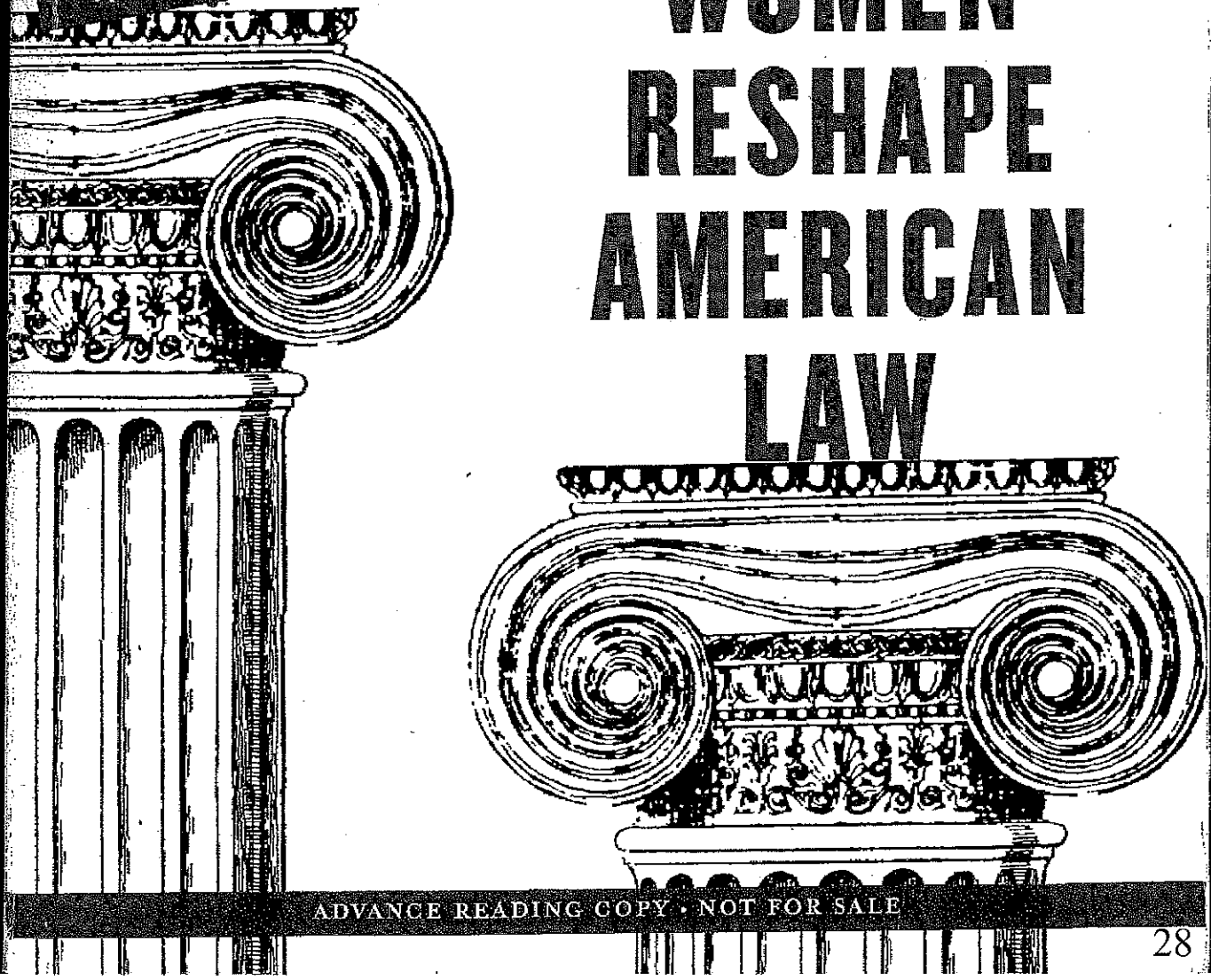
FRED STREBEIGH

EQUAL

WOMEN RESHAPE AMERICAN LAW



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W. W. NORTON & COMPANY
NEW YORK LONDON

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Women Judges to the Rescue

The judge-created reports of judicial gender bias that helped shape the Violence Against Women Act had some power. But by February of 1992, that power seemed far from adequate. Twice already Chief Justice William Rehnquist had attacked VAWA. And even though Senator Biden was ready to fight for VAWA, the bill seemed besieged by judges. Dominoes were falling. Rehnquist's side had won over most identifiable contingents of judges—state chief justices, federal trial judges—and his lobbying at the American Bar Association suggested that he was committed to winning the ABA itself. Victory at the ABA House of Delegates would extend his condemnation of VAWA beyond all the judges in America to, in effect, all the lawyers in America. If Rehnquist could win the ABA, Victoria Nourse and Senator Biden believed, congressional support for VAWA might evaporate.

The one group of judges who might have the power to stop the dominoes was the National Association of Women Judges. Two months earlier, before Rehnquist showed his hand, Sally Goldfarb had sent a memo to a few officers of the NAWJ, at Lynn Hecht Schafran's suggestion, asking for their support. Goldfarb added that even if the NAWJ were unable to endorse VAWA, the judges' willingness to speak publicly about the inadequacy of current state remedies for women victims of sexual assault—as documented by the task force reports—

would provide "much-needed perspective."

In attendance at the same ABA meeting at which Rehnquist attacked VAWA was the almost-ubiquitous Schafran. Conversing with the NAWJ's president, Judge Cara Lee Neville of Minnesota, Schafran asked whether the NAWJ might formally support VAWA—even though support meant opposing the chief justice. Because the NAWJ members would not be gathering again until October, the Board of Directors agreed to consider Schafran's request at its mid-year meeting in March.

Also in March, Nourse got word, which she quickly passed to Goldfarb, that some ABA judges were aiming to convince the entire ABA to oppose the bill. Goldfarb quickly sent out a memo, with emphasis: "*LYNN*, could you please help with this?" Suddenly, the future of VAWA seemed to rest on the women judges of America and Schafran.

As the NAWJ Board of Directors prepared for their annual March meeting, a packet arrived from Schafran asking for the association's endorsement. The packet made clear the strife over the civil rights section. It included Nourse's memo describing the "unexpected controversy" that VAWA "would swamp the federal courts with unimportant 'domestic relations' cases." It included Senator Joseph Biden's challenge that VAWA's critics needed to "consider why they believed acts of domestic violence with an 'interstate' nexus too unimportant to merit federal jurisdiction when current federal law bars 'interstate' theft of a car or a cow."

The packet also included a detailed rebuttal by Goldfarb of claims from both state and federal judges. Goldfarb, like Biden, did not mince words. The resolution of the state chief justices, for example, was both sexist and legally faulty. By suggesting that vengeful wives would file frivolous claims, the chief justices were projecting a "pernicious sexual stereotype." Further, by ignoring the section of the 1871 Civil Rights Act on which VAWA was based, the state chief justices misconstrued civil rights precedent in a manner that amounted to "legal error." Goldfarb's critique flayed Rehnquist as well. In rushing to protect the federal judiciary from any increase in their workload, she alleged, he "misread the proposed legislation and betrayed a tragic insensitivity

to the needs of American women who are victims of assault, rape, and other acts of violence."

WHEN THE NAWJ BOARD OF DIRECTORS convened in March, they met at a point of imminent collision. Hurtling down a track from one direction came many of the nation's judicial groups and all the nation's chief justices including Chief Justice Rehnquist. Hurtling from the opposite direction came VAWA and its idealistic young women lawyers. And between the women and the judges stood the NAWJ.

At the board meeting, debate became spirited. Some judges argued that NAWJ should step aside. One judge reportedly told her colleagues that if they supported VAWA, they would be seen as an adjunct for the National Organization for Women. Another argued that if the NAWJ voted in favor of VAWA, a member might be forced to recuse herself in a VAWA case—to disqualify herself as biased in VAWA's favor. Still others argued that NAWJ should not engage in "lobbying." And no judge seeking to rise within the federal system would gain by opposing Chief Justice Rehnquist.

Other judges insisted that the NAWJ could not step aside. Two judges galvanized the meeting by saying, in different ways, What's the point of having a women judges association if all we do is have social gatherings and can't vote our consciences? They were two leaders of the association, soon to be presidents: Judge Betty Ellerin, who had persuaded Chief Judge Cooke to establish the New York State Task Force on Women in the Courts, and Judge Cindy Lederman of Florida, who more recently, while still working as an attorney in Miami, had helped initiate the Florida Supreme Court Study Commission. Though Lederman had no idea that Florida's task force had played any role in VAWA, she well remembered the process of convincing the state's chief justice to create it. After he insisted there was no gender bias in his state courts, Lederman and her colleagues gathered $10,000 and conducted a pilot study, returning to show the chief justice that yes, indeed, there was.

When she returned with the pilot study, Florida's chief justice told a story against himself that Lederman would recall with a smile long

afterward. Before he had been appointed a supreme court justice, he told the assembled women attorneys, the only thing he had ever judged was the Miss Opa-locka contest.

Soon Florida had a gender-bias task force, and soon Lederman was appointed a judge in the court system of Dade County. To her it was important that the NAWJ, above all, stand up for other women in America and fight against injustice. Responding to the arguments of Lederman and Ellerin, the board voted to present a resolution supporting VAWA to its full membership. The NAWJ would defend VAWA.

BUT WHAT WOULD THE ABA DECIDE? The showdown would come at its August 1992 annual meeting in San Francisco. The growing opposition of America's mostly male judges seemed likely to convince the mostly male house of delegates of the ABA to oppose the civil rights section of VAWA. If so, as Victoria Nourse observed, the message would be clear: if America's lawyers would not defend VAWA, who would? VAWA's civil rights section might face lengthy redrafting or slow withering.

For Nourse, the judges' attack at the ABA came at a bad time. Ever the quick study, Nourse had risen in responsibility on Biden's staff. By mid-1992, she had become the staffer with primary responsibility for coordinating the entire crime bill. She had little time to think of VAWA.

Goldfarb at NOW Legal Defense was Nourse's key ally in refining language for VAWA, which now had 51 cosponsors in the Senate and 182 in the House. Anticipating the showdown at the ABA, she produced detailed responses to the judges' attacks, which had been coordinated within the Judicial Administration Division, the ABA's section concerned with issues surrounding the judiciary. Because the Division's critique of VAWA offered little new, Goldfarb could say little new in response.

The division again raised the specter that VAWA would add costs to the federal courts of $43.5 million. That huge estimate, Goldfarb replied, assumed that every woman who was raped or assaulted would sue her attacker—so long as she knew who he was and he had any

money. The division repeated arguments of the Judicial Conference and the chief justice that VAWA would disrupt state and federal courts by creating the risk that domestic relations cases would be drawn into federal courts. Goldfarb countered that VAWA's language and recent Supreme Court precedent were allied in limiting VAWA's role in cases of "divorce or other domestic relations matters." The division criticized the term "crime of violence" as overbroad, detailing possible discrepancies among different Senate documents. Rather than parse such details, Goldfarb reiterated VAWA's larger goal in a document for distribution at the ABA convention:

> Just as prior civil rights statutes were part of an effective response to pervasive racial violence, Title III is an integral part of the long-overdue national response to violence against women.
>
> Not only are state criminal laws alone an incomplete solution to the problem, the response within the state criminal system itself has sometimes been discriminatory. An important purpose of the post-Civil War era statutes was to provide redress when state court remedies failed to ensure justice to the newly protected class of racial minorities. Similarly, the current climate of discrimination against women has often affected state court systems in such a way as to deprive women of the right to the equal protection of the laws. State gender bias studies have concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men. . . . The post-Civil War era civil rights laws were instrumental in the change in the racial climate of the country. They declared, for the first time, a national commitment against racially motivated violent attacks.

VAWA, Goldfarb insisted, "will play a similarly important role in our national response to gender-based violent attacks." All salvos had been fired. Goldfarb and Nourse were talking civil rights. The chief justice and his allies were talking dollars and logistics.

Not only had Goldfarb, Nourse, and their colleagues said all they

had to say; they had also taken VAWA as far as they could. In this head-on collision with America's mostly male judges, the women leading the push for VAWA seemed likely to lose. On first reading the Judicial Administration Division's resolution and realizing the force of its attack, Schafran informed Goldfarb and others that "we are way behind." Pat Reuss added a concern about its drafters: "Did these people go to law school or the Tailhook convention?" Reuss and Schafran could sense that their younger allies, opposing the mostly male Judicial Administration Division, did not have "equal firepower."

WITH THE YOUNG WOMEN OF VAWA OUTGUNNED, a more established cohort stepped in to save VAWA. Moving from the wings to center stage were two influential women with strong roots in the legal profession: Judge Mary Schroeder and Professor Judith Resnik.

From the United States Court of Appeals for the Ninth Circuit came Judge Schroeder. A judge of open and direct style with the physical presence of a raptor—alert to each movement in a complex conversation or crowded room—Schroeder had the respect of her fellow members of the NAWJ. She also had enough experience with discrimination to have experienced the value of civil rights legislation. After beginning law school at the University of Chicago in 1962, she found that searching for summer jobs produced almost nothing. But after passage of the Civil Rights Act of 1964, she later recalled, federal agencies began "beating a path to the doors of the major law schools looking for women and minorities, of which there were, naturally, almost none. As a result, I had the pick of the best of the government jobs, and I owe my career to the enactment and the enforcement of Title VII." In 1978, President Jimmy Carter moved Schroeder up to the ninth circuit from her position as a state judge on the Arizona Court of Appeals—opening a post to which the governor, Bruce Babbitt, appointed a judge from a lower-level state court, Sandra Day O'Connor.

A federal judge with life tenure, Schroeder had no fear of speaking her mind. She had played no part in the NAWJ board's decision to draft a resolution supporting VAWA, and her only earlier involvement

with the legislation had been to confer briefly with Schafran about some early drafting for what would become a section of the bill that sought congressional funding for studies of gender bias in the federal courts. Schroeder knew the value of federal gender-bias task forces directly, as convener of the ninth circuit's working group in the state of Arizona. But Judge Schroeder had no prior involvement with VAWA's civil rights section, and she had doubts about its language.

From the University of Southern California Law School came Professor Judith Resnik, a specialist in the federal courts and a member of the NAWJ and its Judicial-Academic Network, which brought judges in contact with leading scholars. Prolific in publication and astonishing in energy, Resnik could seem ubiquitous—faxing comments on VAWA to Schafran from Jerusalem, gathering hard-to-find data on the numbers of women judges in America, and occasionally arguing crucial cases herself. Resnik in 1987 had successfully argued a Supreme Court case defending the decision of a local Rotary Club to break the rules of Rotary International by admitting women. Like Judge Schroeder, Professor Resnik had taken a lead in working with the ninth circuit's gender-bias task force, on which she served as one of eight official members. Uniting Schroeder and Resnik, beyond their commitment to federal court studies of gender bias and their membership in the NAWJ, was a shared view of VAWA's civil rights section: it was appropriate for the federal courts to be engaged in litigation that responded to the national problem of violence against women.

Judge Schroeder's work on VAWA began with a phone call from NAWJ's president-elect, Judge Brenda Murray. A self-effacing administrative law judge with the Security and Exchange Commission in Washington, Brenda Murray would say of her stature that her sort of judge lies at the "bottom of the judicial heap." What Brenda Murray suggested, as Judge Schroeder understood her, amounted to a vision of NAWJ's role: the organization was perhaps the only one that could talk to all involved with VAWA. The NAWJ could talk to VAWA's feminist supporters, talk to its legislative drafters, and talk to its judicial opponents. And Murray knew that Schroeder was not just at the top of the judicial heap, with only the Supreme Court above her, but also respected by judges throughout the nation.

Schroeder accepted from Brenda Murray what would become a two-part challenge: First, chair a committee, including NAWJ members who had argued for and those who had argued against supporting VAWA, to create a resolution backing VAWA. Second, become the voice of the NAWJ: negotiate among opposed forces to direct VAWA toward a form that would meet the needs of American women and the American Constitution.

The first challenge could not wait because in August, at the ABA's annual meeting, the Judicial Administration Division would make its final push for condemnation of VAWA's civil rights section. Rushing to be ready, Schroeder's committee agreed on its resolution by the end of July:

> BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF WOMEN JUDGES endorses the provisions of Title I—Safe Streets for Women, Title II—Safe Homes for Women, Title IV—Equal Justice for Women in the Courts Act and Title V—Equal Justice for Women in the Courts Act of the Violence Against Women Act of 1991, S.15 as reported. The National Association of Women Judges supports in principle the provisions of Title III creating a federal remedy for those whose civil rights have been violated by violent attacks motivated by the victim's gender, provided that the provisions of Title III are narrowly tailored to create such a federal form of action in those cases in which a federal forum is both necessary and appropriate.

The committee supported Title III, the civil right remedy, only "in principle." At least one member of Judge Schroeder's committee, Judge Lederman of Florida, had pushed for a resolution to support Title III as written. But other judges hesitated, including Norma Shapiro, a federal district court judge from Philadelphia, whose role was crucial and partly beyond her control. Years before, she had taught one of the early law school courses on women in law, in 1971 at the University of Pennsylvania. Now Judge Shapiro was both a member of the Judicial Administration Division and its official delegate to the ABA House of Delegates. Her position was awkward: as a member of the Judicial

Administration Division, she was well placed to urge alteration of its resolution before submission to the ABA House of Delegates. But once a resolution was submitted, as the Judicial Administration Division's delegate she would be *instructed* to present not her own view but the Judicial Administration Division's to the other assembled delegates of the ABA.

In part to give Judge Shapiro a chance to sway the Judicial Administration Division, the NAWJ committee agreed on a multistep compromise: First, NAWJ's resolution would support Title III not as written but "in principle." Second, Judge Shapiro would work to convert the Judicial Administration Division's condemnation of Title III into similar support in principle—but with insistence that its civil rights remedy be "narrowly tailored." Third, if needed, NAWJ would offer, as an appropriate tailor, the chair of its own VAWA committee: Judge Schroeder, moderate and trusted by all, who would go to work with Joseph Biden's drafters. Judge Schroeder would undertake to show them how to make Title III acceptable to the judges who would review it in court.

IMMEDIATELY BEFORE THE CLIMACTIC MEETING at the ABA came a gathering of federal judges in Idaho—one that would have significant impact on VAWA. In the first week of August in 1992, Schroeder, Resnik, and Schafran were gathering with federal judges from all over the west for the Ninth Circuit Judicial Conference in Sun Valley, made far from idyllic by smoke spreading overhead from summer fires. On August 5, for the first time, a federal court circuit would follow where, beginning with Marilyn Loftus' work in New Jersey, some thirty states had led. Members of the federal judiciary were meeting to discuss a drafted report on gender bias in their courts.

Giving a history of gender-bias task forces, Professor Barbara Babcock of Stanford—who had cowritten the textbook that grew from the first sex discrimination courses at New York University, Georgetown, and Yale—linked the training of women lawyers to the later creation of task forces on gender bias in the courts.

> The task force movement has many links with legal education. On the most basic level, it was not until law schools graduated significant numbers of women that their experiences became, in a sense, statistically significant enough to translate into the findings found in task force reports.

Put another way, until significant numbers of women lawyers appeared before judges, even deep judicial bias against women remained statistically invisible—remained anecdote, not data. And just as the education of women created the need for gender-bias task forces, Babcock added, the task forces were sharpening the way law teachers and law students perceived the influence of gender on the courts and the law.

Following Babcock came Judith Resnik. For months she had labored with the other seven members of the Ninth Circuit Gender Bias Task Force and in consultation with dozens of judges and attorneys associated with the ninth circuit. What they had produced, in the familiar phone-book shape, was an essentially finished analysis of gender bias—albeit labeled "preliminary" to invite commentary. Resnik opened with recollection of advice she received early in her teaching career from a well-meaning colleague. "Be careful," he said,

> Don't teach in any areas associated with women's issues. Don't teach family law; don't teach sex discrimination. Teach the real stuff, the hard stuff: contracts, torts, procedure, property. And be careful—don't be too visible on women's issues.

Working on articles about judges, federalism, and habeas corpus, Resnik had a reputation based on the "hard stuff." But she also was engaged in making clear to the nation's law teachers and judges that, as she told the assembled judges in Sun Valley, "all areas of federal law are connected to and affect 'women'—and, unfortunately, can provide occasions for gender bias."

The Ninth Circuit Task Force found, Resnik told the judges, that women and women's concerns pervaded the federal courts. Despite the fact that federal judges had crafted a "domestic relations" rule that

gave them license to hand many family-related cases to judges in the states, family issues ran through federal courts. Indeed, she argued, legislation before and after the New Deal had created what amounted to "federal laws of the family"—though federal judges thought of them as the federal laws of pension, tax, immigration, welfare, and bankruptcy. In many of these areas, women were involved in half or even a majority of cases.

Yet federal courts resisted considering women as a group. Women had been ignored not just in speeches on the "state of the judiciary" but also, she told the judges of the ninth circuit, in all of the reports since the 1940s of the Administrative Office of the United States Courts. Most evidently, federal courts chose to ignore women and the possibility of bias against women by choosing not to follow their state court brethren in creating gender-bias task forces, which by 1992 had published reports in twenty-one states. About this failure and the attitude that sanctioned such federal failure, Resnik spoke strongly:

> Women are everywhere in the federal courts, but no one—until this study—paid much attention. This silence is a form of gender bias, and the work of the Ninth Circuit begins a process of ending that form of discrimination.

Lest her listeners doubt that the ninth circuit report had found discrimination, Resnik offered examples from the marginalia scribbled on its surveys, some of which sounded "pretty angry" and ranged

> from telling us that this activity was stupid and wasteful ("a complete waste of time and money!"; "a pile of garbage"; "much ado about nothing") to telling us that we were doing something harmful by asking questions about gender. One comment, by a male lawyer, summed up many: "Why the Ninth Circuit should focus on gender bias is beyond me when there are real legitimate problems within the Ninth Circuit which are not being addressed."

Resnik's scholarship amounted to a sustained, multiyear response

to what Chief Justice Rehnquist, in his 1991 report that condemned VAWA, had called the "long-accepted concepts of federalism" with, as he put it, "the federal courts' limited role reserved for issues where important national interests predominate." Resnik presented women's issues as imbedded within the federal courts, though apparently unseen by judges seeking to identify "important national interests."

Discussions of what mattered to the federal courts, including bias against women, linked the launching symposium for the Ninth Circuit Gender Bias Report to the Violence Against Women Act, although Resnik did not mention VAWA in her speech.

VAWA was nonetheless on Resnik's mind: half the members of the "ad hoc committee on gender-based violence" appointed a year earlier by Chief Justice William Rehnquist were in the audience at Sun Valley: Judge Barbara Rothstein (U.S. District Court for the Western District of Washington) and Judge Pamela Rymer (U.S. Court of Appeals for the Ninth Circuit), who had assisted the work of the task force.

During the conference at Sun Valley, both judges spent time in conversation with Resnik or Schafran, discussing and reconsidering judicial opposition to VAWA. (Resnik had already spent hours discussing VAWA at Rymer's home in Los Angeles. Separately, at her home in Washington State, Rothstein would wind up talking for hours about VAWA with a former sorority sister from thirty years before at Cornell University: Helen Neuborne, head of NOW Legal Defense and thus colleague and boss to Goldfarb and Schafran.) In conversations with Rymer and Rothstein, Resnik heard their worries that VAWA's Title III needed to be narrowed. Further, Rothstein and Rymer expressed interest in sending a note to Biden to reopen dialog so long, Schafran gathered, as Biden would welcome their effort. Nourse quickly responded that Biden would be pleased to hear from them.

The launching ceremony for the report of the Ninth Circuit Gender Bias Task Force at Sun Valley offered a particularly fine opportunity for creating a unity of purpose among women involved in federal courts. The day after Resnik's speech, judges at the conference assembled to hear a speaker whom, though a founding member of the NAWJ, no one saw as a radical feminist. Supreme Court Justice Sandra Day O'Connor, after praising the task force report as com-

prehensive and well supported, told a brief story:

> A couple of years ago, I gave a speech in which I discussed the existence of a glass ceiling for women. The next day, headlines and newspaper articles trumpeted my statements as if I had made a surprising new discovery. But it is now 1992, and I don't think most of us were surprised to learn that the Task Force found the existence of gender bias in a federal circuit.

Continuing, she spoke of the disparities in percentages between women lawyers and women judges. She spoke of the difficulty attorneys have in imagining a woman as "partner" and went on to suggest that judicial images of an "effective advocate" or "credible litigant" or even "judge" may all act to exclude women. And, pushing further, she explained to the mostly male judges who had gathered to hear her that the task force report "asks us to take seriously claims that may not bother us personally." Like Resnik, Justice O'Connor challenged federal judges to think more expansively than usual about the reach and responsibility of the federal courts in addressing discrimination against women.

THE SHOWDOWN AT THE ABA occurred in early August of 1992. Although conciliation with Judges Rymer and Rothstein, and thus with half the Judicial Conference's committee, seemed suddenly possible, such belated conciliation would do nothing to help VAWA if the ABA condemned its civil rights section. As Resnik and Schafran headed west from Sun Valley to San Francisco for the ABA meeting, their hope for compromise rested in the work of the NAWJ. Judge Shapiro, as agreed with her fellow members of NAWJ's committee on violence against women, would try to convince her fellow members of the Judicial Administration Division to shift from its attacking resolution to NAWJ's cautious, supporting resolution.

Despite some worries about what the new compromise language might be, Nourse was thankful for the NAWJ. She had heard that the judges opposing VAWA would be hard to beat, and she saw that

NAWJ's compromise might be the best that she and Senator Biden could hope for.

As the showdown approached, neither Biden nor Nourse were well positioned to play a role. Biden was tied up in Senate discussions about war in Bosnia, although he did manage to make a call to Judge Shapiro. And Nourse would be hard to reach on the weekend before the ABA showdown. She and her fiancee, Rick Cudahy, were flying to Chicago for his sister's wedding. Nourse told Schafran that she could be reached "in an emergency c/o Judge Richard Cudahy in Winnetka." Also at the wedding, Nourse expected she might see one of Rick's aunts, Judge Rya Zobel of the first circuit. (She had been chair of the Conference of Federal Trial Judges in February of 1992 when it voted to attack VAWA.) In Nourse's world, judges abounded. With Rick, her future had become a running joke: she would never again find work as a federal litigator, they agreed, because Victoria would always be branded as that woman who forced the federal courts to take domestic relations cases.

But if Judge Shapiro could convince the Judicial Administration Division to support all of VAWA, at least in principle, the worst opposition between VAWA's drafters and its opponents could be averted. A route would open to compromise. Alas, bad news about Shapiro's efforts kept reaching Schafran, who was attending the ABA convention.

Saturday, August 8: NAWJ's supporting resolution would not replace the Judicial Administration Division attack. Shapiro was now encouraging the Judicial Administration Division to defer.

Monday, August 10: One of Biden's staff members had several conversations with Norma Shapiro about a deal with the Judicial Administration Division—the division would defer its attack if Biden would defer the bill for six months. Biden told his staff he was willing to confer with Shapiro herself but not with the Judicial Administration Division because it was being controlled by people who really wanted to defeat the civil rights section.

Later on August 10, more information: Shapiro had mentioned language that could amend the Judicial Administration Division's opposition to qualified opposition. In an amended resolution, the

Judicial Administration Division might oppose VAWA's civil rights section "unless the legislation creates federal offenses and causes of action narrowly defined and specifically tailored to the need for a federal forum." Conferring by phone, Schafran, Goldfarb, and Nourse decide that Goldfarb should call Shapiro and urge a shift from qualified opposition to qualified support. Could Shapiro convince the Judicial Administration Division—if the legislation is "narrowly defined and specifically tailored to the need for a federal forum"—to support VAWA's civil rights section in principle?

Tuesday, August 11, about 9:00 a.m.: Goldfarb heard from Shapiro that support was impossible. Shapiro had tried but failed to get the Judicial Administration Division to accept NAWJ's phrasing. Goldfarb left the conversation feeling that Judge Shapiro had her hands tied.

The showdown that Norma Shapiro and many others in the NAWJ had worked so hard to avoid was now less than thirty hours away. Could VAWA's supporters, after weeks of trying for compromise, gather the votes to stave off the well-planned attack of the Judicial Administration Division?

The task of marshaling opposition fell to Schafran. What she needed were women of stature and fire who were willing to speak against federal judges on the floor of the House of Delegates. Where could she turn for firepower? Shapiro had done her best and now, as an instructed delegate of the Judicial Administration Division, had no choice but to argue its side. Schroeder, after the ninth circuit conference, had not traveled to San Francisco for the ABA. Schafran knew where to turn—back to allies in some of her earliest work to end gender imbalances in the federal judiciary. She found those allies ready to step forward.

On August 12, 1992, hundreds of ABA delegates gathered in a grand room of the San Francisco Hilton. Beginning at 2:25 p.m., Lynn Hecht Schafran sat taking notes as the drama unfolded. First rose Judge Norma Shapiro, always dignified and precise, to argue for the Judicial Administration Division position: the ABA should oppose VAWA's civil rights section. The chair asked the position of the Board

of Governors. As Schafran expected, the board opposed the Judicial Administration Division—which meant support for VAWA.

The Board of Governors' support for VAWA had a hidden history, stretching back several months. In May, the Judicial Administration Division had tried to push the Board of Governors for hasty condemnation of VAWA. Seeking help, Schafran turned to women who had already played a crucial role in advancing the cause of women in the judiciary. She spoke to Brooksley Born, whom she had first worked with when they both testified before Congress in 1981 on behalf of Ronald Reagan's nomination of Sandra Day O'Connor to the Supreme Court. Born was then the first woman member and chair of the ABA's Standing Committee on Federal Judiciary, which evaluated potential judges. In that role, she had rewritten long-standing ABA rules that had excluded women by requiring prospective judges to have compiled fifteen years of experience as litigators—a requirement that, as of the early 1980s, few women could meet.

Speaking from her vantage as a member of the ABA's Board of Governors, Born made her view clear to Schafran: whatever the merits of the Judicial Administration Division's attack on VAWA, the division should not circumvent the usual debate in the House of Delegates. But when Born arrived a few days later for the division's presentation, she began to hear a very different view. First, one judge supported the Judicial Administration Division attack as an effort to limit the work of federal judges. A prominent member of the Board of Governors followed, saying that efforts not to burden judges so evidently aligned with ABA policy that the Judicial Administration Division should feel free to oppose VAWA. "All the men," Brooksley Born told Schafran, concurred.

By the time Born finally was called on to speak, she was furious. She gave it to them, as she later put it, "with both barrels." VAWA's civil rights section, she told them, does not create a new federal crime. It creates a civil action for civil rights in federal court. She was surprised to hear, she continued, that opposition to such a civil right was ABA policy. The problem of gender-based violence was serious, she continued, and she felt sure that the other women in the room had been victims of it, as she had. The resolution, she insisted, should not

avoid full debate in August in the House of Delegates. Voting a few minutes later, the Board of Governors supported her almost unanimously (except for the resolution's proponent). Recalling her meeting later, Born told Schafran that it made her realize something afresh about gender-based violence: how deeply into denial are many men of goodwill.

Despite losing the support of the ABA's Board of Governors at the May meeting, at the August annual meeting Judge Shapiro proceeded to say that the Judicial Administration Division opposed VAWA for its expansion of federal jurisdiction and some of its language, such as "crimes of violence" and "motivated by gender." She mentioned high cost estimates. As she concluded, Schafran noted, she received a smattering of applause.

To rebut rose Brooksley Born. Born's many roles in the ABA only began to suggest her reputation. Perhaps the most-often-told story concerned her rise to partner in the prestigious Washington firm Arnold & Porter. After graduating first in her class at Stanford Law in 1964, she held a federal clerkship and soon after became a lawyer at Arnold & Porter. Three years into the job, she gave birth to her first child. After returning to full-time work she quickly found herself, as she told a *Washington Post* reporter in 1980, an "absolute wreck." She eventually announced her resignation, only to receive a counterproposal from a senior partner: work three days a week but don't expect to make partner. She agreed, raised two children, made uncountable calls from home to clients who assumed she was phoning from the office at Arnold & Porter, and developed into one of the firm's most able tax lawyers.

Several years later, on the night before Brooksley Born's fellow associates at the law firm were scheduled to be voted on for partnership, one of the firm's partners called her at home. "A considerable body of thought" at Arnold & Porter, the *Post* story quoted the partner saying, held that

> "a mistake had been made" in ruling her out for partnership, and could she tell them when she would be ready to return to work full time?

"I don't know," Born recalled saying, "if I'll ever be able to go back full time."

The next day, Arnold & Porter made her a partner. A few years later, with both her children enrolled in school, she returned full time.

When Born rose to address the House of Delegates, she made clear the gravity of their vote. If they passed the resolution, for the first time they would put the ABA on record as opposing federal civil rights legislation. Violence against women, she continued, is epidemic and impairs all aspects of women's lives. She praised the bill for its innovative remedies and suggested that if federal courts feel flooded, they may need to fill vacant judgeships. She concluded that the ABA must not urge federal courts to close their doors.

In response, a Judicial Administration Division supporter insisted VAWA must be narrowed to preserve the federal courts' ability to function. Another VAWA defender asked the ABA to look beyond issues of efficiency and to help ensure women the same sort of federal remedies available to victims of racial and ethnic violence. Another Judicial Administration Division supporter worried that VAWA would lead to fights between federal and state courts over who would handle prominent cases. Another VAWA defender, speaking on behalf of the National Conference of Women's Bar Associations, stated that her board opposed the Judicial Administration Division's first resolution and had never seen today's amended resolution.

The debate felt too close to call. As Schafran expected, the first motion was that the resolution be deferred. Norma Shapiro spoke in opposition and won: no deferral.

A voice vote was called. The response was loud and clear: defeat for the Judicial Administration Division.

But raising a point of order, Shapiro insisted that the chair had failed to permit her, as the resolution's proponent, to make the division's closing argument. She was right. The chair voided the vote.

Shapiro insisted that judges do not oppose VAWA because of their workload. VAWA, she insisted, was confusing to the concept of federalism. Speaking with her characteristic dedication and pride in her

court system, she added that the federal courts would take whatever Congress assigned and do their best with it. But, she continued, the Administrative Office of the Courts is concerned about the impact of new federal civil actions.

Applause was mild. The chair called for the final vote.

Aye? "More votes this time," noted Schafran.

No? The no's, scribbled Schafran, underscoring in a zorro-like slash, "*have it.*" VAWA's civil rights section would *not* be opposed by the ABA. It would not be opposed by American lawyers. The time was *2:53 p.m.* (also underscored), August 12, 1992. VAWA had survived its worst moment on route to Congress.

STAVING OFF DEFEAT AT THE ABA led to the next challenge: how to eliminate the opposition of the heavily male Judicial Conference, which had challenged VAWA's language far more forcefully than recommended by its gender-balanced committee on gender-based violence. Fortunately, although the full conference in late September of 1991 had cut much of the committee's affirmative language about VAWA, the conference had permitted its committee to continue dialog with VAWA's sponsors. On that committee, which still included Judges Pamela Rymer and Barbara Rothstein, a new chair had arrived, Judge Stanley Marcus. A graduate of Harvard Law and a former federal prosecutor from Florida, appointed district judge by Ronald Reagan in 1985, Marcus had won the esteem of lawyers who practiced before him. Professor Resnik, speaking to him at length about VAWA, came to admire him and to sense that, as a former prosecutor, he understood some of the problems women encountered in courts. At his invitation, she spoke not just to him and to members of his four-member ad hoc committee but also to the larger committee of the Judicial Conference that he chaired: the Committee on Federal-State Jurisdiction. Judge Schroeder also spoke to Marcus regularly. Through late 1992, after the ABA declined to condemn VAWA's civil rights section, and into early 1993, as VAWA still sat in limbo in Congress, Schroeder sometimes felt she was speaking to him daily. They discussed new language. She felt that he began to grasp what lay behind VAWA and the entire

concept of its civil rights section. Resnik similarly felt that Marcus was beginning to see that federal judges harmed themselves and their courts when they seemed to lobby, as Chief Justice Rehnquist had, against women who were knocking on the federal door.

In March of 1993, Judge Marcus achieved a breakthrough that Schroeder saw as a "miracle." He achieved it at the Judicial Conference of the United States, the twenty-seven-judge body convened by the chief justice that eighteen months earlier had opposed VAWA's civil rights section. Despite the fact that VAWA's drafters had made no new concessions, Judge Marcus convinced the conference to end opposition to VAWA's civil rights section. Reversing the early direction of the chief justice, the conference shifted from opposition to no position, opening the way for moderate judges on Marcus' committee to push for an acceptable and constitutional civil rights law for women.

A LAST TRANSFORMATIVE MEETING lay ahead for VAWA's civil rights section, on April 26, 1993. Far from the brightly lit ballroom full of ABA delegates, this meeting was private and essentially unknown. It gathered most of the key judges and drafters in the battle over VAWA in what Victoria Nourse and Sally Goldfarb came to think of as "the dark room." Coming as chair of the Judicial Conference committee on violence against women was Judge Stanley Marcus, along with one of the original committee members, Judge Barbara Rothstein. With them, they brought two lobbyists from the Administrative Office of the Courts. Judge Mary Schroeder came as representative of the NAWJ. Meeting with the judges were what Judge Schroeder saw as "the feminists." From NOW Legal Defense came Pat Reuss, legislative organizer, and Sally Goldfarb, legal brains. Hosting the gathering and representing the Senate Judiciary Committee was VAWA's original drafter, Victoria Nourse—who, as host for the gathering, had not planned to meet in a dark room.

When the group gathered at her office, Nourse expected to adjourn to one of the Senate Judiciary Committee's meeting areas, probably the committee's grand conference room with its brown-leather chairs beneath walnut-toned wood and a ceiling about thirty feet high. To

Nourse's surprise, senators were meeting there. Because all nearby meeting areas were taken, Nourse had nowhere to take the judges.

Along the marble halls of the Dirksen Building they walked, then down two flights in an elevator, looking for an empty room and eventually pushing through doors marked only SD G19: *S*enate *D*irksen Building, ground floor, room *19*. Dull turquoise walls contrasted with scuffed cranberry carpets. Metal chairs sat stacked along a wall of floor-to-ceiling cabinets that seemed designed to store volleyballs or badminton nets. "Rumpus room," thought Nourse, but this was the best meeting place she could find. In the dim room, Nourse could see small gilt chandeliers hanging from a low ceiling but giving little light. (The room was used, rarely, for overflow from formal dinners.) The judges and the feminists gathered chrome chairs into a circle and began deciding the future of VAWA.

If deciding VAWA's future was the judges' agenda, however, the feminists had not known that agenda in advance. Goldfarb arrived at the meeting, she would later recall, thinking the judges "would try to bully us" or would try to bully Nourse in order to bully Biden. Nourse went into the dark room thinking "nothing is going to happen." To this point, Nourse's meetings with judges had felt heated but unproductive. This time, she hoped to sit quietly and let Judge Marcus listen to Pat Reuss and Sally Goldfarb. Nourse wanted him to hear from NOW Legal Defense, which represented a coalition of real live people.

Soon Nourse realized this would be an unusual meeting in the Senate building. Almost immediately it became, she thought, a "lawyer's lawyer meeting." On one side were the judges. On the other, speaking for the feminists, was essentially one young lawyer, Sally Goldfarb. First, the judges raised a couple of issues that Nourse had heard about in an odd way. For months at the office of the Senate Judiciary Committee, faxes had been arriving with anonymous drafts that proposed language for VAWA. Although Nourse couldn't tell whom they came from, they led her to believe that some judges out there wanted to find common ground. As the meeting began in the dark room, she decided that some of those judges were sitting before her.

Two topics came up so briefly they seemed compressed into code.

Goldfarb scribbled in her notes "felony." OK said Nourse. Goldfarb scribbled "pendent jurisdiction." OK said Nourse. So two issues were settled instantly: One, the Senate would amend its bill to apply VAWA only to crimes that had the seriousness of a felony. Two, VAWA would not give jurisdiction to federal courts over claims based in state laws, such as a woman's claims concerning divorce, alimony, or child custody. To Nourse, her OKs seemed less than concessions. They seemed reassurances that Joseph Biden meant what he had already said in public hearings.

Next, however, came the big discussion: How broad was VAWA's sweep? How, Judge Marcus asked, do you define "crime of violence"? Do you want to include every violent crime against women?

No, said the feminists.

Judge Schroeder insisted that VAWA's language needed sharpening beyond Senator Biden's oft-repeated comment that VAWA does not cover "random" crimes. VAWA now said that it covered crimes of violence committed "because of or on the basis of gender." The language had been adopted by Nourse long ago, from the language of Title VII of the Civil Rights Act of 1964. But judges kept insisting that "because of . . . gender" was too general.

Earlier, before the meeting, both Judge Schroeder and Judge Marcus had pushed to limit VAWA to crimes that occurred not just *because of* gender but because of "animosity" or "hatred" toward a gender. In a late 1992 phone conversation, Schroeder had pushed Sally Goldfarb to consider language that, as Sally Goldfarb transcribed it, went more or less as follows:

> . . . Motivated by gender means any crime committed because of or on the basis of sex due to animosity against the gender as a class as distinguished from animus against a particular individual.

Goldfarb, speaking for NOW Legal Defense, refused to accept that language. The distinction between animosity toward one woman and all women *as a class*, she wrote back to Schroeder, assumed wrongly that there exists

> a clear distinction between misogyny directed at all women and misogyny directed at one woman. In fact, the two are often blurred; many men (for example, batterers) take action against one woman that expresses their contempt for all women as symbolized by that one woman.

This was the sort of argument that led Nourse, long ago, to respect Goldfarb as a lawyer—a fearless one, it seemed, willing to take on a federal judge who was also one of VAWA's only judicial friends.

An urging that VAWA contend only with "hatred" had been handed out as part of a memo with suggestions by judges when Judge Marcus met earlier in the year with congressional staff members. The memo, containing neither letterhead nor name of author, began, "You have asked for thoughts about how the bill's language might be more tightly focused." This anonymous *thoughts* memo proposed that VAWA cover a "gender-based crime of violence" only if it was "motivated by hatred for the gender of the victim." This was phrasing that Goldfarb and NOW Legal Defense could not accept.

Since January, both judges had thought in detail and conferred often about VAWA's language. Judge Schroeder now brought up the phrase "invidiously discriminatory animus." Goldfarb and Nourse recognized it immediately as the language in *Griffin v. Breckenridge*, the case that Nourse had found herself defending at her first meeting with the Judicial Conference of the United States committee that Judge Marcus now chaired. *Griffin* relied on the same anticonspiracy section of the 1871 Civil Rights Act that helped inspire VAWA. It said that *if* African-Americans could show an attack was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," they could sue a group of white attackers for conspiracy to violate their civil rights.

The language of *invidiously discriminatory animus* had strong appeal: it linked VAWA, at least via court decisions, to its roots in early civil rights law and its still-deeper roots in the Fourteenth Amendment's promise of equality. Though *animus* did not appear in the Civil Rights Act of 1871 itself or the amendment from which it sprang, a

congressman named Shellabarger had used it during the 1871 debates on that Act. The Act, he said, covered a violation of a citizen's right to equality if the "animus and effect" of that violation is "to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights." Though archaic in phrasing, the congressman's goal made modern sense for VAWA: if a woman is struck down, to the end that she may not enjoy equality of rights with men, she deserves protection of the law. In the words of Congressman (later President) James A. Garfield concerning the 1871 Act, it responded to the complaint that states, even when their laws are "just and equal on their face," were guilty of "systematic maladministration" or "a neglect or refusal to enforce their provisions" as a result of which "people are denied equal protection" of the law.

Nourse, in her earliest drafting of VAWA, had included the term *animus* in its old sense of purpose or motive. In June of 1990, she had defined a "crime of violence motivated by the victim's gender" under VAWA as "any rape, sexual assault, or abusive sexual contact motivated by gender-based animus." *Animus* had dropped out of VAWA months later during haggling over how broadly or sharply to define the sort of violence that VAWA covered.

Restoring the word *animus*, as suggested by the judges, could link VAWA to its origins in nineteenth-century law. That linkage also fit a belief in the twentieth-century viability of those civil rights laws. Although the civil rights acts of 1871 and 1875 had been nearly destroyed by retrograde Supreme Court cases of 1883, recent decisions like *Griffin v. Breckenridge* suggested readiness to reject those cases.

More optimistically, in a case called *Guest* in 1966, six justices of the Supreme Court combined in two opinions—though neither was the majority opinion—to suggest that they no longer felt bound by the *Civil Rights Cases*' insistence in 1883 that the Fourteenth Amendment permitted the federal government to attack only state action. Three justices agreed that Congress had the power to punish private conspirators who infringed rights guaranteed by the Fourteenth Amendment. Three other justices, going further in an opinion written by Justice William J. Brennan Jr., suggested that the *Civil Rights*

Cases were wrongly decided in 1883. Summing up the views of the six members of the Court, Brennan's opinion stated that "a majority of the Court today rejects" the state action requirement of the *Civil Rights Cases*. The justices' suggestion in 1966 that the *Civil Rights Cases* were wrong seemed to step beyond an oddity from two years before—and to step around a difficulty with which William Rehnquist had been associated since his first year working at the Supreme Court, as a clerk in 1952.

In two 1964 cases, the Supreme Court considered the constitutionality of the public accommodations provisions, officially Title II, of the Civil Rights Act of 1964. Those provisions resembled the ban on discrimination in hotels and trains attempted by the Civil Rights Act of 1875, which was eviscerated in 1883 by Justice Joseph P. Bradley's decision that the Fourteenth Amendment permitted the federal government to attack only state action. Both Congress and the Kennedy-Johnson administrations grounded the 1964 Civil Rights Act on two sources of constitutional authority. One was the Fourteenth Amendment's guarantee of equal protection, which seemed intuitively strong but remained technically weak from the 1883 evisceration. Second was the commerce clause, which had been expanding in power since at least 1937. That year the Supreme Court used the commerce clause to sustain the National Labor Relations Act, and in 1942 the Court upheld an agricultural act in *Wickard v. Filburn*, the case that said congressional power to regulate interstate commerce extended even to wheat grown at home for home consumption.

Considering those two sources of constitutional authority—protection of equality, roadblocked since the 1880s by the *Civil Rights Cases*, and protection of commerce, affirmed since the 1930s by multiple decisions—the Supreme Court in 1964 swerved. Dodging the roadblock, it affirmed the civil rights act using only the commerce clause.

Such swerves had a history. When the Supreme Court in *Brown v. Board of Education* ruled that separate but equal schools were unconstitutional, after hearing oral arguments in both 1952 and 1953 (by, among others, Thurgood Marshall and Spottswood Robinson) the Court swerved around deciding whether the Fourteenth Amend-

ment guaranteed equality in public education. The Court swerved also around reversing the original case, *Plessy v. Ferguson*, that created the "separate but equal" doctrine. Instead, the Supreme Court in *Brown* ruled only that the doctrine had "no place" in the area of "public education."

The swerve around *Plessy* dodged opposition of the sort that surfaced in a memorandum prepared in 1952 by one of Justice Robert H. Jackson's law clerks, recently graduated from Stanford Law School, William Rehnquist. "I think *Plessy v. Ferguson* was right and should be reaffirmed," wrote Rehnquist in 1952, although his memo acknowledged that it was making "an unpopular and unhumane proposition for which I have been excoriated by 'liberal' colleagues." When the Rehnquist memo became public years later, Rehnquist insisted that it represented his drafting of Justice Jackson's views—an insistence opposed by the secretary of the deceased justice, who charged that Rehnquist had "smeared the reputation of a great justice." Still later, Rehnquist admitted that he might have defended *Plessy* among fellow clerks, strengthening the belief that Rehnquist had sought in 1952 to affirm *Plessy* and its doctrine of "separate but equal." Suggestions that Rehnquist did not oppose segregation appeared again in the 1960s. Writing in the *Arizona Republic*—apparently playing against Lincoln's famous lines in the Gettysburg Address that America is "dedicated to the proposition that all men are created equal"—Rehnquist suggested that "we are no more dedicated to an 'integrated' society than to a 'segregated' society." At about the same time that he articulated such openness to segregation, according to an Arizona legislator, Rehnquist stated that he was "opposed to all civil rights laws."

Swerves left problems. By not "confronting and overturning the racist *Civil Rights Cases*," as Professor Balkin of Yale puts it, "the Warren Court effectively performed an end-run" around those cases when it affirmed the Civil Rights Act of 1964 on the foundation of only the commerce clause. That little-discussed dodge created an embarrassment: the Supreme Court of the United States seemed to view civil rights law as merely economic law, grounded not in equality but in commerce. The dodge also created a weakness: if a later Court chose to point out the obvious—not all civil rights are economic

rights—that later Court could begin to cut away civil rights.

The 1966 assertion by Justice Brennan in *Guest*, claiming that six justices saw the *Civil Rights Cases* as wrongly decided, thus had the potential to correct both an embarrassment and a weakness in civil rights law that stretched from 1883 through 1964. Brennan in *Guest* was reasserting Supreme Court support for equality. Not until 1992, however, did a majority of the Supreme Court state that *Plessy* had been "wrong the day it was decided."

The suggestion to add the word *animus* to VAWA thus had the advantage of echoing *Griffin v. Breckenridge* and, through that case from 1971, aligning with the Supreme Court's apparently belated move to reaffirm the promise of equality created by the Fourteenth Amendment. Adding *invidiously discriminatory animus* could bring disadvantages, however. It could seem to root VAWA in judicial decisions interpreting merely the Civil Rights Act of 1871, whereas VAWA's true roots were broader, in the Fourteenth Amendment and its promise of equal protection of the law. Worse, *invidiously discriminatory animus* would link VAWA tightly to a decision called *Bray v. Alexandria Women's Health Clinic*, delivered for the Supreme Court on January 13, 1993, by one of its most conservative justices, Antonin Scalia. And *Bray*'s ugliness, from the vantage of feminists, was hydra-headed.

In *Bray*, Scalia ruled that the 1871 Civil Rights Act did not apply to conspiracies that obstruct women from gaining access to abortion clinics, a ruling that overturned two lower courts. Those courts (and others, less directly) had ruled that obstruction of women by a nationwide group called Operation Rescue was indeed covered by the Act. Many judges believed Operation Rescue so analogous to the Ku Klux Klan that Justice Sandra Day O'Connor, opposing Scalia, described Operation Rescue's obstruction of women as "a modern-day paradigm" of the situation the 1871 Act (also called the Ku Klux Klan Act) was "meant to address." Finally, in explaining why the 1871 Civil Rights Act did not apply to women obstructed from reaching abortion clinics, Scalia relied on the old embarrassment of *Geduldig v. Aiello* and the early pregnancy cases.

APPARENTLY *GEDULDIG V. AIELLO* LIVED. Nineteen years had passed since Wendy Williams had argued, before the Supreme Court in *Geduldig*, against government health insurance plans that refused to cover women who became pregnant. "Nowhere is the economic discrimination against women," she told the Court, "more apparent than in the rules and practices surrounding the reality that women are the bearers of children." From that reality had emerged the "stereotyped notions that women belong in the home with their children, that women are not serious members of the work force, and that women generally have a male breadwinner in their families to support them." And from those notions had emerged a body of law which, as she said, forces

> able-bodied women off the job, which denies them unemployment insurance once they've gone on mandatory maternity leave, denies them sick leave when their disability results from pregnancy, . . . which does not permit them to return to work at the time when they become physically able, often denies them seniority and other benefits which accrue to workers normally disabled, and finally—when they try to return to the job—often the jobs themselves are denied.

Williams had made the argument that pregnancy discrimination was unconstitutional sex discrimination. Writing against her for the Court, Justice Potter Stewart ruled that pregnancy discrimination constituted not illegal discrimination against women but legal discrimination between "pregnant women and nonpregnant persons."

The embarrassment was so obvious that a year later, when Justice Rehnquist tried to extend the argument to say that Title VII of Congress's Civil Rights Act of 1964 permits similar discrimination against pregnant women, Congress quickly passed the Pregnancy Discrimination Act to correct the Court's error and state the obvious: discriminating against the pregnant was discriminating against women.

But the victory of the obvious over the embarrassing did not undo *Geduldig v. Aiello*, which had interpreted not a law drafted by Congress but the Constitution drafted by the founding fathers. Despite

congressional repudiation of its illogic, *Geduldig* lived on quietly, ready to do damage. *Bray* gave Justice Scalia the chance to trot out part of Justice Stewart's embarrassing *Geduldig* footnote: "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." What that meant in *Bray* for obstruction of women from reaching abortion clinics was evident: only *pregnant* women are suffering—not all women. And in response to a dissent by Justice Stevens pointing out that Congress in the Pregnancy Discrimination Act had repudiated this logic, Scalia answered waggishly but precisely: "Congress understood *Geduldig* as we do." Congress understood, he seemed to say, that it can undo our misunderstandings of Congress but not our misunderstandings of the Constitution.

Scalia went one step further in refusing to acknowledge that the objects targeted for discrimination were women. The "characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion." It drew a line not between women and men, but between women seeking an abortion and all other persons who were not. Such sophistry became possible only thanks to what Scalia called the "continuing vitality of *Geduldig*."

IF THE PHRASE *INVIDIOUSLY DISCRIMINATORY ANIMUS* conjured Scalia's hydra-like decision in *Bray*, of which one coil wrapped around *Geduldig v. Aiello*, why would the judges in the dark room raise that phrase? Perhaps they still hoped all three words might become accepted for use in VAWA. But Goldfarb and Nourse were unwilling, partly because in *Bray* Scalia had sought to define *invidiously discriminatory animus* by focusing on *invidious*. The word, his Webster's dictionary told him, meant "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." As defined thus by Scalia, this *animus* seemed a hateful animus, and perhaps even verged on *hatred*—precisely what Nourse and Goldfarb had refused to accept as a requirement for invoking VAWA.

But the judges insisted that they turned to *animus* and *Bray* for good reason. Thinking "we need proper historical sources here,"

Schroeder later recalled, she re-examined all the important civil rights cases from after the Civil War through *Bray*, in which she saw remarkably appealing language concerning *animus*.

In the middle of *Bray*, as Scalia was rejecting the claim that opposition to abortion reflects an animus against women in general, he made what seemed a concession:

> We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women.

Scalia seemed to be saying that *animus* (in the sense of purpose) against women might not stem from hatred (not be *maliciously motivated*) yet still be hateful (be *objectively invidious*). He continued that such animus, though not demanding malice,

> does demand, however, at least a purpose that focuses upon women by reason of their sex—for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law.

Just as *Bray* revived one of law's great embarrassments regarding women (*Geduldig*, 1974), it seemed to revile another: *Bradwell* from 1873. States could prohibit Myra Bradwell and other women, *Bradwell* had said, from practicing law—a ruling that brought forth, from a group of justices in 1873, the contention that the "law of the Creator" limited women to marriage and motherhood. Further, *Bray* seemed to offer a definition of *animus* that could bridge civil rights efforts from the Civil Rights Act of 1871 to the Violence Against Women Act of the 1990s. Sitting in the dark room with the judges and the feminists, Judge Marcus read aloud Scalia's expansive-seeming concept of discriminatory *animus*: "a purpose that focuses upon women by reason of their sex."

These judges, Nourse was coming to believe, were constructively trying to find a way to meet the concerns of the judiciary yet still to

achieve something for women. For a time, she listened quietly as the three judges debated with Goldfarb over technicalities of existing civil rights law—section 1983, section 1985(3)—and heard Goldfarb lay out the argument that a legal problem existed because whole categories of violent crimes against women fall between the cracks of American civil rights law. At a certain point, Nourse would later say, "I really think I saw a light go off in Marcus's head." The light came when "Sally convinced him that there was a real problem. And before, he thought it was a fraud, he thought it was a *fake*, there was no real problem."

Discussion moved to possible language. A few days before, Judge Schroeder had suggested that VAWA might cover acts "motivated at least in part by animus against the gender of the victim." At one point, Judge Marcus said something that Goldfarb, after months of drafts and redrafts, found heartening. He said that the bill's "language won't be perfect," and she jotted that down in her notes. Some questions will remain, she understood him to mean, until cases are litigated and judges have the opportunity to apply the law to specific facts. She appreciated that. She felt he was easing her burden as a drafter by not forcing her to spell out the answer to every question that might arise. .

THE JUDGES AND THE FEMINISTS left the dark room with a mood of mutual respect. Talking to Sally Goldfarb as they left, Pat Reuss called Judge Stanley Marcus *professorial.* Goldfarb called him *avuncular,* and Reuss teased her because Reuss had to go to a dictionary to find out that Goldfarb thought the judge acted like an uncle. For months after, Reuss would work her new word into conversations and correspondence: "Dear Sally, have an *avuncular* birthday." Even if silly, *avuncular* caught some qualities shared by the judges in the dark room: concern that was somehow familial, and a relation in which age and experience could both influence and be influenced by the perceptions of the young.

Concerning the meeting, Judge Marcus later reported in a formal letter to the House Judiciary Committee on some of the language

that had been hammered out. Judge Schroeder reflected later on that meeting with warmth, as a gathering in which

> the feminists, for lack of a better word, were able to understand and articulate the concerns of the judges, and the judges were able to understand and articulate the concerns of the feminists.

Nourse, Judge Schroeder felt, was a "brilliant young woman" who could grasp the problems the judges were having with VAWA. And she was someone who, "unusual for a legislative aide," had put her heart in this legislation. But she also seemed, to Schroeder, primarily a lobbyist: "not out to create legislation so much as to get the legislation passed." As for the real lobbyist, Sally Goldfarb, Schroeder thought her "extremely knowledgeable about problems that women are experiencing." Goldfarb, she believed, had the qualities of a "first-rate lawyer": the ability to understand the other side and to adjust to its views. And Schroeder realized that Goldfarb also represented a coalition—that "she could not go out on a limb by herself. So she always had to go back to get consensus, and she did that brilliantly as well."

Reflecting on her months of debate and negotiation with both women on the shape of VAWA, and on the pivotal last meeting in the dark room, Judge Schroeder came to feel that dealing with young attorneys, "each so brilliant and so articulate," makes you "feel good about the legal profession, that there are people like that in it." Schroeder "worked so hard," she later explained

> because I wanted the federal government to realize the importance of this problem of violence against women in our country. And it's something that has been kind of thought of as a state problem. And yet the resources of the federal government are so great that it needs to share them with the states.

Narrowed language for vawa emerged from the dark room. Phrasing added by Nourse, which Judge Marcus mentioned with apparent

approval months later in writing to a member of the House Judiciary Committee, included a tightened definition of crimes that VAWA covered. They must be not only "committed because of gender or on the basis of gender" but also must be "due, at least in part, to an animus based on the victim's gender."

Not long after the meeting, Nourse reported she was leaving government to accept a position as law professor at the University of Wisconsin. Soon afterward, Goldfarb won appointment as a professor at Rutgers School of Law in Camden, New Jersey—sister school to the law school in Newark that first appointed Ruth Bader Ginsburg a professor. Soon after Goldfarb joined the Rutgers faculty, Ginsburg became the second woman on the United States Supreme Court.

VAWA in late 1993, long protected by a no-amendment policy of Senators Joe. Biden and Orrin Hatch, itself became a late amendment to the vast congressional crime bill. On September 13, 1994, the Violence Against Women Act became law.