Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act

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RECOGNIZING VIOLENCE AGAINST WOMEN:
GENDER AND THE HATE CRIME
STATISTICS ACT

ELIZABETH A. PENDO*

Two million acts of rape were committed against women in 1991.¹

A report on hate crime issued by the Federal Bureau of Inves-
tigation pursuant to the Hate Crimes Statistics Act of 1991 stated that
only seven of these attacks were motivated by hate.²

The United States Congress defined violence aimed at people because
of their race, religion, sexual orientation or ethnicity as crimes of hate—
crimes that “leav[e] a stain on our Constitution”³ and merit national
attention and response. In doing so, Congress recognized that “[d]if-
ferences in the race, religion, and ethnicity of our citizens should be a
source of national strength, cultural diversity, and celebration of our
Nation’s pluralism.”⁴ By using characteristics such as race, religion and
ethnicity to foster a sense of division and fear among citizens, the
perpetrators injure the stated values of our society,⁵ such as the treatment
of people with equal respect and dignity.⁶

In an attempt to combat a perceived rise in this special type of crime,
Congress enacted the Hate Crimes Statistics Act of 1990 (the “HCSA”),⁷
which requires the United States Attorney General to keep and publish
records on the number of crimes motivated by prejudice based on race,

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¹ STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., VIOLENCE
[hereinafter THE INCREASE OF RAPE IN AMERICA]. This figure takes into account
significant under-reporting. See also Women and Violence: Hearing on Legislation to
Reduce the Growing Problem of Violent Crime Against Women Before the Senate
Committee of the Judiciary Part II, 101st Cong., 2d Sess. 111 (1990) [hereinafter
Hearings, Part II] (testimony of Angela Browne, Professor, Department of Psychology,
University of Massachusetts).
² 60% of Hate Crimes Tied to Race, Chi. Tns., Jan. 5, 1993, at 6.
Conyers).
⁶ See, e.g., U.S. CONST. amend. XIV, § 2 (Equal Protection Clause); Title VII of the
religion, sexual orientation or ethnicity. Violent crimes motivated by gender are not included.

This Recent Development argues that acts of gender-based violence should be recognized as hate crimes under the HCSA, and that certain types of violence against women, such as rape, are fundamentally gender-based. Part I examines the existing definition of “hate crimes” under the HCSA, which focuses on the harm to the victim and the victim’s community. This part also outlines the boundaries of the HCSA, revealing that the majority of violence against women is excluded. Part II argues that gender should be included as a category under the HCSA because of the similar effects of violence directed at women due to gender, and violence directed at members of other groups because of their group identity. Using acquaintance rape as an example, this part also examines the tremendous resistance to the recognition of gender-based violence against women as a hate crime and the institutionalized inequality which that resistance reflects. Part III explores the possible effects of inclusion of gender in the HCSA. Finally, Part IV critiques the current implementation guidelines of the HCSA for failing to recognize the intersection and interaction of the enumerated groups, and makes suggestions for improvement.

I. EXISTING UNDERSTANDING OF HATE CRIME

A. Defining “Hate Crime”

In the early morning hours of December 20, 1986, three young black men left their stalled car on Cross Parkway in Queens, New York, and went to look for help. They walked into the neighborhood of Howard Beach, entered a restaurant and ordered pizza. Upon leaving the restaurant, a group of eight to ten white teenagers taunted them with racial epithets, and chased and beat them. One of the black men died as a result of being struck by a car as he tried to flee the attackers. Another suffered permanent blindness in one eye.8

In 1988, two lesbians in Brockton, Massachusetts, were beaten unconscious by the ex-boyfriend of one of the women. As a result of the attack, one of the women sustained five skull fractures and required extensive reconstructive surgery. According to the victims, the assailant

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continually harassed them after he learned of their involvement, spraying antilebian graffiti on their house and smashing a car windshield.9

On September 17, 1988, on the Jewish Sabbath, two teenage boys desecrated a Brooklyn, New York, synagogue. Swastikas were sprayed on the walls. Six precious Torah scrolls were ripped and burned, and the synagogue itself suffered heavy damage from fire.10

The term “hate crime” generally refers to a crime committed not out of animosity toward the victim as an individual, but out of hostility toward the group to which the victim belongs. There are, however, many different definitions of hate crimes, and the differences between them are important. The California Attorney General’s Commission on Racial, Ethnic, Religious, and Minority Violence created one of the most comprehensive definitions of “hate crime”:

[A hate crime is] any act of intimidation, harassment, physical force, or threat of physical force directed against any person, or family, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution or laws of the United States or the State of California whether or not performed under color of law.11

Other organizations have adopted the California definition but have deleted “sex” from the list of protected groups. For example, the Anti-Defamation League of B’nai B’rith states that a hate crime is “any act to cause physical injury, emotional suffering, or property damage, which appears to be motivated, all or in part, by race, religion or sexual orientation.”12 Similarly, a report commissioned by the National Institute of Justice defines hate crime as “words or action designed to intimidate

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10 Id. at S1072 (statement of Sen. Hatch) (citing Paul M. Barrett, Hate Crimes Increase and Become More Violent; U.S. Prosecutors Focus on “Skinhead” Movement, WALL ST. J., July 14, 1989).
11 CALIFORNIA ATTORNEY GENERAL’S COMM’N ON RACIAL, ETHNIC, RELIGIOUS, AND MINORITY VIOLENCE FINAL REPORT 4 (1986).
an individual because of his or her race, religion, national origin, or sexual preference.\textsuperscript{13}

\textbf{B. The Distinct Harms of Hate Crimes}

A violent crime always devastates its victims. The crime takes on added dimensions of pain and significance at the personal, group and national level, however, when members of groups who have historically faced discrimination are targeted for violence.

Recent studies indicate that crimes that are motivated by prejudice are often more vicious and more lethal than attacks that are not motivated by prejudice.\textsuperscript{14} One report indicated that victims of hate crimes were injured in 74\% of the cases, while the national average for injury to an assault victim is 29\%. At least one victim required hospitalization in 30\% of the prejudice-based assaults, while for other assaults the average rate of hospitalization is only 7\%.\textsuperscript{15}

The individual victim or victims must endure not only the increased level of violence itself, but also a lingering sense of fear and vulnerability. Because they were attacked based on perceived membership in a group and not because of any individual trait or behavior, they feel that they cannot prevent future attacks.\textsuperscript{16} In addition, the victims of hate crime are often blamed for their own victimization.\textsuperscript{17}

Hate crimes are also more serious than comparable crimes that do not involve prejudice because they are intended to intimidate an entire community of people:\textsuperscript{18}

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\textsuperscript{14} Daniel Goldman, Hate Crimes Matter of Turf, Researcher Says, CHI. TRIB., June 1, 1990, at C29. This may be partially due to the fact that hate crimes are increasingly committed in groups of four or more, and the most common number of victims is one.

\textsuperscript{15} Id.


\textsuperscript{17} Patricia Williams points out that much of the public and media response to the Howard Beach attack centered on the actions of the victims:

A veritable Greek chorus formed, comprised of the defendants’ lawyers and resident after resident of Howard Beach, all repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out. “They had to be starting trouble.” . . . “We’re strictly a white neighborhood.” . . . “What were they doing here in the first place?”


For persons who are members of minority groups with a history of mistreatment or persecution, these crimes understandably create anxiety, unease, and concern about the security of their place as Americans in their own land or as people striving to become citizens. Emotional and psychological scars can result from these crimes.\textsuperscript{19}

Thus, violence against members of groups who have historically faced discrimination may symbolically reinforce the legitimacy of such discrimination in a way that violence against an individual for whom the perpetrator feels only personal hatred does not.\textsuperscript{20}

\textit{C. Federal Response: The Hate Crimes Statistics Act of 1990}

Although crimes based on prejudice and bias have always been a part of our society, such crimes have captured the attention of the nation in recent years. This concern is due at least in part to the fact that evidence collected by civil rights groups such as the Southern Poverty Law Center, the National Gay and Lesbian Task Force and the Anti-Defamation League of B’nai B’rith indicates a sharp rise in hate-motivated crimes.\textsuperscript{21} In addition, there is a perception among civil rights groups and other researchers of bias-motivated crimes that the violence is “spreading”; most observers believe that fewer incidents are being committed by members of organized hate groups like the Ku Klux Klan in concentrated geographic areas, and that more crimes are being committed by a range of individuals or small groups of people acting on their own.\textsuperscript{22}

Recognizing that hate crimes are “extraordinary in nature and require a special governmental response,”\textsuperscript{23} Congress passed the Hate Crimes Statistics Act of 1990.\textsuperscript{24} The HCSA mandates the acquisition of data on

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\bibitem{22} \textit{See} Finn & McNeil, supra note 13, at 3376 (“However, many of these offenders may be encouraged by the rhetoric of white supremacist organizations, and by the failure of most community and national leaders to speak out forcefully against these groups.”).
\end{thebibliography}
crimes that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity," including where appropriate the crimes of "murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property." Concerned with possible methodological problems in categorization and collection, Congress directed the Attorney General to develop implementation procedures and guidelines. The guidelines set forth fourteen factors which may, alone or in combination, be indicative of bias.

25 The amendment adding "sexual orientation" to the list of categories engendered copious and furious debate. For a good discussion of the debate over sexual orientation, see Bringing Hate Crime Into Focus, supra note 16, at 262–63.


27 Id. § 534(b)(2). The Attorney General has delegated this responsibility to the Director of the Federal Bureau of Investigation, and the FBI's Uniform Crime Reports Section has been assigned the task of developing procedures. See Uniform Crime Reporting, U.S. Dep't of Justice, Hate Crime Data Collection Guidelines (1990) [hereinafter Guidelines].

28 The fourteen factors are as follows:

(a) The offender and the victim were of different racial, religious, ethnic/national origin, or sexual orientation groups. For example, the victim was black and the offenders were white.

(b) Bias-related oral comments, written statements, or gestures were made by the offender which indicate his/her bias. For example, the offender shouted a racial epithet at the victim.

(c) Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.

(d) Certain objects, items, or things which indicate bias were used (e.g., the offenders wore white sheets with hoods covering their faces) or left behind by the offender (e.g., a burning cross was left in front of the victim's residence).

(e) The victim is a member of a racial, religious, ethnic/national origin, or sexual orientation group which is overwhelmingly outnumbered by members of another group in the neighborhood where the victim lives and the incident took place. This factor loses significance with the passage of time, i.e., it is most significant when the victim first moved into the neighborhood and becomes less and less significant as time passes without incident.

(f) The victim was visiting a neighborhood where previous hate crimes had been committed against other members of his/her racial, religious, ethnic/national origin, or sexual orientation group and where tension remains high against his/her group.

(g) Several incidents have occurred in the same locality, at or about the same time, and the victims are all of the same racial, religious, ethnic/national origin, or sexual orientation group.

(h) A substantial portion of the community where the crime occurred perceives that the incident was motivated by bias.

(i) The victim was engaged in activities promoting his/her racial, religious, ethnic/national origin, or sexual orientation group. For example, the victim is a member of the NAACP, participates in gay rights demonstrations, etc.

(j) The incident coincided with a holiday relating to, or a date of particular significance to a racial, religious, or ethnic/national origin group. (e.g., Martin Luther King Day, Rosh Hashannah, etc.)

(k) The offender was previously involved in a similar hate crime or is a member of a hate group.
II. "GENDER" SHOULD BE INCLUDED AS A CATEGORY IN THE HCSA

In December of 1989, a man walked into the engineering school at the University of Montreal armed with a hunting rifle. He entered a classroom and divided the students he found there into two groups, shouting "I want the women!" As he screamed "You're all a bunch of (expletive) feminists!", he picked each woman off at point blank range. By the time his deadly stalk was over, he had killed fourteen women. A note found in his pocket after his suicide declared that women had ruined his life.29

In May of 1989, a thirty-eight-year-old, Jamaican-born mother of four was forced to a Brooklyn rooftop by three men who, once there, raped and sodomized her. Ignoring her pleas to spare her life, they then threw her down a fifty-foot air shaft, where she landed on the concrete alley below, fracturing her pelvis and breaking both ankles. She was discovered hours later, bleeding, semi-conscious, but alive.30

There is an enormous gap in the coverage of the HCSA because it does not include crimes based on gender. One of the most widely used definitions of hate crime includes "sex" in the list of protected groups.31 Acts of violence against women based on their gender are recognized as hate crimes by ten states.32 "Race, religion, sex, and national origin" has become a virtual refrain in civil rights law. Under the HCSA, however, if a man is beaten or killed because he is black, that counts as a hate crime; but if a woman is beaten, raped or killed because she is a woman, that doesn't count as a hate crime.

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1 There were indications that a hate group was involved. For example, a hate group claimed responsibility or was active in the neighborhood.
2 A historically established animosity exists between the victim's group and the offender's group.
3 The victim, although not a member of the targeted racial, religious, ethnic/national origin, or sexual orientation group, is a member of an advocacy group supporting the precepts of the victim group.

Guidelines, supra note 27, at 2–3.
31 CALIFORNIA ATTORNEY GENERAL'S COMM’N ON RACIAL, ETHNIC, RELIGIOUS, AND MINORITY VIOLENCE FINAL REPORT, supra note 11, at 4.
A. Violence Against Women Is Pervasive

The different treatment of crimes that are based on race and those based on gender cannot be the result of the infrequency of violence against women. Congress has recognized that women suffer an estimated two million rapes and four million beatings at the hands of men each year. In fact, violent attack is the number one threat to the health of American women, and the rate of attack is rising.

Violence aimed at women is devastating to its victims. The effects of rape, for example, are severe and long-lasting. Physical injury is common, and psychological effects include nightmares, inability to concentrate, fear and anxiety, self-blame, depression, impaired relationships and sexual dysfunction. One study revealed that nearly half of rape survivors have contemplated suicide. The victim of rape suffers these harms whether she knew her assailant or not. In fact, women who know

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33 The Increase of Rape in America, supra note 1, at 28. This figure takes into account significant under-reporting.

34 Hearings, Part II, supra note 1, at 111.


37 Rape-induced trauma is recognized as a precipitate of post-traumatic stress disorder, a diagnostic category included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders 236–38 (3d ed. 1980). For a review of the literature discussing the psychological after-effects of rape, see Martha R. Holmes & Janet S. St. Lawrence, Treatment of Rape-Induced Trauma: Proposed Behavioral Conceptualization and Review of the Literature, 3 Clinical Psychol. Rev. 417 (1983).


39 See Christine Gidycz & Mary P. Koss, The Effects of Acquaintance Rape on the Female Victim, in Acquaintance Rape: The Hidden Crime, supra note 38, at 270; Holmes & St. Lawrence, supra note 37, at 418.

40 Gidycz & Koss, supra note 39, at 275.

41 A comparison of women identified by the [Koss study] found that those raped by men they knew reported the same levels of psychological impact as those raped by strangers. The two groups also scored the same in the clarity with which they communicated their nonconsent, the degree of resistance they offered, and their feelings of anger and depression during the assault. In both groups, the effects of
their assailants may also experience intense feelings of betrayal and heightened self-blame. A number of experts have noted the similarity between the effect of racist violence and rape.

### B. The Violence Is Because of Gender

Perhaps women are excluded from the HCSA because Congress believes that many or most acts of violence committed against women are not motivated by prejudice against or hatred of women. Certainly, women can and sometimes do experience acts of violence which are not gender-based, such as random muggings or shootings. Statistics on female victims of violent crime, however, exhibit a consistent and unusual pattern that suggests that women are targeted for sexual violence based on their gender. Rape, for example, is overwhelmingly a crime of one gender against the other. Ninety-seven percent of all sex crime victims are women, and even when the victims are male, the act is profoundly gendered. In this context, the sexual violence suffered by women at the

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rare were profound, reflecting feelings of diminished self-worth, heightened fear and anxiety as well as depressed expectations for the future.


42 CATHARINE A. MACKINNON, FEMINISM, MARXISM, METHOD AND THE STATE: TOWARD FEMINIST JURISPRUDENCE, IN FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 188 (KATHARINE T. BARTLETT & ROSEANNE KENNEDY, EDs., 1991) [HEREINAFTER TOWARD FEMINIST JURISPRUDENCE].

43 For an earlier version of the HCSA, the National Organization for Women testified:

The impact of ethnicviolence is traumatic and long-lasting. Victims experience fear and isolation, never knowing what future act awaits them. Their sense of personal violation is similar to that of the rape victim. They lose sleep. They fear for their lives and those of their children. Some change jobs. Some victims move away from communities, looking for a safe place. They cannot live in peace.


47 See MacKinnon, Toward Feminist Jurisprudence, supra note 42, at 190:

"Rape is a man's act, whether it is male or a female man and whether it is man relatively permanently or relatively temporarily; and being raped is a woman's
hands of men is more than isolated instances of crime. Women are targeted for certain types of violence, like rape, mainly “because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.”

The HCSA does not count rape as a gender-based hate crime because “gender” or “sex” were never considered as possible categories. Forcible rape does, however, appear on the list of hate crimes. This leads to a curious result: under the HCSA, sexual violence against women is counted as a hate crime only if the woman can claim that she was raped because of her race, ethnicity, sexual orientation or religion. One major indicator of prejudicial motivation under the HCSA is that the offender and the victim were of different racial, religious, ethnic or sexual orientation groups. The vast majority of rapes, however, are intraracial. Therefore, despite the inclusion of rape as a possible bias crime, the current structure of the HCSA renders nearly all rape invisible as a bias crime.

Given the history of substantive gender inequality in every major institution of our society, it seems unlikely that gender is not covered under the HCSA because gender bias is not a serious or pervasive historical problem. One of the ways that cultural institutions have maintained their domination over women is through the use and threat of rape. Feminist theorists have defined gender-based violence as the quintessential example of sex discrimination and sexual oppression. Rape is

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experience, whether it is a female or male woman and whether it is a woman relatively permanently or relatively temporarily.”

_Id._ at 334 (quoting Carolyn M. Shafer & Marilyn Frye, _Rape and Respect, in Feminism and Philosophy_ (Mary Vetterling-Braggin et al. eds., 1977).

48 MacKinnon, _Reflections on Sex Equality Under Law_, supra note 45, at 1301. In fact, some studies of convicted rapists indicate that women are chosen because they belong to the class “women”:

[Women are seen as] collectively liable for the rapists’ problems. . . . In other cases, victims were thought to represent all women, and rape was used to punish, humiliate, and “put them in their place.” In both cases, women were seen as a class, a category, not as individuals.


49 It is, of course, possible that the HCSA could count gender as a protected category and not see rape as a form of gender-based violence. See discussion infra notes 57–84.

50 See _Guidelines_, supra note 27, at 2–3.

51 _Menachem Amir, Patterns in Forcible Rape_ 44 (1971) (finding that 93% of rapes are intraracial). A recent study for the Department of Justice shows that in rapes with one offender, seven out of every ten white victims were raped by a white offender, and eight of every ten Black victims were raped by a Black offender. See C. Harlow, _Female Victims of Violent Crime_ 10 (1991).
not a private, random act: it is a political act, a ritual violation enacted against women as women to enforce existing gender relations.\textsuperscript{52}

Sexual violation symbolizes and actualizes women’s subordinate social status to men. It is both an indication and a practice of inequality between the sexes . . . [A]vailability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth.\textsuperscript{53}

MacKinnon analogizes the systemic function of sexual assault to that of lynching (prior to its recognition as a civil rights violation):

[Rape] is a violent, humiliating ritual with sexual elements in which the victims are often murdered. It could be done to members of powerful groups but hardly ever is. When it is done, it is as if it is what the victim is for; the whole target population cringes, withdraws, at once identifies and disidentifies in terror. The exemplary horror keeps the group smaller, quieter, more ingratiating.\textsuperscript{54}

Gender-based violence and female fear of such violence are effective tools. They affect everyday lives, imperil jobs, infect the workplace, and ruin leisure time and educational opportunities.\textsuperscript{55}

Despite the striking parallels in victim harm and social meaning between gender-based violence and those hate crimes recognized by the HCSA, there is tremendous resistance to recognizing violence against women as hate crime. It is said that violence against women is different from violence directed at a particular racial, ethnic or religious group because it is personal. Somehow, the relationship between attacker and


\textsuperscript{53}MacKinnon, Reflections on Sex Equality Under Law, supra note 45, at 1302.

\textsuperscript{54}Id. at 1303.


[O]ne recent study showed that three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50% do not use public transit alone after dark for the same reason. Women accommodate their fears by restricting their behavior. Due in large part to the fear of rape, a woman is eight times more likely than a man to avoid walking in her own neighborhood after dark.

\textit{Id.} at 38–39 (citations omitted).
victim obscures the presence of gender bias. For example, the Anti-Defamation League of B’nai B’rith argued against inclusion of gender in the HCSA, stating that:

[A] substantial majority of women victims of violent crimes were previously acquainted with their attackers. While a hate crime against a black sends a message to all blacks, that same logic does not follow in many sexual assaults. Victims are not necessarily interchangeable in the same way; in cases of marital rape or date rape for example, the relationship between individual perpetrators and victim is the salient fact, whether the defendant is a woman-hater in general is irrelevant.56

The argument is deceptively simple. “Real” hate crime only happens between strangers. American women are more likely to be assaulted and injured, raped or killed by a man whom they know than by any other type of assailant.57 Therefore, these women are not the victims of hate crime. The argument is also familiar. “Real” rape only happens between strangers. A substantial number of women who experience forced sex experience it at the hands of men they know. Therefore, these women are not the victims of rape.

The argument, however, only applies to women. No one applies these tests to violence against members of other groups. Burning a cross in the neighbor’s yard, desecrating a classmate’s place of worship or harassing a co-worker with racial taunts are all understood as hate crimes despite the relationship between the offender and the victim. In fact, the previous relationship makes the crime more heinous because the sense of connection and shared community implied in social familiarity is viciously shattered.

The relationship between assailant and victim strongly influences the social understanding of all forms of violence against women, especially rape. The social history of acquaintance rape and the attitudes that surround it illustrate how deeply ingrained beliefs about gender and sexuality operate to justify treating violence against women differently from violence against other groups.

C. Acquaintance Rape and the Enforcement of Gender Roles

He started kissing her and taking off her clothes. She was crying and telling him to stop. She was scared and thought he was going to hurt

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her. He put his hand over her face and repeatedly forced his penis inside her.58

There was a party on the dorm floor that night. He approached her and offered her a drink. She found him attractive. Later, he asked her back to his room. She agreed, thinking there would be other people there. When she got to his room and saw nobody was there, she didn’t think she could do anything about it. He started kissing her and taking off her clothes. She was crying and telling him to stop. She remembers thinking, “I was scared of him and thought he was going to hurt me . . . I was five foot two and weighed 110 pounds. I had no choice.” He put his hand over her face and repeatedly forced his penis inside her.59

Both of the above scenarios fit the legal definition of rape: sexual intercourse accomplished by means of force and without consent.60 In both cases, the woman told the man to stop, and he proceeded to physically overpower her and forcibly penetrate her. Both are devastating violations of the woman’s body; both will inflict physical and psychological harms.61 In both cases, the recovery process may take years;62 however, many people would probably characterize the first scenario as rape, but not the second.

In the second scenario, the victim knew her attacker. She was a victim of what is commonly called acquaintance rape.63 Although studies documenting sexual aggression between dating couples appeared in the scholarly literature in 1957,64 the first national study of acquaintance rape was not conducted until the mid-1980s. The study, initiated by Mary Koss, Ph.D., in conjunction with the National Institute for Mental Health, revealed that one in four women surveyed was a victim of rape or attempted rape, and that eighty-four percent of those raped knew their attacker.65 The Koss study is the most widely cited study of acquaintance rape prevalence, and its shocking findings have been confirmed by subsequent studies.66

58 See Warshaw, supra note 41, at 30 (Rachel’s story).
59 See id.
61 See supra notes 38–44 and accompanying text.
62 See Katz, supra note 38, at 272.
63 Although the terms “date rape” and “acquaintance rape” are often used interchangeably, I use the term “acquaintance rape” because it is more inclusive.
64 See Eugene J. Kanin, Male Aggression in Dating-Courtship Relations, 63 Am. J. Sociology 197 (1957) (concluding in a study that approximately 18% of women surveyed had suffered attempted or completed forced sexual intercourse while on a high school date).
65 See Warshaw, supra note 41, at 11.
66 See id. at 13–14 (summarizing similar results from various studies).
The Koss study elicited immediate criticism from those who insist that non-consensual sex between acquaintances does not constitute “real rape.” In the words of one commentator, “comparing real rape to date rape is like comparing cancer to the common cold.” Understanding this curious distinction begins with defining “real rape.” The classic “real rape” is a rape by a stranger with a weapon, perpetrated at night, outside (a dark alley?), with a lot of violence, and with vigorous resistance by the victim, resulting in severe injury and other signs of struggle. After the assault, the hysterical, battered victim rushes to the emergency room and immediately reports the crime to the police. Like all rape myths, the “real rape” scenario thrives despite its failure to reflect reality.

Although acquaintance rape fails to conform to the “real rape” scenario in several respects, the most significant distinction is reflected in the name itself—the victim knows her attacker. While a previous relationship between offender and victim is sometimes salient in other crimes, it dominates the social understanding of rape. Why? Because rape involves sexual intercourse, and evaluation of any sexual interaction between men and women involves “treading on the explosive ground of sex roles, of male aggression and female passivity, of our understanding of sexuality.”

The most obvious way in which hierarchical gender roles inform the legal and social definitions of rape is through a concept of consent which defines women as presumptively available for sexual use by men. Consent is crucial to the definition of rape because the physical act at the heart of rape, sexual intercourse, is not criminal when the woman consents. Unfortunately, the structure of rape law has created a presumption of consent that is very difficult to overcome. The “real rape” scenario succeeds in overcoming the presumption of consent because every element repudiates the plausibility of consent, and there is a lot of physical evidence of resistance. This is why the term “forced rape” is so precise and why the concept of “consent” so important.

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68 Like all rape myths, the power of the classic rape scenario is undiminished by objective proof of falsity: Except for “at night,” every element of this scenario is absent in the majority of rapes in this country. See Martha R. Burt, Rape Myths and Acquaintance Rape, in ACQUAINTANCE RAPE: THE HIDDEN CRIME, supra note 38, at 27.

69 Acquaintance rapes usually occur in a home, often without the use of a weapon, and result in few visible injuries. See Laura Bechofer & Andrea Parrot, What Is Acquaintance Rape? in ACQUAINTANCE RAPE: THE HIDDEN CRIME, supra note 38, at 10–11.

70 Susan Estrich, Rape, 95 YALE L.J. 1087, 1090 (1986).

71 For instance, prosecutors in rape trials are often required to prove affirmative nonconsent (the victim said “no”) instead of a lack of affirmative consent (the victim did not say “yes”). See Lani A. Remick, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. PENN. L. REV. 1103, 1110 (1993). As Remick has noted, “only under the law of rape, therefore, the person whose rights may potentially be violated is burdened with the obligation of conveying her nonconsent affirmatively.” Id. at 1112.
evidence of force and struggle. Acquaintance rape, however, lacks the traditional connotations of consent. Many acquaintance rapes occur in a social context in which consensual sexual behavior is seen as a possibility, and the determination of whether a rape occurred comes down to the victim’s word against that of the defendant.

Shaped by a history of sexual subordination, beliefs about gender and sexuality make it extremely difficult for victims of acquaintance rape to establish that a rape occurred. For example, the word of the woman is rarely sufficient because women are thought to “cry rape” after engaging in consensual intercourse because they feel guilty, ashamed or spurned.\footnote{See Susan Estrich, \textit{Real Rape} 5 (1987).} Perhaps the first official judicial recognition of this mythical moral flaw in women is Matthew Hale’s oft-quoted statement that rape charges are “easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.”\footnote{Sir Matthew Hale, \textit{The History of the Pleas of the Crown}, I, LVIII 635 (R.H. Small ed., 1847).} Despite estimates that only two percent of all rape reports prove to be false,\footnote{See Morrison Torrey, \textit{When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions}, 24 U.C. Davis L. Rev. 1013, 1028 (1991). For a discussion of the literature refuting the myth of false claims, see \textit{id}. at 1027–31.} this statement of deep distrust of female rape victims is still being cited as legal authority.\footnote{See \textit{id}. at 1027.} On a practical level, the myth of false reports means that the victim of acquaintance rape must present corroborative evidence of her affirmative nonconsent; otherwise, the rape looks like a later-regretted seduction, a miscommunication or an end-of-the-night misunderstanding.

Of course, this evidence is judged by a male standard, which looks a lot like the reasonable rapist standard.\footnote{See MacKinnon, \textit{Toward Feminist Jurisprudence}, \textit{supra} note 42, at 192.} In other words, brutal, forced sex by men is often deemed to be legal behavior. Catharine MacKinnon has noted that “the law adjudicates the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior.”\footnote{\textit{id}. at 189.} This level is shockingly high.\footnote{See Warshaw, \textit{supra} note 41, at 40–41; Torrey, \textit{supra} note 74, at 1020–22 (summary of studies); Jacqueline W. White & John H. Humphrey, \textit{Young People’s Attitudes Toward Acquaintance Rape, in \textit{Acquaintance Rape: The Hidden Crime}}, \textit{supra} note 38, at 44–49.} Use of a weapon and infliction of significant physical injury are certainly no guarantee of conviction. A South Carolina jury recently acquitted a man after seeing a videotape of him breaking into his estranged ex-wife’s house, tying her to the bed, duct-taping her eyes and mouth, beating her and raping her at knifepoint.\footnote{See Linda Goldstone, \textit{California Moves to Strengthen Law for Prosecuting Spouse Rape}, \textit{Houston Chron.}, Aug. 2, 1991, at A13.}
A hierarchical system of gender roles also hinders victims of acquaintance rape by imposing interpretations on the victim’s behavior without reference to the victim’s actual state of mind. Consent can be inferred from unrelated behaviors that take place long before the attack, and that consent cannot be revoked later. The most common example is the victim’s choice of dress. In 1989, a young Florida woman was abducted from a restaurant parking lot and repeatedly raped at knifepoint. The jury quickly acquitted her attacker, evidently finding consent implicit in her clothing—“[s]he was obviously dressed for a good time”; “[w]e felt she asked for it”; “[t]he way she was dressed with that skirt you could see everything she had; [s]he was advertising for sex.” According to this standard, a woman’s choice of clothing is critical, as it may signify her consent to assault with a deadly weapon, kidnapping and rape at the hands of any man who sees her during the course of the day. Similarly, women should be careful when they invite a man on a date, allow him to pay for a date, agree to go to his apartment or drink alcohol in his presence. All of these behaviors are seen to imply consent and any later attempt to refuse sex could be seen as an unfair attempt to withdraw consent.

Consent can also be inferred from common victim reactions during and after the attack. Victims should take care to act as good victims should: they should not allow their fear and shock to paralyze them. Nor should they try to protect themselves by begging the rapist to use a condom, or wait to subject themselves to examinations by doctors and police officers that they may find painful and humiliating, and they should never, never retain their composure in court.

These interpretations confine women to a narrow social role, that of the good girl (or victim). Rape and rape myths patrol the borders of gender roles by exposing nonconforming women to unchecked sexual violence. Rape and the fear of rape help to subordinate women as a group. It is precisely this effect of rape that justifies its treatment as a hate crime.

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83 See Warsaw, supra note 41, at 42–43.
84 See Estrich, supra note 70, at 1094–1101 (discussing the history of the requirement of victim resistance in rape law).
85 See Condom Protected Rapist; Grand Jury Won’t Indict, Nat’l. L.J., Oct. 26, 1992, 3 (reporting that a grand jury in Austin, Texas, had refused to indict an accused rapist because his victim had begged him to wear a condom. A later grand jury did indict the assailant, who was convicted. See Sandra Sanchez, Condom Rape Suspect Is Indicted, USA TODAY, Oct. 28, 1992, at A4.
86 See Estrich, supra note 70, at 1139; Torrey, supra note 74, at 1041–45.
87 See Blaming the Victim of Rape, St. Petersburg Times, Oct. 7, 1989, at 14A (One of the acquitting juror explained: “When the [victim] testified, she didn’t appear to be shaken up . . . . Basically, we didn’t believe her.”).
While this violence against women serves to subordinate women as other forms of hate crimes subordinate their victims, violence against women is not treated similarly to these other hate crimes. As W.H. Hallock points out in *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, victims of racially motivated violence are not blamed for the violence against them. For instance, as a society we have determined that walking through a white neighborhood is insufficient provocation for beating a black person. “Perhaps 50 years ago, the same crime would have been viewed differently by whites because the victim violated what many considered well-established societal rules.” The parallel to violence against women is obvious:

A rapist claiming he was provoked by a woman’s attire or motivated by sexual desire is as ridiculous as a white person claiming he was provoked or motivated to lynch a black man not because of racial bias, but because the victim looked at him the wrong way or because the offender had a particularly frustrating day and needed to vent his frustrations.

The treatment of acquaintance rape illustrates, however, that women are still seen as provoking and deserving violence when they break well-established societal rules about gender.

Rape, assault or murder at the hands of an acquaintance, friend or lover may not look like the Montreal shooting or the Howard Beach assault, but these acts of violence do share important characteristics. They therefore merit similar treatment under the HCSA.

The harm to the victim is certainly of a similar magnitude. In fact, the relationship between the assailant and victim may convey an especially disturbing message. Because rape by a known assailant often occurs in a context otherwise associated with safety and privacy, the victim may experience an intense sense of betrayal: “Women feel as much, if not more, traumatized by being raped by someone we have known and trusted, someone we have shared at least an illusion of mutuality with, than by some stranger.” Victims of all types of sexual assault experience an overwhelming sense of vulnerability; however, for a woman who has been assaulted by someone she knows, this breakdown of feelings of safety and security can be particularly acute. Although

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87 *Id.*
88 *Id.* at 608 n.201.
89 See Katz, *supra* note 38, at 259.
90 See *id.*
91 MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 42, at 188.
92 See Gidycz & Koss, *supra* note 39, at 278.
the relationship between the assailant and victim is a significant feature of violence against women, it does not make the violence merely "personal," nor does it diminish the intensity of victim and community harm that Congress sought to ameliorate through the HCSA.

Like the "hate crimes" Congress attempted to reach under the HCSA, rape and other acts of violence against women are pervasive and have created a climate of terror that helps maintain the inequality and disadvantaged status of all women. Violence against women is not merely an individual crime of personal injury, but is a form of discrimination. It is therefore an assault on a publicly shared ideal of equality. Any attempt to deal with violent forms of oppression that fails to include violence against women is incomplete and hypocritical: "Until women as a class have the same protection offered others who are the object of irrational, hate-motivated abuse and assault, we as a society should feel humiliated and ashamed."  

D. Federal Response: The Violence Against Women Act

In recognition of the need to address violent discrimination against women, Congress proposed the Violence Against Women Act of 1993 (the "VAWA"). The VAWA is designed to fill in the holes in existing anti-discrimination legislation by providing a cause of action specifically designed to address the types of violence most often suffered by women—acts of violence by a private, known assailant. It differs from analogous federal statutes that have traditionally been invoked against racially motivated violence in two significant ways. First, it provides

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93 See Hearings, Part I, supra note 36, at 57 ("[E]ven women who have not themselves been victims pay a high price for being female. They must routinely take precautions to protect themselves from the omnipresent threat of sex-based violence.") (testimony of Helen R. Neuborne, NOW Legal Defense and Education Fund; VAWA of 1991, supra note 35, at 38 (citing recent studies that estimate that the "fear of rape is central to the day-to-day concerns of about a third of women").

94 See MacKinnon, Toward Feminist Jurisprudence supra note 42, at 1302.

95 VAWA of 1991, supra note 35, at 43.

relief against violent gender-motivated assaults carried out by private individuals and not just private conspiracies or action by government officials.\textsuperscript{97} Second, the VAWA creates a right rather than enforcing existing ones: Title III of the VAWA creates a right for all persons within the United States to be free from violence "motivated by gender"\textsuperscript{98} and provides a cause of action for violation of that right.\textsuperscript{99} Thus, it explicitly recognizes that violence motivated by gender is "violently expressed prejudice."\textsuperscript{100}

The VAWA is important legislation because, unlike the HCSA, it recognizes the discriminatory purpose and effects of gender-based violence against women. Yet although the drafters of the VAWA did recognize the prejudicial nature of gender-based violence, the VAWA unfortunately still suffers from a more subtle version of the confused thinking about violence against women that is inherent in the HCSA. That is, although rape does appear on the HCSA's list of crimes, it only counts as a hate crime under the HCSA if the victim falls into one of the enumerated categories—race, ethnicity, sexual orientation or religion; similarly, the VAWA defines only a subsection of rape and other forms

\textsuperscript{97}See S. 11, 103d Cong., 1st Sess. § 301(c) (1993).

\textsuperscript{98}Id. § 301(b).

\textsuperscript{99}A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits any crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

\textsuperscript{100}VAWA of 1991, supra note 36, at 42:

While this society has announced, and upheld, a national commitment against violent discrimination for 120 years, that commitment has never adequately protected victims of gender-motivated violence. It is the fundamental purpose of Title III of the Violence Against Women Act to correct that imbalance by providing these victims with an effective anti-discrimination remedy for violently expressed prejudice.
of violence against women as hate crimes. Specifically, Title III would cover only those acts which the woman could prove by a preponderance of the evidence were motivated by gender.\textsuperscript{101} While W.H. Hallock persuasively argues that this would still cover nearly all rapes,\textsuperscript{102} this argument misses the point. The structure of the VAWA sends the message that while some rapes and other acts of violence against women are motivated by hatred of women, some are motivated by something else, something personal.

III. SIGNIFICANCE OF INCLUSION OF “GENDER” IN THE HCSA

A. Improved Statistics

Prior to the passage of the HCSA, there was no comprehensive federal mechanism for determining the scope of crimes motivated by prejudice on the basis of factors such as race, ethnicity, sexual orientation and religion.\textsuperscript{103} In passing the HCSA, Congress recognized that accurate, authoritative numbers are important. The data collected pursuant to the HCSA is expected to aid in preventing and solving crimes,\textsuperscript{104} to facilitate the sharing of information among law enforcement agencies and to guide resource allocation.\textsuperscript{105} The HCSA data collection guidelines also require police training, internal department review of hate crime cases and the

\begin{footnotesize}
\textsuperscript{101} See id. at 49.
\textsuperscript{102} W.H. Hallock examines several examples of violence against women, including mugging, stranger rape, date rape and domestic violence, using the 14 bias factors enumerated by the FBI. She concludes that all would probably be actionable under Title III of the VAWA. See Hallock, supra note 86 at 602–12.
\textsuperscript{103} The U.S. Dep’t of Justice does keep records of violent crimes divided by factors such as race, ethnicity and gender. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1990 (1992). These statistics were considered inadequate because they did not reflect what proportion of these crimes were bias-motivated. For instance, in support of an earlier version of the HCSA, H.R. 2455, Rep. Edwards stated:

There are at present no comprehensive, accurate, and up-to-date statistics kept on the national incidence of crimes motivated by racial, ethnic, or religious hatred. We know that these crimes occur, but we do not know the actual extent of hate crimes, what trends there may be in those crimes, what communities may be particularly prone to have such crimes occur, and what law enforcement techniques may be effective in solving and preventing such crimes.

\textsuperscript{106} For example, resources could be used to create special bias crime investigative units such as those in New York City, San Francisco and Boston. See 134 CONG. REC. H3373, H3374 (daily ed. May 18, 1988) (statement of Rep. Conyers).
\end{footnotesize}
appointment of bias crime investigative personnel. These systems and procedures supplement the data collection to provide a broader and more effective tool against hate crime than the mere counting of crimes would suggest.

For these same reasons, a comprehensive federal mechanism for determining the scope of crimes motivated by prejudice on the basis of gender should be established. This is especially true because the statistical data currently collected on violence against women, and especially rape, have been criticized as a gross underestimate of the frequency of such violence. In addition to focusing more consistent attention on gender-based violence, inclusion of gender in the HCSA could help remedy one of the most serious obstacles to data collection in this area—underreporting. Rape remains the most underreported of all crimes, with only seven percent of victims reporting their assaults. Fear that the police will be inefficient, ineffective or insensitive is a major reason why rape survivors do not report the crime. Requiring the collection and reporting of gender-motivated crimes could help to improve the law enforcement community’s response to violence against women and to repair women’s trust in law enforcement.

B. The Power of Naming

Definitions are important because they describe the essential characteristics of a phenomenon and mark its boundaries. As Joseph Gusfield explains in his study of the social construction of drunk driving as a public issue:

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106 See Bringing Hate Crime into Focus, supra note 16, at 282.
107 "The overriding goal of the legislative coalition always was to shape and improve law enforcement's response to hate crime, as the members believed passage of the Act could lead to more competent and sensitive handling of hate crimes." Id. at 282 n.112 (quoting telephone interview with Kevin Berrill, Director, Anti-Violence Project, National Gay and Lesbian Task Force, Oct. 30, 1990).
109 See The Increase of Rape in America, supra note 1, at 7. Comparable reporting rates for other crimes are: burglary—53%, robbery—53%, and assault—46%. See id.
110 See Caroline W. Harlow, U.S. Dept. of Justice, Female Victims of Violent Crime 9 (1991). Other factors include consideration of rape as a private matter, and fear of reprisal by the offender, his family or friends. See id.
Human problems do not spring up, full-blown and announced, into the consciousness of bystanders. Even to recognize a situation as painful requires a system for categorizing and defining events. All situations that are experienced by people as painful do not become matters of public activity and targets for public action. Neither are they given the same meaning at all times and by all people . . . . Those committed to one or another solution to a public problem see its genesis in the necessary consequence of events and processes; those in opposition often point to "agitators" who impose one or another definition of reality.\textsuperscript{112}

The furor over acquaintance rape statistics starkly illustrates Gusfield's point. Shortly after the results of the Koss study on acquaintance rape appeared in the national press, Neil Gilbert, a professor of sociology at the University of California at Berkeley, challenged the results claiming that the numbers were grossly inflated.\textsuperscript{113} He argued that because the authors of the Koss study and other similar studies had inaccurately labeled many sexual encounters as rape, they had documented a much higher number of rapes than the number in Uniform Crime Reporting statistics, and "considerably higher than the average person might ever imagine."\textsuperscript{114} Gilbert called the results "advocacy numbers" and posited that the inflated numbers were a creation of "a small contingent of radical feminists many of whom were victims or close to victims,"\textsuperscript{115} who are "notably uneasy about physical intimacy between the sexes."\textsuperscript{116} He lamented this attempt to impose new norms governing intimacy on the sexes: "Under these definitions of rape and sexual coercion, the kaleidoscope of intimate discourse—passion, emotional turmoil, entreaties, flirtation, provocation, demureness—must give way to cool-headed contractual sex."\textsuperscript{117} After his article was published, a firestorm of protest erupted.\textsuperscript{118}

This reaction suggests that what is at stake in the battle over acquaintance rape is one of the most important privileges of men in a gender-stratified society: the power to name. Men have controlled the definition of rape throughout history, and this control still continues to work to

\textsuperscript{113} Neil Gilbert, The Phantom Epidemic of Sexual Assault, 103 PUB. INTEREST 54 (1991).
\textsuperscript{114} Playing The Numbers, L.A. TIMES, Mar. 29, 1992, at 103.
\textsuperscript{115} Kathleen Hendrix, Defining Controversy: Professor Raises Furor by Claiming Date Rape Statistics Are Inflated, L.A. TIMES, July 9, 1991, at E1.
\textsuperscript{116} Gilbert, supra note 113, at 61.
\textsuperscript{117} id. at 60.
\textsuperscript{118} Students formed Students Organized Against Rape, which protested in Sprout Plaza on the University of California at Berkeley Campus. See Hendrix, supra note 115 at E1.
their benefit: “By reserving the term ‘rape’ to define the most extreme, yet least common incidents of forced sex, men have ensured they will not be held legally or morally responsible for a broad range of sexually violent behavior.”

Just as it is important to “document that cross burnings are more than ‘arson’ and that swastikas painted on synagogues are more than ‘vandalism,’” it is important to recognize gender-motivated violence for what it is: a violent form of gender oppression. Violence against women has been difficult to see as gender-based because it is so pervasive that “It appears to many to be an inescapable aspect of life in a complex society.” Recognizing gender-based violence, and especially rape, as a form of violent gender oppression could make the violence visible by giving it a different name, by forcing people to look at it in a new way. In the words of one commentator, “counting hate crimes against [women] would reveal that half of the population is, as a class, at serious risk of a hate crime.” Advocates of the VAWA recognize this; they hope that the legislation, like prior civil rights legislation, will raise public awareness of the problem and will change the nation’s attitude toward discriminatory violence against women.

While it is impossible to predict exactly what effect heightened governmental and public recognition would have, it would most likely be positive. It might empower victims. It might make the violence in “violence against women” visible in a culture that normalizes and eroticizes sexual force. It might make the women in violence against women visible where they have been obscured. It might also help combat the widely held myths and stereotypes surrounding violence against women.

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121 Women have been subject to gender-based violence for so long and on such a scale in our society that we have difficulty perceiving the enormity of its impact. Worse, because gender-based violence has been part of our society for so long, it appears to many to be a [sic] inescapable aspect of life in a complex society.

Victims of the System, supra note 108, at 92 (statement of Burt Neuborne, Professor of Law at New York University and former National Legal Director of the American Civil Liberties Union).
122 Although beyond the scope of this Recent Development, it has been persuasively argued that domestic violence is similarly gender-based. See generally Hallock, supra note 86.
123 Ann Pellegrini, Rape is a Bias Crime, N.Y. TIMES, May 27, 1990, at 13.
124 See Hearing, Part I, supra note 36, at 70 (statement of NOW Legal Defense and Education Fund).
126 See MacKinnon, Toward Feminist Jurisprudence, supra note 42, at 1302.
127 See infra notes 131–139 and accompanying text.
and allow us all to see that violence against women is often motivated by gender and not by the victim’s appearance or behavior. It might help to repair the trust in law enforcement officials eroded by the perception that this kind of violence is ignored or undeterred by the law. If, as it has been argued, the framework of society dictates the perception of an offense, it might change the way we perceive violent crimes against women and ultimately reshape the motivations underlying the act.

IV. RECOGNIZING INTERSECTION AND INTERACTION

Before the inclusion of women could fully produce these beneficial effects, the HCSA would have to recognize the intersection and interaction of the categories enumerated therein. Current reporting techniques do not recognize that victims of hate crime may fall into more than one category under the HCSA. The Hate Crime Incident Report form created by the FBI has several options under “bias motivation” and instructs the reporting officer to check only one box. This means that if a gay, Latino man is attacked, it is reported as a crime motivated by prejudice against him as a homosexual man or as a Latino, but not both. Similarly, if gender were added as a category and an Arab American woman were raped, it would be reported as a crime motivated by prejudice against her as an Arab American or as a woman, but not as an Arab American woman.

A reporting technique that treats race, religion, sexual orientation and ethnicity (and, if amended, gender) as mutually exclusive leads to an artificial and incomplete view of the victim and of the crime. The Hate Crime Incident Report itself requires that the victim’s identity be severed

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128 See Torrey, supra note 74, at 1021-22; Lisa Heinzerling, So Rape Isn’t Hatred?, L.A. TIMES, May 4, 1990, at B7:

We are not, it is true, accustomed to thinking of crimes against women in the same way that we think of racial or ethnic violence. We tend, instead, to treat brutalizing acts against women either as isolated cases—that is, as events brought about by some specific characteristic or conduct of the victim—or, in rare cases, as manifestations of racial or ethnic hatred.

Id.


130 See Williams, supra note 17, at 129-30 n.7.

131 See McAdams, supra note 20, at 83 n.306 (“Separate treatment of hate crimes may facilitate the reshaping of the underlying malicious preferences, either by direct symbolism of the additional gravity of such offenses or the indirect symbolism achieved by more severe punishment.”)

132 See GUIDELINES, supra note 27, at app.
into discrete, mutually exclusive categories. Legal theorists such as Angela Harris and Kimberlé Crenshaw have argued that such forcible fragmentation of a complex identity is disrespectful and injurious, and has worked to the express disadvantage of women of color. In the words of Audre Lorde:

As a Black lesbian comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self.

Simply adding gender as a category under the HCSA would not solve this problem: insistence that the reporting officer “pluck out” a single bias motivator in every case would still deny the complex identity of women of color, and of all victims who fall into more than one of the included categories.

The failure to recognize intersection and interaction between the various categories of the HCSA severely limits its effectiveness as a tool to understand and eradicate hate crime. In her article Race and Essentialism in Feminist Legal Theory, Angela Harris points out that people are “not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.” The current guidelines of the HCSA, however, envision a single, discrete and identifiable source of prejudice. As Kimberlé Crenshaw illustrates in her discussion of Black women and rape, emphasis on a single source of oppression obscures the real presence of other sources and hinders full understanding:

The singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror. When Black women were raped by white males, they were being raped not as women generally, but as Black women

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135 Harris, supra note 133, at 587.
136 Kimberlé Crenshaw identifies this tendency to look for a single, discrete source of discrimination as a major flaw in most antidiscrimination law. See Crenshaw, supra note 133, at 57.
specifically: Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection.137

Contemporary coverage of the conflict in former Yugoslavia provides another example. Serbian aggression toward Croatsians and Muslims in Bosnia has been repeatedly characterized as "ethnic cleansing," a term which obscures the fact that the Serbian army specifically targets the women of those two ethnic groups for degradation and violence. There have been reports of soldiers routinely committing brutal rapes, including gang rapes and rape-murders,138 and torturing women by mutilating their breasts and genitals.139 The most ominous reports are of a Serbian policy of organized mass rape and forced impregnation, including special detention centers for women of reproductive age known as "rape camps."140

Not surprisingly, the media has emphasized the element of ethnic hatred. In this context, rape is clearly perceived as an expression of that ethnic hatred and therefore appears especially heinous when perpetrated by former neighbors, associates and classmates of the women.141 What we must recognize is that gender prejudice does not cease to exist simply because ethnic prejudice is present. Croatian and Muslim women are not being raped, maimed and murdered simply because they are Croatian or Muslim, or simply because they are women: it is because they are Croatian and Muslim women. Attempts to understand the devastating effects of their victimization, or to prevent similar tragedies in the future, will be futile if we fail to recognize the fusion of these attributes into their identities.

Similarly, the HCSA must recognize the fusion of multiple elements in the identity of victims of hate crimes. A first step is to develop a more sophisticated reporting system which could encompass a wider range of

137 Id. at 68–69.
139 See Drakulic, supra note 138, at 17; Sharon Shahid, Bosnia Rapes: Neither Young Nor Old Spared, USA TODAY, Jan. 13, 1993, at 11A; Testimony, supra note 138, at 30, 32.
140 See Drakulic, supra note 138, at 17; Testimony, supra note 138, at 28.
141 See Helen Maserrati, War Crimes Trials, ATLANTA J. & CONST., Mar. 28, 1993, at A8 (“[In many of the rape cases, the alleged perpetrator was someone known to the victim, perhaps a neighbor or a classmate.”); George Rodrigue, Politics of Rape, DALLAS MORNING NEWS, May 5, 1993, at 1A, 26A (“Uncounted numbers of women simply disappeared. They were abducted by blood-stained paramilitary ‘Tigers,’ or ‘White Eagles,’ or by Serbian boys with whom they had gone to high school, who suddenly wore ski masks and carried assault rifles.”).
categories and possible points of intersection and interaction. This may mean reporting multiple bias categories when present in a single incident or remaining flexible enough to create new categories when necessary. The data would then more accurately reflect potential patterns or variations and would therefore facilitate the development of the most appropriate and effective solutions.

CONCLUSION

The Hate Crimes Statistics Act of 1990 is a significant achievement; it represents "an important step in the right direction, in the direction of developing what we need most—a national consensus that this society will not tolerate this kind of violence and the terror that it spawns."

The failure to include gender as a category, however, both undermines the message and curtails the effectiveness of the HCSA. Violence against women is a violent form of gender oppression and must be recognized as a hate crime. The very act of excluding the victims of such violence may be a symptom of the same social pathology that encourages or tolerates the violence. We must work toward changing the norms that minimize, obscure or ignore violence against women in all of its forms, rather than allowing the HCSA to become another example of those norms. Inclusion of gender, along with structural changes in reporting requirements to recognize the fusion of multiple attributes within the victims’ identities, would move toward that goal.

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142 A Week in the Life of America, supra note 55, at 26.