be seen as an alternative to effective criminal enforcement. That is not to say that civil remedies are intended to allow or encourage law enforcement officials to shirk or otherwise fail to protect women, but rather that, in the face of systematic failure of law enforcement, these remedies serve as an

other victims of violence, [and] that discrimination against women was a motivating factor” behind this custom. *Id.* at 1031. Finally, women could bring suit under 42 U.S.C. § 1983, which provides a civil remedy for individuals who have been deprived of constitutional rights by state actors. However, “judicial interpretation has rendered relief [under § 1983] extremely limited, if not unavailable outright.” Goldscheid, *supra*, at 748. Because the constitutional rights that women could allege were violated are generally limited to those such as equal protection or substantive due process, for the reasons stated above, such claims are likely to fail. A further complicating factor is the doctrine of qualified immunity, which holds that state actors are not liable under § 1983 for discretionary acts so long as they did not violate clearly established law. This makes it particularly difficult to bring suit against individual actors. Beyond the minimal likelihood of success in such suits, there are likely similar barriers to bringing § 1983 suits as there are for private remedies for gender violence broadly. See *infra* Part III for a discussion of limits to victims’ ability to bring civil suits against attackers.

⁸⁶ While both men and women are victims of gender-motivated violence, women vastly outnumber men as victims, and men vastly outnumber women as perpetrators. BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 5 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf>. As such, I will use female pronouns when discussing victims of gender-motivated violence, and male pronouns when discussing perpetrators.

⁸⁷ See Goldscheid, *The Civil Rights Remedy*, *supra* note 72, at 138 (discussing the many advantages of the Civil Rights Remedy over traditional tort claims).

⁸⁸ See *infra* Part III (discussing reasons why many victims of gender-motivated violence may choose not to seek criminal prosecution of their attackers).

alternative.⁸⁹ The Federal Civil Rights Remedy was likely intended to serve both as an alternative to inadequate law enforcement and as an additional method of redress for victims, particularly in light of women's inability to receive redress in state courts.⁹⁰

While providing as many options for redress as possible is surely important, one must remember that the original purpose of Congress in enacting the Federal Civil Rights Remedy was to address the failure of states to enforce laws or otherwise prevent violent crime against women, a failure that is deeply bound up with the relegation of women to the private sphere. Yet it is difficult to conceive of how a private remedy could possibly serve to break the public/private barrier, and thereby to compel violence against women to be taken seriously.

As I discuss in the next Part, civil remedies have little pragmatic benefit in practice, and treating civil remedies as an appropriate alternative to failing law enforcement may exacerbate the problem of inadequate enforcement. Civil remedies further entrench the understanding of women and the violence against them as belonging in the private sphere, and thus not appropriate for, and not important to, public protection.

III PROBLEMS WITH PRIVATE REMEDIES

While feminist scholars have vigorously criticized the role that the public/private barrier has played in perpetuating gender inequality,⁹¹ they have generally looked favorably on private remedies for victims of gender-motivated violence.⁹² In this Part, I argue that the uncritical acceptance of private remedies is misguided, as these

⁸⁹ See, e.g., Bublick, *supra* note 80, at 68 (“Against this background of failed criminal process, it is logical to think that victims might look elsewhere for a more congenial and effective forum. . . . Sexual assault victims can file civil suit against attackers when the government is unable or unwilling to prosecute a criminal case”); Goldscheid, *The Civil Rights Remedy*, *supra* note 73, at 117–19 (describing Congress’s support for the VAWA Civil Rights Remedy under Section 5 of the Fourteenth Amendment as rooted in acknowledgment that “formal and informal legal barriers to . . . criminal suits” denied women equal protection of the laws); Claire Bushey, *Why Don't More Women Sue Their Rapists?*, SLATE (May 26, 2010, 10:07 AM), <http://www.slate.com/id/2254980/> (noting that tort suits may be used to impose an alternate form of punishment on perpetrators).

⁹⁰ See, e.g., S. REP. NO. 103-138, at 37–38 (1993) (describing the purpose behind VAWA in terms of both addressing failures of law enforcement and creating a new type of remedy for victims of gender bias).

⁹¹ See *supra* Part I.B.

⁹² See, e.g., MacKinnon, *supra* note 37, at 165 (“The simple truth is that the sex-discriminatory harm of violence against women cannot be remedied without providing direct actions that women harmed by men across the society can use themselves.”).

remedies in fact perpetuate the existing public/private divide that is responsible for women's continued inequality and concurrent victimization. Specifically, treating private remedies as an alternative option when law enforcement fails has the dual effect of reinforcing the understanding of crimes against women as individual and non-systemic, and also entrenching women in the private sphere. The normative force of private remedies specifically for victims of gender-motivated violence is different than that of private remedies in other contexts because of the gendered nature of privacy, and the way in which privacy has operated to contribute to and justify the subjugation of women in ways that it has not in other areas or for other classes of people.⁹³

A. *Inadequacy of Civil Suits as an Alternative to Public Enforcement*

There are many reasons why civil suits are simply inadequate as remedies for victims. These reasons can be broadly divided into two categories: ex ante barriers to bringing civil suits in the first place, and structural differences between civil suits and criminal prosecution that limit the efficacy of civil suits.

One of the most notable distinctions between a criminal prosecution and a civil suit is cost. Because the state, rather than the victims of crimes, brings a criminal prosecution, cost is not a concern for victims in the context of criminal prosecution. Civil suits, on the other hand, are brought by individuals who must bear their own costs in order to bring the suit. One of the important advantages of the federal Civil Rights Remedy under the VAWA in this regard was that, just as with other federal civil rights claims, successful plaintiffs could recover attorneys' fees along with other damages.⁹⁴ While state or local civil remedies may also provide for attorneys' fees,⁹⁵ there are nonetheless many economic barriers that limit potential plaintiffs' access to attorneys.

⁹³ The privacy-based root of subjugation appears to be unique to gender subordination, with one exception, which is the master-slave relationship. Privacy also served as a justification for non-intervention in the master-slave relationship, though this was further complicated by the conception of the slave as property. See generally ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 98–121 (2000) (describing the “paternalist” relationship between master and slave, in which the master had complete power to decide how to deal with his slaves).

⁹⁴ 42 U.S.C. § 1988 (1994) (amended by VAWA to include the Civil Rights Remedy as a statute under which prevailing parties could recover attorneys' fees).

⁹⁵ CAL. CIVIL CODE § 52.4 (West 2007) (providing a civil remedy for gender-motivated violence, including coverage of attorneys' fees); 740 ILL. COMP. STAT. ANN. 82/10 (West 2010) (same); N.Y.C. ADMIN. CODE § 8-901 (2010) (same).

One significant problem for a victim is finding an attorney willing to represent her.⁹⁶ Even with allowances for awarding attorneys' fees, there is still the problem of potentially insolvent defendants. As such, attorneys are unlikely to accept cases against defendants with questionable ability to pay.⁹⁷ As will be discussed below, this is why many civil suits brought by victims of gender-motivated violence are not actually against attackers themselves, but against third parties, usually for failing to prevent the attack.⁹⁸ Further, there are structural barriers that limit the ability of victims of domestic violence in particular to access attorneys. Domestic violence victims are often economically disadvantaged and, as a result, are less likely to know that they have legal claims, or that there are legal services available to them.⁹⁹

What may likely be the biggest deterrent to women bringing suit against their attackers is that acts of gender-motivated violence are very often committed within relationships. Intimate-partner violence is by definition committed by a person with whom the victim is or was formerly in a relationship,¹⁰⁰ and the majority of rape victims know their attackers.¹⁰¹ Simply because there is a relationship between the victim and attacker, victims may be less inclined to bring a civil suit than they would be if the suit were against a stranger.¹⁰²

Yet there are also unique factors to the context of acquaintance rape and domestic violence that further minimize the likelihood that victims will bring suit. Domestic violence relationships are characterized by a cycle of abuse and control, from which victims often have

⁹⁶ See, e.g., Bushey, *supra* note 89 (“[F]or every case the National Crime Victim Bar Association’s 300 lawyers take, ‘there’s 10 they turn away.’”).

⁹⁷ See *id.* (noting that “most of these [civil suits for sexual assault] go after third-party defendants—the kind with assets”); see also Bublick, *supra* note 80, at 84 (“If third-party actions were not viable in tort, lawyers would not have pursued so many cases.”).

⁹⁸ See *infra* notes 118–20 and accompanying text (noting that third-party defendants are often better able to pay damages).

⁹⁹ See Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 222–23 (2004) (describing structural barriers to bringing tort suits for victims of domestic violence).

¹⁰⁰ See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PROFILE OF INTIMATE PARTNER VIOLENCE CASES IN LARGE URBAN COUNTIES 1 (2009) (defining intimate partner violence as “intentional physical violence committed, attempted, or threatened between spouses, ex-spouses, common-law spouses, boyfriends or girlfriends, present or past”).

¹⁰¹ BUREAU OF JUSTICE STATISTICS, BULLETIN, CRIMINAL VICTIMIZATION, 2009, at 7 (2010) (indicating that seventy-nine percent of rapes or sexual assaults committed against female victims were committed by a non-stranger).

¹⁰² See Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 142–44 (2001) (describing relationship-based reasons why domestic violence victims may not sue their abusers).

great difficulty in breaking free.¹⁰³ Once they have, victims will go to great lengths to avoid contact with their batterers, taking actions such as seeking protective orders, because batterers will use contact with victims to exert further control over them.¹⁰⁴ For example, abusive partners frequently make use of protracted child custody litigation as a way of remaining in contact with, and hence in control of, their victims.¹⁰⁵ Consequently, victims who wish to avoid contact with their abusers are unlikely to engage in voluntary litigation that would require such contact.

While rape victims may not have the same cyclical sort of relationship with their attackers as domestic violence victims, there are nonetheless other factors that may prevent rape victims from bringing suit. As noted above, most rape victims know their attackers, which for a variety of reasons serves as a deterrent to bringing voluntary litigation against them. Not being believed is a common problem among rape victims generally,¹⁰⁶ and this problem, or the fear thereof, may be exacerbated when the victims' friends or family also know or are in some relationship with the attacker.¹⁰⁷ Furthermore, regardless of whether the victim knows her attacker, rape victims are often deeply traumatized by contact with their attackers.¹⁰⁸ Finally, many states do not have rape shield laws for civil suits, meaning that victims may be subject to the serious embarrassment and emotional trauma of having their sexual history put on trial.¹⁰⁹

¹⁰³ See Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 9, at 171 (describing the "pattern of coercion and control" exercised by batterers over victims); see also Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1531–38 (1998) (discussing the failure of treatment programs for batterers due to very high recidivism rates).

¹⁰⁴ See Goldscheid, *supra* note 98, at 222 (describing reasons that domestic violence victims may be reluctant to bring civil suits against attackers).

¹⁰⁵ See Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 111–13 (2004) (describing extensive ways in which batterers may manipulate the custody process in order to exert control over victims).

¹⁰⁶ See Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459, 459–60 (1984) (indicating that rape is one of the most underreported crimes in the country, and that victims are far less likely to report when attackers are acquaintances due to fear of not being believed).

¹⁰⁷ *Id.* at 460 ("The fact that a woman knows her rapist may encourage her to blame herself Even when a woman identifies herself as a rape victim, she may fear that others will not believe she was raped if she knew the man.").

¹⁰⁸ See NATIONAL CENTER FOR VICTIMS OF CRIME, RAPE-RELATED POSTTRAUMATIC STRESS DISORDER 1 (2004), available at <http://www.sacnwg.org/Rape-Related%20PTSD.pdf> (describing how reminders of a rape incident trigger severe stress reactions in victims).

¹⁰⁹ See Annie Rotner, *The Legal Scholar: Rape Shield Laws in Civil Cases*, 4 VICTIM ADVOCATE 24, 24–25 (2005) (listing the only eight states that provide rape shield laws in civil cases).

The efficacy of civil suits as an alternative to effective law enforcement is considerably hampered by these factors, which make victims unwilling to bring suit. In addition, victims may be financially unable to bring suit. Another simple, yet important, reason why victims may not bring suit is that they do not know of the availability of such private remedies. In fact, there is evidence that the federal Civil Rights Remedy was used in extraordinarily few cases,¹¹⁰ and one scholar noted that “[t]he state statutes enacted after the *Morrison* decision have received little public attention and do not yet appear to be widely used.”¹¹¹ While it is unclear whether civil remedies are not used because of the lack of publicity, or because of the aforementioned structural reasons why victims might elect not to take advantage of them, it is clear that there are substantial barriers to civil remedies functioning as an effective alternative to criminal enforcement.

Differences between civil suits and criminal prosecution, coupled with characteristics of perpetrators of gender-motivated violence, further render civil suits inadequate as an alternative to criminal prosecution. One of the most obvious differences between civil suits and criminal prosecution is that defendants found guilty in criminal proceedings may be incarcerated.¹¹² Incarceration is an essential component of achieving the goals of criminal prosecution, in that it prevents

¹¹⁰ Judith Resnik’s article *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction* describes the limited extent to which these remedies were taken advantage of:

Despite judges’ fears of a flood of cases, only about fifty published decisions on the Civil Rights Remedy were reported in the federal courts during the statute’s short life (from 1994 until the spring of 2000). Of those cases, about forty-five percent involved allegations of violence in commercial or educational settings. The small number and the kind of claims did not fulfill proponents’ hopes that the Civil Rights Remedy would provide access to federal courts for those otherwise unable to make their way there.

14 YALE J.L. & FEMINISM 393, 404–05 (2002).

¹¹¹ Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 9, at 166.

¹¹² There is considerable disagreement among feminist scholars about the value of incarceration or other forms of criminal prosecution for domestic violence, insofar as criminal enforcement may undermine victim autonomy and serve to further disempower women. Compare Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 813 (2001) (arguing that mandatory arrest and mandatory prosecution policies further subjugate already marginalized groups of women), with Machaela M. Hocror, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 686–88 (arguing that victim-autonomy based arguments “amount[] to a wolf in sheep’s clothing” and give batterers further control over their victims). This is a complicated debate, into which this Note does not seek to enter; I contend merely that insofar as criminal enforcement operates to protect individuals from violent crime, it should do so in non-discriminatory ways.

future criminal acts—at least for the period of incarceration—and may also deter future crimes.¹¹³

It is important to note that there are many particularly pernicious aspects of the American criminal justice system. Communities of color are often much more heavily targeted by law enforcement, as are poor communities, such that increased criminal enforcement of crimes against women would likely disproportionately affect these communities. Further, prisons are often violent and rife with sexual assault.¹¹⁴ In discussing criminal enforcement as a better solution to civil suits in this Note, I do not intend to endorse an unjust criminal system or to suggest that the criminal system is without flaws. Rather, I contrast civil suits with criminal enforcement in order to illustrate the different ways in which the state cognizes and redresses harms based on the gender identity of the victims.

Removal of perpetrators from society is especially important in cases of rape and domestic violence. Studies have shown that rapists are highly likely to be recidivists.¹¹⁵ Recidivism among rapists is facilitated by low reporting rates for rape in general, particularly when the victim has used drugs or alcohol, which attackers often deliberately exploit.¹¹⁶ Domestic violence relationships are often cyclical, with the batterer finding ways to remain present in the life of his victim in order to continue abuse and control.¹¹⁷ Without the isolation effect of criminal prosecution, such perpetrators are free to continue committing acts of violence with impunity. While payment of money damages may have some deterrent effect on individual perpetrators, the infrequency with which such suits are brought would likely dampen the intended effect.

A final concern regarding deterrence is that many civil suits for gender-motivated violence are not brought against perpetrators, but are rather brought against third parties, who usually have a greater ability to pay money damages.¹¹⁸ Suits against third parties serve very important goals, particularly since “a large number of the cases

¹¹³ See generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (describing the broad purposes of criminal law).

¹¹⁴ See generally Coker, *supra* note 112 (describing the disproportionate adverse effects of domestic violence prosecution on poor communities and communities of color).

¹¹⁵ See David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002) (detailing a study which found that 63% of self-identifying rapists are repeat offenders).

¹¹⁶ *Id.* (indicating that over 80% of self-identifying rapists reported raping women who were incapacitated because of drugs or alcohol).

¹¹⁷ See *supra* notes 103–05 and accompanying text.

¹¹⁸ See Bublick, *supra* note 80, at 96–97 (describing a significant number of cases in which third parties paid substantial damages).

[against third parties] also involve particularly vulnerable victims including children, the permanently or temporarily disabled, and the infirm.”¹¹⁹ While the importance of ensuring that third parties adequately protect against sexual violence cannot be overstated, such suits are usually brought under a theory of negligence, such that separate remedies for acts of gender-motivated violence likely have little effect on the viability of such suits.¹²⁰ More importantly, suits against third parties have no retributive or deterrent effect on the actual perpetrators of crimes.

Preventing or deterring individual attackers is not the only way in which inadequate law enforcement can be addressed; another important avenue to consider is encouraging greater efforts on the part of law enforcement. Yet there is no indication that private suits, against either perpetrators or third parties, successful or not, are likely to have any effect on the decisions made by law enforcement officials, particularly in encouraging greater levels of enforcement. Rather, the persistence of the notion of women as existing in the private sphere, and of gender-motivated violence as private conduct, simply reinforces the existing failures of law enforcement to take the protection of women seriously.

B. *Entrenching Women in the Private Sphere*

Apart from the many reasons why civil remedies likely have little practical value for victims or potential victims of gender-motivated violence,¹²¹ there are serious normative concerns with constructing and supporting a legal regime that requires women to be responsible for their own protection, while men receive the protection of the state. Reliance on private suits as a substitute for failing public enforcement indicates both that the state is unable or unwilling to provide women with *ex ante* protection from violence, and that when women are victims of such violence they must seek out their own redress. In stark contrast is the protection of the state that is afforded to men, which is two-fold: Men are more likely than women to be victims of violent crimes¹²²—crimes that are far better enforced than crimes which dis-

¹¹⁹ *Id.* at 66–67 (indicating that suits are often brought against institutions that are entrusted with care of others, such as hospitals, foster homes, and mental health institutions).

¹²⁰ *See id.* at 66 (explaining that suits against third parties are often brought under a theory of negligence).

¹²¹ *See supra* Part III.A.

¹²² Jennifer L. Truman & Michael R. Rand, *Criminal Victimization, 2009*, BUREAU JUST. STAT. BULL. (Bureau of Justice Statistics), Oct. 2010, at 4 (noting that rape and sexual assault are the only violent crimes in which women are more often the victims).

proportionately affect women¹²³—and, as explained above, men who commit such crimes against women are protected from prosecution. In effect, the state protects the right of men to be free from violence, and also protects their position of power by declining to adequately punish them for acts of violence against women.¹²⁴

The problems with such a system are manifold. Most importantly, privatizing the enforcement of crimes against women reinforces the idea of separate spheres and reifies women's long-standing relegation to the private sphere.¹²⁵ The essential idea of separate spheres is that there is a domain of individual privacy into which it is inappropriate for the state to intervene, in contrast to the public and the market, which are subject to state regulation.¹²⁶ As a result of numerous and long running legal and societal barriers to entry in the public sphere, the essential gendered aspect of separate spheres is that women are confined to the private sphere, and thus beyond the reach of state regulation.¹²⁷

The state, in shifting the burden to individual women to prevent or seek redress for acts of violence against them, reinforces to both victims and perpetrators of such violence that this conduct is outside the sphere of state regulation—it is private conduct that should be addressed privately. The public reinforcement of the idea that harms to women are private harms is particularly problematic given that a great deal of violence against women does in fact happen in private, making detection, prevention, and enforcement more difficult. By so exempting women from adequate or equal public protection,¹²⁸ regardless of where they actually suffer the harms of

¹²³ See *Arrests by State, 2009*, CRIME IN THE UNITED STATES 2009 (Federal Bureau of Investigation) http://www2.fbi.gov/ucr/cius2009/data/table_69.html (last visited Nov. 5, 2012) (indicating substantially higher arrest rates for aggravated assault and robbery, of which men are more likely to be victims, than for forcible rape).

¹²⁴ See MacKinnon, *supra* note 37 at 171 (“Obscuring the affirmative nature of the abdication [of state responsibility to protect women from violence] in *Morrison*, as the majority does, in turn obscures the involvement of the state in impunity for male dominance and its collaboration with the occurrence of violence against women society-wide.”).

¹²⁵ See *supra* notes 28–59 and accompanying text (discussing the history of women's relegation to the private sphere).

¹²⁶ See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 96 (1987) (describing the private sphere as “demarking the threshold of the state at its permissible extent of penetration into a domain that is considered free by definition”).

¹²⁷ See MACKINNON, *supra* note 36, at 168 (“The law of privacy treats the private sphere as a sphere of personal freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal.”); see also Goldfarb, *supra* note 3, at 19–22 (2000) (describing the concept of separate spheres and its effect on the legal rights of women).

¹²⁸ See MacKinnon, *supra* note 37, at 158 (“[A] woman is entitled to the same freedom from sex-based violence a man has. A woman should get the same state protection . . . a

gender-motivated violence,¹²⁹ the state denies women the full panoply of rights otherwise available to full participants in the public sphere.

C. *Violence Against Women as Individualized Harm*

Requiring women to enforce their own protection not only reinforces the idea of violence against women as private conduct, it also reinforces the idea that such harm is to the individual only, rather than to society.¹³⁰ The foundation of criminal prosecution is that one has harmed society (hence why prosecutors represent ‘the People’ rather than victims of crimes), whereas civil suits are intended for resolution of private disputes.¹³¹

The fact that criminal prosecution indicates a societal rather than individual harm can be seen in many contexts. Significant governmental resources are devoted to prosecuting crimes that are considered victimless, such as many drug crimes.¹³² Some states limit the admissibility of victim-impact statements—statements made by victims of crimes or their family members about how the defendant’s actions have harmed them—in criminal trials or sentencing hearings.¹³³ This suggests that the victims’ sense of individual harm is not a relevant inquiry in determining appropriate punishment for criminal conduct. Finally, of the classic goals of criminal justice (retribution, rehabilitation, and deterrence),¹³⁴ none are directed at addressing

man can get. If Congress cannot say that the Fourteenth Amendment means at least this much, the Fourteenth Amendment made a promise the Nation cannot keep.”)

¹²⁹ See *id.* at 170–71 (noting that Christy Brzonkala was raped while attending public university, by men she did not know in a room not her own, conduct which cannot possibly be considered private).

¹³⁰ Catharine MacKinnon has noted that standing doctrine, with its requirement of individualized harm, similarly undermines women’s ability to seek redress for gender-motivated violence, and to cognize such violence as systematic in nature. MACKINNON, *supra* note 36, at 238–39 (1989) (“Doctrines of standing suggest that because women’s deepest injuries are shared in some way by most or all women, no individual woman is differentially injured enough to be able to sue for women’s deepest injuries.”).

¹³¹ See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 784–85 (1997) (comparing civil to criminal suits in terms of their treatment as private and public remedies, respectively).

¹³² See John R. Lott, Jr. & Russell D. Roberts, *Why Comply: One-Sided Enforcement of Price Controls and Victimless Crime Laws*, 18 J. LEGAL STUD. 403, 410–11 (describing drug dealing as a “traditional victimless crime” in which all involved parties have similar incentives to hide the crime).

¹³³ See *Legal Issues: States that Allow Victim Impact Statements*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/legal-issues-states-allow-victim-impact-statements> (2008) (last visited Nov. 5, 2012) (citing John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 268 (2003)) (indicating that victim impact statements may be inadmissible in up to seven states).

¹³⁴ See Hart, *supra* note 113, at 426 (discussing the various goals of criminal punishment).

individual harms. Retribution recognizes that the defendant has committed some harm that must be punished, but there is no indication that the defendant is being punished for harm to an individual rather than to society. Rehabilitation and deterrence are both about ensuring that the perpetrator does not cause future harm to others, either through personal reform or fear of future punishment.

Effectively limiting women's redress for gender-motivated violence to civil suits, which are traditionally the forum for resolving private conduct, indicates that harms to women are not in fact harms to society, hence why they are not subject to criminal prosecution. In contrast to the aforementioned goals of criminal prosecution, the purpose of civil penalties is compensation—that is, to make whole the specific individual who was harmed.¹³⁵ Further, a finding of liability in tort hinges on determinations of individual causation,¹³⁶ which serves to further mask the extent to which gender-motivated violence is a systemic problem rather than an individual failing.¹³⁷ This is troubling from the perspective of both victims and perpetrators. If gendered violence is seen as an individual, rather than societal harm, then men who commit acts of violence against women have not committed a wrong against their society, and thus are not subject to the stigma that would attach to such wrongs. By extension, women are perceived as a class that is separate and distinct from society. This further reinforces the women/society dichotomy discussed above, and further alienates women from public life.

Effectively forcing victims of gender violence to resort to private suits indicates that violence against women is not a harm that society need be concerned with preventing or addressing. Another particularly pernicious implication of this is that victims may be treated again as though they are to blame for their own harms, at least in failing to prevent them.¹³⁸ If certain conduct is deemed to be a harm to society, this means that society should vindicate this harm through the criminal process, and also that society is obligated to prevent such harms—

¹³⁵ Steiker, *supra* note 131, at 784–85 (“[C]ivil justice is not concerned with the creation or redistribution of entitlements, but rather with ‘private transactions between private individuals’”).

¹³⁶ See generally Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980) (describing the role of individualized causation in determining tort liability).

¹³⁷ See Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2203–06 (2000) (“Immunity is . . . presumed for those who create an ideological system that makes rape possible. . . . [W]e persist in telling women to seek redress from rapists, not from a system that creates and condones rape.”).

¹³⁸ See S. REP. NO. 103-138, at 38 (1993) (describing the “archaic prejudices that blame women for the beatings and the rapes they suffer” as reason for enacting the VAWA).

hence the deterrent function of criminal law. In that same vein, individuals who are harmed may also be seen as under an obligation to prevent their own harms, at least to some extent. This is the basis for the doctrine of contributory negligence in tort law.¹³⁹ Such treatment is particularly troubling in light of the long-standing and persistent tendency to blame victims of violence against women for their own abuse,¹⁴⁰ and to treat such acts of abuse as natural and understandable tendencies of men in response to certain provocations.¹⁴¹

Treating violence against women as a series of individual harms rather than as a harm to the collective enables the perpetuation of such violence. It allows for abuse and gender violence to be seen as a result of, at best, individual failings, rather than a product of a culture that is excessively permissive toward abuses of women, and, at worst, structured upon the subjugation of women.¹⁴² The reports of Congress leading up to the passage of the VAWA were of particular importance in this regard. They drew attention to the systematic, rather than individual, nature of violence against women. One report noted that “[w]omen in America suffer all the crimes that plague the Nation—muggings, car thefts, and burglaries, to name a few. But there are also some crimes, including rape and family violence, that disproportionately burden women . . . [and amount to] violently expressed gender prejudice.”¹⁴³ Yet by allowing harms against women to be viewed as harms only to the individual, the value of this recognition is lost. It is impossible to adequately address gender violence without addressing the underlying “public standard of impunity” which permits its perpetuation.¹⁴⁴

The total effect of treating private suits as an alternative to inadequate criminal enforcement of violent crimes against women is to relegate women to second-class status. Protecting women from violent crime is not given the primacy accorded to preventing crimes against men. Women are continually marginalized from and denied the rights attendant with full participation in the public sphere. As a continued

¹³⁹ See, e.g., Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 989 (1951) (describing the contributory negligence doctrine as protecting defendants from suits for avoidable harm).

¹⁴⁰ See SCHULHOFER, *supra* note 26, at 260–64 (1998) (describing tendency of many, including scholars, to blame women for failing to “take responsibility” for acts of sexual violence committed against them (internal quotations omitted)).

¹⁴¹ See MACKINNON, *supra* note 37, at 173 (describing how rape is understood as a point on a spectrum of acceptable and allegedly natural male sexual violence).

¹⁴² MacKinnon, *supra* note 37, at 169–70 (describing how the *Morrison* majority defended a federal system in which states “monopolize the power to address violence against women in order to do little about it”).

¹⁴³ S. REP. NO. 103-138, at 37–38 (1993).

¹⁴⁴ MacKinnon, *supra* note 37, at 171.

reminder that the citizenry is presumptively male, harms against women are not viewed as harms to society, indicating that women are not part of the collective of society.¹⁴⁵ This particularly grim view of women's status in American society is available only for those women who are able to bring suits against those who harm them. As discussed in Part III.A, for what is likely the vast majority of women who are unable to bring suit, the state makes no promise that it is willing or able to protect them from acts of violence, and the promise of civil remedies provides them with nothing.

CONCLUSION

Professor Jeannie Suk describes the home as “simultaneously the place of unique security and comfort and the place of unique potential for terror and vulnerability.”¹⁴⁶ This Note has sought to demonstrate the ways in which this dual character of privacy has operated to entrench gender inequality. In this Note, I have sought to problematize civil remedies as a method of redress for gendered acts of violence. Whether it would be beneficial to do away with such remedies altogether is a different question, one that is beyond the scope of this Note, and is not what I propose. Rather, I have sought to shed light on the ways in which a regime of private enforcement may serve to undermine the goals of these remedies, and may also serve to inhibit progress toward greater gender equality.

For a broad range of reasons, as this Note has shown, civil remedies do not actually protect women from gender-motivated violence, nor can they undermine the public/private barrier that allows such violence to continue with impunity. Structural differences between criminal prosecution and civil suits make civil suits inadequate to serve criminal justice goals.¹⁴⁷ Further, limitations on access to civil suits mean that such suits will not make up for the initial problem of under-enforcement. There is symbolic value in the availability of civil remedies—they indicate that gender-motivated violence is a systemic problem and a source of gender discrimination, and also that the state has, at least in principle, made a commitment to addressing such discrimination. However, the symbolic value of providing such remedies

¹⁴⁵ See Jan Jindy Pettman, *Body Politics: International Sex Tourism*, 18 *THIRD WORLD Q.* 93, 94 (1997) (noting that “[t]he citizen, soldier, leader, worker was presumed to be male”).

¹⁴⁶ SUK, *supra* note 23, at 2.

¹⁴⁷ While criminal prosecution may also be rife with problems, this Note does not seek to imagine wholesale reworkings of the criminal justice system. Rather, this Note suggests that so long as criminal enforcement exists as a method of protecting individuals from harm, it should do so on a non-discriminatory basis.

is not categorically positive; while these remedies may evince some commitment to addressing violence against women, they also evince the continued relegation of women and the injuries they suffer to the private sphere, and hence the continued status of women as not equal members of the body politic.

This analysis paints a rather grim picture of the capacity of the current legal system to protect women from violence, and to remedy the entrenched discrimination against women that leaves them vulnerable to acts of violence. In a legal system predicated on a gendered division between public and private, it is difficult to protect against the violent manifestations of this gender inequality while the barriers that allow for its persistence remain in place. To take women's safety, and consequently their status as fully equal citizens, seriously requires breaking down this barrier. To change the way that the state treats violence against women demands that we fundamentally change the relationship between women and the state that allows this violence to persist. That is, women must be construed as full members of the state, whose harm is a social harm, before their victimization can be adequately addressed.

This Note does not seek to offer a simple legal solution to what is a long running and deeply entrenched problem. Rather, I have sought to illustrate that methods of redressing this problem will not be successful, and may indeed prove harmful, if they operate within the bounds of the barriers that are themselves the root of the problem.