A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act

Panel Two: The VAWA Civil Rights Provision: Shaping It, Saving It, Litigating It, Losing It

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Lynn Hecht Schafran: Our next panel is called the VAWA Civil Rights Provision: Shaping It, Saving It, Litigating It, Losing It. Our moderator is Martha Davis who is now a law professor at Northeastern University, and who was our legal director at Legal Momentum during the years when the civil rights remedy[1] was being litigated across the country. So if everyone who is on that panel will come up.

I also want to mention that someone has just joined us, another Legal Momentum alum, Kathy Rogers, where are you sitting? Kathy Rogers literally just flew in from speaking in Dallas in order to be with us this afternoon. She was the president of Legal Momentum in those years when Martha was our Legal Director and Julie and Martha were working these cases across the country. So Kathy . . . can you stand up for a moment to let us recognize you?

Martha Davis: Thank you very much. That is a hard speech to follow because it was so heartfelt and so moving to hear from the Vice President, so I'm all the more happy to be here and happy that we have a chance to talk about this today. As Lynn said, I'm Martha Davis. I was the Legal Director at NOW Legal Defense Fund from 1996 to 2002, which was a key period in the development of VAWA.[2] So I wasn't present at VAWA's birth, but I was present at its infancy. We have a distinguished and knowledgeable panel; I'm going to introduce them very briefly. As Lynn said, bios are in your program. I'll introduce people in the order they are going to speak.

Professor Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, and I couldn't resist the temptation to quote Fred Strebeigh's dead-on

1. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified at 42 U.S.C. § 13981), *held unconstitutional by* United States v. Morrison, 529 U.S. 598 (2000) (referenced throughout).

2. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at scattered sections of 18 U.S.C. and 42 U.S.C.) (referenced throughout).

description of Professor Resnik in his new book, *Equal*.[3] He says, "Prolific in publication and astonishing in energy, Resnik could seem ubiquitous."[4] That was in 1992, before she had a Blackberry! Next, Judge Mary Schroeder. Judge Schroeder joined the Ninth Circuit Court of Appeals in 1979, serving as its chief judge from 2000 to 2007. She is a founding member and former president of the National Association of Women Judges (NAWJ), and I expect she'll speak about the role she played in getting NAWJ to become the only judicial organization to support the principles of VAWA. Next, Professor Julie Goldscheid, who was my colleague at NOW Legal Defense [Fund]. She's an Associate Professor of Law at The City University of New York (CUNY) School of Law. Before joining the CUNY faculty she spent over six years at Legal Momentum. There she spearheaded the organization's legal work to end violence against women, which included arguing the *United States v. Morrison*[5] case before the U.S. Supreme Court. And finally, Fred Strebeigh. Mr. Strebeigh teaches non-fiction writing at Yale University. He's written for numerous publications including the *Atlantic Monthly*, *Legal Affairs*, *New Republic*, *New York Times* and others and he just published *Equal: Women Reshape American Law*,[6] a fabulous book and the last 135 pages deal with the topic that we're talking about today.

Before I turn it over to the panelists, I want to take my prerogative as the moderator and make just two points. First, you'll see when you look at Judge Schroeder's bio that she writes that, "She joins many men and women of our nation who mourn the civil rights remedy's Supreme Court demise." I teach constitutional law, and so I have the chance to reconsider the *Morrison* decision in depth again every spring. It's a sad section in the course, and it actually makes me angry. The constitutional law case books of course excerpt the decision, maybe provide a citation to one of Professor Resnik's articles or Professor Goldscheid's commentary, but what they don't tell, and what most law students aren't learning, is how close this case was and how easily it could have gone the other way. As Professor Goldscheid may mention, all of the courts that considered the issue before the Fourth Circuit's en banc decision in the *Morrison* case, with the exception of the lower court in *Morrison*, had found that the civil rights remedy was constitutional. Many legal scholars had written about it and reached the same conclusion. To be a legal realist for a moment, I think you would have to say that the composition of the Supreme Court matters, and this is a case that could have turned out differently in a different time.

The second point I want to make briefly is just the same point that Vice President Biden made earlier about how indebted we as lawyers and citizens are to the individuals who come forward and are willing to bring cases—in this

3. FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW (2009).
4. *Id.* at 395.
5. 529 U.S. 598 (2000) (referenced throughout).
6. STREBEIGH, *supra* note 3.

instance cases under the VAWA civil rights remedy. Christy Brzonkala, the plaintiff in the *Morrison* case, is here today, and I wanted to recognize her. As we all know, it takes individual bravery and fortitude and, ultimately, belief in justice to come forward, to bring a case like this when it involves your own personal experiences of violence. It's because of these individuals that Judge Schroeder and all of us on the panel mourn—and are angered by—the civil rights remedy's demise. So with that let me turn it over to Professor Resnik.

PLEASE REFER TO PAGE 557 FOR JUDITH RESNIK'S COMMENTARY BASED ON HER REMARKS AT THE SYMPOSIUM EVENT.

JUDGE MARY SCHROEDER: Well all I have to say is, "Oh my gosh." Not only do I have to follow the Vice President but I also have to follow Judith Resnik—Professor Judith Resnik, an old friend. I am Mary Schroeder, and I am a judge of the United States Court of Appeals for the Ninth Circuit, but I am here in my capacity as a member of the National Association of Women Judges (NAWJ). And the NAWJ became involved because I received a phone call from a wonderful woman named Brenda Murray, who happens to be here. She is the Chief Administrative Law Judge of the Securities and Exchange Commission, and in a roomful of heroes and heroines, she is one of them. And she told me that I ought to get involved in the Violence Against Women Act. And it seemed to me as I looked at it, and looked at some of the materials that Judith has so brilliantly put before you, that because women's groups were the principal proponents of the Violence Against Women Act and because judges were the principal opponents of the Violence Against Women Act that the National Association of Women Judges was the only organization that could speak to both groups.

And so we went to the Association and obtained a resolution in support of the Violence Against Women Act. And we had a very lively meeting, I recall, because, as is their wont, judges and law professors tend to try to redraft everything. And there were many efforts to rewrite the legislation right there at our conference, but what was eventually agreed—and I think this is a pretty good gambit for those of you who are law students or who may be working in organizations in the future—what was agreed was that we would support the civil rights provision, which was of course quite controversial, in principle. And then essentially what the group did was delegate to me the authority on behalf of the National Association of Women Judges to negotiate the language of the provision. And so that is really what happened. And those of us who were involved in it wound up in a basement of the Capitol one afternoon, and that is how the actual animus language that was developed got into the Act.

And so in anticipation of this wonderful celebration, I prepared by reading Fred's wonderful book, and then by going through the three entire file cabinet drawers of materials that I had collected fifteen years ago on this project. And I was struck by three things. First, the extraordinary dedication of Senator Biden to the cause—we were really lucky to have him in the Senate Judiciary Committee during that period. Second, the exceptional brilliance of the women who

envisioned the civil rights provision as the centerpiece of the larger act embodying the rights of women to be free from violence toward their sex. And I remain to this day in awe of Victoria Nourse and Sally Goldfarb, who are sitting together right down here, because they were absolutely fabulous. And I don't know where Pat Reuss went but I am also grateful to her because she never let anybody get too carried away with idealism during this whole effort. And the third thing that struck me seemed to me then as the mindboggling hostility of the judiciary to the civil rights provision, because the judiciary thought it would clutter up the federal courts with trivia and impede the state courts in administering the divorce laws. The judges not only didn't get it; they were openly hostile to the Act and oblivious to the extent and pervasiveness of the violence that spawned it. And after fifteen years of more or less open discussion of abuse, domestic violence, establishment of shelters, hotlines, reform of the rape laws, and people like Christy Brzonkala who have come forward, it is difficult for us to imagine the ignorant hostility that existed a couple of decades ago. So let me talk about each of these things very briefly in turn.

Senator Biden was simply relentless in his pursuit of this goal, and it was a determination that at the time baffled me, because my male friends that were in Senator Biden's generation (which is also my generation), and the generation that preceded us—that educated and mentored us—were clueless. And while I intellectually comprehended Senator Biden's desire to use his Judiciary Committee position to enact significant legislation, I never in my heart understood why he was driven so hard to enact this particular legislation, until of course I heard him today and also until I saw him last summer at the Democratic convention with his wife Jill. And I think that we all recognized a man who truly understood and could admire women for their own accomplishments, which of his generation was quite unusual.

As for Sally and Victoria, I never before saw and I never again expect to see a team of such brilliance working together as lobbyist and staffer to accomplish a legislative goal that was to them both personally and professionally so meaningful. And I was sorry to see them both leave Washington and join the ranks of academia. In fact, when I got my computer set up in my own study at home a few years ago, the first thing I did was to look up Victoria Nourse and see if she was still in Madison. I was going [to] look her up and I wish I had. And in looking back at the *Morrison* disaster I tend to think—and I was talking to Fred a little bit about this earlier—if we could have organized a small band of women like Sally and Victoria who could have been out there systematically litigating cases involving the civil rights provision and related issues we might have gotten another vote in *Morrison*, and I think I know where that vote might have come from.

Finally, about the judges and indeed, the entire male-dominated legal establishment at the time, who were so opposed to the civil rights provision: these were men of a generation that failed to understand sexual violence and could not

comprehend the concept of violence as an assertion of power against women. The concerns that drove them to oppose this statute, however, were quite mundane. Federal judges, I can tell you, worry a lot about status. And for many judges the federal courts are to be reserved for important statutes and constitutional cases, and important statutes are those that may involve a lot of money. So the state courts, on the other hand, are there to handle—according to the federal courts—are there to handle little people's problems, and there are lots and lots of judges in the state courts who can handle those kinds of things. I remember once at a meeting of the [National Association of] Women Judges in Washington, Chief Justice Burger came out to meet with us. I remember he came out and looked at the room, like this, filled with women, and the only thing he could say in shock was, "Are you all really judges?" I think Gladys[7] remembers that, it was quite a memorable moment.

The combination of ignorance and elitism, that was the thing that led federal judges and some leading constitutional practitioners to oppose the civil rights provision. I think the opposition was caught up in the phrase that I kept hearing over and over again. As I would talk to people and say, "Why are you against this?" they would say, "We don't want purse snatchers in federal court." And on the state side, the concern was to protect their turf and to prevent what seemed to me to be the imaginary threat that the civil rights provision would be used to raise the stake in divorce cases—because the stakes in most of those cases aren't very big anyway.

So the judges were concerned about status and turf, and why should we be surprised at that? And yet it is still surprising to me in a way, and I look back at the judicial impact statement that the Administrative Office of the U.S. Courts prepared for VAWA. In those days the judicial impact statement generally resulted in opposing legislation, because the impact would maximize the number of cases that could be filed in federal court. In the case of VAWA, the estimate for the civil rights provision began with the premise that every rape case prosecuted in state court was a potential federal court case, so the estimates of additional litigation in federal court went into the range of 30,000 to 50,000 cases a year. In short, and this is my point, the greater the magnitude of the problem that Congress wanted to address, *i.e.*, the larger the amount of injustice suffered by people as a result of violation of their rights, then the more motivated the federal judiciary was to oppose the legislation.

Again, I'm speaking just for me. I have always believed, however, that that view was the view that was driving Chief Justice Rehnquist's opinion in *Morrison*. And so therefore, I can't say enough about the work of Judge Stanley

7. Judge Gladys Kessler, Federal District Court for the District of Columbia, formerly Judge of the Superior Court of the District of Columbia and a former President of the National Association of Women Judges.

Marcus of now the Eleventh Circuit[8] in this regard, because he was the person who didn't get it originally, but he was the chair of the State-Federal Jurisdiction Committee at the Judicial Conference of the U.S. And in his view judges just shouldn't be against civil rights legislation, and he was the one who was instrumental in getting the Judicial Conference of the U.S. to pull back its opposition.

So, in the years since *Morrison* was decided I served for seven years as Chief Judge of the Ninth Circuit and I sat on the Judicial Conference of the United States presided over most of that time by Justice Rehnquist. And the Chief Justice has an incredible amount of power, because he is not only the Chief Justice of the United States Supreme Court, he is also the chief administrative officer of all of the federal courts. And he has incredible power. And I now understand what I didn't understand in 2000 when *Morrison* was decided. I think it is very easy for a judge who is charged with administrative power to get the administrative roles and the judicial roles mixed up. And I think Justice Rehnquist saw the administrative role—that is, to keep the courts from being overburdened—as paramount to his judicial role, which was to vindicate the rights of people under the Constitution.

And so I think, in closing, that the only Chief Justice in my time who never got confused on that score and always kept the true function of the federal courts paramount was Earl Warren. And so, while there have been many great men who have served with honor on the Court and who have passed on, I think when *Morrison* was decided not one of them turned over in his grave more often than Earl Warren. So I thank you very much for the honor of asking me to be here and as you can tell VAWA still means a great deal to me. Thank you.

JULIE GOLDSCHEID: Hello. I want to thank Lynn and Legal Momentum for inviting me and for organizing this symposium, and to Georgetown for being the host. Lynn asked me to talk about the cases litigated under the civil rights remedy, including those decided before *Morrison,* to put in context the work you heard about this morning, which laid the groundwork for VAWA's enactment. I started working at Legal Momentum, which was then called NOW Legal Defense Fund, one month after VAWA was enacted, and was charged with helping to implement the civil rights remedy. NOW Legal Defense Fund became involved in many of the cases litigated around the country. I will talk a bit about those cases, about the *Morrison* decision, and about some of the post-*Morrison* advocacy.

As others have mentioned, at the time that the Supreme Court decided *Morrison*, the lower court rulings striking the law were anomalies. Between fifty and sixty lower court decisions had addressed the civil rights remedy and virtually all had upheld its constitutionality. NOW Legal Defense [Fund] was

8. The Eleventh Circuit was created in 1981 when Congress divided the Fifth Circuit into the Fifth and Eleventh Circuits.

involved in some of those cases as co-counsel and in many as amicus. In others we provided technical assistance to local lawyers bringing the claims.

The cases were split between claims involving domestic violence and sexual assault: those involving marital rape involved both. As soon as the cases began to be filed, defendants challenged the law's constitutionality. As you've heard, much of the congressional debate centered around the statutory terminology, including the scope of the definition, and the elements of the cause of action. But because of the shift in the federal judiciary that you've heard about today, and what has been termed "the federalism revolution," the law's constitutionality rather than the scope of the substantive elements, took center stage.

As you know, VAWA was signed into law in September of 1994. Early in 1995 the Supreme Court decided *United States v. Lopez*,[9] in which it cut back Congress's power to enact legislation under the Commerce Clause[10] for the first time since the New Deal. The Commerce Clause, as many of you probably know, was one of two constitutional bases for the civil rights remedy. As lower courts decided motions to dismiss claims that argued that the law was unconstitutional under *Lopez*, the courts, with the exception of the lower courts in *Morrison* and one other, had upheld the law as constitutional. Those decisions rested on the depth of the congressional record that established the connections between violence against women and the economy, and the ways in which states' responses denied women equal protection of the laws. We argued, along with the Department of Justice in many cases, that the law was constitutional based both on the Commerce Clause and on Section Five of the Fourteenth Amendment[11] (which you probably know is the clause under which Congress can enact laws to enforce the Fourteenth Amendment's promise of the equal protection of the laws). Most of the decisions upheld the law under the Commerce Clause, and readily deferred to the strong congressional record.

The history of those cases that is less often told is the account of how the decisions addressed the substantive elements. A plaintiff would have had to satisfy two elements to sustain a claim under the civil rights remedy. The first element required proof that the act was "gender-motivated" and the second required proof that the conduct was a "crime of violence," both of which were defined in the statute. There was a lot of concern about whether or not the law was crafted in a way that was too narrow, particularly with respect to the requirement of "gender-motivation."

As it turned out, courts had very little difficulty applying familiar concepts of circumstantial evidence of discrimination to distinguish which cases satisfied the "gender motivation" requirement. For example, in domestic violence cases, courts recognized that batterers' epithets, patterns of conduct, and stereotypical

9. 514 U.S. 549 (1995).
10. U.S. CONST. art. 1, § 8, cl. 3.
11. U.S. CONST. amend. XIV, § 5.

behavior toward their partners reflected gender bias. They didn't have difficulty ruling and concluding that sexual assaults committed in a range of contexts were gender-motivated. Those cases included allegations of sexual assault on a college campus, such as in *Morrison*, or of a graduate student by a professor; allegations of sexual assault in the workplace; or allegations of sexual assault by priests or parishioners. In other cases, courts concluded that any act of sexual harassment would be considered "gender-motivated." Thus, one of the civil rights remedy's legacies is this record of cases recognizing allegations of domestic and sexual violence as civil rights violations.

An aspect of those decisions that may be surprising is that a number of claims were dismissed based on the "crime of violence" element. That element required a plaintiff to establish that the underlying violent conduct would rise to the level of a felony under certain provisions of federal law. One case that was dismissed involved allegations of unwanted sexual touching by a psychiatrist of a patient during a routine examination. The court found that there wasn't enough force or coercion to rise to the level of a felony. Although not many cases grappled with this element, those that did are worth reviewing if similar remedies are considered in the future.

The argument itself was challenging but the questioning and the results were not a surprise. Perhaps the biggest surprise of the oral argument was the fact that Justice O'Connor announced the decision in *Kimel v. Florida Board of Regents*[12] that morning. In that decision, the Court declared that a private individual could not sue a state in federal court under the federal law prohibiting age discrimination in employment. The case was premised on the scope of Congress's power under Section Five of the Fourteenth Amendment, one of the two bases for upholding the civil rights remedy. I happened to be sitting right in front of Justice O'Connor as she announced the decision, and I remember being relieved that we had planned to emphasize our Commerce Clause, and not our Section Five, arguments.

Although it may be self-serving, I can't help but agree with Martha's earlier comment, that perhaps at a different point in time the case may have been decided differently. Perhaps in the future a similar case might be decided differently. But given the fact that what was at issue was a private federal cause of action in an area historically seen as family law—which, as you've heard, has traditionally been thought of as relegated to the state courts—that law was bound to be challenged, given the philosophical approach of the Supreme Court of the time.

That leaves us with the question of where do we stand post-*Morrison*? As Judith Resnik said, some states and some localities have enacted laws and others have legislation pending. In Congress, Representative Conyers introduced an amended civil rights remedy in 2000 that would address the concerns identified

12. 528 U.S. 62 (2000).

by the Supreme Court.[13] It would provide a cause of action that, in addition to the requirements of the law as passed in 1994, would also include a so-called "jurisdictional element" that would require proof of economic impact in each case. That proposed legislation also would authorize the Department of Justice to intervene upon a showing that local authorities' response to gender-based crimes was discriminatory. I leave the relative benefits and costs of such an approach for future discussion. Beyond those proposals, longstanding civil recovery provisions under state bias-crime laws have been in force for many years.

As we look to the future, I can't help but think that *Morrison* was the product of an historic moment in our federalism debates. The civil rights remedy focused opposition to VAWA, but we must remember that VAWA has had tremendous impact notwithstanding the fate of the civil rights remedy. We might think about the civil rights remedy's potential to produce change in two categories. One is its symbolic value, as we heard about earlier, and another is practical, as an avenue to provide redress for the economic harm that violence against women produces. As we move forward, and as we have the opportunity to think about different types of reform—whether legislative or otherwise—it is important to keep those two goals in mind. We should work as rigorously and as creatively as we can, to shift conceptions of violence against women from a private matter to a matter of public concern, a matter of civil rights. We also should do all we can, particularly in these economically challenging times, to redress the economic imbalances that violence against women produces. Thank you very much.

FRED STREBEIGH: So again, thank you so much. I'm Fred Strebeigh. I am deeply honored to be here on a panel in which I'm permitted to follow, in the past two panels, precisely the people whom I spent a number of years following, a number of years learning from, when I was writing the narrative legal history just out in the past few weeks that has been so generously referred to: *Equal: Women Reshape American Law*.[14] *Equal* has five major sections and almost 600 pages. It begins with the first days in the 1970s when a then thirty-something professor of law at Columbia whose name was Ruth Bader Ginsburg was just beginning to shift from the study of Scandinavian legal procedure—which would not have changed our nation in significant ways—to her work to advance the law of women throughout the nation and beyond. Though the book begins there, and begins also at a time when she had the great good fortune to have Lynn Hecht Schafran as one of her students at Columbia Law School, *Equal* devotes almost a third of its length to the efforts to create and defend the Violence Against Women Act.

My challenge from Lynn is this: Lynn asked me to address directly, "Why did you devote one third of *Equal* to narrating the history of Violence Against Women Act?" And I partly translate that challenge as follows: What can be

13. Violence Against Women Civil Rights Restoration Act of 2000, H.R. 5021, 106th Cong. (2000).
14. STREBEIGH, *supra* note 3.

learned from tracing the narrative of the creation of the Violence Against Women Act? That has partly already been followed today. I'll give a quick answer before a slightly longer one. For those who worked so wisely and so analytically, as well as passionately, for VAWA and its vision for civil rights for women—Julie and Judith and Judge Schroeder and Sally and Victoria and Pat and Lynn and many others—I do think you were robbed. I think, as a result, the rest of us were robbed of a law that could have advanced the cause of equality and civil rights in the nation.

That law we were robbed of is one that Senator Biden—then in 1990 as he first introduced it—spoke of truly eloquently. Irasema Garza has already quoted him today, and I thought I might, but instead I want to jump to the day when I first met, in any sense, then-Senator Biden. It was a cold outdoor January day in 2000. He was standing on the cold marble steps of the Supreme Court. There were only a handful of people there to listen to him—so unlike today—though I remember one was Nina Totenberg of National Public Radio, in a sense listening for us all. We had just been inside the Supreme Court; we had just heard the oral argument in the case of Christy Brzonkala and the case of the Violence Against Women Act. Senator Biden, remarkable to me, sat in the front row. He was facing down the Chief Justice of the United States personally—a remarkable presentation of self there—and full of energy, speaking to everyone, talking to Lynn who was there, talking with Judith, also there, Sally, also there, alive and vital and saying that this is a law that matters.

We heard Julie argue along with then-Solicitor General Seth Waxman, trying to save VAWA from defeat at the Court. And it was—as I think Julie just said—it was a tough oral argument, which I thought Julie handled wonderfully against tough odds. For Senator Biden, I'm sure it was painful to hear Justice Scalia interrupting repeatedly. Justice Scalia broke in with questions. I remember him saying to Julie that a Congress that could enact VAWA, he argued, could also enact a general criminal statute against violence, such as a federal rape law or federal robbery law. "Right?" he asked. Julie answered wonderfully. She said: "No, each VAWA case has to show discriminatory motivation." Justice Scalia was pressing hard for his side, and it's a side that he had been developing over a period of years. It was also painful to hear Justice Rehnquist, with the support of Justice Kennedy, urging Solicitor General Waxman—who teamed with Julie—not to make a civil rights argument based on the Equal Protection Clause of the Fourteenth Amendment. Now that was linked partly to the shock of the *Kimel* decision,[15] coming down just as Julie and Solicitor General Waxman were about to begin. But it sent a message—certainly as I heard it from Justice Kennedy—saying, "Don't talk about equality," or at least about equality in the hope for the often-undelivered promise of the Fourteenth Amendment.

There was a chilled sense in the Court that day, and after these painful-to-hear

15. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

challenges from the Justices, Joe Biden headed outside to those wet cold steps. Very few people followed, and rain was falling. The contrast to today was striking. He was standing beneath an umbrella. It carried the seal of the Senate; it looked like just the tissue of power, it looked truly fragile there before those marble columns of the Court. And he proceeded to make an argument for women's equality, which seemed to be part of what Julie and Solicitor General Waxman actually were being blocked from making in the Court that day. And you all heard him today; he was masterful. And then he said this: "Men don't choose not to take jobs," he said, "for fear of gender-motivated violence, but women do alter their life patterns." You could sense that he felt this. And then he continued saying that "the Violence Against Women Act and its effort to protect women against gender-based violence empowers my daughters and granddaughters," again taking it very, very much in personal and in fundamentally powerful terms. But he also looked simultaneously awfully cold and awfully alone, albeit committed utterly long-term, and how fabulous to see that represented for us today in his talk. So I do think that I have devoted a large part of *Equal* to narrating the history of the Violence Against Women Act partly because the arguments that were being made by Julie, by Senator Biden, and others rang so true.

I also devote a third of *Equal* to narrating the history of [the] Violence Against Women Act because it seems to me that readers need time to grasp the multi-century history of the law's resistance to redressing the problem of violence against women. And I think that Victoria Nourse and I took something of a similar route, Victoria much more quickly than I, as we went back—Victoria to the law library reading room of the Library of Congress, where as she said she dug into great early works by people like Sue Ross and Justice Ginsburg and Herma Hill Kaye and others, working her way back. A key guide for us also, I should say, was Professor Susan Estrich's article in the 1986 *Yale Law Journal* on rape.[16] And just to give one emblematic example, a reading partly via Estrich, kept taking me back to a comment by Britain's Lord Chief Justice Matthew Hale, who died in 1676 but continued to reverberate. The comment was that a rape accusation, said Hale, is "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[17]

You know this is the comment that Judge David Bazelon called one of the most oft-quoted—and he should have said one of the most oft over-quoted—passages in our jurisprudence. And it was then adopted throughout American law, state after state after state, so that judge after judge after judge was issuing the so-called "Hale instruction," which fundamentally suggested that judges and juries may need to disbelieve women who bring rape charges. That was its impact.

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16. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

17. MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778), *quoted in* Estrich, *supra* note 16, at 1094-95 n.15.

But then as Victoria and I read further separately—but I was following—Victoria told me what she had read, so I followed its trace in order to try to recreate the analytical trajectory of drafting the Violence Against Women Act. Victoria went to a *Duke Law Journal* article in the 1980s.[18] It delivered a really remarkable twist, and under-discussed: the California Supreme Court in the 1970s uncovered the long-neglected context for Lord Hale's famous instruction.[19] Although judges in the U.S. had echoed Hale year after year, questioning the veracity of women of all ages and intellects, Hale had devised his instruction when considering a special circumstance: a rape charge brought by a twelve year-old girl. Hale's question had been whether a girl so young, legally an infant, should be allowed to testify at all—and he believed she should. That was the direction of his argument. But he was systematically misread by American courts for two centuries. I mean, this should enter the discussion of what authorities courts are permitted to draw from. Why are they permitted to draw from something so ancient and then draw so inaccurately? In any event, in other words, Hale's warning was that a jury could trust a young girl—but American law transformed this nuanced trust of Hale in the 1600s into stark distrust of women. This is the sort of trajectory through which *Equal* takes readers, and I found, as reviews have come in, that this is something that readers follow. I'm absolutely fascinated.

And a similar trajectory, which I won't take you through now, goes through the remarkable work of the National Judicial Education Project of the National Association of Women Judges—I'm looking to Lynn; I'm looking to Judge Schroeder—which is also a multi-year history of looking at bias in the courts in the United States. Which again, year after year, has become an educating force. It was an educating force, I know, for Victoria and for Sally in working on the Violence Against Women Act. I also devoted a third of *Equal* to the Violence Against Women Act because I felt readers needed to grasp the idealism, as I encountered it, and the lack of self-interestedness of the people who chose to fight for VAWA.

Lynn asked me to mention one among many, a long-time partner at Arnold & Porter here in Washington, D.C.—and her name, known to many of you, is Brooksley Born—who played a wonderful and important role. By the way, Brooksley Born may be well known to you and, if not, should be—because from 1996 to 1999 Brooksley Born was chair of the U.S. Commodity Futures Trading Commission, one of those institutions that all of us ignore. Except that in that role she tried hard, truly hard, as reported in the March 2, 2009, issue of *Newsweek* and elsewhere, against great resistance to limit unregulated derivatives—the so-called damaging financial instruments that Warren Buffett has now called

18. A. Thomas Morris, *The Empirical, Historical, and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154 (1988).

19. *See* People v. Rincon-Pineda, 538 P.2d 247, 254 (Cal. 1975).

financial weapons of mass destruction. Brooksley Born tried to stave off one of the main causes of the current economic crisis. But earlier, in another worthy cause at the start of the 1990s, Brooksley Born played a major role. It was open, but also out of sight of most of us: defending VAWA against attack within the American Bar Association, when the attack of the judges which has already been described spilled over into an attack at the ABA itself. Brooksley Born played a crucial role in heading off that attack against VAWA, one that Victoria and Senator Biden have said they think could have killed VAWA had the attack succeeded. And in speaking with Lynn—and again Lynn as she has already said gave me access to all of her wonderful files—Brooksley Born said to Lynn that listening to male lawyers who were attacking VAWA made her, made Brooksley Born, realize something afresh about gender-based violence, which was how deeply into denial are many men of good will. And it struck me as I read those notes, and then conferred with Brooksley Born, the extent to which this battle is not one she went looking for. And once engaged, the surprise of this—the deep denial of men of good will—pulled her forward. But this was not a battle that she went to out of—well of course not—out of anything that could be thought of as self-interest or as a planned piece of motivation.

I think, too, of the involvement of the National Association of Women Judges. Judge Schroeder has already spoken about her role, and Judge Murray's role also, in bringing in the National Association of Women Judges. This is not a battle that the organization went looking for, but what it accomplished was so admirable in defense of VAWA.

And then in conclusion, a related sort of expression of motivation would be—and here I am adopting language from Justice Sandra Day O'Connor that she spoke but not about VAWA. And here is that language: VAWA, I believe, "asks us to take seriously claims that may not bother us personally." My goodness, you heard Vice President Biden speaking of that today. When asked if it was a family concern that brought him to VAWA, he said (and I paraphrase): My family concern opposes the abuse of justice, but no, this is not a story of narrow attack within my family. In 1992, at the launching ceremony for the report of the Ninth Circuit Gender Bias Task Force—again, part of Lynn Schafran's work in judicial education, part of the National Association of Women Judges' work in judicial education in Sun Valley, Idaho, Judge Schroeder was there, Professor Resnik was there, Lynn was there, and Sandra Day O'Connor was there to speak. And she remarked, speaking of the report's findings of bias in some courts, this is Justice O'Connor: "I don't think most of us were surprised to learn that the [Ninth Circuit Gender Bias] Task Force found the existence of gender bias in a federal circuit" court system, the Ninth Circuit. And then Sandra Day O'Connor proceeded to challenge the mostly male judges who had gathered to hear her. The challenge of the Task Force report on gender bias, she said, is that it "asks us to take seriously claims that may not bother us personally."

Again I feel I'm circling with the Vice President's comments, but I devoted so

much of *Equal* to the narrative of the Violence Against Women Act because I believe that VAWA—in Sandra Day O'Connor's words, though not speaking about VAWA, I must emphasize—asks us to "take seriously claims that may not bother us personally." I do indeed think that Vice President Biden has said almost that exactly, and I'm sure it thrilled him, as it should thrill us all, to be here in this group that now works so well, to carry on that particular battle looking to the future. I just want to thank you all for bringing everyone here together. Thanks so much.

MARTHA DAVIS: Thanks to all of the panelists for a wonderful range of presentations.