

# DRAFTING, LOBBYING, AND LITIGATING VAWA: NATIONAL, LOCAL, AND TRANSNATIONAL INTERVENTIONS ON BEHALF OF WOMEN'S EQUALITY

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*At the symposium, my commentary was interlaced with references to a several-page handout, providing excerpts of statutes, reports, and speeches. In written format, those materials are partially reproduced in text and otherwise in footnotes; for easier reading, these comments are set out separately from the transcript.<sup>1</sup>*

## ENACTING AND DEBATING VAWA'S CIVIL RIGHTS REMEDY

I begin with the centerpiece of the conflict about the Violence Against Women Act of 1994 (VAWA)—the civil rights remedy of VAWA.<sup>2</sup> Its words were both

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\* Arthur Liman Professor of Law, Yale Law School. All rights reserved. © 2010, Judith Resnik. Thanks are due to the conveners and the Journal for their hospitality, to co-panelists, Martha Davis, Julie Goldscheid, Mary Schroeder, and Fred Strebeigh, to the speakers on the other panels, to Victoria Degtyareva, Allison Tait, Marisa B. Van Saaren, and Sarah J. Watson for help in shaping this commentary, and to Nicole Eisenman for enabling this format, offering some of the many citations to our discussions. As I explained when I greeted others at the Symposium, I knew as soon as I arrived that thanks were due to Lynn Hecht Schafran, Legal Momentum, and the Georgetown Journal of Law and Gender for bringing together so many of the participants to mark the fifteenth anniversary of the enactment of the Violence Against Women Act of 1994 (VAWA). But I had not realized until I listened to the discussions and to the eloquent speech by Vice President Biden just how moved and educated I would be, and hence how deep my gratitude is. Special recognition is owed to Lynn Hecht Schafran, who directs the National Judicial Education Program, a title more than apt, for Lynn is, par excellence, a remarkable designer of educational curricula. Lynn has illuminated the roles that gender, race, and ethnic stereotypes and bias play in the law, the harms of violence against women, and has identified methods of responses that have reshaped laws and practices. Hence, Lynn teaches us about the work that brought VAWA into being and what needs to be done now.

1. I cannot provide comprehensive bibliographical materials but want to offer a few citations to serve as paths to the extensive literature. See, e.g., Martha Davis, *Fighting Gender and Sexual Orientation Harassment*, 9 J.L. & POL'Y 387 (2001); *Contemporary Challenges to Gender Equality*, 43 N.Y.L. SCH. L. REV. 159 (1999); Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act*, 4 J.L. & POL'Y 391 (1996); Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731 (2007); *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L.Q. 157 (2005); *The Second Circuit Addresses Gender-Based Violence: A Review of Violence Against Women Act Cases*, 66 BROOK. L. REV. 457 (2000); Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951 (2000); Lynn Hecht Schafran, *There's No Accounting For Judges*, 58 ALB. L. REV. 1063 (1995); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1993); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URBAN L.J. 439 (1993); Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615 (1998); FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW (2009); Mary Schroeder, *Judging with a Difference*, 14 YALE J.L. & FEMINISM 255 (2002). My commentary draws in part on previously published articles, noted below, that I have written about VAWA, gender, and the federal courts.

2. VAWA included many provisions, codified in various parts of the United States Code, and remaining in effect. The provision on which I focus is the subpart, called "Civil Rights Remedies for

carefully thought out and negotiated, and hence the exact terms are important to know. Key to what Congress entitled the “Civil Rights” remedy of VAWA is its provision: “All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . .”<sup>3</sup> In addition, Congress specified a right to obtain supplemental remedies in federal court atop what other provisions might be available under state law—provided to “all persons” subjected to what VAWA recognized as violations of liberty, autonomy, and equality.<sup>4</sup>

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Gender-Motivated Violence Act,” codified at 42 U.S.C. § 13981, that was held to be beyond congressional powers in *United States v. Morrison*, 529 U.S. 598 (2000), discussed *infra*.

3. 42 U.S.C. § 13981(6).

4. The text of the relevant parts of 42 U.S.C. § 13981 reads:

Civil Rights Remedies for Gender-Motivated Violence Act

(a) Purpose

Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d)).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section 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.

(d) Definitions

For purposes of this section—

(1) the term ‘crime of violence motivated by gender’ means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender; and

(2) the term ‘crime of violence’ [means]—

(A) [means] an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

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

As was discussed during the symposium, many different sectors weighed in on the language of this provision. My focus is on federal judges, who have three principle ways to provide views. The longstanding and familiar method is through judgments rendered in specific cases by individual trial level judges, by panels on appeal, and by the Supreme Court.

Second, the federal judiciary “speaks” through a collective voice when it makes official policy under the auspices of the Judicial Conference of the United States. This body was first chartered by Congress in the 1920s at the prompting of then-Chief Justice William Howard Taft. Today, more than two dozen federal judges gather from around the country twice annually to consider the “condition of business in the courts of the United States.”<sup>5</sup>

A third means by which judicial viewpoints can be made known are the speeches of the Chief Justice. Since the mid-1980s, the Chief Justice of the United States has offered an annual “state of the judiciary” speech, thereby serving as a spokesperson addressing topics of his own choosing.<sup>6</sup> While not official policy, these annual addresses may be interrelated to the positions taken by the Judicial Conference, which the Chief Justice chairs.

The role taken on by the Judicial Conference has grown over the decades. Under the leadership of Chief Justices Earl Warren, Warren Burger, and William Rehnquist, the group became more active in seeking to make its views known to Congress. The Conference has called upon Congress to support more judgeships, better salaries, and expansion of courthouse facilities.

On occasion, the Conference has also proposed changes in legislation, such as its advocacy for the Multi-District Litigation statute and for the creation of magistrate judgeships. Beginning mid-century, the Judicial Conference began, on selected occasions, to offer views on the desirability of enacting legislative

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c).

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle.

(4) Supplemental jurisdiction

Neither section 1367 of title 28, United States Code, nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree. . . .

5. See 28 U.S.C. § 331. Additional discussion of the history of the Conference can be found in Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter Resnik, *Trial as Error, Jurisdiction as Injury*].

6. Chief Justice Warren Burger first began what is now a tradition of annual “state of the judiciary” speeches. See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1608 (2006).

proposals to vest authority in the federal courts for new causes of action. When issuing such views, the Judicial Conference formally votes to make the official policy for the federal courts.<sup>7</sup> All three forms of judicial voices—decisions, Conference policies, and the Chief Justice’s speeches—were heard in the debate about the civil rights remedy of VAWA.<sup>8</sup>

In 1991, the Chief Justice appointed an “Ad Hoc Committee on Gender-Based Violence” to advise the Judicial Conference on whether it should take a position on the Violence Against Women Act that then-Senator Biden had introduced into Congress.<sup>9</sup> The Committee reported that it reluctantly recommended *opposing* VAWA.<sup>10</sup> As the excerpt (distributed at the symposium) from 1991 indicates, judges were concerned about VAWA’s potential impact on the federal courts because, as drafted, the Conference believed the statute could “significantly threaten the ability of the federal courts to administer” both the new VAWA provisions and “other Acts of Congress, promptly, fairly, and in accordance with” those acts’ objectives.<sup>11</sup> Pursuant to the Committee’s recommendations, the Judicial Conference took the official position that, while “supporting the objectives” of VAWA, it was opposed to enactment of the civil rights remedy of VAWA.<sup>12</sup>

What was the divide between proponents of the civil rights remedy and the Judicial Conference in 1991? The supporters saw (and continue to see) its provisions as methods to further the substantive equality of women by enabling them to be equal participants in all facets of life—from their households to their workplaces and in between, moving freely in urban areas and in rural settings. The model was earlier federal provisions against lynching—used to try to make plain (and to make true) that federal law tolerated no violence based on race. Creating a cause of action for people treated violently because of their gender that gave them access to the federal courts was one way to help women be physically safe when they used public transportation to participate in commercial activities as they went to schools and universities and when they worked in their homes. I should add that the need for physical safety as a female worker was more than apparent to me in the late 1990s, when I worked at night on the VAWA amicus brief filed on behalf of some one hundred law professors arguing the statute’s

7. See Resnik, *Trial as Error, Jurisdiction as Injury*, *supra* note 5, at 950.

8. This discussion builds on my article, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000), which provides additional analysis of the roles played by the federal judiciary.

9. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 47 (Sept. 1991) (describing the vote of the Executive Committee of the Judicial Conference to “recommend the appointment by the Chief Justice of a special Ad Hoc Committee on Gender-Based Violence”).

10. See Resolution of the Judicial Conference of the United States, *in* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57-58 (Sept. 1991) [hereinafter *Judicial Conference VAWA Resolution, 1991*] (approving the resolution “after considering the report and recommendation of the Committee on Federal-State Jurisdiction and the Ad Hoc Committee on Gender-Based Violence”).

11. *Id.* at 57.

12. *Id.*

constitutionality.<sup>13</sup> When leaving my office in New Haven, I worried about my late night walk to a car—was it safe for me to do so? Workers who must travel at night are particularly vulnerable to violence, and given that safety is required for the realization of women’s economic equality, I was all the more clear that VAWA was appropriately located by Congress under its Article I Commerce Clause powers as well as its Fourteenth Amendment authority.

In contrast to this vision that violence was linked to economic equality and civil rights and that federal law could help to inscribe that connection, opponents of the draft civil rights remedy located the issue of violence as a matter of local governance over families, domestic relations, and crime, and then objected to letting those kinds of issues into federal courts. In 1991, the Judicial Conference joined with the National Conference of Chief Justices of the State Courts to argue that, if the 1991 version of VAWA were enacted, women could use such federal lawsuits as a “bargaining tool within the context of divorce negotiations” that were already “often acrimonious.”<sup>14</sup> Moreover, the Judicial Conference of the United States cited Chief Justice Rehnquist as noting that more than “three million domestic relations cases were filed in state courts in 1989. If a party to one-tenth of those suits were to seek collateral recourse under [VAWA], those cases alone would exceed the total of all cases now pending in the district courts and the courts of appeals of the federal judiciary.”<sup>15</sup> While opposing this aspect of the legislation, the Judicial Conference expressed its support of the need to protect women from violence and offered to “work with Congress to ensure the most efficient utilization of scarce judicial resources and to fashion an appropriate response to violence directed at women.”<sup>16</sup>

During the same year, 1991, Chief Justice William Rehnquist used his annual state of the judiciary address to call on Congress to “reexamine the role of the federal courts,” as he also counseled against increasing too much the number of judges. He argued that “[m]odest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action.”<sup>17</sup> Chief Justice Rehnquist listed several bodies of extant law that he called “candidates for possible curtailment,” such as diversity jurisdiction, the Federal Employers’ Liability Act, the Jones Act, and habeas corpus. The Chief Justice also cited pending legislation as “unnecessarily” expanding federal jurisdiction; included on that list was VAWA. “Although supporting the underlying objective . . . to deter violence against women,” he reiterated the objections of the

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13. Brief of Law Professors as Amici Curiae in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032805. I joined, as co-counsel, Bruce Ackerman, Jack M. Balkin, Vicki C. Jackson, and Frank I. Michelman [hereinafter Law Professors VAWA Amicus Brief].

14. Judicial Conference VAWA Resolution, 1991, *supra* note 10, at 57 (quoting and endorsing comments made on behalf of the National Conference of State Chief Justices).

15. *Id.* at 58.

16. *Id.*

17. See William H. Rehnquist, 1991 Year-End Report on the Federal Judiciary, *reprinted in* THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Jan. 1992, at 2–3.

Judicial Conference—that because of what he characterized as its too-sweeping definition of crimes of violence and its creation of a private right of action, the bill “could involve the federal courts in a whole host of domestic relations disputes.”<sup>18</sup>

The idea that the Judicial Conference would be opposed to giving access to the federal courts for suits brought by victims of violence motivated by gender was troubling to many—inside as well as outside the judiciary. Much discussion ensued, producing both a revised draft of VAWA’s civil rights remedy and another request by the Judicial Conference to a reconstituted Ad Hoc Committee on Gender-Based Violence to take up the question of the statute again.<sup>19</sup> In 1993, the Judicial Conference reported that, based on the new committee report and “as a result of a dialogue the Ad Hoc Committee has undertaken with the sponsors of the proposed Violence Against Women Act of 1991,” the Conference had modified its views.<sup>20</sup> It took “no position” on the specific provisions (and hence on the civil rights remedy) and reiterated “its general concerns about the trend toward federalization of state law crimes and causes of action.”<sup>21</sup> Further, the Conference affirmatively supported provisions of Title V of VAWA, “encouraging circuit judicial councils to conduct studies with respect to gender bias in their respective circuits.”<sup>22</sup>

In 1994, VAWA was enacted. Thereafter, the Chief Justice continued to raise questions about its validity. In 1998 at a speech to the American Law Institute (ALI), the Chief Justice mentioned several pieces of enacted legislation that he thought questionable because of their expansion of federal jurisdiction.<sup>23</sup> Included were the Anti-Car Theft Act of 1992, the Violence Against Women Act of 1994, the Freedom of Access to Clinic Entrances Act of 1994, the Child Support Recovery Act of 1992, and the Animal Enterprise Protection Act of 1992,

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18. *Id.* at 3.

19. Many of the panelists, including Mary Schroeder and Victoria Nourse, provided discussions of how the shift came about. *See, e.g., Present at the Creation: Drafting and Passing the Violence Against Women Act* (remarks of Victoria Nourse), *supra*, and *The VAWA Civil Rights Provision: Shaping It, Saving It, Litigating it, Losing It* (remarks of Hon. Mary Schroeder), *supra*.

20. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (March 1993) [hereinafter *Judicial Conference VAWA Resolution, 1993*].

21. *Id.*

22. *Id.* *See also* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 63-64 (Sept. 1992) (bias in the Federal Judiciary). “Concluding that bias, in all of its forms, presents a danger to the effective administration of justice in federal courts,” the Committee on Court Administration and Case Management recommended and the Conference adopted “a resolution encouraging each circuit not already doing so to sponsor educational programs for judges, supporting personnel and attorneys to sensitize them to concerns of bias based on race, ethnicity, gender, age, and disability, and the extent to which bias may affect litigants, witnesses, attorneys, and all who work in the judicial branch.” *Id.* at 64. The Conference also voted to “encourage each circuit to report” to its committee the implementation actions taken on the resolution. *Id.*

23. William H. Rehnquist, Remarks at the Monday Afternoon Session, in *Am. Law Inst., 75th Annual Meeting: Remarks and Addresses*, May 11–14, 1998, at 13, 17-18.

as well as “recent arson provisions.”<sup>24</sup> Not only did “[t]raditional principles of federalism that have guided this country throughout its existence” render the statutes of concern, Chief Justice Rehnquist explained, “one senses from the context in which [these bills] were enacted that the question of whether the states are doing an adequate job in this particular area was never seriously asked.”<sup>25</sup>

As is familiar, in 2000, the Chief Justice wrote the majority decision on behalf of the five justices who found VAWA’s civil rights remedy to be unconstitutional.<sup>26</sup> In that opinion, the Chief Justice relied on the view that the “Constitution requires a distinction between what is truly national and what is truly local,” and concluded that Congress had exceeded its authority under both the Commerce Clause and the Fourteenth Amendment.<sup>27</sup>

The civil rights remedy was plainly of great symbolic import. A question exists, however, about its practical utility. Before VAWA’s enactment, the Judicial Conference had asked its Office of Judicial Impact Assessment to study the anticipated impact of the legislation. The Office argued that the judicial impact would be profound and forecast a flood of new filings, with some 13,000 cases expected each year.<sup>28</sup> Moreover, as noted above, the Judicial Conference had suggested that the 1991 version of VAWA could have produced a caseload larger than that of the district and appellate courts.<sup>29</sup> But when the Supreme Court decided *Morrison*, those of us writing the amicus brief on behalf of law professors found few decisions under VAWA; we reported that we had identified some fifty opinions citing the civil rights remedy that had been published during its six-year lifespan.<sup>30</sup>

#### ASSESSING THE IMPORT AND THE ROUTES TO CHANGE

What, then, should we make of this brief overview, spanning the last decade of the twentieth century? Did it matter that the civil rights remedy was won and then lost? What was lost? What are the lessons to be drawn from these events? Below, I sketch five insights to be gleaned from these exchanges.

A first focus is on the constitutional import of the ruling. Some of my law colleagues have argued that the Court’s limits on Commerce Clause powers in *Morrison* have been undercut by later decisions, such as *Gonzalez v. Raich*,<sup>31</sup> and concluded that as a matter of constitutional doctrine, *Morrison* is not of great moment. I think them wrong; *Morrison* stands as a serious obstacle to the federal,

24. *Id.*

25. *Id.* at 18.

26. *United States v. Morrison*, 529 U.S. 598 (2000).

27. *Id.* at 617–18. See generally Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) [hereinafter Resnik, *Categorical Federalism*].

28. See *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 13 (1991) (quoting an Office of Judicial Impact Assessment estimate).

29. Judicial Conference VAWA Resolution, 1991, *supra* note 10, at 58.

30. Law Professors VAWA Amicus Brief, *supra* note 13, at \*13.

31. 545 U.S. 1 (2005).

legal acknowledgement of the role that inequality and violence play in social ordering and to the contributions that the federal courts could make as one source of remedies. When, as in *Morrison*, a woman is raped on a college campus, that event has nothing to do with families and the remedies should not be seen as exclusively located in state competencies. Violence ought not to be presumed to be a facet of family life or only of local criminal activity but, given the degree to which women are the targets, as a structural issue with broad implications.

Moreover, even when violence occurs within families, that category—family—is not one beyond the reach of federal law or necessarily outside the authority of the federal judiciary. Elsewhere, I have detailed some of the content of what I termed the “federal laws of the family,”<sup>32</sup> through which federal courts regularly deal with family-related issues as they interpret statutes, constitutional mandates, and international agreements. While not often termed “family law,” bodies of federal statutory regimes—immigration, tax, bankruptcy, pensions—all require federal judges to apply legal rules to family life. One example is the Employee Retirement Income Security Act of 1974 (ERISA), which is, in part, federal marital property law as it governs the allocation of pension assets between spouses.<sup>33</sup> Another example comes from The Hague Convention governing international custody disputes.<sup>34</sup>

In addition, the Supreme Court has also identified an important role for constitutional law to play in superintending state court decisions about marriage and visitation rights. Famously, in the aptly-named *Loving v. Virginia*, the Court held that race could not be used as a criterion for marriage.<sup>35</sup> In *Troxel v. Granville*, the Court concluded that a state could not, in certain instances, require that grandparents be given visitation rights.<sup>36</sup> Meanwhile, Congress has opined on same-sex marriage through its enactment of the Defense of Marriage Act, authorizing states, as a matter of federal Full Faith and Credit law, to decline to recognize same-sex marriages if permitted in other states.<sup>37</sup> To sum up this first lesson from the VAWA conflicts, *Morrison* stands as a mis-description of federal law’s relationship to households, and as a missed opportunity to recognize the role played by violence in subordination and in the production of economic inequality.

A second lesson comes from the history of federal judicial efforts before 1993

32. See Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex, Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

33. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829; see also *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA preempted the application of Louisiana’s community property laws).

34. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 99 U.S.T. 11 (codified at 42 U.S.C. §§ 11601–11610).

35. 388 U.S. 1 (1967).

36. 530 U.S. 57 (2000).

37. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of the U.S. Code, including 28 U.S.C. § 1738C).

to dissuade Congress from enacting the civil rights remedy of VAWA. What transpired is an example of why federal judges ought not to weigh in on proposals in Congress about whether to create new causes of action or new crimes—whether opposed or supportive. When the judiciary can be seen as positioned *ex ante*, its legitimacy *ex post* can be questioned. Moreover, as sophisticated litigants come to understand that the federal judiciary can take positions on statutes, efforts are made to influence those views. The judiciary becomes a target of lobbying, as the history of the civil rights remedy in VAWA illustrates.

The judiciary as an entity ought instead to be understood to be agnostic about what comes before it. Therefore the Judicial Conference ought not exercise its corporate voice as a spokesperson for Article III judges to propose or to oppose new rights or new crimes. Similarly, the Chief Justice ought not to target statutes and raise questions about them in speeches but rather stand apart from discussions of the merits of particular congressional authorizations that bring cases to the federal courts. Of course, both the Conference and the Chief Justice could report that the courts' workload, in general, outruns its resources. But neither should identify particular categories of cases as the "wrong kind" for "the federal courts"; to do so both intrudes on the policy decisions that Congress ought to make about when to authorize use of the federal courts and suggests that the judiciary has prepositioned itself in terms of certain kinds of claims or certain kinds of claimants.

Let me be sure to underscore that the exchange around VAWA's civil rights remedy was but one of many instances in which the Judicial Conference had been active in opposing the entry of certain kinds of rights-seekers into federal court. Federal judges campaigned against the Child Support Recovery Act from its inception in the 1940s (when it was nicknamed the "Runaway Pappy Act"<sup>38</sup>) through its enactment in 1992.<sup>39</sup> Further, as can be seen from the excerpt of the 1995 *Long Range Plan of the Judicial Conference of the United States*, that first-ever report included a Recommendation (number 6) that stated: "Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests."<sup>40</sup> The *Long Range Plan* offered a few examples of what would justify new claims (such as state-failures), but the *Plan's* basic thrust was that Congress should have a presumption *against* new rights-creation, if enforced in federal court. While these remarks are not the place to explore how theories of judging do not envision judges adopting a corporate

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38. See H.R. 1538, 81st Cong. (1949); S. 1265, 77th Cong. (1941); see also Resnik, *Categorical Federalism*, *supra* note 27, at 646–53.

39. See, e.g., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57 (Sept. 1992) ("[e]xpressing opposition to a pronounced trend by Congress of federalizing traditional state crimes, the Executive Committee agreed on behalf of the Judicial Conference to oppose" four bills, including the "Anti-Car Theft Act of 1992" and the "Kahla Lansing Child Protection Act").

40. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), reprinted in 166 F.R.D. 49, 88 (1995).

identity to advance their world view through legislation,<sup>41</sup> my point here is that the history of VAWA's civil rights remedy is not unique, for the Judicial Conference has sought to derail other legislation proposals to send various litigants (such as those whose computers collapsed as was feared in Y2K or health care claimants) to the federal courts.

A third lesson to be drawn from *Morrison* is about federalism. While that opinion invoked federalism against the civil rights remedy, the fact is federalism can be used in service of the aims of VAWA. The redundancy and multiple sources of law-making that are intrinsic to a federated system offer opportunities to generate many efforts, at the state and local level, to respond to the injuries identified in VAWA. As the New York City Council put it in 2000, "In light of the void left by the Supreme Court's decision, this Council finds that victims of gender-motivated violence should have a private right of action against their perpetrators under the Administrative Code."<sup>42</sup> The Council then explained that its "private right of action aims to resolve the difficulty that victims face in seeking court remedies by providing an officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence."<sup>43</sup> At the state level, both California and Illinois have also crafted private actions for damages or other remedies in their state courts for victims of "gender violence" or "gender-related violence."<sup>44</sup> Like VAWA, the reported case law on these remedies is sparse, and may well remind us of the criticism made in advance by some commentators of VAWA's civil rights remedy—that it was a limited remedy because it depended on victims with knowledge and resources to pursue such relief.

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41. I discuss these questions in depth in Resnik, *Trial as Error, Jurisdiction as Injury*, *supra* note 5; and in Judith Resnik, *Constricting Remedies: the Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003).

42. Declaration of Legislative Findings and Intent, Actions by Victims of Gender-Motivated Violence, N.Y.C. ADMIN. CODE § 8-902 (2000). Very few reported decisions cite this cause of action. *See, e.g.*, *Lee v. Cintron*, No. 5999/2008, 2009 WL 3199222 (N.Y. Sup. Ct. Oct. 6, 2009) (unreported decision on disqualification of defendant's counsel); *Cordero v. Epstein*, 869 N.Y.S.2d 725 (N.Y. Sup. Ct. 2008) (finding City Council's extension of a statute of limitations for gender-motivated violence preempted by state legislation).

43. N.Y.C. ADMIN. CODE § 8-902.

44. *See* CAL. CIVIL CODE § 52.4 (West 2004) ("Any person who has been subjected to gender violence may bring a civil action for damages against any responsible party. The plaintiff may seek actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. The prevailing plaintiff may also be awarded attorneys' fees and costs."); 740 ILL. COMP. STAT. ANN. 82/10 (West 2004) ("Any person who has been subjected to gender-related violence . . . may bring a civil action for damages, injunctive relief, or other appropriate relief against a person or persons perpetrating that gender-related violence. For purposes of this Section, "perpetrating" means either personally committing the gender-related violence or personally encouraging or assisting the act or acts of gender-related violence."). A California court recently concluded that a claim under this provision did not fall within an arbitration agreement entered into between two companies. *See RN Solution Inc. v. Catholic Healthcare West*, 81 Cal. Rptr. 3d 892 (Cal. Ct. App. 2008). *See generally* Sarah F. Russell, *Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327 (2003).

A fourth lesson is that *Morrison* slowed, but did not stop, national efforts to redress violence against women. In 2003, members of Congress put forth the Violence Against Women Civil Rights Restoration Act, which would have provided for damage actions in federal court under specified circumstances, such as if the gender-based violence entailed interstate travel or instrumentalities.<sup>45</sup> In addition, in 2007, Senator Biden again demonstrated his concern about violence when he proposed the International Violence Against Women Act (IVAWA). That bill sought “to promote women’s political, economic, educational, social, cultural, civil, and human rights and opportunities throughout the world” by systematically integrating and coordinating “efforts to prevent and respond to violence against women and girls into United States foreign policy and foreign assistance programs, and to expand implementation of effective practices and programs.”<sup>46</sup> Recall that the majority had used state authority as a basis for rebuffing VAWA’s civil rights remedy. In contrast, IVAWA relies on federal authority to relate to the international arena.

Moving to this transnational level, many bodies have recognized the harms of gender-based violence and expressly linked them to women’s subordination and lack of equality. For example, a 2000 report issued by the United Nations Children’s Fund and entitled *Domestic Violence Against Women and Girls* concluded that:

Violence against women is present in every country, cutting across boundaries of culture, class, education, income, ethnicity and age. Even though most societies proscribe violence against women, the reality is that violations against women’s human rights are often sanctioned under the garb of cultural practices and norms, or through misinterpretation of religious tenets. Moreover, when the violation takes place within the home, as is very often the case, the abuse is effectively condoned by the tacit silence and the passivity displayed by

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45. The proposal would have provided for damage actions in federal court if:

(A) [I]n connection with the offense—

(i) the defendant or the victim travels in interstate or foreign commerce;

(ii) the defendant or the victim uses a facility or instrumentality of interstate or foreign commerce; or

(iii) the defendant employs a firearm, explosive, incendiary device, or other weapon, or a narcotic or drug listed pursuant to section 202 of the Controlled Substances Act, or other noxious or dangerous substance, that has traveled in interstate or foreign commerce;

(B) the offense interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(C) the offense was committed with intent to interfere with the victim’s commercial or other economic activity.

Violence Against Women Civil Rights Restoration Act of 2003, H.R. 394, 108th Cong. § 2 (2003).

46. See International Violence Against Women Act of 2007, S. 2279, 110th Cong. § 3 (2007).

the state and the law-enforcing machinery.<sup>47</sup>

A similar recognition of the harm of violence against women comes from the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>48</sup> When first in force in the early 1980s, CEDAW did not speak directly to violence. In 1992, however, the expert committee that oversees CEDAW promulgated its General Recommendation No. 19, which calls on state parties to “take all legal and other measures . . . necessary to provide effective protection against gender-based violence,” including “penal sanctions, civil remedies and compensatory provisions” as well as “preventive” and “protective” measures aimed at education and rehabilitation.<sup>49</sup> Likewise, the United Nations Development Fund for Women (UNIFEM) also has identified limiting violence against women as one of the central goals for the decade.<sup>50</sup>

These multiple efforts bring me to a fifth lesson from the narrative of VAWA’s civil rights remedy and the federal courts—about the need to operate on multiple levels at the same time, rather than to box problems as “truly local,” or “truly national,” or specifically international. Chief Justice William Rehnquist was right to focus on the localism of violence, for that violence is visited on the locality of a woman’s body. But it is also a phenomenon shared across all borders. Thus, the error was in assuming that the localism of violence should be a barrier to a remedy provided at each and every level.

Hence, I want to put forth a gentle critique of the 2007 draft of the International Violence Against Women Act, with a new national “Office of Women’s Global Initiatives.”<sup>51</sup> The proposed statute does not specify that such an office ought to be looking at the local levels as well as focused on interactions at the level of nation-states. In cities around the world, individuals have done important work on violence against women—making localities (sadly) more than expert on these problems. National efforts ought to find means by which to help transmit knowledge of the better programs and practices, of the challenges of law enforcement, and of the effects of social structures, from jurisdiction to jurisdiction, crossing borders and bridging the local, the national, and the international.<sup>52</sup> The legislation should structure into its mandates that federal-level offices draw on such resources as well as serve as a hub to connect programs

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47. UNICEF, *Domestic Violence Against Women and Girls*, INNOCENTI DIGEST, June 2000, at 2, <http://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

48. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

49. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (11th Session, 1992), ¶ 24(t), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

50. See UNIFEM, UNIFEM ANNUAL REPORT 2008–2009 (2009) (Mission and Mandate), available at [http://www.unifem.org/attachments/products/annual\\_report\\_2008\\_2009\\_en.pdf](http://www.unifem.org/attachments/products/annual_report_2008_2009_en.pdf).

51. See International Violence Against Women Act of 2007, S. 2279, 110th Cong. § 300B.

52. For additional discussion, see Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

and legal remedies at different levels of governance to enable trans-local and trans-national relationships to develop.

The criss-crossing of borders is not a novel suggestion but rather exemplified by so many who worked on VAWA—Legal Momentum, the National Judicial Education Project, and the National Association of Women Judges. In the language of social movements, the concept of “NGOs”—nongovernmental organizations—is familiar. Legal Momentum is one example. In addition, one can find many government organizations (GOs) doing policy work. Political science also identifies “SIGs” or “special interest groups,” and PIGs, “public interest groups.”

Yet another set of organizations needs to be added to this typography, and I propose capturing it with the term “translocal organizations of government actors”—and the acronym TOGAs, reflecting their civic import. These are “private” groups of “public” actors who come together to share information and expertise and to influence policy. Illustrative are the National Association of Women Judges, the U.S. Conference of Mayors, the National Governors Association, the National Association of Attorneys General, and the National Conference of Chief Justices of the State Courts. These private organizations gain political capital by being comprised of various kinds of government office holders and they can—as illustrated by the 1994 enactment of VAWA—have significant effects on lawmaking. We who are interested in reshaping the remedies for violence against women should turn again to consider the spectrum of organizations—TOGAs, NGOs, and the like—to enlist them affirmatively in such work.<sup>53</sup>

In sum, in this, the fifteenth year after the enactment of the Violence Against Women Act, we should be acutely aware that we are *in media res*, in the middle of the story. Most of the Act is in place, and is an important source of federal support for anti-violence efforts. I’m grateful and touched to be brought together for a reunion in honor of our fifteenth year, and I hope for a return invitation. But I would like not to wait fifteen years, but just five, and at the twentieth anniversary, I hope we will debate the next piece of legislation and that it, in turn, reflects the interdependencies between the local, the national and the global—all to be engaged to respond to the role played by violence in gender inequalities.

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53. See Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).