NOTES

Prologue: Toward Equality (1968)

ix If you entered Harvard Law School before 1950: Ruth Bader Ginsburg, "Remarks on Women's Progress in the Legal Profession in the United States," 33 *Tulsa Law Journal* 13 (1997), p. 13.

ix By 1967 . . . about 5 percent . . . In 2001, . . . more than 49 percent: "First Year and Total J.D. Enrollment by Gender 1947–2005," available at www.abanet.org/legaled/statistics/charts/enrollment bygender.pdf (visited 5/19/07). Harvard Law School, *Alumnae Directory, 1953–2003* (Cambridge: Harvard Law School, 2003), pp. 793–796, and David Warrington, Librarian for Special Collections, Harvard Law School Library, email to author, 8/31/07.

ix "reduced by close to a half" . . . "a policy of admitting women, the halt, and the lame" . . . "the foreign born": House Committee on Education and Labor, Special Subcommittee on Education, *Higher Education Amendments of 1968: Hearing on H.R. 15067*, 90th Cong., 2d sess., 1968, held 2/9/68, p. 179.

ix "a policy of admitting women, the halt, and the lame": Some reports of the colloquy of Harvard president Nathan Pusey and Congressman John Erlenborn have simplified it, apparently following an early article, by Ann Sutherland Harris, "The Second Sex in Academe," *AAUP Bulletin,* September 1970, p. 283. Harris wrote, "When President Nathan Pusey of Harvard realized that the draft was going to reduce the number of men applying to Harvard's graduate school, his reaction was: 'We shall be left with the blind, the lame and the women.'" This language appeared subsequently in, for example, Cynthia Fuchs Epstein, *Women in Law*, 2nd ed. (Urbana: University of Illinois Press, 1993), p. 52, citing Ruth Bader Ginsburg, "Women at the Bar—A Generation of Change," 2 *University of Puget Sound Law Review* 1 (1978), p. 4, which prints the same words (but without quotation marks) as a "rumination attributed to Harvard's then President Pusey." Statements similar to the one attributed to Pusey were made by other educators, including the president of the Council of Graduate Schools (quoted in R. Drummond Ayres, "Colleges Attack New Draft Rules," *New York Times*, 1/30/68, p. 30) and an administrator for the American Council on Education (speaking before Pusey at the 2/9/68 hearings, quoted at p. 166). Further references to Epstein's 1993 book will be cited as Epstein, *Women in Law.*

x fastest advance in the history of America's elite professions: For comparison to physicians, see Mary Roth Walsh, *"Doctors Wanted: No Women Need Apply"* (New Haven: Yale University Press, 1977), p. 245 (women in 1947 for the first time accounted for more than 9% of medical students in the United States, a level women did not reach in law schools until 1971). For comparison to university professors, see Martha S. West and John W. Curtis, *AAUP Faculty Gender Equity Indicators 2006*, available at www.aaup.org/AAUP/pubsres/research/geneq2006 (visited 2/6/08), figure 1, which shows that women in 1960 were earning more than 10% of doctorates, the usual entry degree for a professorship; as of 2000, that figure had had risen to approximately 45% (see U.S. Department of Education, Digest of Education Statistics 2005 (Table 246), available at http://nces.ed.gov/programs/digest/d05/tables/dt05_246.asp?referrer=report (visited 2/6/08)). For comparison to architects, see Nicolai Ouroussoff, "Keeping Houses, Not Building Them," *New York Times*, 10/31/07, which reports that, according to the American Institute of Architects, its membership in 2006 was less than 14% women.

x "a game played by the male superiors": *Bundy v. Jackson*, 19 Fair Empl. Prac. Cas. (BNA) 828. Decided 4/25/79, United States District Court for the District of Columbia.

Part One
SCRUTINY (1970–1975)

In this part, I rely on the personal papers of, and interviews with, Ruth Bader Ginsburg and Stephen Wiesenfeld, her client in *Weinberger v. Wiesenfeld* at the Supreme Court. I am grateful for their generosity and for the care with which they reviewed my narrative for possible errors. Important primary sources, particularly interviews and collections of documents, are listed below, with the abbreviations used in the endnotes that follow. Other primary sources and important secondary sources appear with full citations in the endnotes.

Berzon interview	Interview with Marsha Berzon, San Francisco, 5/16/95
Blackmun papers	Papers of Justice Harry A. Blackmun, Library of Congress
Brennan papers	Papers of Justice William J. Brennan Jr., Library of Congress
Commentator	*The Commentator: The Student Newspaper of the New York University Law Center*
Douglas papers	Papers of Justice William O. Douglas, Library of Congress
Freeman interview	Interview with Mary Elizabeth (M. E.) Freeman, New York City, 3/22/94
Ginsburg files	Personal files of Justice Ruth Bader Ginsburg, consulted August 1994 and January 1995, in the justice's storage room at the Supreme Court
Ginsburg interview	Interview with Ruth Bader Ginsburg, Washington, DC, 8/24/94
Goodman interview	Interviews with Janice Goodman, New York City, by phone, 4/13/94 and 8/16/05
Kelly interview	Interview with Mary F. Kelly, White Plains, New York, 3/29/01
Markowitz interview with Greenberg	Interview with Ruth Bader Ginsburg conducted by Deborah L. Markow itz with Susan Deller Ross and Wendy Webster Williams, Washington, DC, 2/24/86, as preparation for Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," 11 *Women's Rights Law Reporter* 2 (Summer 1989), pp. 73–98. Although Markowitz's article at p. 75n22 says that the interview is available at the Schlesinger Library for Women's History at Radcliffe College, the library apparently does not have the tapes (I conferred with Schlesinger librarians including Ann Engelhart on 2/1/94 and Jacalyn Blume

	on 8/17/05). In the summer of 1994, Markowitz permitted a Yale student, Jody Esselstyn, to visit at her home in Vermont in order to make duplicate tapes of this fascinating interview; I am indebted to them both.
Marshall papers	Papers of Justice Thurgood Marshall, Library of Congress
Martin Ginsburg interview	Interview with Martin D. Ginsburg, Washington, DC, 2/7/95
Princeton ACLU papers	American Civil Liberties Union papers, Box 679, Seeley G. Mudd Manuscript Library, Princeton University
Root-Tilden files	Files of Root-Tilden-Kern Scholarship program at New York University School of Law, as of 10/27/05
Wiesenfeld files	Files of Stephen Wiesenfeld, as of 3/13/94
Wiesenfeld interview	Interview with Stephen Wiesenfeld, Tamarac, Florida, 3/11–13/94
Wulf interview	Interview with Mel Wulf, New York City, 3/4/94

1: The Story of Paula Wiesenfeld

3 Late in 1972: Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 12/27/72, in Ginsburg files. They had first spoken the day before, by phone.

3 Immediately she knew: Ginsburg, letter to Phyllis Zatlin Boring, 12/27/72, in Ginsburg files.

3 the legal case she needed: "*Wiesenfeld* was going to be the . . . perfect case," in Ginsburg interview. In Markowitz interview with Ginsburg, Ginsburg said, "If ever there was a case to attract suspect classification for sex lines in the law, [*Wiesenfeld*] was the one." For a fine article that focuses on *Wiesenfeld*, see Ruth Cowan, "Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976," 8 *Columbia Human Rights Law Review* 373 (1976). Further references will be cited as Cowan, "Women's Rights."

3 greatest professional goal: Confirmed by Ruth Bader Ginsburg, letter to author, 8/7/03.

3 "gender lines in the law": Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, p. 8, in Ginsburg files.

3 When Paula Polatschek first met: Biographical information and quotations are from Wiesenfeld interview and Wiesenfeld files (including photos), unless otherwise indicated.

4 price tag was $32,000 [house] . . . more than $30,000 [mini-computer]: Stephen Wiesenfeld, letter to author, 10/1/03.

6 Paula's mother began redesigning his life. . . . put him up for adoption: Wiesenfeld interview and Stephen Wiesenfeld, letter to author, 10/1/03.

6 "like a sack of potatoes": Wiesenfeld interview.

7 difficulties faced by single fathers: Richard Gorman, "Benefits War Began with Letter to Home News," *New Brunswick Home News*, 3/21/75, p. 19, in Wiesenfeld files. Gorman reports that the article to which Wiesenfeld replied was "written by a news service, appeared on Nov. 16, 1972, and outlined the plight of single fathers raising young children."

7 benefit (about $200 per month): See discussion of facts at Supreme Court: *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), 640–641, which says benefits were "$206.90 per month until September 1972, and $248.30 per month thereafter."

7 "mother's insurance benefit": Department of Health Education and Welfare, "Application for Mother's Insurance Benefits," form SSA-5 (1/73), date of application not filled in, in Wiesenfeld files. And see *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638n1 (1975).

8 He calculated his potential return: Wiesenfeld interview. He said, "Why would anybody spend

hundreds of thousands of dollars to recover $206 a month?" For a similar calculation (using a later rate of payment) and narrative of Stephen's decision, see Cowan, "Women's Rights," p. 385.

8 "Your article about widowed men": Stephen Wiesenfeld, letter to *New Brunswick Home News*, 11/27/72, in Wiesenfeld files.

8 professor of Spanish . . . and founder of the New Jersey branch: Records for New Jersey Women's Equity Action League of Phyllis Zatlin Boring, description available at www.scc.rutgers.edu/wild/browse_coll.cfm (visited 8/14/05).

9 Boring: Quotations from Boring's letter are from Phyllis Zatlin Boring, letter to Stephen Wiesenfeld, 11/27/72, in Wiesenfeld files. See also Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," 11 *Women's Rights Law Reporter* 73 (Summer 1989), p. 84n141 (further references will be cited as Markowitz, "In Pursuit"), and Cowan, "Women's Rights," p. 386. Cowan provides a valuable narrative of work on *Wiesenfeld* at pp. 384–389 and 395–399.

9 ally in pushing Rutgers to admit women: Correspondence of Phyllis Zatlin Boring and Ruth Bader Ginsburg, letters of December 1970 through September 1971, in Ginsburg files.

9 board member of WEAL . . . Ginsburg: Ruth Bader Ginsburg, letter to author, 8/7/03.

9 December 26, 1972: Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 12/27/72, in Ginsburg files.

9 Ginsburg called Stephen Wiesenfeld: "He wrote that letter, and Phyllis Zatlin Boring read it, and she called me; that's how it all began." Ginsburg interview.

9 Three "facts": Wiesenfeld interview.

9 To the last he replied, "My son is in my care": Stephen Wiesenfeld, letter to Ruth Bader Ginsburg, 1/1/73, in Wiesenfeld files.

10 Ginsburg made sure that Stephen Wiesenfeld realized: Wiesenfeld interview.

10 income cutoff (approximately $8,400): Author's calculations based on data in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), 641.

10 loser will appeal straight to the Supreme Court: Wiesenfeld interview.

10 the case she had been seeking: Ruth Bader Ginsburg, letter to Phyllis Zatlin Boring, 12/27/72, in Ginsburg files. She wrote, "It's a great case and we certainly will take it if Mr. W agrees. . . . If you come across any other gems like this, please let me know." Confirmed by Ruth Bader Ginsburg, letter to author, 8/7/03.

10 "double-edged sword": Brief for Petitioner-Appellant by Ruth Bader Ginsburg and Martin D. Ginsburg, in *Charles E. Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), undated typescript in advance of argument on 10/28/71, p. 20, in Ginsburg files.

11 Joan Ruth Bader: This biographical narrative for Ruth Bader Ginsburg relies on numerous sources, of which the best include articles written following her nomination to the Supreme Court. Most valuable are a three-part series by David Von Drehle, "Ruth Bader Ginsburg: Her Life and Her Law," *Washington Post*, 7/18–20/93; and a two-part series by David Margolick, "Ruth Ginsburg: Her Life and Her Law," *New York Times*, 6/25/93 and 6/27/93. A fine early biography is by Eleanor H. Ayer, *Ruth Bader Ginsburg: Fire and Steel on the Supreme Court* (New York: Dillon Press, 1994). These sources include many details (including stories of Flatbush, meningitis, the Go-Getters, the Chinese restaurant, cancer, and bank accounts) about which I did not reinterview Justice Ginsburg when we spoke. Further references will be cited as Von Drehle on Ginsburg; Margolick on Ginsburg; and Ayer, *Ginsburg*. Fine articles on Ruth Bader Ginsburg near the time of her nomination include "Clinton Picks Ruth Bader Ginsburg to Succeed Retiring Justice White," *U.S. Law Week*, 6/15/93; Tracy Schroth, "At Rutgers, Ginsburg Changed," *New Jersey Law Journal*, 6/21/93, p. 1; Sara Fritz, "Inch by Inch, Ginsburg Set Gender Scale toward Center," *Los Angeles Times*, 6/28/93, p. A1; Eva

M. Rodriguez, "On Bench, in Life Her Tiny Steps Lead to Big Gains," *Legal Times*, 6/21/93, p. 1; Kathleen Best, "The Role of the Law; Judge Ruth Ginsburg: An Evolving Advocate," *St. Louis Post-Dispatch*, 6/20/93, p. 1B. A few corrections to information published in newspapers (e.g., details of her father's work and the age at which her sister died) come from Ruth Bader Ginsburg, letter to author, 8/7/03.

11 March 15, 1933: Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, in Ginsburg files.

11 "with the smell of death": Von Drehle on Ginsburg, 7/18/93, p. A1.

12 "scary smart": Margolick on Ginsburg, 6/25/93, p. A1.

12 various campus bathrooms: Ruth Bader Ginsburg, letter to author, 8/7/03.

12 boyfriend from . . . camp: Von Drehle on Ginsburg, 7/18/93, p. A1.

12 highest average among women: Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, in Ginsburg files.

12 before 1950 had never admitted a woman: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991), p. 11n33.

12 entering as one of nine women in the fall of 1956: Ruth Bader Ginsburg, "The Changing Complexion of Harvard Law School," 27 *Harvard Women's Law Journal* 303 (2004), p. 303.

12 "New England grandmother type": Ruth Bader Ginsburg, letter to author, 8/7/03.

13 Ruth collected notes taken by students . . . keep the family together: Ruth Bader Ginsburg, letter to author, 8/7/03.

13 "God, it's Ruth": Von Drehle on Ginsburg, 7/18/93, p. A1.

13 law review at yet another law school: Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, p. 2, in Ginsburg files.

13 tie for first: Margolick on Ginsburg, 6/25/93, p. A1.

13 one of the first twenty women: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991), p. 10n26.

13 Rutgers as a rare law school with two women professors: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991), pp. 8–11.

13 Eva Hanks, was asked by a male colleague: Tracy Schroth, "At Rutgers, Ginsburg Changed," *New Jersey Law Journal* , 6/21/93, p. 1.

14 teaching . . . civil procedure and conflict of laws: Ruth Bader Ginsburg, "Some Reflections on the Feminist Legal Thought of the 1970s," 1989 *University of Chicago Legal Forum* 9 (1989), p. 11.

14 European style: William Hodes, cited in Von Drehle on Ginsburg, 7/18/93, p. A1.

14 a group of Rutgers students asked Professor Ginsburg: Markowitz interview with Ginsburg.

14 feminism never entered her conversations: Ginsburg, in a 1988 speech, quoted in Margolick on Ginsburg, 6/25/93, p. A1.

14 Until the last months of 1969: Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan C. [later Susan Deller] Ross, *Sex Discrimination and the Law: Cases and Remedies* (Boston: Little, Brown, 1975), p. v. Further references will be cited as Babcock and others, *Sex Discrimination* (1975).

14 two law students: Ginsburg interview; the two were Janice Goodman and Mary F. Kelly.

14 PATH train: Kelly interview.

14 September of 1968 . . . bookstore . . . Ross said, Don't you think: Goodman interviews; confirmed by Susan Deller Ross, letter to author, 8/8/05. See also *Women at NYU Law School, 1892–1992* (New York: New York University School of Law, 1992), p. 20; published by NYU law school for "our celebration of 100 years of women graduates."

14 Janice Goodman, who not long before had been organizing against discrimination in Mississippi with the Freedom Democratic Party: Goodman interviews.

14 Root-Tilden Scholarship . . . package worth about $10,000 a year: House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, "Statement of Women's Rights Committee of New York University Law School," p. 588. See also Diane Schulder, "Does the Law Oppress Women," in Robin Morgan, ed., *Sisterhood Is Powerful* (New York: Random House, 1970), p. 142, with citation to The Women's Rights Committee, "Fair and Equal Treatment for Women at New York University Law School" (1969).

14 paid summer internships: Susan Deller Ross, letter to author, 8/8/05.

14 one of the first women's groups at any law school: See Epstein, *Women in Law*, p. 71. Epstein quotes NYU's *Law Women News* 1:1 (March 1980), which stated that "women banded together for the first time at any law school at New York University in 1968 and formed the Women's Rights Committee"; NYU Law has lost its archive copy of *Law Women News* 1:1, according to Linda Ramsingh at NYU, by phone call to author, 5/29/97. Women's groups with different goals seem to have begun earlier at other schools. See, for example, the following claim: "1886 Seven women lawyers and law students at the University of Michigan form the Equity Club, the first national organization of women lawyers. It lasts four years," quoted at www.law.harvard.edu/alumni/bulletin/back issues/spring99/article2.html (visited 3/24/03).

15 *women's liberation*—a phrase coined . . . male mockery and heckling: Susan Brownmiller, *In Our Time: Memoir of a Revolution* (New York: Dial Press, 1999), p. 16. Further references will be cited as Brownmiller, *In Our Time*. Women's Liberation groups were forming in Chicago and then New York (pp. 18–21); the New York group became New York Radical Women. For "Shit. I asked for volunteers" . . . "assumption of male superiority" . . . "The position of women in SNCC is prone," see pp. 12–14.

15 better than prone was that of lawyer: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991), p. 11, says that "the civil rights movement and the reborn women's movement . . . stimulated women's interest in the legal profession."

15 When Holmes volunteered for SNCC in the summer of 1963: Joan Steinau Lester (as authorized by Eleanor Holmes Norton), *Fire in My Soul* (New York: Atria Books, 2003), p. 111ff. Further references will be cited as Lester, *Fire in My Soul*.

16 "let me tell you" . . . "I go to the Yale Law School": Lester, *Fire in My Soul*, p. 112.

16 applied in 1959 for a Root-Tilden Scholarship: According to Eleanor Holmes Norton, when she applied for the Root-Tilden Scholarship at NYU in 1959, it was the richest legal scholarship in America. She recalls receiving a letter in reply that "expressly said the scholarship was reserved to men" and that she assumed the law school was bound by a donor's bequest. NYU offered her a lesser scholarship; she went to Yale Law. Interview with Eleanor Holmes Norton, driving from New Haven to Hartford, Connecticut, 5/22/05. See also Lester, *Fire in My Soul*, p. 146. For "her family had little money to pay tuition," see p. 56.

16 "future public leaders": House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, "Statement of Women's Rights Committee of New York University Law School," p. 588.

16 In 1967, women accounted for more than 12 percent of its entering class: "Class of 1970 Largest Ever: February Class Abolished," *Commentator*, 9/13/67, p. 1; see also Epstein, *Women in Law*, p. 54.

16 in 1968, all law schools received an incentive: House Committee on Education and Labor, Special

Subcommittee on Education, *Higher Education Amendments of 1968: Hearing on H.R. 15067*, 90th Cong., 2d sess., 1968, held 2/9/68, p. 166, and R. Drummond Ayres, "Colleges Attack New Draft Rules," *New York Times*, 1/30/68, p. 30.

16 in 1968 . . . ratio . . . jumped more than 50 percent: This and data for ratios of women to men are from Herma Hill Kay, *Text, Cases, and Materials on Sex-Based Discrimination*, 3rd ed. (St. Paul: West Publishing, 1988), p. 882; see also "First Year Enrollment in ABA Approved Law Schools 1947–2004 (Percentage of Women)," available at www.abanet.org/legaled/statistics/charts/enrollmentbygender.pdf (visited 5/13/06).

16 NYU . . . twenty for every hundred: Paul Sobell, "Class of '71 Rated Good despite Draft Call Blues," *Commentator*, 9/12/68, p. 1; Dennis Stern, "Admissions Director Says '72 Best on All Counts," *Commentator*, 10/1/69, p. 3.

17 "too strong": Bernice Sandler, " 'Too Strong for a Woman': The Five Words That Created Title IX," *About Women on Campus* (newsletter of the National Association for Women in Education), Vol. 6, No. 2, Spring 1997, p. 1. See also Bernice Sandler, "A Little Help from Our Government: WEAL and Contract Compliance," in Alice C. Rossi and Ann Calderwood, eds., *Academic Women on the Move* (New York: Russell Sage Foundation, 1973), partly reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 525–534.

17 taught her how to file complaints: Interview with Bernice Sandler, Washington, DC, by phone, 3/19/98. For a fine narrative, see Bernice Sandler, " 'Too Strong for a Woman': The Five Words That Created Title IX," *About Women on Campus* (newsletter of the National Association for Women in Education), Vol. 6, No. 2 (Spring 1997), p. 1. For technical details, see Bernice Sandler, "A Little Help from Our Government: WEAL and Contract Compliance," in Alice S. Rossi and Ann Calderwood, eds., *Academic Women on the Move* (New York: Russell Sage Foundation, 1973), partly reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 525–534.

17 recently founded group called the Women's Equity Action League: WEAL was incorporated in 1968 in Ohio, according to Babcock and others, *Sex Discrimination* (1975), p. 525.

17 federal government began delaying payment of millions of dollars: Stanley Pottinger, "The Drive toward Equality," *Change*, October 1972, p. 24; reprinted in Babcock and others, *Sex Discrimination* (1975), p. 514; see also p. 536 for threatened termination of contracts with Columbia.

17 Law schools responded: For a history of federal initiatives that caught universities' attention, see Carnegie Commission on Higher Education, *Opportunities for Women in Higher Education* (New York: McGraw-Hill, 1973), partly reprinted in Babcock and others, *Sex Discrimination* (1975), p. 534ff.

17 By century's end the ratio would reach almost exactly one to one: "First Year Enrollment in ABA Approved Law Schools 1947–2004 (Percentage of Women)," available at www.abanet.org/legaled/statistics/charts/enrollmentbygender.pdf (visited 5/13/06).

17 When the NYU Women's Rights Committee began: Narrative comes primarily from Goodman interviews; interview with Susan Deller Ross, Washington, DC, 8/25/94; and Ross and Goodman, emails and phone calls with author, August 2005.

17 known as "Roots": "The Revolution of '68," *Women at NYU Law School, 1892–1992* (New York: New York University School of Law, 1992), p. 20.

17 Niles . . . in 1951 helped create the scholarship: "Faculty Tables Root Study," *Commentator*, 4/29/70, p. 3.

18 "sacred trust": Goodman interviews.

18 "It is the sense of the faculty": Daniel Collins, memo to Jan Goodman, 10/18/68, in Root-Tilden files.

18 Professor Niles had visited . . . Foundation, evidently hoping it would oppose . . . Niles' reasons . . . "encourage bright young women": Russell Niles, letter to Daniel Collins, 12/15/66, in Root-Tilden files. Niles wrote, in part, "I regret to have to report that it was his [executive director's] opinion that . . . we could admit women if we wanted to. I am still opposed to admitting women."

18 The story from two years before started to emerge: "Group Meets with McKay to Demand Women's Rights," *Commentator,* 11/6/68, p. 1.

18 Niles had insisted . . . inappropriate . . . "administrative action": "Memo Urges Root Opening for Women," *Commentator,* 11/20/68, p. 1.

18 faculty had already voted . . . But it never followed: Administrative delay from 1966 to 1968 seems likely to have emerged in part from concern for Professor Niles. After the faculty voted again in 1968, a colleague wrote to the dean of the law school urging delay by yet another year before letting women get the Root-Tilden Scholarship. He said delay would be "more gracious toward Dean Niles." Ralph F. Bischoff, "Memorandum to Dean McKay," 12/10/68, in Root-Tilden files.

18 "nobody cared enough": Interview with Susan Deller Ross, Washington, DC, by phone, 7/29/05.

18 Ross rose to address the faculty on November 22: "Faculty Meeting Approves Root Openings for Women," *Commentator,* 12/4/68, p. 3.

18 Women's Rights Committee would take legal action . . . would sue their own law school: Susan Deller Ross, letter to author, 8/8/05: "I threatened litigation in the faculty meeting."

18 After the students threatened . . . professor turned . . . ask what the trust said . . . Niles had to admit . . . stunned silence . . . students were told that they could leave the room: Goodman interviews.

19 some letters between NYU and the foundation: "Faculty Tables Root Study," *Commentator,* 4/29/70, p. 3. In 1970, on an issue not related to opening the scholarship to women, Niles speaks of "trust limitations"; Collins argues that any limitations are open to interpretation and are contained in letters between the New York University School of Law and the Avalon Foundation.

19 Within days, outgoing mail: "Faculty Meeting Approves Root Openings for Women," *Commentator,* 12/4/68, p. 3.

19 from NYU—as demanded: no author, "Demands of Women's Rights Organization Re: Root-Tilden Scholarships," undated (c. 11/4/68), in Root-Tilden files.

19 Diane Schulder: "Courses on Women and the Law" (mimeo prepared for conference at Yale Law School), date c. December 1971, in files of Ann E. Freedman, as of 6/1/98.

19 pay her $500: House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, "Statement of Women's Rights Committee of New York University Law School," p. 584.

19 first course . . . fall of 1969: Babcock and others, *Sex Discrimination* (1975), p. v.

19 Jan Goodman and a friend named Mary F. Kelly headed for Rutgers . . . two tenured women law professors: Ginsburg interview, Goodman interviews, and Kelly interview.

19 one of the first law schools to begin admitting women in significant numbers: Epstein, *Women in Law*, p. 54.

19 "proved not to be a burdensome venture": Ruth Bader Ginsburg, "Some Reflections on the Feminist Legal Thought of the 1970s," 1989 *University of Chicago Legal Forum* 9 (1989), p. 11.

19 "land, like woman, was meant to be possessed": Curtis J. Berger, *Land Ownership and Use: Cases, Statutes, and Other Materials* (Boston: Little, Brown, 1968), p. 139, cited in Ruth Bader Ginsburg, "Some Reflections on the Feminist Legal Thought of the 1970s," 1989 *University of Chicago Legal Forum* 9 (1989), p. 9n2.

19 "How have people": Ginsburg, quoted in Margolick on Ginsburg, 6/25/93, p. A1.

19 responding to the urging of her Rutgers students and the emissaries from NYU: Markowitz interview with Ginsburg. See also Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," 11 *Women's Rights Law Reporter* 73 (Summer 1989), p. 75fn22. Further references will be cited as Markowitz, "In Pursuit."

19 emissaries from NYU: Kelly interview.

20 Equal Pay Act [1963] . . . Civil Rights Act of 1964: Ruth Bader Ginsburg, "Gender and the Constitution," 44 *University of Cincinnati Law Review* 1 (1975), pp. 9–10.

20 spring of 1970, Ginsburg taught her first course on women and the law: Ruth Bader Ginsburg, letter to author, 8/7/03. Although Justice Ginsburg seems sure that she taught her seminar on women and the law for the first time in the spring of 1970, Rutgers Law School–Newark does not have a record of the course in that term. According to the law school's registrar, Linda Garbaccio, assistant dean for academic services, the law school's class rosters show Ruth Bader Ginsburg teaching her seminar in the spring of 1971. Dean Garbaccio says she "can't guarantee" that class rosters are accurate; also, the catalogs for 1970–71 are missing from both the law library and the registrar's office. (The course does not appear in course catalogs for 1968–69 or 1969–70; if Ginsburg added the course in the middle of the 1969–70 academic year, a catalog would not list it.) A student transcript for Diana Rigelman (on file with author) shows that she took Professor Ginsburg's "Women & the Law Sem," Course No. 446, in the spring of 1971, and Rigelman believes that the course was being offered for the first time. The course catalog for 1971–72 shows the course taught again in the spring of 1972, Ginsburg's last term teaching at Rutgers. Interview with Dean Linda Garbaccio, Registrar's Office, Rutgers Law School–Newark, by phone, 5/4/06; transcript for Diana J. Rigelman, Rutgers Law School–Newark, dated 6/4/72, copy provided to author by Diana Guza-Wells (formerly Rigelman).

20 phone call from a stranger: Ginsburg interview. The date of the call evidently came between the following two letters: Nora Simon, first letter to New Jersey ACLU, 7/23/70, and Ruth Bader Ginsburg, letter on behalf of Simon to L. Howard Bennett (director of Equal Opportunity for the Armed Forces), 7/29/70, both in Ginsburg files.

20 bounced around by ACLU offices: Nora Simon, letter to Washington ACLU, 1/8/70, and Clara L. Breland (secretary, Legal Department, national ACLU in New York City), letter to Nora Simon, 3/26/70, both in Ginsburg files.

20 wondered why Nagler called her: Ginsburg interview.

20 Working at the New Jersey ACLU that summer . . . Diana Rigelman: Nora Simon's first contacts with the New Jersey ACLU seem to be two letters, both dated 7/23/70, one of which is addressed to Diana Rigelman. Nora Simon, letter to Rigelman, 7/23/70, in Ginsburg files. Most details of Nora Simon's case come from Ginsburg files and Ginsburg interview.

20 just taken Ginsburg's first-year course: Interview with Diana J. Guza-Wells (formerly Rigelman), Bellingham, Washington, by phone, 2/22/06; Diana J. Guza-Wells, email to author, 3/31/06; transcript for Diana J. Rigelman, Rutgers Law School–Newark, dated 6/4/72, copy provided to author by Diana Guza-Wells.

20 "ice woman" . . . "a female lawyer with clout": Diana J. Guza-Wells (formerly Rigelman), emails to author, 3/06.

21 sad story: Nora Simon, letter to "Dear Miss/Sir" at New Jersey ACLU, 7/23/70, in Ginsburg files.

21 untenured professor at Rutgers . . . kept quiet about her pregnancy: Markowitz interview with Ginsburg.

21 letter to the director for Equal Opportunity: Quotations from the letter are from Ruth Bader Ginsburg, letter to L. Howard Bennett, 7/29/70, in Ginsburg files.
22 For a month and a half she received no reply: L. Howard Bennett, letter to Ruth Bader Ginsburg, 9/18/70, in Ginsburg files.
22 "zippy" legal complaint: Ruth Bader Ginsburg, letter to Marc Adams Franklin, 10/6/70, in Ginsburg files.
22 simply mailed her original letter to the offices: Ruth Bader Ginsburg, letters to Melvin Laird, Stanley Resor, and others, 9/17/70 and 9/24/70, in Ginsburg files.
23 was not ready to alter its policy: Letters of 10/26/70 and 12/22/70 show Ruth Bader Ginsburg pushing the Army to make a policy change, not just an exception for Nora Simon. Letters in Ginsburg files.
23 Two weeks after the Army relented: John G. Kester (Office of the Army), letter to Ruth Bader Ginsburg, 10/15/70, in Ginsburg files.
23 Near the end of October in 1970: Theodore Tannenwald Jr., letter to Martin D. Ginsburg, 11/4/70 (replying to letter of 11/2/70 from Martin D. Ginsburg about *Moritz*), in Ginsburg files.
23 Martin walked into her office . . . "You've gotta read this," . . . case of Charles E. Moritz: Martin Ginsburg interview and Martin Ginsburg letter to author, 8/12/03.
23 "Marty" . . . "you know I have no time to read tax cases": Ginsburg interview.
23 "household help for invalid mother": Brief for Petitioner-Appellant by Ruth Bader Ginsburg and Martin D. Ginsburg, in *Charles E. Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), undated typescript, p. 3, in Ginsburg files (copy to author, 1/20/95).
23 Moments after . . . crank calls . . . best stationery . . . 100 percent concession: Martin Ginsburg interview.
24 at her office door appeared: Wulf interview.
24 cheery face of Melvin Wulf: Wulf interview. As he recalled, "I was just me being my usual congenial self. I literally went and knocked on her door. And she said, Come in. If she hadn't been there, life may have been different. She might not have ended up being the great repository of all gender-equality constitutional wisdom."
24 remembered her as "Kiki" Bader: See Ruth Bader Ginsburg, letter to Mel Wulf, 10/11/71, in Princeton ACLU papers. She signs the letter "Kiki."
24 big blue eyes: Joan Danoff, a childhood friend, quoted in Von Drehle on Ginsburg, 7/18/93, p. A1.
24 Richard Dauntless . . . *Ruddigore* . . . teenage idyll: This and summer camp details are from Wulf interview. "In terms of Edenesque, it was that," he recalled. "You'd get up in the morning, and you went out and you played ball all day and went swimming and boating, and went dancing and dipped and necked and that sort of stuff. It was quintessential adolescent fan-ta-say-a."
25 helped develop the legal concept of a right to privacy: Wulf interview. See also David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994), pp. 167–172. Further references will be cited as Garrow, *Liberty and Sexuality*.
25 He pushed the ACLU: Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), pp. 186 (legal director), 262–265 (activism and civil rights), 282–286 (Vietnam).
25 "plucked Ruth Ginsburg from obscurity": Wulf interview.
25 "some down and dirty women's rights work" . . . "the lofty aeries": Wulf interview.
25 male-female pair, each as irrational as the other: Ginsburg interview.
26 Recalling Mel in his valorous *Ruddigore* role: Ruth Bader Ginsburg, letter to author, 8/7/03.
26 *Moritz* would be "as neat a craft": Ruth Bader Ginsburg, letter to Mel Wulf, 11/17/70, in Ginsburg files; elaborated in Ruth Bader Ginsburg, letter to author, 8/7/03.

26 "docketing statement": in Ginsburg files.
26 "Dear Ruth/Kiki": Mel Wulf, letter to Ruth Bader Ginsburg, 2/2/71, in Ginsburg files.
26 offered to settle for a dollar: Martin Ginsburg interview.
26 she immediately wrote Wulf: Ruth Bader Ginsburg, letter to Mel Wulf, 3/2/71, in Ginsburg files and in Princeton ACLU papers.
26 "I am the lawyer": Mel Wulf, letter to Ruth Bader Ginsburg, 3/9/71, in Princeton ACLU papers.
27 As she read the jurisdictional statement . . . shortcomings: Ginsburg interview.
27 "Dear Mel": Ruth Bader Ginsburg, letter to Mel Wulf, 4/6/71, in Ginsburg files.
27 "one of the very best presentations" . . . Dorsen sent a copy of his letter to Wulf: Norman Dorsen, letter to Ruth Bader Ginsburg, 4/12/71, in Ginsburg files.
27 Within three days, Wulf called: Ruth Bader Ginsburg, letter to Leo Kanowitz, 4/15/71, in Ginsburg files.
27 seeking a role in *Reed* was one of the key decisions: Panel discussion at Columbia Law School, 11/19/93.
27 "Damn, maybe I didn't pluck her from obscurity": Wulf interview. Wulf said this after the author showed him the text of Ginsburg's letter to Wulf, 4/6/71, quoted above.

2: Old Law Meets a New Case—*Reed*

28 For a century, the Supreme Court had consistently refused to extend to women . . . "the equal protection of the laws": Ruth Bader Ginsburg, "Interpretations of the Equal Protection Clause," 9 *Harvard Journal of Law and Public Policy* 41 (1986), pp. 41–43.
28 "scrutiny": For discussion of the legal term *scrutiny* as of 1970, see Note, "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969), p. 1089.
28 Supreme Court's first refusal . . . Bradwell: *Bradwell v. Illinois*, 83 U.S. 130 (1872), argued 1/18/1873, decided 4/15/1873.
28 case of Myra Bradwell: For background on Bradwell, see Martha Minow, "Forming under Everything That Grows" 1985 *Wisconsin Law Review* 819 (1985), pp. 840–850.
29 "should not admit any person": This and subsequent quotations from the Illinois Supreme Court decision, unless otherwise indicated, are from *Bradwell v. Illinois*, 83 U.S. 130 (1872).
29 extend equal protection: Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Virginia Law Review* 1045 (2001), pp. 1099–1100, which says that "the Citizenship Clause was designed to overrule the Dred Scott decision, which held that blacks could not be citizens and 'had no rights which the white man was bound to respect.' "
29 The day before: *Slaughter-House*, decided 4/14/1873: Kermit L. Hall, ed., *Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), p. 789; *Bradwell* decided 4/15/1873. Further references will be cited as Hall, *Oxford Companion*.
30 *Slaughter-House Cases*: Quotations from the decision in this case, unless otherwise indicated, are from *In Re Slaughter-House Cases*, 83 U.S. 36 (1872). For a discussion of their impact, see Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham: Duke University Press, 1999), pp. 62–68.
30 Justice Samuel Freeman Miller declared: Quotations from Miller's and his colleagues' opinions, unless indicated otherwise, are from *Bradwell v. Illinois*, 83 U.S. 130 (1872).
30 "the civil law" . . . "The paramount destiny": *Bradwell v. Illinois*, 83 U.S. 130, 141–142 (1872).
31 In the hundred years . . . remarkably little change: Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), p. 2; Ginsburg, "Inter-

pretations of the Equal Protection Clause," 9 *Harvard Journal of Law and Public Policy* 41 (1986), p. 41.

31 "standards of review": For contemporary discussion, see Note, "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969), p. 1076ff.

31 case of Sally Reed: Details of *Reed* are from In the District Court of the Fourth Judicial District of Idaho, In the Matter of the Estate of Richard Lynn Reed, Clerk's Transcript on Appeal, filed 1/30/69, in Princeton ACLU papers. See also Brief for Appellant (Sally Reed), by Melvin L. Wulf and Ruth Bader Ginsburg to Supreme Court, filed 6/25/71, in *Reed v. Reed*, 404 U.S. 71 (1971). Further references will be cited as Wulf-Ginsburg Brief for Sally Reed.

31 "tender years" doctrine: Markowitz interview with Ginsburg.

32 "males must be preferred to females": *Reed v. Reed*, 404 U.S. 71 (1971), p. 73.

32 California had copied them from New York, which had apparently drawn them from some still earlier source: Brief for Respondent (Cecil R. Reed) by Charles S. Stout to the Supreme Court, c. 7/9/71, In *Reed v. Reed*, 404 U.S. 71 (1971), available at www.yale.edu/lawweb/avalon/curiae/html/404–71/006.htm (visited 3/26/03). Stout writes that he was "unable to trace the origin of this law in New York."

32 ACLU volunteer attorney: Markowitz interview with Ginsburg. Marked-up copy of *Law Week* of 3/10/70 [38 LW 2481] is in Princeton ACLU papers.

32 "nature itself has established the distinction": Wulf-Ginsburg Brief for Sally Reed, p. 54.

32 offer help . . . Derr accepted: Allen R. Derr, letter to Mel Wulf, 3/24/70, and Mel Wulf, letter to Allen R. Derr, 4/2/70, both in Princeton ACLU papers.

32 one of his specialties at the ACLU, a "jurisdictional statement": Wulf interview.

32 "rational basis" . . . "irrational classification" of women's role: Jurisdictional Statement for Sally M. Reed, by Melvin L. Wulf and Allen R. Derr (with acknowledgement on last page to "Miss Eve Cary, third year law student at New York University Law School") to Supreme Court, pp. 6 and 10, dated 7/1/70, in *Reed v. Reed*, 404 U.S. 71 (1971).

32 jurisdictional statement in March of 1971: Mel Wulf, letter to Ruth Bader Ginsburg, 3/9/71, in Princeton ACLU papers.

32 she saw that his strategy was less radical: Ginsburg interview.

32 Ginsburg knew . . . two levels of "scrutiny": See Wulf-Ginsburg Brief for Sally Reed, pp. 8–9, which cites "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969).

33 Court looked harder: Wulf-Ginsburg Brief for Sally Reed, pp. 9–10. See also Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), p. 12.

33 tough test: it was "scrutiny that was 'strict' in theory and fatal in fact" according to Gerald Gunther, "The Supreme Court 1971 Term. Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harvard Law Review* 1 (1972), p. 8.

33 Florida law that failed this test . . . "one racial group" . . . "overriding": *McLaughlin v. Florida*, 379 U.S. 184 (1964).

33 start of a larger strategy: The creation of this strategy is explained superbly in Markowitz, "In Pursuit," pp. 73–98, and in Cowan, "Women's Rights," p. 384ff. I drew also on Markowitz interview with Ginsburg and my interview with Ginsburg, when she explained that strict scrutiny was "an idea that I wanted to plant" in *Reed* and *Moritz* and that she thought the Supreme Court justices "were going to inch their way to the idea" during multiple cases.

34 Wulf had failed to convince Reed's lawyer, Allen Derr: See Mel Wulf, letter to Allen R. Derr, 6/4/71, Princeton ACLU papers.

34 four women students: All are named in Wulf-Ginsburg Brief for Sally Reed.
34 Ann E. Freedman . . . spreading the idea of legal courses: Interview with Ann E. Freedman, Philadelphia, by phone, 5/17/98.
34 calling out, "BOO": Goodman interviews.
34 "educate the court on everything" and Brandeis: Goodman interviews.
34 two pages of law and 110 pages of social science: Hall, *Oxford Companion*, p. 85 (discussing Brandeis).
34 "kinship between race and sex discrimination" . . . "In the earlier common law": Brief for Appellant (Sally Reed) by Mel Wulf and Allen R. Derr (but author names crossed off by hand) to Supreme Court, undated draft of c. 6/9/71, typescript p. 12 (numbered by Princeton library as 44618–16), in *Reed v. Reed*, 404 U.S. 71 (1971), in Princeton ACLU papers. This draft, containing marginalia by many different hands, is a fascinating artifact of the work on a major case. Quotations from Madison, *New York Herald*, and Myrdal appear at (in library pagination) 44618–26 and 28.
35 they presumed, she would fix their footnotes . . . "We just dumped it on her": Goodman interviews.
35 underestimated Ginsburg: See later discussion of Wulf's proposed role for Eleanor Holmes Norton in *Reed*.
35 her first work experiences: This and the biographical narrative that follows are from Von Drehle on Ginsburg and Margolick on Ginsburg; see also Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, in Ginsburg files.
36 A needy male married to a wealthy woman . . . "Nobody could see anything wrong": Martin Ginsburg interview.
36 Dean Erwin Griswold, who had apparently told the first entering class of women in 1950 that he had opposed their admission: Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to Present* (New York: Random House, 1986), p. 103.
36 reception at his home: The story of Dean Griswold's reception is told well by Von Drehle on Ginsburg, 7/18/93, p.A1, and Margolick on Ginsburg, 6/25/93, p.A1.
36 "what better place to catch a man?": Markowitz interview with Ginsburg; confirmed by Ruth Bader Ginsburg, letter to author, 7/8/03.
36 Frankfurter . . . "I can't stand girls in pants!": Margolick on Ginsburg, 6/25/93, p. A1.
37 he would feel uncomfortable: Markowitz interview with Ginsburg.
37 would have been the second woman to clerk for a Supreme Court justice: For a listing of early clerks, see Epstein, *Women in Law*, p. 246. After a woman clerked for Justice William O. Douglas in 1944, the next came in 1966 to clerk for Justice Hugo Black.
37 Learned Hand, a judge she revered: Ruth Bader Ginsburg, "Interpretations of the Equal Protection Clause," 9 *Harvard Journal of Law and Public Policy*, 41 (1986), p. 45.
37 strong language . . . inhibited: Markowitz interview with Ginsburg.
37 Edmund L. Palmieri . . . balked . . . trial basis: Gerald Gunther, "Ruth Bader Ginsburg: A Personal, Very Fond Tribute," 20 *Hawaii Law Review* 583 (1995), p. 584.
37 Hand . . . "Young lady": Margolick on Ginsburg, 6/25/93, p. A1.
37 justices were men . . . "What is this sex discrimination?": Ginsburg interview.
37 ranging from 1908 . . . to as recent as 1961: Wulf-Ginsburg Brief for Sally Reed, p. 41.
38 "a sharp line between the sexes": Justice Frankfurter in *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).
38 "Only six years" . . . "buried the historic common law" . . . "the law-sanctioned subordination":

These and other quotations from *Brown* and from Holmes are from Wulf-Ginsburg Brief for Sally Reed, pp. 46–47.

39 "about a merry old alewife": Ginsburg interview. See also Ruth Bader Ginsburg, "Some Reflections on the Feminist Legal Thought of the 1970s," 1989 *University of Chicago Legal Forum* 9 (1989), p. 13.

39 Ginsburg hastily spliced: Markowitz interview with Ginsburg; comparison by author of printed Wulf-Ginsburg Brief for Sally Reed, p. 20, to draft brief [Brief for Appellant (Sally Reed) by Mel Wulf and Allen R. Derr (but author names crossed off by hand) to Supreme Court, undated draft of c. 6/9/71, typescript p. 16 (numbered by Princeton library as 44618–16), in *Reed v. Reed*, 404 U.S. 71 (1971), in Princeton ACLU papers].

39 "Sex, like race and lineage": This and subsequent quotations from the *Reed* brief are from Wulf-Ginsburg Brief for Sally Reed), p. 20, citing *Sail'er Inn v. Kirby*, 3 CCH Employment Practices Decisions 8222 (5/27/71), pp. 6756–6757.

39 opinion's real author: See Part 2 in the book.

40 "The sex line": Wulf-Ginsburg Brief for Sally Reed, p. 5.

40 Ginsburg had no expectation of winning strict scrutiny: Ginsburg interview, in which she said, "It [strict scrutiny] was an idea that I wanted to plant. I did not think the court was going to accept that [strict scrutiny] in *Reed*, or in *Frontiero*. I thought they were going to inch their way to the idea." Ginsburg has also said that the planning that led to the one-two sequence from *Reed* to *Frontiero* merely "gave the appearance of well-planned first steps in a sustained litigation campaign": Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), p. 4.

40 deception here, as Ginsburg knew: Discussion of tactical deceptions in this brief draws on Ginsburg interview.

41 work that had reached back decades: Ginsburg recalls how she and her husband found *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920): "I know how we got to *Royster Guano*. We looked up every old equal protection case and took the one with the best language." Ginsburg interview. The Ginsburgs may have also encountered this case and its fine language in Note, "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969), p. 1076.

41 "must be reasonable, not arbitrary": *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

41 quoted only once since the 1930s: Computer search by author.

41 rightly repudiated . . . *Royster Guano* became a joke: Ginsburg interview.

41 "never before been questioned": This and other quotations from Stout's brief, unless otherwise indicated, are from Brief for Respondent (Cecil R. Reed) by Charles S. Stout to the Supreme Court, c. 7/9/71, In *Reed v. Reed*, 404 U.S. 71 (1971), available at www.yale.edu/lawweb/avalon/curiae/html/404–71/006.htm (visited 3/26/03).

42 Ginsburg immediately realized that the Court might dismiss: Markowitz interview with Ginsburg.

42 "Have you given any thought": Mel Wulf, letter to Allen R. Derr, 9/17/71, in Princeton ACLU papers.

42 series begun half a year before: Mel Wulf, letter to Allen R. Derr, 3/8/71.

42 letters not just to Derr: Mel Wulf, letter to Sally Reed, 9/29/71.

42 On his mind, as on Ginsburg's . . . what Wulf called "the kind of locker-room humor": Mel Wulf, letter to Allen R. Derr, 6/4/71; Ginsburg interview.

42 "a lady law clerk": Supreme Court transcript of *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971), argued 12/9/70.

42 in private conference: Douglas papers.

43 he had told some of his own clerks that he would never hire a woman as clerk: Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), p. 141. Further references will be cited as Woodward and Armstrong, *Brethren*.

43 not to nominate a woman as justice: John W. Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (New York: Free Press, 2001), pp. 91, 179–180, and 287 (Nixon tapes were not made public until 2000). Further references will be cited as Dean, *Rehnquist Choice*.

43 He believed, she pointed out, that *wives* have children but fathers don't: Ruth Bader Ginsburg, "Sex and Unequal Protection," 11 *Journal of Family Law* 347 (1971), p. 352.

43 Ginsburg believed, his banter might not have sunk so low: Ginsburg interview.

43 "going into the big leagues with a big league brief" . . . "damn fool" . . . Wulf urged Derr to cede oral argument: Mel Wulf, letter to Allen R. Derr, 7/21/71, Princeton ACLU papers.

43 "The ACLU underestimated her": Goodman interviews.

43 Derr stood his ground, with the support of Sally Reed: Allen R. Derr, letter to Sally Reed, 12/9/71, in Princeton ACLU papers.

43 opening analogy: Markowitz interview with Ginsburg.

43 Derr began by telling the Court that "we are here today": This and subsequent quotations from Derr's oral argument are from Supreme Court transcript of *Reed v. Reed*, 404 U.S. 71 (1971), argued 10/19/71; audio recording available at www.oyez.org/cases/1970–1979/1971/1971_70_4/argument (visited 7/29/07).

44 Ginsburg was appalled: Markowitz interview with Ginsburg.

44 one justice, asking about the Michigan case: Anonymity of justices speaking in oral argument was preserved in official Supreme Court transcripts prior to October 2004; see "Supreme Court of the United States Argument Transcripts," available at www.supremecourtus.gov/oral_arguments/argu ment_transcripts.html (visited 8/16/06). Where I write "one justice," I have found no clues that make possible a positive identification of the justice.

44 "may have been one of the worst" . . . Wulf believed all hope hung on Ginsburg's brief: Mel Wulf, letter to Allen R. Derr, 10/21/71, in Princeton ACLU papers.

44 "perhaps the worst argued": Justice Blackmun, oral argument notes, 10/19/71, in Blackmun papers.

44 to make the Court more conservative: Dean, *Rehnquist Choice*, pp. 12–14.

44 Burger's decision . . . "The question presented": This and subsequent quotations from the *Reed* decision are from *Reed v. Reed*, 404 U.S. 71 (1971).

45 Wulf and Ginsburg had never doubted the Court would invalidate Idaho's preference: Mel Wulf, Letter to Allen R. Derr, 10/21/71, in Princeton ACLU papers; Markowitz interview with Ginsburg.

45 "the bland and very narrow opinion": Mel Wulf, letter to Allen R. Derr, 12/20/71, in Princeton ACLU papers.

45 Ginsburg, in contrast, was delighted . . . first step she needed: Ginsburg interview.

45 *Reed* . . . marked the first time in history that the Court had invalidated a law as unconstitutional sex discrimination: Ruth Bader Ginsburg, *Text, Cases, and Materials on Constitutional Aspects of Sex-Based Discrimination* (St. Paul: West Publishing, 1974), p. 59; see also Ginsburg, "From No Rights, to Half Rights, to Confusing Rights," *Human Rights*, May 1978, p. 13.

45 "more liberal bunch" . . . "giant step" . . . "turning point case": Markowitz, "In Pursuit," p. 80.

45 "turning point case": See also Ruth Bader Ginsburg, "Some Reflections on the Feminist Legal Thought of the 1970s," 1989 *University of Chicago Legal Forum* 9 (1989), p. 15.

45 "A classification" . . . "must be reasonable, not arbitrary": see *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

46 Soon he would feel the barb: See, for example, the commentary in Gerald Gunther, "The Supreme Court 1971 Term. Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harvard Law Review* 1 (1972), p. 3: "difficult to understand [*Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered [that involved] importing some special suspicion of sex-related means . . ."

46 Ginsburg presented the ACLU board with a proposal to create the "Women's Rights Project" . . . $50,000: Ginsburg interview. See also Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998), p. 83 (which says budget was $30,000).

46 $5 million . . . Playboy Foundation: Cowan, "Women's Rights," p. 384.

46 two Supreme Court cases on sex discrimination: Markowitz, "In Pursuit," p. 80.

46 "I knew when I was outclassed": Wulf interview.

46 Ginsburg in the fall of 1972 was moving to Columbia: Ruth Bader Ginsburg, "Responses to ABA Personal Data Questionnaire," 6/18/93, p. 3, in Ginsburg files.

46 Congress extended its two most formidable antidiscrimination statutes (Title VII and Equal Pay Act) to cover academic employees: Babcock and others, *Sex Discrimination* (1975), pp. 558–559.

46 "the year of *the* woman": Ginsburg interview.

46 Columbia, fearful: Ginsburg interview; see also Cowan, "Women's Rights," pp. 384–385. In Ginsburg interview, she said, "I was teaching a women-in-law course at Harvard, and I think Columbia wanted to be sure they got me and not Harvard."

3: *Frontiero* Brings Hopes

48 case of Susan Struck: For most details of *Struck*, see Markowitz, "In Pursuit," pp. 80–81.

48 serving in Vietnam in 1970 . . . automatic rule required discharge: Brief for Captain Susan R. Struck by Ruth Bader Ginsburg, Melvin L. Wulf, Joel M. Gora, and Brenda Feigen Fasteau to Supreme Court, pp. 3–4, in *Struck v. Secretary of Defense*, No. 72–178, cert. granted, 409 U.S. 947, vacated, 409 U.S. 1071 (1972). Further references will be cited as Struck brief.

48 government encouraged her to have an abortion: Markowitz, "In Pursuit," p. 81; Struck brief, pp. 54–56.

48 "moral or administrative reasons": Ginsburg, in Markowitz interview with Ginsburg; quoted in Markowitz, "In Pursuit," p. 81.

49 special medical leaves: Markowitz, "In Pursuit," p. 81.

49 "Captain Struck indulged in": Ginsburg, in Markowitz, "In Pursuit," p. 81.

49 Ginsburg saw utter irrationality: Struck brief, p. 69.

49 Air Force . . . received instructions . . . solicitor general: Markowitz, "In Pursuit," p. 81.

49 *moot*: *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990), p. 1008.

49 more arguments before the Supreme Court than any man alive: Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Knopf, 1987), pp. 33, 52. Further references will be cited as Caplan, *Tenth Justice*.

50 just one chance: Markowitz, "In Pursuit," p. 81.

50 extra pay for their housing . . . both Frontieros were thrifty: Appendix to Brief for Sharron A. Frontiero and Joseph Frontiero by Joseph J. Levin, Jr., and Morris S. Dees, Jr., to Supreme Court of the United States, p. 11, undated, in *Frontiero v. Richardson*, 411 U.S. 677 (1973) available at www.yale.edu/lawweb/avalon/curiae/html/411–677 (visited 8/24/05).

50 $8,200: Supreme Court transcript of *Frontiero v. Richardson*, 411 U.S. 677 (1973), argued 1/17/73.

50 GI bill: Ruth Bader Ginsburg, "Gender and the Constitution," 44 *University of Cincinnati Law Review* 1 (1975), p. 11.

50 the military assumed that a wife was "dependent": Appendix to Brief for Sharron A. Frontiero and Joseph Frontiero by Joseph J. Levin, Jr., and Morris S. Dees, Jr., to Supreme Court of the United States, pp. 15–16, undated, in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

50 Southern Poverty Law Center . . . "equal protection of the laws": Brief for Sharron A. Frontiero and Joseph Frontiero by Joseph J. Levin, Jr., and Morris S. Dees, Jr., to Supreme Court of the United States, p. 14, undated, in *Frontiero v. Richardson*.

50 "rational basis": *Frontiero v. Laird*, 341 F. Supp. 201, 209 (M.D. Ala. 1972).

50 Levin . . . asked Mel Wulf for ACLU help . . . understanding that the ACLU would have primary responsibility for *Frontiero* . . . any oral argument would be handled by Ruth Ginsburg: Ruth Bader Ginsburg, letter to Joseph J. Levin Jr., 10/24/72, and Joseph J. Levin Jr., letter to Ruth Bader Ginsburg, 10/27/72, both in Ginsburg files. See also Markowitz, "In Pursuit," p. 82, particularly notes 116–118.

51 brief and oral argument intended to push the next step toward strict scrutiny: Ginsburg interview.

51 first chance to argue . . . "grown very attached": Joseph Levin, letter to Mel Wulf, 10/17/72, in Ginsburg files.

51 "not very good at self-advertisement": Ruth Bader Ginsburg, letter to Joseph Levin, 10/24/72, in Ginsburg files.

51 agreed . . . that Ginsburg would handle the oral argument . . . "chauvinistic": Joseph Levin, letter to Ruth Bader Ginsburg, 10/27/72, in Ginsburg files.

51 an *amicus* brief . . . parent briefs: Ginsburg interview. For analysis of how the *Frontiero* brief diverged, see Markowitz, "In Pursuit," p. 82.

52 The split . . . called attention to disagreement even among *Frontiero*'s supporters: Markowitz interview with Ginsburg.

52 his [Levin's] argument: Details and quotations from Levin's oral argument for *Frontiero* are from Supreme Court transcript of *Frontiero v. Richardson*, 411 U.S. 677 (1973), argued 1/17/73, beginning at 1:28 p.m.

52 her first argument before the Supreme Court . . . At lunchtime she had been so nervous she had not eaten: Ayer, *Ginsburg*, p. 52, citing Elinor Porter Swiger, *Women Lawyers at Work* (New York: Messner, 1978), p. 52.

53 "Mr. Chief Justice": Details of and quotations from Ginsburg's oral argument for *Frontiero*, unless otherwise indicated, are from Supreme Court transcript of *Frontiero v. Richardson*, 411 U.S. 677 (1973), argued 1/17/73.

53 renowned law school casebook: Gerald Gunther and Noel T. Dowling, *Cases and Materials on Constitutional Law*, 8th ed. (Mineola, NY: Foundation Press, 1970).

53 "some special sensitivity to sex" . . . "special suspicion": Gerald Gunther, "The Supreme Court 1971 Term. Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harvard Law Review* 1 (1972).

53 fought to get Ginsburg her first clerkship: Panel discussion at Columbia Law School, 11/19/93.

53 "visible and immutable biological characteristic": Brief for Appellees (Melvin R. Laird) by Erwin N. Griswold, Solicitor General, et al., to Supreme Court, p. 15, dated December 1972, in *Frontiero v. Richardson*, 411 U.S. 677 (1973). In the Supreme Court transcript of *Frontiero v. Richardson*, 411 U.S. 677 (1973), argued 1/17/73, pp. 16–17, Ruth Bader Ginsburg repeats this phrasing, almost

verbatim, as "sex, like race and national origin, is a visible, immutable characteristic bearing no necessary relationship to ability."

54 Griswold . . . replaced: Caplan, *Tenth Justice*, pp. 33–36.

54 Brenda Feigen began to wonder: Interview with Brenda Feigen, Beverly Hills, California, by phone, 6/14/94.

54 Martin Ginsburg began to worry: Martin Ginsburg interview.

54 radicals from NYU . . . sound utterly logical: Goodman interviews.

55 " 'I ask no favor for my sex' " : Sarah Grimké, *Letters on the Equality of the Sexes and the Condition of Woman* (Boston: I. Knapp, 1838), p. 10, quoted in Ruth Bader Ginsburg, "Sex Equality and the Constitution," 52 *Tulane Law Review* 451 (1978), p. 464.

55 insist they were mesmerized: Interview with Brenda Feigen, Beverly Hills, California, by phone, 6/14/94.

55 C+ . . . "very precise female": Blackmun notes on oral argument, 1/17/73, in Blackmun papers. Blackmun gave Levin a B–.

55 conference, the highly secretive gatherings: See, for example, Woodward and Armstrong, *Brethren*, p. 70.

55 strict scrutiny apparently played no part . . . "nothing to do with" *Reed* . . . "has the right to draw lines": Details and quotations from justices' conference are from conference notes, 1/19/93, by Justices Blackmun, Brennan, and Douglas, in Blackmun papers, Brennan papers, and Douglas papers.

55 William O. Douglas . . . in his thirty-fourth year on the Court: Hall, *Oxford Companion*, p. 234.

56 when the justices considered whether to hear Frontiero's case: tally of votes on jurisdictional statement in *Frontiero*, undated, in Brennan papers.

56 feinted toward nominating a woman . . . resisted fiercely by Chief Justice Burger: See Dean, *Rehnquist Choice*, including pp. 91 ("Poor old Burger couldn't work with the woman"), 179–180 (Burger threatens to resign), 181 (Nixon tells his attorney general that "I don't think any of those women are worth a damn"), and 287 (tapes released for public listening on 11/16/00).

56 merely a "screen": Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (New York: Ecco, 2005), p. 41. Further references will be cited as Biskupic, *O'Connor*.

57 Douglas had been scribbling: Conference notes in Douglas papers. (Conference notes by Blackmun also show no mention of "suspect classification" or "strict scrutiny." Blackmun papers.)

57 Douglas assigned the opinion to his frequent ally, Brennan: Document headed "October Term A. D. 1972," dated 1/22/73, in Marshall papers. In what seems a minor inaccuracy in fine coverage of the *Frontiero* decision, Woodward and Armstrong, *Brethren*, p. 301, say the opinion was assigned by the chief justice, thinking Brennan could do "little harm."

57 following what he understood to be his instructions: Justice William J. Brennan Jr., memorandum to all justices, 2/14/73, in Brennan papers and Marshall papers.

57 "without reaching the question" . . . "an appropriate vehicle": Justice William J. Brennan Jr., "1st DRAFT," circulated 2/14/73, in Brennan papers.

57 Brennan had been strongly influenced by Ginsburg's argument: Martin Ginsburg interview.

57 Brennan had been counting votes . . . one more vote . . . Potter Stewart: Brennan memorandum to all justices, 2/14/73, says "perhaps there is a court"—enough votes—for strict scrutiny, and see Brennan memorandum to all justices, 2/28/73, in Marshall papers.

57 Thurgood Marshall had begun arguing . . . *Reed* decision went beyond the easy "rational basis" test: Justice William J. Brennan Jr., letter to Justice Powell, 3/6/73, in Marshall papers.

57 Byron White was inclined to agree: Justice Byron R. White, letter to Justice William J. Brennan Jr., 2/15/73, in Marshall papers.

57 as was William O. Douglas: Brennan memorandum to all justices, 2/28/73, in Marshall papers.

57 "We hold today": This and details of Brennan's revision are from Justice William J. Brennan Jr., "3rd DRAFT," circulated 2/28/73, in Brennan papers.

58 Douglas, White, and Marshall joined his opinion immediately: Memos dated 2/28/73 and 3/1/73, in Marshall papers. One of Blackmun's clerks unsuccessfully urged him to join Brennan; memo initialed JWZ [apparently James W. Ziglar], 3/3/73, in Blackmun papers.

58 "You have now gone all the way": Lewis F. Powell, memo to Justice William J. Brennan Jr., 3/2/73, in Marshall papers.

58 equal rights amendment . . . passed overwhelmingly by Congress in 1972 . . . thirty-eight of which were required: Babcock and others, *Sex Discrimination* (1975), p. 129ff; p. 133n14 lists the final vote in the House as 354 to 23 and in the Senate as 84 to 8 in favor of the equal rights amendment. See also Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," *59 American Bar Association Journal* 1013 (1973).

58 "on account of sex": Babcock and others, *Sex Discrimination* (1975), p. 129.

58 Some legal experts opposed . . . argument made by William Rehnquist: See Robert C. Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power," 112 *Yale Law Journal* 1943 (2003), p. 2003.

58 majority of state legislatures by 1973 supported the ERA, as did Ruth Bader Ginsburg . . . Jefferson: Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," *59 American Bar Association Journal* 1013 (1973), pp. 1013 (Jefferson), 1018 (majority), and 1019 ("sharp legislative lines").

58 "My principal concern" . . . "Women certainly": Lewis F. Powell, letter to Justice William J. Brennan Jr., 3/2/73, in Marshall papers.

59 Stewart's long-awaited memo . . . agreed generally with Powell: Potter Stewart, letter to Justice William J. Brennan Jr., 3/5/73, in Marshall papers.

59 a strong response to Powell . . . "will of the people": Justice William J. Brennan Jr., letter to Lewis F. Powell Jr., 3/6/73, in Marshall papers.

60 Stewart . . . failed to talk Brennan into a compromise: Woodward and Armstrong, *Brethren*, pp. 301–303. When I asked Ruth Bader Ginsburg about the report in *The Brethren*, she replied, "That kind of bargaining certainly hasn't happened with me this first term [on the Supreme Court]. . . . I can't imagine Stewart putting it this baldly." Ginsburg interview.

60 Stewart . . . not step beyond the decision in *Reed*: Potter Stewart, letter to Justice William J. Brennan Jr., 3/7/73, in Marshall papers.

60 "shuttlecock" . . . "The author of *Reed*": Warren Burger, letter to Justice William J. Brennan Jr., 3/7/73, in Marshall papers.

60 so Ginsburg supposed: Markowitz interview with Ginsburg. Ginsburg says, "I would say that Stewart was lost to strict scrutiny because Brennan moved too soon."

60 "the will of the people": *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973).

60 could tell how close . . . heard rumors that Stewart had wavered: Ruth Bader Ginsburg, "Gender and the Constitution," 44 *University of Cincinnati Law Review* 1 (1975), p. 19.

60 "the female of the species": Ginsburg interview; see also Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," *59 American Bar Association Journal* 1013 (September 1973), p. 1017, quoting Stewart from *Harvard Law School Record*, 3/23/73, p. 15.

60 Rehnquist . . . Nixon . . . added to the Court the same day as Powell: Dean, *Rehnquist Choice*, p.

264; the day was 10/21/71, two days after the oral argument in *Reed v. Reed*, 404 U.S. 71 (1971), in which they did not participate.

61 labeled a "concurrence" . . . "the Court" . . . "has assumed" the responsibility: *Frontiero v. Richardson*, 411 U.S. 677, 691, (1973) (Powell, J., concurring).

61 Ginsburg saw strong evidence . . . Powell had written in opposition to . . . Brennan victory: Ruth Bader Ginsburg, "Gender and the Constitution," 44 *University of Cincinnati Law Review* 1 (1975), p. 19.

61 *Wiesenfeld* was the perfect case: Ginsburg interview.

61 disaster . . . Kahn: Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 5/3/74, in Wiesenfeld files.

61 *Reed* and *Frontiero* . . . gave the appearance of deftly orchestrated first steps: Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), p. 4.

61 Washington Civil Liberties Union, which originated *Struck*: Ruth Bader Ginsburg, letter to author, 8/7/03.

62 "ripe for change": Cowan, "Women's Rights," p. 392.

62 ACLU rules forbade bringing a case to the Supreme Court: Ginsburg interview; Markowitz, "In Pursuit," p. 85; interview with Kathleen Peratis, New York City, 3/8/94.

62 She [Ginsburg] heard . . . through . . . *Law Week*: Cowan, "Women's Rights," p. 391, and Markowitz, "In Pursuit," pp. 84–85.

62 shocked her. "You're from the ACLU?": Ginsburg interview ("Well," she said, "you could have picked me up off the floor").

62 $15 . . . sought only to help men: Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), pp. 4–5.

62 A few days later . . . Hoppe, sent: Bill Hoppe, letter to Mel Wulf, 10/31/73, in Ginsburg files.

62 "Egad!" . . . "Today a woman is fully emancipated": Bill Hoppe, jurisdictional statement to Supreme Court, dated 6/29/73, in Ginsburg files.

62 His enclosed letter . . . "would appreciate any help": Bill Hoppe, letter to Mel Wulf, 10/31/71, in Ginsburg files.

62 For Ginsburg, the *Kahn* problem was now her problem: Ruth Bader Ginsburg, letter to Gerry Gunther, 1/5/74.

63 "large leeway" . . . Douglas was unlikely: Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Supreme Court Review* 1 (1976), pp. 5–6.

63 Douglas saw his mother left destitute . . . "often meant the difference": William O. Douglas, *Go East, Young Man: The Early Years* (New York: Random House, 1974), p. 21.

63 She decided not to discuss sex as a suspect classification: Ruth Bader Ginsburg, memo to Brenda Feigen and Marc Fasteau, 11/13/73, in Ginsburg files.

63 her oral argument for Kahn: Details and quotations of Ginsburg's oral argument are from Supreme Court transcript of *Kahn v. Shevin*, 416 U.S. 351 (1974).

64 the votes quickly went against Ginsburg . . . Scribbling notes . . . "women as widows are largely destitute": Conference notes, 3/1/74, in Douglas papers.

64 his opinion for the Court: Details and quotations from Douglas' opinion are from *Kahn v. Shevin*, 416 U.S. 351 (1974).

64 within ten days: In Douglas papers, draft says "for printer, 3/9/74," in handwriting of William O. Douglas.

64 The lone consolation for Ginsburg: Markowitz, "In Pursuit," p. 86.

64 grounded the Court's opinion only on *Reed* and its version of the rational-basis test: *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

64 only Brennan and Marshall still argued for it: *Kahn v. Shevin*, 416 U.S. 351 (1974), 358 (Brennan and Marshall, invoking "strict judicial scrutiny") and 361 (White, speaking less forcefully of classifications that are "suspect and require more justification than the State has offered").

64 backward: Ruth Bader Ginsburg, "Supreme Court Back on Track," 1 *Women Law Reporter* 203 (May 1975), p. 203, in Wiesenfeld files.

4: *Wiesenfeld* Brings Reality

65 "bad precedent": Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 5/3/74, in Wiesenfeld files. Calling *Kahn* a "keen disappointment," she told Wiesenfeld that "bad precedent has been set and we will have to do our best to overcome it."

65 "if ever there was a case": Markowitz, "In Pursuit," p. 84. This discussion of *Wiesenfeld* is indebted to Markowitz and to parts of Cowan, "Women's Rights."

65 it had everything: Panel discussion at Columbia Law School, 11/19/93. *Wiesenfeld*, said Ginsburg, "epitomized for me what all that we were doing in the 70s."

65 *Wiesenfeld* . . . "presents no possibility of settlement": Cowan, "Women's Rights," p. 397, and see pp. 395–399 for fine discussion of Ginsburg's strategy in *Wiesenfeld*.

65 media was beginning to call "men's lib": "Landmark for Male Liberation," *Family Circle*, June 1974, p. 14, in Wiesenfeld files.

65 Ginsburg hoped to show that discrimination against either sex ultimately hurt both: Supreme Court transcript of *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), argued 1/20/75. Her metaphor of a "double-edged sword" argument extends back to brief for Petitioner-Appellant by Ruth Bader Ginsburg and Martin D. Ginsburg, in *Charles E. Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), undated typescript, p. 20, in Ginsburg files (who sent copy to author, 1/20/95).

66 Ginsburg had fought against . . . *men's lib* and *women's lib*: Margolick on Ginsburg, 6/25/93, p. A1.

66 the route to the Supreme Court would run . . . via district court: Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 12/27/72, in Wiesenfeld files.

66 Equal Rights Advocacy Seminar: Reports of Equal Rights Advocacy seminar for 1973–74 and 1974–75, in Ginsburg files.

66 students chose from among a menu: Freeman interview.

66 art historian: Ginsburg interview.

66 doctorate in French literature: Freeman interview.

66 sex discrimination case against her magazine: Panel discussion at Columbia Law School, 11/19/93.

66 women's bathroom expanded: Freeman interview; see also *History of Women at Columbia Law School*, available at www.law.columbia.edu/publications/fall2002womenofcolumbialaw.htm (visited 2/22/03).

66 "breaking new ground": Interview with Sandra Grayson, Manhasset, New York, by phone, 2/25/94.

67 a student would write; Professor Ginsburg would rewrite . . . manna . . . "I mean" . . . "to pick a man" . . . "Ruth" . . . would cut and polish . . . "OH, YES YES" . . . part of the students' lives: Freeman interview.

67 the rest of law school classes, where the abstract could crowd out the human: Panel discussion at Columbia Law School, 11/19/93.

67 Students saw letters: Interview with Sandra Grayson, Manhasset, New York, by phone, 2/25/94; she recalled the letter about nannies.
67 "Having gone through more helpers and housekeepers": Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 1/10/73, in Wiesenfeld files.
67 Ginsburg's vision of an ideal society . . . "illustrative of what Ruth has been saying her whole life": Freeman interview.
68 Ginsburg challenged her ERA seminar: Cowan, "Women's Rights," p. 385.
68 term had just ended when a three-judge panel in Trenton heard the case: *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F. Supp. 981, 985n6 (stating oral argument was 6/20/73).
68 "natural basis": "Widower Bids for Equal Aids on Benefits," *Newark Star Ledger*, 6/21/73, in Wiesenfeld files.
68 Ginsburg argued for strict scrutiny: Ruth Bader Ginsburg, letter to author, 8/7/03.
68 Wiesenfeld heard the government make an argument: Wiesenfeld interview.
68 "mother's insurance benefits" of just under $250 per month . . . could not exceed $200 per month: *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 (1975).
68 apparently designed by Congress to help a widow stay at home and care for a child: For full analysis of congressional intent, see *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651 (1975).
68 $1,500 a month: *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F. Supp. 981, 984 (D. N.J. 1973).
68 $10,000: *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F. Supp. 981, 985 (D. N.J. 1973).
68 Stephen worried . . . without describing his scheme to Ginsburg . . . gave up his job at Cyphernetics: Wiesenfeld interview. He said, "She was the kind of person you knew would not ask you to alter your lifestyle or what you want to do in order to keep her going. But once I knew that these things might have an effect on the outcome, I chose to make it as simple as possible—to not disqualify myself by earning too much money." For "give up his job," see also Affidavit of Stephen Wiesenfeld, dated 9/28/73, in Appendix, filed 12/9/74, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), p. 19.
69 tricky specifications: Wiesenfeld interview.
69 he would sell high-grade bicycles . . . Fuji bikes: Details of the store are from Wiesenfeld interview.
68 Late that month, Arab nations announced an oil embargo: Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power* (New York: Simon and Schuster, 1991), pp. 608–609.
70 "back in the situation" . . . affidavit: Ruth Bader Ginsburg, letter to Jane Z. Lifset, 9/12/73, in Ginsburg files; Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 2/7/93, and Jane Z. Lifset, letter to Stephen Wiesenfeld, 6/5/73, both in Wiesenfeld files.
70 affidavit: Affidavit of Stephen Wiesenfeld, dated 9/28/73, in Appendix, filed 12/9/74, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), p. 19. (He said he was "considering opening a retail shop" near his home.)
70 never told Ginsburg: Ginsburg interview and Wiesenfeld interview.
70 "She was the kind of person": Wiesenfeld interview.
70 "strong argument for dismissal" . . . "inherently suspect": *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F. Supp. 981, 986, 990 (D. N.J. 1973).
70 somewhat obscure position: Caplan, *Tenth Justice*, p. 3.
70 Bork . . . Cox . . . "Saturday night massacre": For narrative, see Bob Woodward and Carl Bernstein, *The Final Days* (New York: Simon and Schuster, 1976), pp. 66–72; Woodward and Armstrong, *Brethren*, pp. 339–341; Caplan, *Tenth Justice*, pp. 36–38.
71 Office of the Solicitor General . . . opposed the district court's ruling: Jurisdictional Statement by

Robert H. Bork, Solicitor General, et al., to Supreme Court, dated June 1974, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); for "notice of appeal" filed 2/25/74, see Jurisdictional Statement, p. 2, and Appendix, p. 25a.

71 Paula Wiesenfeld . . . "contributed to Social Security": Brief for Stephen Wiesenfeld by Ruth Bader Ginsburg and Melvin L. Wulf to Supreme Court, p. 10, filed 12/20/74, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

72 oral argument: Details and quotations of Ginsburg's oral argument, unless otherwise indicated, are from Supreme Court transcript of *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), argued 1/20/75.

72 sat him directly beside her . . . "this was as genuine as any case" . . . "this sort of sex stereotyping" . . . see themselves: Ginsburg interview.

72 Ginsburg had made Stephen feel close . . . called him . . . 4–4 tie: Wiesenfeld interview.

73 For years, Ginsburg had been arguing: Brief for Petitioner-Appellant by Ruth Bader Ginsburg and Martin D. Ginsburg, in *Charles E. Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), undated typescript, p. 20, in Ginsburg files (copy to author, 1/20/95). It reads, in part, "The constitutional sword necessarily has two edges. Fair and equal treatment for women means fair and equal treatment for members of both sexes."

73 "presents a classic example": Brief for Stephen Wiesenfeld by Ruth Bader Ginsburg and Melvin L. Wulf to Supreme Court, p. 23, filed 12/20/74, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

73 Precisely two months: *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), argued 1/20/75, decided 3/19/75.

73 Wiesenfeld was sitting at home. . . . Ginsburg was calling: Wiesenfeld interview.

74 decision was unanimous: *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

74 "The Government seeks to characterize": This and subsequent quotations of the Court's opinions are from *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

74 "This was Justice Brennan's year": Lynn Hecht Schafran, letter to Ruth Bader Ginsburg, 4/4/75, in Ginsburg files.

75 Schafran had the story basically right: Berzon interview. When I related Schafran's narrative to Berzon, she exclaimed, "Who told you that? Who knows it?"

75 Professor Stephen R. Barnett, who phoned her at each reversal: Berzon interview.

75 Another rumor . . . curse in chambers . . . "an older gentleman": Berzon interview.

75 Burger, Rehnquist, and apparently Blackmun planned to vote against: Blackmun papers.

75 Berzon followed a cue that she felt Ginsburg had planted with a footnote: Berzon interview. See Brief for Stephen Wiesenfeld by Ruth Bader Ginsburg and Melvin L. Wulf to Supreme Court, p. 17n9, filed 12/20/74, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

75 Rehnquist . . . praised the opinion's legislative history . . . "the only parent remaining": *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975). Ginsburg also praised the "exhaustive review of legislative history": Ruth Bader Ginsburg, "Supreme Court Back on Track," 1 *Women Law Reporter* 203 (May 1975), p. 204.

75 "had to be the perfect case": Ginsburg interview.

76 Gone, as if forgotten . . . "strict scrutiny" . . . knew Brennan could not muster the votes . . . " 'heightened scrutiny' without further labeling": Ruth Bader Ginsburg, letter to Professor Elizabeth Defeis, 8/18/75, in Ginsburg files; quoted partly in Markowitz, "In Pursuit," p. 88.

76 Her reasoning was simple: Cowan, "Women's Rights," p. 398; Markowitz, "In Pursuit," p. 88.

76 "skeptical scrutiny": *United States v. Virginia*, 518 U.S. 515, 531 (1996).

76 Wiesenfeld . . . wanted the victory to be not just principled . . . "I wanted to make sure that I qualified for the benefit for a while" . . . entrepreneurial venture: Wiesenfeld interview.

76 $22,000 profit . . . 1975 to 1982 on Social Security benefits: Stephen Wiesenfeld, letter to author, 10/1/03.

77 Stephen Wiesenfeld testified . . . Justice Ginsburg presided: Stephen Wiesenfeld, letter to author, 10/1/03.

Part Two

PREGNANCY (1972–1978)

In this part, I rely on the personal papers of Ruth Weyand (courtesy of her daughter) and interviews with a number of plaintiffs and attorneys including Sally (Augustina) Armendariz, Linda Dorian, Mary Dunlap, Ruth Bader Ginsburg, Jacqueline Jaramillo, Herma Hill Kay, Stanley Pottinger, Susan Deller Ross, Peter Weiner, and Wendy Webster Williams. Important primary sources, particularly interviews and collections of documents, are listed below, with the abbreviations used in the endnotes that follow. Other primary sources and important secondary sources appear with full citations in the endnotes.

Armendariz interview	Interview with Sally (Augustina) Armendariz, Gilroy, California, 5/16/95
Blackmun papers	Papers of Justice Harry A. Blackmun, Library of Congress
Brennan papers	Papers of Justice William J. Brennan Jr., Library of Congress
Dorian interview	Interview with Linda Dorian, Olviedo, Florida, by phone, 9/18/95
Dunlap interview	Interview with Mary Dunlap, San Francisco, by phone, 6/6/95
East files	Files of Catherine East as of 2/8/95
East interview	Interview with Catherine East, Arlington, Virginia, 2/8/95
Fuentes interview	Interview with Sonia Pressman Fuentes, Potomac, Maryland, by phone, 6/14/95
Ginsburg interview	Interview with Ruth Bader Ginsburg, Washington, DC, 8/24/94
Greenberger interviews	Interviews with Marcia Greenberger, Washington, DC, by phone, 6/13/95 and 6/28/95
Jaramillo interviews	Interviews with Jacqueline Jaramillo, Colorado Springs, by phone, 6/9/95 and 6/14/95
Kay interview	Interview with Herma Hill Kay, Berkeley, California, 5/10/95
Marshall papers	Papers of Thurgood Marshall, Library of Congress
Pottinger interview	Interview with Stanley Pottinger, South Salem, New York, by phone, 9/15/95
Ross and Williams interview	Interview with Susan Deller Ross and Wendy Webster Williams, Washington. DC, 8/25/94
Weiner interview	Interview with Peter Weiner, driving in California, by phone, 5/2/95
Weyand files	Files of the late Ruth Weyand (courtesy of her daughter, Sterling Perry) as of 5/21/95
Weyand interview	Thomas J. Moore, "Interview with Ruth Weyand," 3/25/77, Part 4, p. 38, in "Monograph, *General Electric Company v. Gilbert*, Professor Park, April 28, 1977," in files of the late Ruth Weyand (courtesy of her daughter, Sterling Perry) as of 5/21/95

5: What Happened to Sally Armendariz Could Not Happen to a Man

81 "happen to a man": Ruth Bader Ginsburg, "From No Rights, to Half Rights, to Confusing Rights," 7 *Human Rights* 13 (1978).

81 rear-ended by another car . . . mother . . . woke up blind: Armendariz interview.
81 twenty-nine years earlier: Consolidated Complaint for Injunctive and Declaratory Relief (Civil Rights) by Roland C. Davis, Joel Gomberg, Cecilia D. Lannon, Joseph C. Morehead, Peter Hart Weiner, and Wendy Webster Williams to United States District Court for the Northern District of California, dated 12/26/72, in Civ. No. C-72–1402 SW [*Carolyn Aiello v. Sigurd Hansen*] and C-72–1547 SW [*Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo v. Sigurd Hansen*], reprinted in Brief for the State of California to the Supreme Court, Appendix, dated 2/9/74, in *Geduldig v. Aiello*, 417 U.S. 484 (1974). Further references will be cited as *Aiello* complaint.
82 miscarriage . . . not even wash dishes: *Aiello* complaint.
82 Her doctor told her to stay away: *Aiello v. Hansen*, 359 F. Supp. 792, 795 (N.D. Cal. 1973).
82 May of 1972, Sally's husband had just become unemployed . . . eight-month-old son . . . $394 monthly salary: *Aiello* complaint.
82 paid 1 percent: Armendariz interview; *Aiello v. Hansen*, 359 F. Supp. 792, 794 (N.D. Cal 1973).
82 Disability Insurance . . . "arising in connection with pregnancy": *Geduldig v. Aiello*, 417 U.S. 484, 486, 489 (1974).
82 Young Christian Workers . . . demanded an appeal . . . voluntary? . . . "all the time": Armendariz interview.
83 California Rural Legal Assistance: Wendy Webster Williams, letter to author, 6/10/05.
83 "the guys": Armendariz interview.
83 One of the first guys . . . one of his fellow clerks: Weiner interview.
83 federal fellowships . . . poverty law: Wendy Webster Williams, letter to author, 6/10/05.
84 then husband enrolled in Hastings: Wendy Webster Williams, letter to author, 6/10/05.
84 talk to him about his work: Dunlap interview.
84 few women law students: Sandra Pearl Epstein, "Law at Berkeley: The History of Boalt Hall" (PhD dissertation, University of California, Berkeley, 1979), p. 426. Further references will be cited as Epstein, "Law at Berkeley."
84 belonged at home . . . wasting spaces: Dunlap interview.
84 "strict scrutiny" . . . "not in our lifetimes": Ross and Williams interview.
84 mostly male ranks of Berkeley's Boalt Hall law faculty: Epstein, "Law at Berkeley," p. 425.
84 fourteenth woman appointed . . . Armstrong, had been appointed at Berkeley in 1922: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991).
84 Barbara Nachtrieb Armstrong . . . not fall to zero: Epstein, "Law at Berkeley," pp. 410, 421–425.
85 child of a Methodist minister . . . become a lawyer: Harriet Chiang, "Crusader Leads Boalt Hall," *San Francisco Chronicle*, 8/7/92, p. A12.
85 University of Chicago Law School in 1959 as one of only three women in her class: Katherine Bishop, "Sweet Victory for Feminist Pioneer at Law School," *New York Times*, 4/3/92, p. A19.
85 clerked at the California Supreme Court: Richard Saver, "Insider Kay Is Favorite for Boalt Deanship," *Recorder*, 11/22/91, p. 1.
85 "rife with discrimination" . . . liberalizing abortion: Harriet Chiang, "Crusader Leads Boalt Hall," *San Francisco Chronicle*, 8/7/92, p. A12.
85 inspired by Amelia Earhart, she flew: Wendy Webster Williams, letter to author, 6/10/05.
85 no organization at Boalt Hall . . . discuss the status of women: Kay interview.
85 Boalt Hall Law Wives Club . . . served coffee: "An Informal Introduction to Boalt Hall," 1970, p. 20, typescript in library of Boalt Hall.
85 no group gathered university women . . . someone in the president's office . . . "Dear Boalt Hall Girl": Kay interview.

85 new breed: not passive consumers: Herma Hill Kay, "The Future of Women Law Professors," 77 *Iowa Law Review* 5 (1991).

86 summers registering voters in Mississippi: Kay interview.

86 professor who questioned whether women should serve on juries: Dunlap interview.

86 On the spot, the women decided: Wendy Webster Williams, speaking during interview with Ruth Bader Ginsburg conducted by Deborah L. Markowitz with Susan Deller Ross and Wendy Webster Williams, Washington, DC, 2/24/86, as preparation for Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," 11 *Women's Rights Law Reporter* 73 (Summer 1989), pp. 73–98. Further references will be cited as Markowitz interview with Ginsburg.

86 Boalt Hall Women's Association . . . plan a course . . . "rooting out of anti-woman discrimination": "An Informal Introduction to Boalt Hall," 1970, p. 20, typescript in library of Boalt Hall.

86 "Wanted by the Law: Women!": Wendy Webster Williams, "The Gifts of Mary Dunlap (1949–2003)," 19 *Berkeley Women's Law Journal* 12 (2004), pp. 12–13.

86 tall woman stood out . . . urgency and energy . . . "Question Authority!": Kay interview.

86 clerk for Justice Raymond J. Peters of the California Supreme Court: Wendy Webster Williams, Professor of Law, available at http://data.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=346 (visited 3/24/03).

86 "deny review" . . . "scooting right in to my judge" . . . sex discrimination!: Williams, in Ross and Williams interview.

86 Justice Peters . . . write me a memo . . . "killed myself" . . . "Well": Williams, in Ross and Williams interview.

87 "sprightly and ribald": *Goesaert v. Cleary*, 335 U.S. 464 (1948), quoted in Ruth Bader Ginsburg, *Text, Cases, and Materials on Constitutional Aspects of Sex-Based Discrimination* (St. Paul: West Publishing, 1974), p. 17; and see Part 1 in the book.

87 Sail'er Inn was a topless bar . . . topless bartenders: Kay interview and Dunlap interview.

87 rely on that brief in her draft: Wendy Webster Williams, letter to author, 6/10/05.

87 a bit improper . . . "An *amicus* brief HAS TO COME IN." And Professor Kay said: Williams, in Ross and Williams interview.

87 Kay . . . called on the students: Kay interview.

87 first women-in-the-law course: Kay sat in on Boalt's first women-in-law course, taught by Colquit Walker, and then began teaching her own in the spring of 1972. Kay interview and "Courses on Women and the Law" (mimeo prepared for women and law teaching conference at Yale Law School), date c. December 1971, in files of Ann E. Freedman, as of 6/1/98.

88 "the smarmiest thing": Dunlap interview.

88 Women's Association resolved . . . Kay gave guidance: Kay interview.

88 Mary Dunlap and Margaret Kemp, wrote the brief: Dunlap interview. Quotations from the *Sail'er Inn* brief are from Brief for Sail'er Inn, a California Corporation, doing business as The Classic Cat, by Herma Hill Kay, Sponsor of the Boalt Hall Women's Association, to the Supreme Court of the State of California, dated 12/1/70, in *Sail'er Inn v. Kirby*, 5 Cal.3d 1 (1971); copy in files of Herma Hill Kay as of 8/1/97.

88 Sail'er Inn lawyers . . . used the Boalt Hall brief . . . "Hi! This is Ray Peters": Williams, in Ross and Williams interview.

89 first decision . . . sex discrimination violated the Constitution: Wendy Webster Williams, letter to author, 6/10/05.

89 decision in *Sail'er Inn*: Quotations from the *Sail'er Inn* decision are from *Sail'er Inn v. Kirby*, 5 Cal.3d 1 (1971).

89 "designated classifications" . . . "sex, like race and lineage": *Sail'er Inn v. Kirby*, 5 Cal. 3d 1 (1971).

89 to her delight, Ruth Bader Ginsburg . . . into her *Reed* brief: Interview with Ruth Bader Ginsburg, Washington, DC, 8/24/94; Markowitz interview with Ginsburg; Brief for Appellant (Sally Reed) to Supreme Court, filed 6/25/71, in *Reed v. Reed*, 404 U.S. 71 (1971), 20, citing *Sail'er Inn v. Kirby*, 3 CCH Employment Practices Decisions 8222 (5/27/71), pp. 6756–6757. See Part 1 in the book.

89 "The pedestal" . . . "We conclude": *Sail'er Inn v. Kirby*, 5 Cal.3d 1 (1971).

89 *Sail'er Inn* . . . in judicial opinions: It was paraphrased by Justice William J. Brennan Jr. in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), who wrote that for years discrimination "put women, not on a pedestal, but in a cage." Brennan did not cite *Sail'er Inn*—a citation that Ruth Bader Ginsburg argues would have been appropriate. Interview with Ruth Bader Ginsburg, Washington, DC, 8/24/94.

89 No one reading . . . naked women: The *Sail'er Inn* opinion makes no reference to such words as *naked*, *nude*, or *topless*.

6: The First Pregnancy Case: *Aiello*

90 Williams heard the story . . . worked together: Ross and Williams interview.

90 Elizabeth Johnson, a single mother with a five-year-old child: Most details of Johnson's story are from *Aiello* complaint and from interview with Cecilia Lannon, attorney for Elizabeth Johnson, San Rafael, California, by phone, 5/5/95.

91 Jaramillo, from Oakland: Most details of Jaramillo's story are from Jaramillo interviews and *Aiello* complaint.

91 Williams . . . last vacation: Wendy Webster Williams, letter to author, 6/10/05.

91 calls from another lawyer telling her he had another case like that of Sally Armendariz . . . just filed Aiello's case . . . in federal court: Williams, in Ross and Williams interview.

91 Carolyn Aiello . . . ectopic pregnancy: *Aiello* complaint.

91 ectopic pregnancy . . . outside the womb: Ectopic pregnancy, *MedlinePlus Medical Encyclopedia*, available at www.nlm.nih.gov/medlineplus/ency/article/000895.htm (visited 8/24/06).

91 Williams . . . filed suit as planned in state court . . . California . . . requested that her cases be removed to federal court: Williams, in Ross and Williams interview. See also Jurisdictional Statement by Evelle J. Younger, Elizabeth Palmer, and Joanne Condas to Supreme Court, p. 5n4, in *Geduldig v. Aiello*, 417 U.S. 484 (1974). Further references will be cited as California Jurisdictional Statement in *Geduldig v. Aiello*.

91 Aiello, whose original lawyer soon decided to leave the case: Wendy Webster Williams, letter to author, 6/10/05.

92 federal fast track: Williams, in Ross and Williams interview.

92 The shock waves from *Aiello*: Greenberger interviews.

92 Ruth Weyand: See Chapter 7 in the book.

92 In nine arguments . . . had not lost: Paul Bogas, "Patience, Planning Pay Off for Equal Pay Act Counsel," *National Law Journal*, 12/23/85, p. 1. Further references will be cited as Bogas, "Patience."

92 In the first half of 1971 . . . groundwork: Equal Employment Opportunity Commission, "Failure to Include Pregnancy under Disability Insurance Plan Was Sex Bias," Decision No. 71–1474, 3/19/71, in Weyand files. This EEOC decision initiated the case that Weyand argued as *General Electric Company v. Gilbert*, 429 U.S. 125 (1976). See also Weyand interview, p. 4-38; Weyand explains that the case began in response to a report on the EEOC decision of March 19 that she published in the May–June 1971 issue of her union's publication, *Keeping Up with the Law*.

92 Judge Ben C. Duniway . . . Spencer Williams . . . Alfonso J. Zirpoli: *Aiello* complaint.

92 nephew to a famous feminist . . . tried to get him disqualified . . . met when he refused to hire her as his clerk . . . He started muttering . . . secretary didn't want to work with female law clerks: Williams, in Ross and Williams interview.

93 claims on the Constitution of the state of California . . . also based two claims on federal law. . . . the equal protection clause . . . revised sex discrimination guidelines: *Aiello* complaint.

93 which she could no longer use: Wendy Webster Williams, letter to author, 6/10/05.

93 guidelines covering pregnancy discrimination: U.S. Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," Part 1604.10b, Title 29 of the *Code of Federal Regulations*, *Federal Register* 37 (4/5/72), p. 6837; quoted in *Gilbert v. General Electric*, 375 F. Supp. 367, 380 (E.D. Va. 1974).

93 "classifications based upon": Brief for Appellees (Carolyn Aiello et al.) by Wendy Webster Williams and Peter Hart Weiner to Supreme Court, p. 24, dated 3/13/74, in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

93 breakthrough . . . new lawyer: Susan Deller Ross, letter to author, 8/8/05, and see Part 1 in the book.

93 late February of 1973, Williams appeared at the U.S. courthouse: Brief for the State of California to the Supreme Court, Appendix, p. 27, dated 2/9/74, in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

93 Wendy did a great job: Armendariz interview.

93 May 31, 1973, . . . opinion, written by Alfonso Zirpoli: Quotations from *Aiello* opinions, unless otherwise indicated, are from *Aiello v. Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973).

94 "slightly altered" . . . "slightly, but perceptibly, more rigorous": *Aiello v. Hansen*, 359 F. Supp. 792 (N. D. Cal. 1973).

95 "discriminates against women": *Aiello v. Hansen*, 359 F. Supp. 792, 806 (N.D. Cal. 1973) (Williams dissenting).

95 *Supremes* . . . men on the high court: Williams, in Ross and Williams interview.

95 California changed the terms: *Geduldig v. Aiello*, 417 U.S. 484, 491 (1974).

95 another California woman: *Rentzer v. Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).

95 precisely a week before the state lost *Aiello*: *Rentzer* was decided 5/24/73; *Rentzer v. Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973). *Aiello* was decided in district court on 5/31/73; *Aiello v. Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973).

95 The entire battle in state courts was unknown to Williams and, the state's lawyers in *Aiello* claimed, unknown to them: California Jurisdictional Statement in *Geduldig v. Aiello*, p. 6.

95 compensate "in part" for wage loss . . . "abnormal pregnancy with involuntary implications" . . . "normal pregnancy and delivery": California Jurisdictional Statement in *Geduldig v. Aiello*, pp. 8, 41, 49.

95 Armendariz, for example, received $84: Armendariz interview.

96 Some two hundred thousand working women in California gave birth each year: *Aiello* complaint.

96 When Jacqueline Jaramillo's IUD failed: Jaramillo interviews and *Aiello* complaint.

96 "cradle Catholic" . . . worry that abortion might be her only chance: Jaramillo interviews.

97 In late 1973 when the Supreme Court announced it would hear: Probable jurisdiction noted, 12/17/73, *Geduldig v. Aiello*, 414 U.S. 1110 (1973).

97 Williams was technically ineligible . . . less than three years: Weiner interview; "Supreme Court of the U.S.—Rules, Admission to the Bar," available at www.law.cornell.edu/rules/supct/5.html (visited 8/1/07).

97 A day before leaving for Washington . . . twisted her ankle . . . like an expert on disabilities: Ross and Williams interview, and Williams, letter to author, 6/10/05.
97 Weiner and Williams arrived in DC in late March: Weiner interview.
97 Center for Law and Social Policy . . . imperfect case: Greenberger interviews.
98 directed California's Department of Human Resources Development: *Geduldig v. Aiello*, 417 U.S. 484 (1974).
98 As oral arguments began: Details of and quotations from oral arguments, unless otherwise indicated, are from Supreme Court transcript of *Geduldig v. Aiello*, 417 U.S. 484 (1974), argued 3/26/74. Further references will be cited as Supreme Court transcript of *Geduldig v. Aiello*.
98 "redhead" and "B+": Blackmun's oral argument notes in Blackmun papers.
98 $120 million: Supreme Court transcript of *Geduldig v. Aiello*, p. 3.
98 citing Judge Williams' dissent: *Aiello v. Hansen*, 359 F. Supp. 792, 802ff. (N.D. Cal. 1973) (Williams dissenting).
98 women already derived more benefit: Supreme Court transcript of *Geduldig v. Aiello*, p. 14.
98 enriched women would then choose not to return to their jobs: Supreme Court transcript of *Geduldig v. Aiello*, p. 46.
99 On crutches . . . None asked: Ross and Williams interview.
99 Blackmun scribbled "B-" . . . "long stringy hair": Blackmun's oral argument notes in Blackmun papers.
99 women's disability leave would average half as long: Supreme Court transcript of *Geduldig v. Aiello*, p. 26.
99 "pay in more and get out less": Supreme Court transcript of *Geduldig v. Aiello*, p. 25.
100 first woman to argue before the Supreme Court had done so in 1880: Clare Cushman, ed., *Supreme Court Decisions and Women's Rights: Milestones to Equality* (Washington, DC: CQ Press, 2001), p. 207. Further references will be cited as Cushman, *Supreme Court*.
100 not until 1971 had two women . . . right to abortion: Clare Cushman, ed., *Supreme Court Decisions And Women's Rights: Milestones to Equality* (Washington, DC: CQ Press, 2001), p. 272. Further references will be cited as Cushman, *Supreme Court*. *Doe v. Bolton* is discussed in Garrow, *Liberty and Sexuality*.
100 Ten months before . . . "The pedestal": *Frontiero v. Richardson*, 411 U.S. 677 (1973), decided 5/14/73.
101 In the conference for discussion of *Geduldig v. Aiello*: Tally sheet in Blackmun papers and memos in Brennan papers.
101 Stewart's draft: Quotations from Stewart's draft opinion in *Geduldig v. Aiello* are from Justice Potter Stewart, "2nd DRAFT," circulated 5/15/74, in Brennan papers.
102 only if a state started protecting pregnant men . . . pregnant women: Susan Deller Ross, letter to author, 8/8/05.
102 "skirted discussion of sex discrimination": RR [apparently Robert I. Richter], memo to Justice Harry A. Blackmun, 5/15/74, in Blackmun papers.
102 Justice White, after reading Stewart's draft, replied: Justice Byron White, memo to Potter Stewart, 5/17/74, in Brennan papers.
102 Brennan circulated a draft of his answering dissent: Quotations from Brennan's draft are from Justice William J. Brennan Jr., circulated in typescript 6/10/74, in Brennan papers, dissent in *Geduldig v. Aiello*, 417 U.S. 484 (1974).
102 twenty-four-line footnote: Quotations from the footnote are from Justice Potter Stewart, "3rd DRAFT," circulated 6/12/74, in Brennan papers.

7: The Second Pregnancy Case: *General Electric*

104 most successful women lawyers in the history of Supreme Court: Some women who, unlike Weyand, were not undefeated at the Supreme Court had argued more often there, with the record going to thirty cases argued by Bea Rosenberg. See Cushman, *Supreme Court*, pp. 228–229.

104 writing briefs . . . in more than 140 cases: Tabulation by author based on Lexis search "genfed;courts;counsel (Ruth pre/2 Weyand)," 6/1/95; see also "Ruth Weyand Resume," typescript in files of the late Phineas Indritz as of 9/17/95.

104 in those oral arguments before the Supreme Court, tackling controversial discrimination and labor issues, Ruth Weyand had never lost: Bogas, "Patience," p. 1.

104 By the time she was seven years old, Ruth Weyand: This and other details of her life are from Bogas, "Patience," p. 1; "Courage, Patience, and Driving Energy: A Portrait of Ruth Weyand," *Law School Record* (University of Chicago Law School), Spring 1986, pp. 14–15; "Ruth Weyand Resume," typescript in files of the late Phineas Indritz as of 9/17/95; and Bart Barnes, "EEOC Counsel Ruth Weyand Identified as Crash Victim," *Washington Post*, 11/20/86, p. B10.

105 "I wanted to go right out" . . . "If I could" . . . "the faculty was not keen": Bogas, "Patience," p. 1.

105 in 1870 Chicago had become the first school in America to award a law degree to a woman: Epstein, "Law at Berkeley," p. 405.

105 graduated with honors at age twenty: "Ruth Weyand Resume," typescript in files of the late Phineas Indritz as of 9/17/95; Bart Barnes, "EEOC Counsel Ruth Weyand Identified as Crash Victim," *Washington Post*, 11/20/86, p. B10.

106 Chicago firm: "Ruth Weyand Resume," typescript in files of the late Phineas Indritz as of 9/17/95.

106 "I kept submitting briefs": Bogas, "Patience," p. 1.

106 in charge of NLRB litigation before the . . . Supreme Court: Details of cases Weyand argued for the NLRB are from Bogas, "Patience," p. 1, and Bart Barnes, "EEOC Counsel Ruth Weyand Identified as Crash Victim," *Washington Post*, 11/20/86, p. B10.

106 outlaw discrimination by race in collective bargaining: *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); see also Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1975), p. 232ff. Further references will be cited as Kluger, *Simple Justice*.

106 outlaw discrimination by race in real estate sales: *Shelly v. Kraemer*: 334 U.S. 1 (1948); see also Kluger, *Simple Justice*, p. 248ff

106 late 1940s . . . with Thurgood Marshall: Interview with Phineas Indritz, Silver Spring, Maryland, by phone, 9/15/95, and see *Shelley v. Kraemer*, 334 U.S. 1 (1948), argued by Thurgood Marshall and Loren Miller, with Ruth Weyand "with them on the brief." See also "Courage, Patience, and Driving Energy: A Portrait of Ruth Weyand," *Law School Record* (University of Chicago Law School), Spring 1986, p. 15: "From 1945 onwards she was a formal member of the Association's [NAACP] national legal committee."

106 another NAACP lawyer, Leslie S. Perry: "Lobbyists: Four Negroes Working behind the Scenes to Influence Congress on Civil Rights," *Ebony*, July 1950, pp. 25–28.

106 married in 1949 . . . 1950, when word of their marriage became public: "Perry Swears He's Wed to Miss Weyand," *Washington Post*, 2/4/50, p. B7.

106 Perry urged her to keep the marriage secret: Bogas, "Patience," p. 1, which says the marriage may have been as early as 1947.

106 alienating her husband's affections: "Miss Weyand, NLRB Attorney, Sued by NAACP Man's Wife," *Washington Post*, 1/10/50, p. 13.

106 Interracial marriage remained illegal . . . "a successful negro male": "Famous Negroes Married to Whites," *Ebony*, December 1949, pp. 20–30.

106 Weyand chose not to use anesthesia: Greenberger interviews.

107 someone set fire to Weyand and Perry's home: Bogas, "Patience," p. 1; "Courage, Patience, and Driving Energy: A Portrait of Ruth Weyand," *Law School Record* (University of Chicago Law School), Spring 1986, p. 15.

107 "was reported to feel that Miss Weyand's value": "Ruth Weyand, NLRB Lawyer, Who Married Negro, Is Fired," *Washington Post*, 1/19/50, p. 1.

107 a union that represented electrical workers: International Union of Electrical, Radio and Machine Workers, "Ruth Weyand Resume," typescript in files of the late Phineas Indritz as of 9/17/95.

107 Weyand played a major role . . . "comparable worth" . . . Equal Pay Act of 1963: Judy Mann, "A Gentleman and a Lawyer," *Washington Post*, 7/8/94, p. E3.

107 "take-it-or leave-it" . . . *Boulwarism*: Bart Barnes, "EEOC Counsel Ruth Weyand Identified as Crash Victim," *Washington Post*, 11/20/86, p. B10.

107 ideal case for Ruth Weyand: Details on the case and its origins are from Weyand interview. I am indebted to this fine interview, saved by Ruth Weyand and her daughter, for much of the narrative of Ruth Weyand's early work on the *General Electric* case. See also Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998), p. 44.

107 Equal Employment Opportunity Commission had just issued a decision: Equal Employment Opportunity Commission, "Failure to Include Pregnancy under Disability Insurance Plan Was Sex Bias," Decision No. 71–1474, 3/19/71, in Weyand files.

108 Barbara Hall . . . "felt good": Joint Appendix, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

108 in a flip: Photograph of Martha Gilbert (and others) for *AFL-CIO News,* 4/20/74, in Weyand files.

108 Erma Thomas . . . Emma Furch: Brief for Martha V. Gilbert et al. by Winn Newman, Ruth Weyand, and Seymour DuBow to Supreme Court, dated 12/31/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976), pp. 23–29, 32–35. Further references will be cited as *Gilbert* brief.

109 Sherrie O'Steen . . . "put me out without pay": Joint Appendix, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

109 General Electric . . . employed one hundred thousand women: *Gilbert* brief, p. 9.

109 GE had been a pioneer in the concept of employee benefits: *Gilbert* brief, p. 87.

109 "women did not recognize the responsibilities of life": Appendix Vol. III, p. 958, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976), quoting Gerard Swope in David Loth, *Swope of GE* (New York: Simon and Schuster, 1958).

109 "long-standing differentials between rates for women's jobs and men's jobs": Decision of the War Labor Board in *General Electric Company*, 28 War Labor Rep. 666 (1945), reprinted in Appendix Vol. III, pp. 996–1003, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

110 Title VII was the employment section of the landmark Civil Rights Act of 1964: Narrative of events leading to Title VII relies significantly on Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1975), p. 755ff. Further references will be cited as Kluger, *Simple Justice*.

110 "as old as the Scriptures" . . . "as clear as the Constitution" . . . "If an American, because his skin is dark": Kluger, *Simple Justice*, p. 756.

111 63.6 percent of a man's salary in 1957 but only 60.6 percent in 1960: Cynthia Harrison, *On Account*

of Sex: The Politics of Women's Issues, 1945–1968 (Berkeley: University of California Press, 1988), p. 91. Further references will be cited as Harrison, *On Account of Sex*.

111 Equal Pay Act of 1963: History of Equal Pay Act relies on Harrison, *On Account of Sex*. See also Jo Freeman, *The Politics of Women's Liberation* (New York: McKay, 1975), and Catharine MacKinnon, *Sex Equality* (New York: Foundation Press, 2001), p. 17ff. Further references will be cited as Freeman, *Politics of Women's Liberation*.

112 "a seniority system": The language of Equal Pay Act of 1963 is from 29 U.S.C. section 206(d) (1) (1964), quoted in Caruthers Gholson Berger, "Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women," *5 Valparaiso University Law Review* 326 (1971), p. 327.

112 "race, color, religion, or national origin" . . . nothing about sex . . . "would not even give protection": The quotations and narrative of the campaign to add "sex" to Civil Rights Act of 1964 are from Harrison, *On Account of Sex*, p. 176.

112 equal rights amendment . . . opposed by the Kennedy administration: Pauli Murray, *Song in a Weary Throat: An American Pilgrimage* (New York: Harper and Row, 1987), pp. 348–349.

112 display of the party's conservative slant: According to Cynthia Harrison, the view of the National Woman's Party was that "if the federal government insisted on offering protection to black workers, the National Woman's Party did not want women placed at a relative disadvantage." Harrison, *On Account of Sex*, p. 177.

112 party sent every member of Congress a resolution: Caruthers Gholson Berger, "Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women," *5 Valparaiso University Law Review* 326 (1971), p. 332.

112 If civil rights legislation had to pass, Smith had been arguing . . . lacked the votes: Jo Freeman, "How Sex Got into Title VII," *9 Journal of Law and Inequality* 163 (1991), pp. 171, 181. Further references will be cited as Freeman, "How Sex."

113 two congresswomen decided: Harrison, *On Account of Sex*, p. 177; see also Freeman, "How Sex," and, for role of Martha Griffiths, see Flora Davis, *Moving the Mountain: The Women's Movement in America since 1960* (New York: Simon and Schuster, 1991), pp. 39–40 and 504–505. Further references will be cited as Davis, *Moving the Mountain*.

113 On February 8, 1964, Smith rose on the House floor to propose an amendment . . . "real grievances" . . . "yes, dear": *Civil Rights Act* of 1964, 88th Cong., 2d sess., *Congressional Record* 110 (2/8/64): H 2577.

113 eleven of the twelve women members: Harrison, *On Account of Sex*, pp. 178–179.]

113 "if a colored woman shows up": *Civil Rights Act* of 1964, 88th Cong., 2d sess., *Congressional Record* 110 (2/8/64): H 2579.

113 Republican men sympathetic to women's rights, and southern Democrats interested in killing the civil rights bill: Martha Griffiths, quoted in Freeman, "How Sex," pp. 181–182; Freeman argues against assuming "that the Southerners' only motive in voting to add 'sex' to Title VII was their antagonism toward civil rights."

114 all but one of the men . . . voted against the full bill: Harrison, *On Account of Sex*, p. 179.

114 according to Griffiths, Smith told her that he had offered his sex amendment "as a joke": Davis, *Moving the Mountain*, p. 45, based on interview of Griffiths by Davis, 12/3/85.

114 many women lobbied aggressively: Strong support came from the National Federation of Business and Professional Women, with 150,000 members; see Freeman, "How Sex," p. 178.

114 on the model of the National Labor Relations Board . . . the Equal Employment Opportunity Commission . . . opponents in the House and Senate managed to strip the commission . . . recommend that the U.S. attorney general prosecute a case: Freeman, *Politics of Women's Liberation*, pp. 179–182.

114 limited powers: Title VII of the Civil Rights Act of 1964, available at www.eeoc.gov/policy/vii.html (visited 5/19/05); Susan Deller Ross, Isabelle Katz Pinzler, Deborah A. Ellis, and Kary L. Moss, *The Rights of Women: The Basic ACLU Guide to Women's Rights*, 3rd ed. (Carbondale: Southern Illinois University Press, 1993), pp. 52–53; Freeman, *Politics of Women's Liberation*, p. 179.

115 a third of all complaints, far more than expected, came from women: Equal Employment Opportunity Commission, Fifth Annual Report (1971), p. 30, cited in Freeman, "How Sex," p. 164. See also Sonia Pressman Fuentes, *Eat First—You Don't Know What They'll Give You, the Adventures of an Immigrant Family and Their Feminist Daughter* (Philadelphia: Xlibris, 1999), p. 131. Further references will be cited as Fuentes, *Eat First*.

115 "boredom" to "virulent hostility": Aileen Hernandez, quoted in Harrison, *On Account of Sex*, p. 187.

115 first executive director . . . "the Commission is very much aware": Harrison, *On Account of Sex*, p. 187.

115 "fluke" that had been "conceived out of wedlock": Herman Edelsberg, at NYU 18th conference on labor, 61 *Labor Relations Reporter* (8/25/66), pp. 253–255, quoted in Freeman, *Politics of Women's Liberation*, p. 54n26.

115 In one of its earliest decisions, the EEOC . . . "no blacks need apply" . . . segregated by sex: Harrison, *On Account of Sex*, pp. 188–190.

115 Pregnancy seemed the toughest issue: Fuentes interview; Testimony of Charles T. Duncan, general counsel of the EEOC from September 1965 to October 1966, in excerpts from transcript of proceedings of *Gilbert v. General Electric*, 375 F. Supp. 367 (E.D. Va. 1974), argued 7/24/73, reprinted in Appendix, p. 661, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

115 first woman lawyer . . . "sex maniac": Fuentes, *Eat First*, pp. 129–132.

115 Phi Beta Kappa from Cornell and first in her class at the University of Miami School of Law: Biography of Sonia Pressman Fuentes, available at www.erraticimpact.com/~feminism/html/sonia_pressman_fuentes.htm (visited 1/17/07).

115 two theories . . . "disability due to pregnancy" . . . terminate a woman when her pregnancy started to show . . . Did seniority accumulate during pregnancy leave?: Sonia Pressman Fuentes and Cruz Reynoso, "Prohibition in Sex Discrimination on the Basis of Pregnancy" (law review article draft), undated but c. 1968, in files of and courtesy of Sonia Pressman Fuentes, 6/14/95, pp. 1–4, 16, 23; Wendy Webster Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," 13 *New York University Review of Law and Social Change* 323 (1984–85), pp. 333–336.

116 At the start of the 1970s . . . Sonia Fuentes . . . leaned personally toward special treatment . . . pregnant with her own daughter in 1971, six weeks sounded about right: Fuentes interview.

116 In the fall of 1970 . . . believed was the best place: Ross and Williams interview.

116 "I hear you're one of those feminists" . . . What if you have a construction company: Ross and Williams interview.

117 two of the ACLU's women board members were hopping mad: Interview with Susan Deller Ross, Washington, DC, 8/25/94. For related narrative, see also Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998), pp. 71–81.

117 Ross took on . . . special-treatment laws: Ross and Williams interview; Susan Deller Ross, letter to author, 8/8/05; and see Susan Deller Ross, "Sex Discrimination and 'Protective' Labor Legislation," reprinted in House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, pp. 592–603.

117 As Ross's critique of protective labor laws became known: East interview.

117 Catherine East . . . executive secretary: Citizens' Advisory Council on the Status of Women, *Women in 1970* (Washington, DC: U.S. Government Printing Office, 1971), second page (unnumbered), in East files.

117 Citizens' Advisory Council on the Status of Women, a group appointed as advisors by the president of the United States: Babcock and others, *Sex Discrimination* (1975), p. 316n6.

117 East, a covert ally of Betty Friedan and (also covertly) Sonia Fuentes: Betty Friedan, *It Changed My Life: Writings on the Women's Movement* (New York: Random House, 1976), p. 77; Fuentes, *Eat First*, p. 141. See also interview with Sonia Pressman Fuentes, by Sylvia Danovitch, Potomac, Maryland, 12/27/90, 81 pages and marked "sanitized version" by Fuentes; in files of and copy courtesy of Sonia Pressman Fuentes, 7/7/95, p. 21.

117 by 1970 had drafted a simple approach to pregnancy: Ross and Williams interview; see also Citizens' Advisory Council on the Status of Women, "Statement of Principles" on "Job-Related Maternity Benefits," dated 10/29/70, reprinted in Citizens' Advisory Council on the Status of Women, *Women in 1970* (Washington, DC: U.S. Government Printing Office, 1970), p. 20.

118 "Disabilities caused or contributed": Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," Part 1604.10b, Title 29 of the *Code of Federal Regulations*, *Federal Register* 37 (4/5/72): 6837; quoted in *Gilbert v. General Electric*, 375 F. Supp. 367, 380 (E.D. Va. 1974).

118 "equal treatment" . . . advantages: Wendy Webster Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate,"13 *New York University Review of Law and Social Change* 323 (1984–85), p. 328.

118 The concept was familiar to the law since the time of Aristotle: likes should be treated alike: Catharine MacKinnon, *Sex Equality*, 2nd ed. (New York: Foundation Press, 2001), p. 4ff., quoting Aristotle, *The Politics*.

119 a provision created to prevent victims of discrimination from having to bring cases in their hometowns, where they might face entrenched prejudice, she could select among a range of district courts: *Gilbert v. General Electric*, 347 F. Supp. 1058, 1059–60 (E.D. Va. 1972).

119 She chose . . . Robert R. Merhige Jr.: Weyand interview, p. 4-42.

119 Judge Merhige's opinion . . . "The maternity policy": *Cohen v. Chesterfield County*, 326 F. Supp. 1159 (E.D. Va. 1971), 1161.

119 General Electric trial in district court . . . "serious doubts that costs mean anything": Details are from excerpts of transcripts of proceedings of *Gilbert v. General Electric*, 375 F. Supp. 367 (E.D. Va. 1974), argued 7/24–26/73, reprinted in Appendix Vol. I, p. 308, through Vol. II, p. 717, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

120 "friendly judge": Weyand interview, p. 4-43.

120 Weyand supposed he was watching the progress of his earlier *Cohen* opinion: Weyand interview, p. 4-42.

120 Eleven days after a three-judge panel at the court of appeals affirmed . . . hear the *General Electric* case: *Cohen v. Chesterfield County*, 467 F.2d 262 (4th Cir. 1972); *Gilbert v. General Electric*, 347 F. Supp. 1058 (E.D. Va. 1972).

120 Then in early 1973 the entire court of appeals . . . "can relieve females from all of the burdens": *Cohen v. Chesterfield County*, 474 F.2d 395, 397 (4th Cir. 1973).

120 Three months later, the Supreme Court said it would hear: *Cohen v. Chesterfield County*, 411 U.S. 947, certiorari granted, 4/23/73.

120 Finally, his *Cohen* decision won, in a sense . . . early 1974 . . . albeit on grounds that differed from Merhige's original opinion: *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

120 within three months, Judge Merhige issued his long-delayed *General Electric* opinion: Quotations of Merhige's opinion are from *Gilbert v. General Electric*, 375 F. Supp. 367 (E.D. Va. 1974), decided 4/13/74.

121 "lunch-hour treatment": Excerpts from transcripts of proceedings of *Gilbert v. General Electric*, 375 F. Supp. 367 (E.D. Va. 1974), argued 7/24–26/73, decided 4/13/74, reprinted in Appendix Vol. II, p. 691, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

121 "forego a fundamental right": *Gilbert v. General Electric*, 375 F. Supp. 367, 382 (E.D. Va. 1974).

121 He refused . . . discrimination in years prior to 1964: *Gilbert v. General Electric*, 375 F. Supp. 367, 380 (E.D. Va. 1974). See also Weyand interview, p. 4-43.

122 Weyand felt doomed: Weyand interview, p. 4-44.

122 Beatrice Rosenberg . . . more cases than any other woman: Cushman, *Supreme Court*, pp. 228–229.

122 Then in 1972, she moved to join the EEOC: "Beatrice Rosenberg; Prominent Attorney for the U.S. Was 81," *New York Times*, 12/2/89, p. 1:15.

122 Rosenberg sent Linda Dorian . . . Dorian found Weyand . . . piles of documents . . . least wanted to face Clement Haynsworth: Dorian interview.

122 "relieve females": *Cohen v. Chesterfield County*, 474 F.2d 395, 397 (4th Cir. 1973).

122 Ethics questions ultimately: NPR Staff, "A History of Conflict in High Court Appointments," available at www.npr.org/templates/story/story.php?storyId=4732341 (visited 2/5/07).

122 first rejection of a Supreme Court nominee in four decades: *West's Encyclopedia of American Law* (St. Paul: West Publishing, 1998). www.answers.com/topic/clement-haynsworth (visited 2/5/07).

123 GE's lawyers appeared jubilant: Dorian interview.

123 One moment that stood out for Dorian: Dorian interview.

123 To Weyand, the *Liberty Mutual* case had terrible shortcomings . . . very few details: Weyand interview, pp. 4–60–61; Theophil C. Kammholz, Stanley R. Strauss, John S. Battle Jr., J. Robert Brame III, Winn Newman, Ruth Weyand, and Seymour DuBow, "Joint Petition of All Parties for a Writ of Certoriari to the United States Court of Appeals for the Fourth Circuit," p. 7, filed 6/17/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

123 no "evidentiary facts that could arguably give rise to a defense": *Wetzel v. Liberty Mutual*, 511 F.2d 199, 208 (3rd Cir. 1975).

124 GE's lawyers wrote to the court of appeals to ask for a quick decision . . . appeals court . . . would delay . . . One of GE's attorneys then went to Weyand with a suggestion: Interview with Stanley R. Strauss, counsel for General Electric, by Samuel J. Malizia, Washington, DC, 4/6/77, p. 14, in Weyand files. Further references will be cited as Strauss 1977 interview by Malizia.

124 Weyand felt sure that her case had better facts than *Liberty Mutual*: Weyand interview, pp. 4–60–61.

124 Bea Rosenberg at the EEOC agreed: Dorian interview.

125 "a well-recognized difference" . . . "need only be 'rationally supportable'": *Gilbert v. General Electric*, 519 F.2d 661, 666–667 (4th Cir. 1975).

125 Supreme Court argument: Quotations from oral arguments are from Supreme Court transcript of *Liberty Mutual v. Wetzel*, 424 U.S. 737 (1976), argued 1/19/76; Supreme Court transcript of *General Electric v. Gilbert*, 429 U.S. 125 (1976), argued 1/19–20/76 (first oral argument).

125 argument that Ruth Weyand dreaded: Weyand interview, p. 4-44.

125 "on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination": *Gilbert v. General Electric*, 519 F.2d 661, 668 (4th Cir. 1975).

125 Ruth Weyand's ever-expanding brief . . . now 266 pages long: *Gilbert* brief.

127 For the Women's Rights Project of the ACLU, Ruth Bader Ginsburg had teamed with Susan Deller Ross: Details of brief are from Brief for Amici Curiae of American Civil Liberties Union and National Education Association by Ruth Bader Ginsburg, Melvin L. Wulf, Kathleen Willert Peratis, Susan C. Ross, Eve Cary, and Helene Burgess to Supreme Court, pp. 21ff. and 47ff., filed 9/26/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

127 Susan Deller Ross (seven months' pregnant when they filed their brief): Susan Deller Ross, letter to author, 8/8/05.

127 Wendy Webster Williams, still smarting from losing the Aiello case, teamed with her friend Peter Weiner: Wendy Webster Williams, letter to author, 6/10/05.

127 The most valuable brief: Brief for the United States and the Equal Employment Opportunity Commission by Robert H. Bork, J. Stanley Pottinger, Brian K. Landsberg, Walter W. Barnett, Mark L. Gross, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg, Linda Colvard Dorian, and Beth L. Don to Supreme Court, dated 1/10/76, in *Liberty Mutual v. Wetzel*, 424 U.S. 737 (1976).

128 "didn't want the government to participate": Dorian interview.

128 Bork opposed Ruth Bader Ginsburg's sex discrimination argument in *Wiesenfeld*: See Part 1 in the book and Jurisdictional Statement by Robert H. Bork, Solicitor General, et al., to Supreme Court, dated June 1974, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

128 "tighten your brief again": Dorian interview.

128 What emerged: Brief for the United States and the Equal Employment Opportunity Commission by Robert H. Bork, J. Stanley Pottinger, Brian K. Landsberg, Walter W. Barnett, Mark L. Gross, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg, Linda Colvard Dorian, and Beth L. Don to Supreme Court, pp. 9 and 18, dated 1/10/76, in *Liberty Mutual v. Wetzel*, 424 U.S. 737 (1976).

128 All six courts of appeals: *General Electric v. Gilbert*, 429 U.S. 125, 147 (1976).

128 Supreme Court threw out *Liberty Mutual*: *Liberty Mutual v. Wetzel*, 424 U.S. 737, 746 (1976).

128 Justice Rehnquist had asked about procedure: Supreme Court transcript of *General Electric v. Gilbert*, 429 U.S. 125 (1976), argued 1/19–20/76 (first oral argument).

129 *General Electric* would be "restored to calendar for reargument": *General Electric v. Gilbert*, 425 U.S. 989 (1976).

129 *Brown v. Board of Education*, argued 1952 and reargued 1953: Kluger, *Simple Justice*, pp. 563, 667. Another case that needed to be reargued, the *Dred Scott Case* of 1856 (argued twice that year), may have helped send the United States to civil war; see Hall, *Oxford Companion*, p. 760.

129 *Roe v. Wade*, argued 1971 and reargued 1972: Garrow, *Liberty and Sexuality*, pp. 524 and 859n70 (first argument 12/13/71); pp. 563 and 868n112 (second argument 10/11/72).

129 rearguments were uncommon: David J. Fitzmaurice, "Memorandum," 6/23/76, in Weyand files.

129 school desegregation cases . . . lengthy questions: Kluger, *Simple Justice*, p. 615.

129 The first abortion argument . . . awaiting the arrival in early 1972 of Justices Powell and Rehnquist: Kluger, *Simple Justice*, p. 522.

129 attorneys received no guidance . . . Speculation among attorneys: Dorian interview, and Strauss 1977 interview by Malizia, pp. 15–16.

129 Blackmun's notes . . . "pass": Conference notes in Blackmun papers; conference notes are thin in Brennan papers.

129 "Do I recuse"?: Justice Harry A. Blackmun, handwritten note to self, 9/18/76, in Blackmun papers.

129 "4 to 4" . . . "a bit of strong-arming in typical PS fashion": Justice Harry A. Blackmun, dictated note to self, 8/31/76, in Blackmun papers.

130 "male-oriented" . . . "oh, come now?" . . . "so—" . . . "I have no idea" . . . "Donna overstates": Donna Murasky, typed memo to Justice Harry A. Blackmun, 8/14/76, in Blackmun papers. Justice Harry A. Blackmun's handwritten marginalia is on pp. 10, 26.
130 Rosenberg . . . sought to assure Weyand . . . "OK, Linda, here's the deal": Dorian interview.
130 reputation for making sex discrimination a priority in the Civil Rights Division: Brian K. Landsberg, email to author, 5/7/03.
130 He had pressed to end discrimination against women in universities: Ginsburg interview.
130 by 1976 had begun a multiyear romance with Gloria Steinem: Lynn Langway with Nancy Cooper, "Steinem at 50: Gloria in Excelsis," *Newsweek*, 6/4/84, p. 27.
130 Baffled when invited to join the reargument . . . "doomed mission": Pottinger interview.
131 opening the reargument: Details and quotations from the reargument, unless otherwise indicated, are from Supreme Court transcript of *General Electric v. Gilbert*, 429 U.S. 125 (1976), reargued 10/13/76 (second oral argument).
132 turning red in the face: Dorian interview.
132 "Boy this is just exactly": Pottinger interview.
133 *Griggs*: *Griggs v. Duke Power*, 401 U.S. 424 (1971).
133 Weyand had lost her poise but Pottinger had kept his . . . "Linda" . . . "he didn't want the government involved": Dorian interview.
133 Blackmun . . . remained a hope: Interview with Seymour DuBow, by Thomas J. Moore, Washington, DC, 3/23/77, in Weyand files.
133 "pretty bad": Justice Blackmun, handwritten notes during oral argument, 10/13/76, in Blackmun papers.
133 *General Electric* decision: *General Electric v. Gilbert*, 429 U.S. 125 (1976).
133 justices' conference in October . . . "still not firm" . . . "still is correct": Justice Blackmun, conference notes in Blackmun papers.
133 Brennan, preparing to dissent: Justice William J. Brennan Jr., letter to Justices Marshall and Stevens, 10/20/76, in Marshall papers.
133 "culminated" in the 1972 EEOC guidelines: *General Electric v. Gilbert*, 429 U.S. 125, 156 (1976) (Brennan dissenting), identical text to first draft of dissent, circulated 11/23/76, p. 12, in Brennan papers.
134 Diane Wood . . . opposing Rehnquist's draft: Diane Wood, "Comments on opinion circulated by WHR," typed memo to Justice Blackmun, 10/29/76, in Blackmun papers.
134 Allied with her . . . William Block: William H. Block, typed memo to Justice Blackmun, 11/8/76, in Blackmun papers.
134 Blackmun proposed to Rehnquist with a hint: Justice Harry A. Blackmun, letter to Justice William Rehnquist, 11/22/76, in Blackmun papers.
134 Stewart urged Rehnquist to follow Blackmun's: Potter Stewart, letter to William Rehnquist, 11/22/76, in Blackmun papers.
134 In his opinion, Rehnquist: Details and quotations are from *General Electric v. Gilbert*, 429 U.S. 125 (1976).
134 letters (dug up by GE) . . . same general counsel, Charles Duncan . . . "sex maniac": Testimony of Charles Duncan, in excerpts from transcript of proceedings of *Gilbert v. General Electric*, 375 F. Supp. 367 (E.D. Va. 1974), argued 7/24–26/73, reprinted in Appendix, p. 666, dated 11/24/75, in *General Electric v. Gilbert*, 429 U.S. 125 (1976); "Opinion Letter of General Counsel, October 17, 1966," in Appendix, pp. 720–722, quoted in *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976); Fuentes, *Eat First*, pp. 129–132.
135 Stevens . . . "Of course": *General Electric v. Gilbert*, 429 U.S. 125, 161 (1976).

8: The Final Pregnancy Battle: Beyond the Supreme Court

136 "Women's Rights Movement Is Dealt Major Blow" . . . "shock and anger": Lesley Oelsner, "Supreme Court Rules Employers May Refuse Pregnancy Sick Pay," *New York Times*, 12/8/76, p. A1.

136 Weyand . . . did not mope. She laid a plan: Bogas, "Patience," p. 1.

136 the lone dissenter on the court of appeals had started a pattern . . . "legislate in favor" . . . "legislatures have made less rational classifications for centuries": *Gilbert v. General Electric*, 519 F.2d 661, 669 (4th Cir. 1975).

136 "Congress did not so choose": Supreme Court transcript of *Liberty Mutual v. Wetzel*, 424 U.S. 737 (1976), argued 1/19/76.

136 "the folks" in Congress: Supreme Court transcript of *General Electric v. Gilbert*, 429 U.S. 125 (1976), argued 1/19–20/76 (first oral argument).

137 "if we are wrong, Congress can change": Justice Harry A. Blackmun, handwritten note to self, 9/18/76, in Blackmun papers, which contains both "if we are wrong, Congress can change" and (as its last words) "Congress can change if we are wrong." See also Justice Harry A. Blackmun, dictated note to self, 8/31/76, in Blackmun papers, pp. 5–6, which says, "If we are wrong, Congress could change the Act" and "There is one comfort, and that is that Congress may cure the situation if our guess is not in accord with their desire."

137 As she read Justice Rehnquist's *General Electric* opinion . . . "did not intend": *General Electric v. Gilbert*, 429 U.S. 125, 140 (1976).

137 hastily typed press release . . . "move to get Congress": "For Immediate Release," carbon copy dated 12/7/76, in Weyand files.

137 No women's group had ever asked . . . Congress to pass a statute to reverse a Court decision: As Wendy Webster Williams points out, however, women had asked Congress to pass a constitutional amendment to override a Supreme Court decision of the 1870s that denied women the right to vote; see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162. The amendment came in 1920. Wendy Webster Williams, letter to author, 6/10/05.

137 "Congress Free to Act": Lesley Oelsner, "Supreme Court Rules Employers May Refuse Pregnancy Sick Pay," *New York Times*, 12/8/76, p. A1.

137 An Associated Press wire story . . . gave half its space: Richard Carelli, "Court-Pregnancy," Associated Press (typescript), 12/8/76, in Weyand files.

137 long-term planning: Dorian interview.

137 took a "dive": Pottinger interview.

137 Within days . . . "Feminist Leaders Plan": UPI, "Feminist Leaders Plan Coalition for Law Aiding Pregnant Women," *New York Times*, 12/15/76, p. 2:14.

138 op-ed article . . . "If it is not sex discrimination": Ruth Bader Ginsburg and Susan Deller Ross, "Pregnancy and Discrimination," *New York Times*, 1/25/77, p. 33.

138 Ross and . . . Williams . . . testifying: Quotations from the bill and the committee hearing are from House Committee on Education and Labor, Subcommittee on Employment Opportunities, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, Ninety-fifth Congress, First Session, on H.R. 5055 and H.R. 6075 . . . Held in Washington, D.C., April 6 [–June 29], 1977*, 2 vols. (Washington, DC: U.S. Government Printing Office, 1977).

138 stayed up most of the night: Ross and Williams interview.

139 "overturn" . . . "I know that when I cast my vote for Title VII" . . . 376 to 43 in the House . . . won in all the courts of appeals . . . eighteen district courts: Senate Committee on Labor and Human

Resources, *Legislative History of the Pregnancy Discrimination Act of 1978: Public Law 95–555* (Washington, DC: U.S. Government Printing Office, 1980), pp. 2, 11–12, 137, 191, 211.

Part Three

LAWYERING (1968–1984)

In this part, I rely on the personal papers of and interviews with Diane S. Blank and Mary F. Kelly, and on interviews with, among others, Judge Constance Baker Motley, Eleanor Holmes Norton, and Harriet Rabb. Important primary sources, particularly interviews and collections of documents, are listed below, with the abbreviations used in the endnotes that follow. Other primary sources and important secondary sources appear with full citations in the endnotes.

Blackmun papers	Papers of Justice Harry A. Blackmun, Library of Congress
Blank files	Files of Diane S. Blank as of 3/23/01
Blank interviews	Interviews with Diane S. Blank, New York City, 3/16/01 and 3/23/01
Commentator	*The Commentator: The Student Newspaper of the New York University Law Center*
Cooper interview	Interview with George Cooper, Key West, Florida, by phone, 4/3/01
Dolkart interview	Interview with Jane Dolkart, Dallas, Texas, by phone, 4/04/01
Kelly files	Files of Mary F. Kelly as of 5/22/01
Kelly interviews	Interviews with Mary F. Kelly, White Plains, New York, by phone, 3/29/01 and 4/4/01
Kohn interview	Interview with Margaret Kohn, Washington, DC, by phone, 3/12/01
Moss interviews	Interviews with Sara Moss (formerly Sara Steinbock), New York City, by phone, 5/9/02 and 5/24/02
Motley interview	Interview with Judge Constance Baker Motley, New York City, 6/20/02
NARA files	National Archives and Records Administration (NARA), New York City, as of 3/18/02
Norton interview	Interview with Eleanor Holmes Norton, driving from New Haven to Hartford, Connecticut, 5/22/05
Rabb interview	Interview with Harriet Rabb, Washington, DC, by phone, 2/26/01

9: A Problem in the Profession

143 wanted to be a lawyer: Blank interviews.

143 fall 1968 issue . . . "furnished with castoffs" . . . "since he was" . . . "never be satisfied": "Success as a Student's Wife," *Bride's*, August/September 1968, p. 187.

144 business and constitutional law . . . easier than at Barnard . . . "finite": Blank interviews.

144 dean's list in her first year . . . "law clerk": "Resume of Diane S. Blank third year," in Preston David, the City of New York Commission on Human Rights, "Determination after Investigation: D. Blank against Sullivan & Cromwell," dated 1/28/74, in Blank files. Further references will be cited as Commission on Human Rights, "Determination."

144 "wrong side of the tracks": Blank interviews.

144 bookkeeper at a dairy: Diane Blank, email to author, 8/11/07.

144 out of commission five days: Blank interviews; for similar narrative, see Douglas McCollam, "Taking It to the Street," *American Lawyer*, March 1999, pp. 122–123. I am indebted to McCollam for giving me copies of some of his reporting files. Further references will be cited as McCollam, "Taking It."

144 Did her husband . . . want her to be a lawyer: Diane Blank, personal journal entry, 6/11/73, in Blank files.

145 Kelly began encountering odd reactions: Kelly interviews and Mary F. Kelly, letter to author, 5/13/05.

145 honors in 1965 from the College of New Rochelle: *Vita*, 1968, in Kelly files.

145 "valiant Christian women": Kelly interviews.

145 "ladies day" . . . abortion and rape and sexual imagery: Kelly interviews.

146 Root-Tilden: see Part 1 in the book.

146 be a wonderful secretary: Kelly interviews.

146 Blank requested an interview with the firm Shearman & Sterling: Narrative is from Blank interviews; Diane Blank, letter to Joan Graff at Equal Employment Opportunity Commission, 2/4/70, in Blank files; further references will be cited as Blank letter to Graff, 2/4/70. See also Cynthia Fuchs Epstein, *Women in Law*, 2nd ed. (Urbana: University of Illinois Press, 1993), pp. 184–187.

146 women got together . . . lounge at the ladies' bathroom: Blank interviews.

146 From sixty-seven students: Blank letter to Graff, 2/4/70.

147 those three men worked as writers under her: Blank interviews.

147 "equivocal" . . . "whole situation looked equivocal" . . . "small numbers involved" . . . meet a Shearman & Sterling interviewer: These quotations as well as others from, and much of the narrative of the meetings with, Shearman & Sterling are from Blank letter to Graff, 2/4/70.

147 pages of charts: Diane Blank, chart of men and women, "interviewed and not interviewed" c. 10/2/69, in Blank files.

148 "looked first for Law Review experience" . . . "A position of command in the military": Blank letter to Graff, 2/4/70.

148 "this emissary role could best be filled by a single (not married) male" . . . "a woman would never have to appear in court" . . . "But" . . . "the ladies have their own little luncheon party": Blank letter to Graff, 2/4/70.

149 Ginsburg could not . . . interview for a Supreme Court clerkship: See Part 1 in the book.

150 Sandra Day O'Connor . . . legal secretary—an offer she did not receive: Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), p. 10. Further references will be cited as Greenburg, *Supreme Conflict*. See also Biskupic, *O'Connor*, pp. 28 and 348n24.

150 Ruth Weyand: Bogas, "Patience," p. 1.

150 "the prejudice encountered by girl students": "Group Meets with McKay to Demand Women's Rights," *Commentator*, 11/6/68, p. 1.

150 refusal to hire any individual because of her sex: Title VII of the Civil Rights Act of 1964, available at www.eeoc.gov/policy/vii.html (visited 5/19/05).

150 In the fall of 1969 . . . no one knew: Cooper interview; see also McCollam, "Taking It," pp. 122–123.

150 Nancy Grossman . . . memo . . . "have an opening": Nancy Grossman, "memorandum re interview with Shearman & Sterling," 10/27/69, in Blank files.

150 Nicholas J. Bosen . . . letter . . . "when do you plan": Nicholas J. Bosen, assistant dean and director of placement, University of Chicago, letter to Shearman & Sterling, 10/29/69, in Blank files.

151 "female activists" . . . "the charge of discrimination": Hamilton Hadden Jr., letter to Nicholas J. Bosen, 11/5/69, in Blank files.

151 Chicago's placement dean quickly backed down . . . letters saying that "allegations in this case" . . . "most vocal": Nicholas J. Bosen, letter to Placement Office, Columbia University School of Law, 11/19/69, in Blank files.

151 Chicago students sent Nancy Grossman's memo: Law Women's Caucus, University of Chicago Law School, letter to Placement Office, New York University, 12/19/69, in Blank files.
151 filed a charge of discrimination . . . "a patently discriminatory": Marjorie Gelb, "Charge of Discrimination," 1/5/70, and Marianne O'Brien and Kathy Soffer, letter to Law Women's Caucus of University of Chicago, 2/23/70; both in Blank files.
151 1969 in Diane Blank's kitchen: Blank interviews.
152 April 1970 . . . NYU School of Law: Diane Blank and Janice Goodman, memo to National Conference of Law Women, 4/13/70, in Blank files.
152 Dean Robert McKay of NYU urged . . . Association of American Law Schools refused . . . Women's Rights Committee decided to conduct its own study: Women's Rights Committee of New York University School of Law, "Proposals," undated but apparently December 1969, and Women's Rights Committee of New York University School of Law, "Pilot Study of Sex Based Discrimination in the Legal Profession," 12-page typescript, undated but apparently February 1970, both in Blank files. Further references will be cited as NYU Women's Rights Committee, "Pilot Study".
152 700 questionnaires: Details of and quoted responses from the questionnaire are from NYU Women's Rights Committee, "Pilot Study."
152 "we just hired a woman": NYU Women's Rights Committee, "Pilot Study," p. 13.
152 "we hire some women": NYU Women's Rights Committee, "Pilot Study," p. 15.
152 "Are you planning to have children?": NYU Women's Rights Committee, "Pilot Study," p. 22.
152 "we don't like to hire women": NYU Women's Rights Committee, "Pilot Study," p. 26.
153 "Clients wouldn't like it": NYU Women's Rights Committee, "Pilot Study," p. 6.
153 "humiliation on the job": NYU Women's Rights Committee, "Pilot Study," p. 9.
154 offered comparative statistics: Doris Sassower, "Locked Out: Women and the Legal Profession," *Student Lawyer Journal*, November 1970, p. 13ff.
154 "One out of every 7300 Negroes has managed to become a lawyer": Doris Sassower, "What's Wrong with Women Lawyers?" *TRIAL Magazine*, October–November 1968, pp. 37–38.
154 second speaker was Eleanor Holmes Norton: Ellen Coin, "Women Attorneys Discuss Sex Bias," *Commentator*, 3/11/70, pp. 3–4.
154 A few days later at the ACLU . . . forty-six women employees at *Newsweek*: Brownmiller, *In Our Time*, p. 140.
154 "needed to do group therapy": Norton interview. Excellent narratives of the *Newsweek* case appear in Brownmiller, *In Our Time*, pp. 140–146, and Lester, *Fire in My Soul*, pp. 149–150.

10: Taking Action

155 as far west as Berkeley and as far south as Duke: "Statement of Mrs. Diane Blank and Mrs. Susan D. Ross, Women's Rights Committee of New York University Law School," House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, pp. 584–592.
155 For two days they discussed issues affecting women law students . . . series of resolutions . . . "worst offenders" . . . "join a Title VII action": Diane Blank and Janice Goodman, memo to National Conference of Law Women, 4/13/70, in Blank files.
156 what Title VII called a pattern or practice: Title VII of the Civil Rights Act of 1964, available at www.eeoc.gov/policy/vii.html (visited 5/19/05).
156 Kelly . . . represent NYU in the nationals: Bob Newman, "Two Women Compete for NYU in Nationals," *Commentator*, 10/13/70, p. 3.

156 Congress invited Blank and Ross: "Statement of Mrs. Diane Blank and Mrs. Susan D. Ross, Women's Rights Committee of New York University Law School," House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, pp. 584–592.

156 in July Professor Ruth Bader Ginsburg: see Part 1 in the book.

156 Isn't motherhood the greatest goal . . . "politically educated": Dolkart interview.

157 Another Columbia student, Margaret Kohn . . . "For some reason women": Kohn interview. Part of Kohn's complaint is reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 376–377.

157 more than 130 attorneys . . . three were women . . . decided not to interview five women: Complaint of Diane Serafin Blank, dated 6/28/71, attached to Commission on Human Rights, "Determination"; see also Harriet Rabb, Howard J. Rubin, and George Cooper (of counsel), "Complaint Class Action," 1/15/75, in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977).

157 learned that three were women . . . jotted down immediately after on a note card, "some of the partners have prejudices against women": Transcript of deposition of the plaintiff (Diane Blank) conducted 4/24–25/75, 221-page typescript in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), pp. 137–139; in NARA files. Further references will be cited as Blank 1975 deposition.

157 why a nice lady like you: Kelly interviews.

158 teamed up with Professor Daniel Collins . . . seventy-six schools: Daniel G. Collins and Mary F. Kelly, letter attaching "preliminary statistical compilation of the responses to a questionnaire sent to law school deans by the AALS Special Committee on Women in Legal Education," 12/22/70, in Kelly files.

158 response to NYU's urging: Jacob Laufer, "AALS Finds Sex Discrimination," *Commentator*, 2/2/71; Women's Rights Committee of New York University School of Law, "Proposals," undated but apparently December 1969, in Blank files.

158 Within weeks, at age thirty-two and pregnant with her first child, Norton became chair of the city's Commission on Human Rights: Lester, *Fire in My Soul*, p. 160. See also Robin Morgan, ed., *Sisterhood Is Powerful* (New York: Random House, 1970), p. 598.

158 teacher for the course on women and the law: Roy Jacobs, "3 Grads Appointed Adjuncts," *Commentator*, 2/2/71, p. 3, in Kelly files.

158 excited that students wanted to engage in rigorous study of sex discrimination . . . Root-Tilden . . . presumed it was reserved for men by a bequest . . . "almost no feminist consciousness": Norton interview. See also Lester, *Fire in My Soul*, p. 146.

159 symposium on the equal rights amendment . . . "the 'Women's Rights Amendment' and Kindred Matters": Association of the Bar of the City of New York, "Has 'Women's Liberation' Liberated Anyone?" 3/25/71, invitation in Kelly files.

159 Association of the Bar . . . report opposing the ERA: Jan Pawlak, "Women Demonstrate at Bar Symposium," *Commentator*, 3/30/71, p. 3.

159 "to make feminists look like idiots" . . . told Ellie Norton . . . meeting soon after, which included both Norton and Steinem: Blank interviews.

159 Gloria Steinem rose to address an audience of some fifteen hundred: Details of and quotations from the symposium, unless otherwise indicated, are from "Women's Lib Uses a 'Trojan Horse'," *New York Times*, 3/26/71, p. 45; Timothy Ferris, "The Gals Find the Bar Guilty," *New York Post*, 3/28/71; Jan Pawlak, "Women Demonstrate at Bar Symposium," *Commentator*, 3/30/71, p. 1.

159 Mary Kelly . . . "Has the anti-defamation league": Quotations from talk are from Kelly's notes for talk to Association of the Bar of the City of New York, 3/25/71, in Kelly files.

160 Jan Goodman . . . "Federal Legislation Committee": Jan Pawlak, "Women Demonstrate at Bar Symposium," *Commentator*, 3/30/71, p. 1.

160 Emily Goodman . . . "obscenely" . . . "What kind of lawyer": Timothy Ferris, "The Gals Find the Bar Guilty," *New York Post*, 3/28/71.

160 "The virtually impossible technical difficulties": Eleanor Holmes Norton, quoted in Jan Pawlak, "Women Demonstrate at Bar Symposium," *Commentator*, 3/30/71, p. 3. One of the speakers, Rita Hauser, representative of the United States on the United Nations Human Rights Commission, argued that working for passage of the ERA was less efficient than working for enforcement of existing laws; see Timothy Ferris, "The Gals Find the Bar Guilty," *New York Post*, 3/28/71, and p. 3 in Pawlak's article.

161 race discrimination case: *Griggs v. Duke Power*, 401 U.S. 424 (1971).

161 contributed to the brief: Cooper interview.

161 "the effects of employment practices" . . . "startling breakthrough": George Cooper, "Introduction, Equal Employment Law Today," *5 Columbia Human Rights Law Review* 263 (1973), p. 265.

161 Cooper had another idea . . . "peanuts grant" . . . "the old-boy network" . . . "the balls for the job" . . . "I had enough awareness": Cooper interview.

161 family friend of the dean: Rabb interview.

162 high-school hopes to become a cheerleader: Lindsey Van Gelder, "Harriet Rabb, Scourge of Corporate Male Chauvinism," *New York*, 6/26/78, pp. 38–40. Further references will be cited as Van Gelder, "Harriet Rabb."

162 "the idea of having a Jewish cheerleader" . . . "Harry, it's that nigger girl calling": Nan Robertson, *The Girls in the Balcony: Women, Men and the* New York Times (New York: Random House, 1992), p. 161. Further references will be cited as Robertson, *Girls in the Balcony.*

162 "Valentine's Day massacre": Cynthia Fuchs Epstein, *Women in Law*, 2nd ed. (Urbana: University of Illinois Press, 1993), p. 66.

162 Embarrassing questions: Alan Kohn, "The Ms. Who Keeps Picking on the 'Boys'," *New York Law Journal*, 5/10/77, p. 1. Further references will be cited as Kohn, "Picking on the 'Boys'."

162 similar questions aimed at her friends: Harriet Rabb, letter to author, 5/10/05.

163 "saving the world from reactionaries": Rabb, quoted in Robertson, *Girls in the Balcony*, p. 162.

163 After law school, she began dating: Robertson, *Girls in the Balcony*, p. 162; Van Gelder, "Harriet Rabb," pp. 38–40.

163 she phoned Bruce . . . neither of their employers would totally trust: Harriet Rabb, letter to author, 5/10/05; for a similar narrative, which Rabb partly disputes, see Van Gelder, "Harriet Rabb," p. 40, and Robertson, *Girls in the Balcony*, pp. 162–163.

164 Republicans in the capital . . . Democrats do not hire: Van Gelder, "Harriet Rabb," p. 40.

164 only a week . . . "contact the White House": Harriet Rabb, letter to author, 5/10/05;

164 "My dear": Bazelon, quoted in Robertson, *Girls in the Balcony*, p. 163.

164 consumer safety litigation . . . Child Protection and Toy Safety Act: Harriet Rabb, letter to author, 5/10/05; Harriet Rabb *vita*, 1999, in files of Douglas McCollam as of 3/23/01.

164 caught George Cooper by surprise: Cooper interview.

164 "was like a gift": Dolkart interview.

165 Norton . . . introduced Blank to Rabb: Jonathan Kwitny, "Law Firm Is Stung by Hiring-Bias Suit Filed by Woman Lawyer and Heard by Woman Judge," *Wall Street Journal*, 8/8/75, p. 26. Further references will be cited as Kwitny, "Law Firm Is Stung." This seems affirmed (albeit with some uncertainty) in Blank interviews (she said, "I think Harriet got involved through Ruth Bader Ginsburg, but it may have been [through] Ellie Norton") and in Norton interview (she said, "We all travel in the same circles, it certainly—I don't have a specific memory of it either—it seems right"). Rabb has no recollection who introduced her to Blank; Harriet Rabb, letter to author, 5/10/05.

165 Blank and her fellow students had already done much of the legal work: Rabb interview; complaint of Margaret Kohn, dated 5/27/71, partly reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 376–377; complaint of Diane Serafin Blank, dated 6/28/71, attached to Commission on Human Rights, "Determination."

165 For Norton, the students' suits fit the sort of cases she wanted: Norton interview.

165 Margaret Kohn's . . . "women are really good at": Complaint of Margaret Kohn, dated 5/27/71, partly reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 376–377. But see also Affidavit of John B. Loughran, 11/6/72, in *Kohn v. Royall, Koegel & Wells*, 59 F.R.D.515, 515 (S.D. N.Y. 1973), in NARA files.

165 "anti-female bias" . . . "prejudiced against women": Complaint of Diane Serafin Blank, dated 6/28/71, attached to Commission on Human Rights, "Determination."

166 9 women among 1,409 partners . . . "We would give you": "Statement for the Press" beginning "Complaints are being filed against 10 New York City law firms for discrimination against women lawyers in recruitment, hiring, conditions of employment, and promotion," apparently July 1971, in Blank files.

166 "strong advocate" . . . "did not like to hire women": "13 Women Law Students Here Accuse 10 Large Firms of Bias," *New York Times*, 7/1/71, p. 59.

166 New York State Bar Exam . . . single test location: This and most details are from Mary F. Kelly, "Affidavit," July 1971 (day not stated), in Kelly files. See also Alan Kohn, "Bar Examiners to Abolish Separate Areas for Women," *New York Law Journal*, 7/21/71, p. 1; Bruce Drake, "Fem Students Sue the Bar Examiners," *New York Daily News*, 7/20/71; Mary Connelly and Marvin Smilon, "Testing Board Invites Gals: Join Men at Bar (Exams)," *New York Post*, 7/21/70.

167 "one female matron": Mary F. Kelly, "Affidavit," July 1971 (day not stated), p. 4, in Kelly files.

167 "We want to be sure . . . statistically better than men": Bruce Drake, "Fem Students Sue the Bar Examiners," *New York Daily News*, 7/20/71.

167 "character and fitness": Mary F. Kelly, "Affidavit," July 1971 (day not stated), p. 3, in Kelly files.

167 Kelly called Rabb . . . "administrative convenience": Kelly interviews; Mary F. Kelly, "Affidavit," July 1971 (day not stated), p. 4, in Kelly files, and Alan Kohn, "Bar Examiners to Abolish Separate Areas for Women," *New York Law Journal*, 7/21/71, p. 1.

168 as a "cooperating attorney" . . . Rabb initiated a federal suit: Alan Kohn, "Bar Examiners to Abolish Separate Areas for Women," *New York Law Journal*, 7/21/71, p. 1; Bruce Drake, "Fem Students Sue the Bar Examiners," *New York Daily News*, 7/20/71; Mary Connelly and Marvin Smilon, "Testing Board Invites Gals: Join Men at Bar (Exams)," *New York Post*, 7/21/70.

168 "administrative convenience": Alan Kohn, "Bar Examiners to Abolish Separate Areas for Women," *New York Law Journal*, 7/21/71, p. 1.

168 "to discriminate": Mary Connelly and Marvin Smilon, "Testing Board Invites Gals: Join Men at Bar (Exams)," *New York Post*, 7/21/70.

168 Eleanor Holmes Norton . . . had filed a class-action lawsuit: Lester, *Fire in My Soul*, pp. 149–150.

168 agreement produced unsatisfactory results . . . Rabb took Norton's place: Rabb interview.

169 most visible gender-discrimination lawyers: Van Gelder, "Harriet Rabb," pp. 38–40.

169 "always one woman" . . . "Shit may hit the fan": Cooper interview.

169 Rabb found that Dean Sovern backed her: Harriet Rabb, letter to author, 5/10/05.

169 ten different complaints: "13 Women Law Students Here Accuse 10 Large Firms of Bias," *New York Times*, 7/1/71, p. 59.

169 tossing out five for lacking "probable cause": Alan Kohn, "Court Lauds Pattern in Settling Rogers &

Wells Sex-Bias Suit," *New York Law Journal*, 2/9/76, no page number evident. See also McCollam, "Taking It," pp. 122–123.

169 Reporting in April of 1972 . . . "was the second best applicant" . . . "probable cause" . . . "permission to sue": Preston David, the City of New York Commission on Human Rights, "Probable Cause Decision: Margaret [Kohn] against Respondent [name omitted], Complaint No. 5207-JS," dated 4/27/74, reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 378–380, 382 ("permission to sue").

170 Reporting in January of 1974: Quotations from the report are from Commission on Human Rights, "Determination."

171 EEOC did not see "probable cause" . . . "right to sue": Arthur W. Stern, "Determination," *Blank v. Sullivan & Cromwell*, Equal Employment Opportunity Commission Case No. YNY 5–138, 10/16/74, in NARA files.

11: A Young Woman Takes an Old Wall Street Firm to Court

172 Harriet Rabb submitted . . . "pattern and practice of sex discrimination": Harriet Rabb, Howard J. Rubin, and George Cooper (of counsel), "Complaint Class Action," 1/15/75, in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), in NARA files.

172 family of progressive lawyers . . . London had never lost: Glenn Fowler, "Ephraim London, 78, a Lawyer Who Fought Censorship, Is Dead," *New York Times*, 6/14/90, p. B13.

172 one of a few Socialist Party congressmen . . . defended the rights of garment workers: American Jewish Historical Society, "An 'Entirely Different' Jew in Congress," *Chapters in American Jewish History*, available at www.ajhs.org/publications/chapters (visited 2/21/07).

173 *The Miracle* from Italy (Supreme Court, 1952) . . . *Language of Love* from Sweden (1971): Glenn Fowler, "Ephraim London, 78, a Lawyer Who Fought Censorship, Is Dead," *New York Times*, 6/14/90, p. B13.

173 *Lady Chatterley's Lover* from France (1959): *Kingsley Pictures Corp. V. Regents*, 360 U.S. 684 (1959); Bosley Crowther, "L'Amant de Lady Chatterley (1955)," *New York Times* , 7/11/59, available at http://movies2.nytimes.com/movie/review?res=980CE4DE143BEF3BBC4952DFB1668382649EDE (visited 8/5/07).

173 Helen Lehman Buttenwieser . . . Robert Soblen: Glenn Fowler, "Ephraim London, 78, a Lawyer Who Fought Censorship, Is Dead," *New York Times*, 6/14/90, p. B13.

173 hosted some of the women: Mary F. Kelly, letter to author, 5/13/05.

173 At the filing . . . drew a name of a judge: Harriet Rabb, letter to author, 5/10/05.

173 only woman among the court's twenty-seven judges: Kwitny, "Law Firm Is Stung."

173 Constance Baker Motley had been winning race discrimination cases (she won nine out of ten): Constance Baker Motley, *Equal Justice under Law: An Autobiography* (New York: Farrar, Straus and Giroux, 1998), p. 218. Further references will be cited as Motley, *Equal Justice*, which is the source for most biographical details and quotations, unless noted otherwise.

173 chef for . . . Skull and Bones: Douglas Martin, "Constance Baker Motley, 84, Civil Rights Trailblazer, Lawmaker and Judge, Dies," *New York Times*, 9/29/05, p. B1.

175 Months earlier, she had begun work as a clerk to a young attorney, Thurgood Marshall: Motley, *Equal Justice*, pp. 58–59.

175 helped represent Martin Luther King Jr. . . . in Birmingham: Motley, *Equal Justice*, pp. 157–159; Joe Holley, "Constance Motley Dies," *Washington Post*, 9/29/05, p. B07.

176 probably (Supreme Court historians remain unsure) the first black woman: Cushman, *Supreme Court*, p. 224.

176 case concerning the right to adequate counsel . . . "intent" to ravish: *Hamilton v. State of Alabama*, 368 U.S. 52 (1961); see Motley, *Equal Justice*, pp. 192–194, 271n1.
176 allowing Motley to remark: Motley interview.
176 In 1966, President Lyndon Johnson—after hearing praise from his attorney general [Ramsey Clark] . . . praise for her from every civil rights leader in the country: Motley, *Equal Justice*, p. 213.
177 "seeks a declaratory judgment": Harriet Rabb, Howard J. Rubin, and George Cooper (of counsel), "Complaint Class Action," 1/15/75, in NARA files.
177 "affirmative defenses" . . . "unclean hands" . . . urged other women to lie: Ephraim London, "Answer," 4/7/75, in NARA files.
177 "ugliest case": Diane Blank, personal journal entry, 4/8/75, in Blank files.
177 "ask to be relieved" . . . "Unconscious feelings": Ephraim London, letter to the Hon. Constance Baker Motley, 4/16/75, in NARA files.
178 she had expected lawyers to "misbehave" . . . no lawyer had ever tried to get her to leave a case: Motley interview.
178 "there would not be any judge": Harriet Rabb, letter to the Hon. Constance Baker Motley, 4/17/75, in NARA files.
179 London sent a second letter: Ephraim London, letter to the Hon. Constance Baker Motley, 4/22/75, in NARA files.
179 legal deposition . . . London began: Quotations from and details on the deposition of Blank, unless indicated otherwise, are from Blank 1975 deposition.
179 "I feel like this horrible inevitable thing": Diane Blank, personal journal entry, 4/23/75, in Blank files.
179 Judge Charles H. Tenney: "Suit Continued Charging Bias by Law Firm," *New York Law Journal*, 7/22/75.
179 Bellamy, Blank, Goodman, Kelly, Ross, and Stanley: Laurie Johnston, "2 Law Firms Push Feminism," *New York Times*, 2/17/73.
179 Carol Bellamy was a New York state senator . . . Susan Deller Ross and Nancy Stanley had worked at the EEOC: Alan Kohn, "6 Women Lawyers Form 'Feminist' Firm," *New York Law Journal*, 2/13/73.
179 Jan Goodman had teamed with Mary Kelly: See Part 1 in the book.
179 "Ms. Blank has embarked on a career of a certain kind": Blank 1975 deposition.
181 London asked Blank if she could name one of those applicants. "No," she said: Blank 1975 deposition, p. 177.
182 Blank's case looked not great . . . "mindset" . . . "a kid" . . . "lion of the bar": Moss interviews.
183 In a letter . . . "yahoo": Ephraim London, letter to Harriet Rabb, 4/30/75, in district court transcript of *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), pretrial conference, 6/2/75, p. 19, in NARA files. Further references will be cited as *Blank* transcript 6/2/75.
183 Motley replied to London's letter . . . "timely and sufficient affidavit": Constance Baker Motley, letter to Ephraim London, 5/8/75, in NARA files.
183 Steinbock got the impression: Moss interviews.
183 Motley had misunderstood: Ephraim London, letter to the Hon. Constance Baker Motley, 5/12/75, in NARA files.
183 instructed Rabb to submit her written argument: Constance Baker Motley, "Order for Filing and Briefing Plaintiff's Motion for Class Certification," 5/14/75, in NARA files.
183 opposition no later than August 5, 1975: *Blank* transcript 6/2/75, p. 4.
183 All sides understood that the future of the case hung in the balance: Arthur H. Dean, "Affidavit

Requesting Disqualification," 7/23/75, p. 3, in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), in NARA files.

183 June 2, 1975 . . . pretrial conference: Unless otherwise noted, conference details and quotations come from *Blank* transcript 6/2/75.

183 "All right ladies": *Blank* transcript 6/2/75.

184 "A suit for violation of Title VII": *Kohn v. Royall, Koegel & Wells*, 59 F.R.D.515, 522 (S.D. N.Y. 1973), quoting *Bowe v. Colgate-Palmolive*, 416 F.2d 711, 719 (7th Cir. 1969).

184 "is the usual and normal" . . . raise some new question . . . "What is your name": *Blank* transcript 6/2/75.

184 Steinbock was shocked: Moss interviews.

184 risen from about 1.4 to 12.5 percent: Arthur W. Stern, "Determination," *Blank v. Sullivan & Cromwell*, Equal Employment Opportunity Commission Case No. YNY 5–138, 10/16/74, in NARA files.

185 heart of the case . . . "I am going to rule now" . . . "I have just countermanded it": *Blank* transcript 6/2/75, pp. 7, 36.

185 memo to explain: *Blank* transcript 6/2/75, p. 7.

185 "Oh my god": Moss interviews.

185 "job was to stall": Motley interview.

186 "some of the partners have prejudices against women": Blank 1975 deposition, pp. 137–139.

186 "barratrous and champertous plan": *Blank* transcript 6/2/75, p. 10, and see also p. 27.

186 *barrator* . . . "frequently exciting" . . . *champerty* . . . "pests of civil society": William Blackstone, *Commentaries on the Laws of England* (Oxford: Printed at the Clarendon Press, 1765), Vol. 4, Chap. x, Sect. 11, pp. 134–135; *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990), pp. 151, 230–231. (*Black's* uses the spelling *barretor.*)

186 archaic: Moss interviews.

186 To Motley, they echoed her recent past: Motley interview.

186 Southern states responded . . . *barratry* and *champerty*: Motley, *Equal Justice*, p. 126; Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (Oxford: Oxford University Press, 1994), pp. 272–282 (further references will be cited as Tushnet, *Making Civil Rights Law*); and Susan D. Carle, "From Buchanan to Button: Legal Ethics and the NAACP," 8 *University of Chicago Law School Roundtable* 281 (2001), p. 297.

186 "runner" . . . "capper" . . . "individual or organization": Susan D. Carle, "From Buchanan to Button: Legal Ethics and the NAACP," 8 *University of Chicago Law School Roundtable* 281 (2001), p. 300.

186 Virginia's highest court ruled . . . violating the state's new antibarratry statute . . . "valid police regulation": *NAACP v. Harrison*, Supreme Court of Virginia, 202 Va. 142, 160 (1960). See also Tushnet, *Making Civil Rights Law*, pp. 275–276.

187 Motley joined in writing the brief: Motley, *Equal Justice*, p. 126.

187 Writing the decision in early 1962 for a 5–4 majority: This narrative of the two decisions relies on the superb research in Tushnet, *Making Civil Rights Law*, pp. 275–282.

187 "to discriminate as partisans in favor of Negroes": Felix Frankfurter, letter to Hugo Black, 2/19/62, quoted in Tushnet, *Making Civil Rights Law*, p. 277.

187 "moved not by financial gain but by public interest": Felix Frankfurter, draft opinion, January 1962, *NAACP v. Button*, 371 U.S. 415 (1963), quoted in Tushnet, *Making Civil Rights Law*, pp. 278, 363n16.

187 indictment as barrators: Tushnet, *Making Civil Rights Law*, p. 275.

187 decision never appeared: Tushnet, *Making Civil Rights Law*, p. 279.
187 "obtuse": *Blank* transcript 6/2/75, p. 170.
188 "Dear Ms. Rabb, don't bother" . . . what was a *yahoo*: *Blank* transcript 6/2/75, p. 19.
188 "A *yahoo*, your Honor": *Blank* transcript 6/2/75, p. 19.
188 excerpted what he viewed as Rabb's moments of unlawyerly obstruction: Ephraim London, "Exhibit 3: Examples of the Misconduct of Plaintiff's Attorney during Her Client's Deposition," 5/12/75, in NARA files.
188 *puerile* . . . "may now be applied to a woman's conduct": Ephraim London, "Affidavit in Support of Motion," dated 5/12/75, p. 3, in NARA files.
188 *puerile* . . . young boys: *Oxford English Dictionary*, available at http://dictionary.oed.com (visited 2/7/2008).
188 "in which a lawyer" . . . "We don't conduct any cases like that": *Blank* transcript 6/2/75, pp. 20–21.
188 She had doubts he would try such tactics before a male judge: Motley interview.
188 "You know how everybody talks" . . . knew was improper . . . contempt of court: Motley interview.
188 London filed: Ephraim London, "Application for Disqualification," 7/24/75, in NARA files.
189 "identified with those who suffered discrimination": Ephraim London, "Affidavit in Support of Disqualification," 7/24/75, in NARA files.
189 Writing to the court of appeals, he requested that it overturn her ruling: Ephraim London, "Notice of Appeal" (to the United States Court of Appeals for the Second Circuit), 7/25/75, in NARA files.
189 Motley went looking for courage . . . Judge Leon Higginbotham: Motley interview.
189 Only the year before, in a case: Quotations from Higginbotham's response are from *Commonwealth of Pennsylvania v. Local Union 542*, 388 F. Supp. 155 (E.D. Pa. 1974).
189 "Defendants assert that my use of the term": *Commonwealth of Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 170 (E.D. Pa. 1974).
190 "no President had ever appointed a black": *Commonwealth of Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 177 (E.D. Pa. 1974).
190 "In a nation which" . . . "had a revolution theoretically": *Commonwealth of Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 182 (E.D. Pa. 1974).
190 answer to London's challenge: *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 75 Civ. 189 (S.D. N.Y. 1977), 8/4/75, denying motion for disqualification.
191 "to make its victims social and economic cripples" . . . "I hasten to add": Ephraim London, "Affidavit in Support of Disqualification," 7/24/75, p. 12, in NARA files.
191 not be "objective": Ephraim London, "Petition for a Writ of Mandamus Directing Judge Constance Baker Motley to Disqualify Herself as Judge of This Case," 8/5/75, in NARA files.
191 "offers as support for this 'identification'": This and subsequent quotations from Motley's response are from *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D. N.Y. 1977), 8/4/75, denying motion for disqualification.
192 embodying "bias": Ephraim London, "Affidavit in Support of Disqualification," 7/24/75, in NARA files.
192 "that he previously": *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 5 (S.D. N.Y. 1977), 8/4/75, denying motion for disqualification.
192 Almost immediately: Order, "A petition for a writ of mandamus . . . referred to the panel of judges sitting Monday, August 11, 1975," dated 8/4/75, in NARA files.
192 Judge Motley would not be disqualified: Motley interview.

192 “not so strong” . . . “stronger each time he showed up” . . . Steinbock’s favorite line: Moss interviews.

193 “wasn’t so all-fired important” . . . Commission on Human Rights, “before which many of the complaints were filed”: Kwitny, “Law Firm Is Stung.”

193 Rabb was upset, calling the article scurrilous . . . “talk of Wall Street” . . . “a law firm that can’t win its own lawsuit”: Diane Blank, personal journal entry, 8/9/75, in Blank files.

193 “a sort of second string law review”: Kwitny, “Law Firm Is Stung.”

193 From the start, London had fought against handing over data: Harriet Rabb, “Plaintiff’s First Interrogatories and Request for Production of Documents,” to Ephraim London, Attorney for Defendant Sullivan & Cromwell, 4/17/75, and Ephraim London, “Affidavit in Support of Motion” (to strike Plaintiff’s First Interrogatories numbered 1–65 and 115–119), 5/19/75, in NARA files.

193 statistics that Sullivan & Cromwell guarded most fiercely concerned its partners: John F. Cannon, “Affidavit of a Partner of Sullivan & Cromwell Regarding Report of United States Magistrate,” dated 4/1/76, p. 14, in NARA files.

194 never promoted a woman to partner: Commission on Human Rights, “Determination.”

194 Among Rabb’s questions . . . why was each woman not offered the opportunity to become a partner: Harriet Rabb, “Plaintiff’s First Interrogatories and Request for Production of Documents,” to Ephraim London, Attorney for Defendant Sullivan & Cromwell, 4/17/75, pp. 16–17, partly reprinted in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), order defendants to respond to interrogatories, 11/22/76.

194 “Title VII does not require an offer of partnership”: Ephraim London, “Affidavit: Objections to Report of Magistrate Harold J. Raby, made March 15, 1976,” dated 4/1/76, p. 2, in NARA files.

194 fourteen-page affidavit . . . “I personally”: John F. Cannon, “Affidavit of a Partner of Sullivan & Cromwell Regarding Report of United States Magistrate,” dated 4/1/76, in NARA files.

194 Motley sided with the firm: *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), order defendants to respond to interrogatories, 11/22/76, quoting order dated 5/24/76.

195 Rabb applied to Judge Motley: Memorandum in Support of Plaintiff’s Application for Rehearing and Modification of the Court’s Order of 5/24/76, by Harriet Rabb, dated 6/18/76, in NARA files.

195 “partners and partnerships are not within the purview” . . . “choosing to do business in the partnership form”: Brief for the Equal Employment Opportunity Commission by Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg, and Charles L. Reischel to District Court, pp. 2–4, dated 6/15/76, p. 4, in NARA files.

195 “Title VII did not make it unlawful”: Defendant’s Brief in Opposition to Motion for Rehearing and Modification of the Court’s Order of 5/24/76, by Ephraim London, p. 2, dated 7/9/76, in NARA files.

195 “unnecessary” . . . “to reach the difficult issue”: *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), order defendants to respond to interrogatories, 11/22/76.

196 “It is difficult to conceive of anything more telling”: Order of 1/7/75, by Judge Morris Lasker, in *Kohn v. Royall, Koegel & Wells* (S.D. N.Y. 1973), quoted in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), order defendants to respond to interrogatories, 11/22/76.

12: Time to Settle

197 By late spring of 1977, a proposed settlement: Agreement, signed by Diane Blank, Harriet Rabb, Sullivan & Cromwell, and Ephraim London, dated 4/11/77, in NARA files.

197 press reported: “Details Disclosed of Settlement by Sullivan & Cromwell of Bias Suit,” *New York*

Law Journal, 5/6/77, p. 1; Arnold H. Lubasch, "Top Law Firm Agrees to Bar Sex Discrimination in Jobs and Promotions," *New York Times*, 5/8/77; Jonathan Kwitny, "New York Law Firm Accepts Conditions in Hiring-Bias Case," *Wall Street Journal*, 5/9/77; Kohn, "Picking on the 'Boys'," p. 1.

197 "Two women lawyers and a woman judge": Jonathan Kwitny, "New York Law Firm Accepts Conditions in Hiring-Bias Case," *Wall Street Journal*, 5/9/77.

197 not discriminate in the future, as it "has not certainly in the past several years": District court transcript of *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), settlement hearing 6/28/77.

198 *Recruiting women*: This and other elements of the agreement are from Agreement, signed by Diane Blank, Harriet Rabb, Sullivan & Cromwell, and Ephraim London, dated 4/11/77, in NARA files.

199 appeal the decision back to Judge Motley: Agreement, signed by Diane Blank, Harriet Rabb, Sullivan & Cromwell, and Ephraim London, dated 4/11/77, in *Blank v. Sullivan & Cromwell*, 75 Civ. 189 (S.D. N.Y. 1977), and Press Release [draft], c. 6/30/77, provided by Theodore O. Rogers Jr. of Sullivan & Cromwell, in files of Douglas McCollam as of 3/23/01.

199 $30,000 as fees: Agreement, signed by Diane Blank, Harriet Rabb, Sullivan & Cromwell, and Ephraim London, dated 4/11/77, in NARA files.

199 Blank received $2,000: Blank interviews.

199 Rogers & Wells . . . paying fees of $40,000 and agreeing to a hiring quota: Kohn, "Picking on the 'Boys'," p. 1; Arnold H. Lubasch, "Top Law Firm Agrees to Bar Sex Discrimination in Jobs and Promotions," *New York Times*, 5/8/77.

199 half led to settlements: Kohn, "Picking on the 'Boys'," p. 1.

199 Although settlements in the three that did not go to court were kept confidential, news reporters learned: Alan Kohn, "Court Lauds Pattern in Settling Rogers & Wells Sex-Bias Suit," *New York Law Journal*, 2/9/76, no page number evident.

199 When the firm interviewed Blank in 1970, it had no women partners and only three women associates (roughly 3 percent of all associates): Complaint of Diane Serafin Blank, dated 6/28/71, attached to Commission on Human Rights, "Determination."

199 When Sullivan & Cromwell settled . . . twenty-six women associates (more than 22 percent) . . . no women partners: Arnold H. Lubasch, "Top Law Firm Agrees to Bar Sex Discrimination in Jobs and Promotions," *New York Times*, 5/8/77.

199 "Obviously": Jonathan Kwitny, "New York Law Firm Accepts Conditions in Hiring-Bias Case," *Wall Street Journal*, 5/9/77.

199 Sullivan & Cromwell had not conceded: Agreement, signed by Diane Blank, Harriet Rabb, Sullivan & Cromwell, and Ephraim London, dated 4/11/77, in NARA files.

199 Some seven years later . . . Sullivan & Cromwell would have only one woman among its seventy-five partners: Tamar Lewin, "Impact of Court Ruling Called Mainly Symbolic," *New York Times*, 5/23/84, p. D27.

13: The Chief Justice's Second Draft

200 claim that law firms could discriminate against women . . . reached the Supreme Court in the 1980s: *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); David Margolick, "Sex Bias Suit Perils Law Firms' Methods of Picking Partners," *New York Times*, 4/23/83, p. A1.

200 known to her friends as Betsy . . . graduating in 1972 . . . Harlan Fiske Stone Scholar: William G. Blair, "Woman in the News; Victor in Bias Case: Elizabeth Anderson Hishon," *New York Times*, 5/23/84, p. D27.

200 She saw herself as someone who did not wear armbands or march in demonstrations: Connie Bruck, "The Case No One Will Win," *American Lawyer*, November 1983, pp. 101–106.

200 one woman attorney, as an associate, back in about 1944: William G. Blair, "Woman in the News; Victor in Bias Case: Elizabeth Anderson Hishon," *New York Times*, 5/23/84, p. D27.

201 "fair and equal" . . . papers in federal court: Chief Justice Warren E. Burger, "1st DRAFT," *Hishon v. King & Spalding*, 467 U.S. 69, 71–72 (1984), circulated 12/28/83, pp. 3, 8, in Blackmun papers.

201 argued not just that Title VII did not cover partnerships, but further that the First Amendment of the Constitution granted law partners the right to freedom of association and expression: *Hishon v. King & Spalding*, 467 U.S. 69, 77–78 (1984); Linda Greenhouse, "High Court Rules Rights Law Covers Law Partnerships," *New York Times*, 5/23/84, p. A1.

201 law firm won first in federal district court: *Hishon v. King & Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980).

201 "Title VII does not apply to decisions regarding partnership": *Hishon v. King & Spalding*, 678 F.2d 1022, 1024 (11th Cir. 1982).

201 "nine of the twelve active judges of the Eleventh Circuit": Emmet J. Bondurant, quoted in Connie Bruck, "The Case No One Will Win," *American Lawyer*, November 1983, p. 105.

201 William Bradford Reynolds, let his staff know that he sided with the firm: Howard Kurtz, "Reynolds' Defenders Excoriate Foes for 'Hitting below the Belt'," *Washington Post*, 6/27/85, p. A6.

201 For a summer outing, King & Spalding . . . "the body we'd like to see more of": James B. Stewart, "Fairness Issue; Are Women Lawyers Discriminated against at Large Law Firms?" *Wall Street Journal*, 12/20/83, p. 1.

202 third year at Harvard Law: Nina Burleigh and Stephanie B. Goldberg, "Breaking the Silence: Sexual Harassment in Law Firms," *ABA Journal*, August 1989, p. 46.

202 Oral argument on Halloween: Quotations from the oral argument are from Supreme Court transcript of *Hishon v. King & Spalding*, 467 U.S. 69 (1984), argued 10/3/83.

202 "get over" the pain of injustice: Connie Bruck, "The Case No One Will Win," *American Lawyer*, November 1983, p. 102.

202 all nine justices voted against King & Spalding: Conference notes, dated 11/2/83, in Blackmun papers.

202 apparently in favor of applying Title VII to partnerships: Justice John Paul Stevens, letter to Chief Justice Warren Burger, 12/30/83, in Blackmun papers.

202 Burger—during oral argument in a Title VII case—had sought reassurance . . . "as a matter of general policy": Supreme Court transcript of *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971), p. 7, argued 12/9/70, and see Part 1.

203 His draft opinion: Quotations from the draft opinion are from Chief Justice Warren E. Burger, "1st DRAFT," *Hishon v. King & Spalding*, 467 U.S. 69 (1984), circulated 12/28/83, in Blackmun papers.

203 Blackmun scrawled . . . "Do not Destroy": For comparison of handwriting, compare the word "Do" to same word in oral argument notes, 10/31/83, in Blackmun papers.

203 Burger devoted much of the first half of his opinion to suggesting that partners of King & Spalding might not be "employees" for the "purposes of Title VII": Chief Justice Warren E. Burger, "1st DRAFT," *Hishon v. King & Spalding*, 467 U.S. 69 (1984), circulated 12/28/83, p. 4–6.

203 attacked Burger's effort to limit Title VII: William J. Brennan Jr., letter to Warren E. Burger, 12/28/83, in Blackmun papers.

203 rebuked the chief justice for not following the unanimous vote: John Paul Stevens, letter to Warren E. Burger, 12/30/83, in Blackmun papers.

203 "novel theory of Title VII": Justice William J. Brennan Jr., "1st DRAFT," *Hishon v. King & Spalding*, 467 U.S. 69 (1984), circulated 12/30/83, p. 4n3, in Blackmun papers.

204 Marshall and . . . O'Connor opposing his contract theory: Justice Thurgood Marshall, letter to Chief Justice Warren E. Burger, 12/29/83, in Blackmun papers; Justice Sandra Day O'Connor, letter to Chief Justice Warren E. Burger, 1/3/84, in Blackmun papers.

204 "there seems to be considerable feeling" . . . Justice Blackmun penciled, "*Of course*!": Chief Justice Warren E. Burger, memorandum to the conference, 12/30/83, in Blackmun papers.

204 After again discussing the alleged "contract," in a footnote he conceded . . . "private discrimination": *Hishon v. King & Spalding*, 467 U.S. 69, 74–75, 75n6 (1984).

204 Court opinion from 1973: *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), quoted in *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

204 he [chief justice] overruled the lower court decision: *Hishon v. King & Spalding*, 467 U.S. 69, 72 (1984).

204 press reported . . . "ruled unanimously" . . . "advertising agencies": Linda Greenhouse, "High Court Rules Rights Law Covers Law Partnerships," *New York Times*, 5/23/84, p. A1; Fred Barbash, "Partnerships at Issue; Law Firms Held to Anti-Bias Rule," *Washington Post*, 5/23/84, p. A6.

205 "Give me a break": George F. Will, "Put 'er There, Partner," *Washington Post*, 5/27/84, p. C7.

Part Four

HARASSMENT (1974–1986)

In this part, I rely on the personal papers of and interviews with Patricia J. Barry, Catharine A. MacKinnon, and Karen Sauvigné, and on interviews with, among others, Mechelle Vinson. I also learned a great deal from the files of Working Women United, the papers of Judge George E. MacKinnon, and the 1980 trial transcript of *Vinson v. Taylor*, which was unavailable to Supreme Court litigators and justices. Important primary sources, particularly interviews and collections of documents, are listed below, with the abbreviations used in the endnotes that follow. Other primary sources and important secondary sources appear with full citations in the endnotes.

Barry files	Files of Patricia J. Barry as of 3/19/93
Barry interviews	Interviews with Patricia J. Barry, Los Angeles, 3/17–19/93
Blackmun papers	Papers of Justice Harry A. Blackmun, Library of Congress
Brennan papers	Papers of William J. Brennan Jr., Library of Congress
Burns interviews	Interviews with Sarah E. Burns, New York City, by phone, 2/11/93 and 6/15/93
Catharine MacKinnon files	Files of Catharine A. MacKinnon as of 5/11/95
Catharine MacKinnon interview(s)	Interviews with Catharine A. MacKinnon on multiple dates including Washington, DC, 10/5/90; Ann Arbor, Michigan, 10/21–24/90; Washington, DC, 12/16/90; California, by phone, 2/15/95; California, 5/11/95; California, 10/18–21/95; California, by phone, 3/14/98; and New Haven, Connecticut, 4/2/04
George MacKinnon papers	George E. MacKinnon Papers, Minnesota Historical Society
Katz interview	Interview with Debra Katz, Washington, DC, by phone, 8/20/93
Lenhoff interviews	Interviews with Donna Lenhoff, Washington, DC, by phone, 8/17/93 and 8/18/93

Ludwic interview — Interview with Judith Ludwic, Washington, DC, 4/6/93
Marshall papers — Papers of Thurgood Marshall, Library of Congress
Meisburg interviews — Interviews with John Marshall Meisburg Jr., Orlando, Florida, by phone, 5/28/93 and 6/2/93
Meyer interview — Interview with Susan Meyer, New York City, by phone, 2/25/98
Nemy interview — Interview with Enid Nemy, New York City, by phone, 6/22/05
Sauvigné files — Files of Karen Sauvigné as of 6/7/93
Sauvigné interview — Interview with Karen Sauvigné, New York City, 6/7/93
Semonoff interview — Interview with Ellen Semonoff, Cambridge, Massachusetts, by phone, 5/6/98
Singer interview — Interview with Linda Singer, Washington, DC, by phone, 2/6/98
Vinson DC transcript — District court transcript in *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980). For this transcript, I am indebted to the Washington Lawyers' Committee for Civil Rights Under Law, including Joseph M. Sellers and Eloise Kehler, who in June 1993 permitted Katherine McCarron, who had recently graduated from Yale, to copy their approximately 1,500-page transcript of proceedings on Civil Action No. 78–1793, for the dates of the trial, 1/21–2/1/1980, in the United States District Court for the District of Columbia. In an earlier effort, I found only fragments of the transcript available at the courthouse. Many attorneys working on this case during its route from district court to the Supreme Court, including Patricia J. Barry and Catharine MacKinnon (see later narrative), never had access to full transcripts; nor have other reports of which I am aware.
Vinson interview — Interview with Mechelle Vinson, Washington, DC, 4/17/93
Working Women files — Files of Working Women United (and its successor Working Women's Institute) at the Barnard Center for Research on Women, Columbia University

14: No Law

209 Mechelle Vinson: Biographical details and quotations about Vinson's life, and details and quotations about Sydney Taylor and his behavior, are from Vinson interview and *Vinson* DC transcript, unless indicated otherwise.
209 nineteen-year-old Mechelle Vinson: *Vinson* DC transcript, 1/22/80, p. 16.
209 between railway lines: Author visit, 3/25/95, to 13th Place, NE, Washington, DC.
209 first professional opportunity: See *Vinson* DC transcript, 1/24/80, p. 5 (working since she was age 12), and *Vinson* DC transcript, 1/22/80, afternoon session, p. 16 (working at Barbara Ellen Figure Salon before working at the bank).
209 her family bank . . . wanted a job at this bank: *Vinson* DC transcript, 1/22/80, pp. 17–18.
209 "a very small, black bank" . . . "be something": Vinson interview.
210 One day in September of 1974: *Vinson* DC transcript, 1/22/80, pp. 16–19; *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).
210 knew as Mr. Taylor: *Vinson* DC transcript, 1/22/80, p. 17.
210 jobs since she was twelve . . . age fifteen she had started a marriage: *Vinson* DC transcript, 1/24/80, p. 5.
210 marriage that was now having problems . . . bank as her chance finally to advance: Vinson interview.
210 "outstanding" . . . head teller and assistant branch manager simultaneously: Pretrial Statement of

Defendant, Sidney L. Taylor, to United States District Court for the District of Columbia, filed 1/3/80, p. 2, in *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

210 "9 plus": Sidney L. Taylor, letter to George J. Boyce, President, Capital City Federal Savings and Loan Association of Washington, DC, 9/29/77, attached to Answer for Plaintiff's Request for Production of Documents, by Karen Smith Woodson, to United States District Court for the District of Columbia, filed 12/18/79, in *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

210 "go far": *Vinson* DC transcript, 1/29/80, p. 25.

210 dapper: Meisburg interview.

210 gentlemanly: *Vinson* DC transcript, 1/22/80, p. 18, and 1/24/80, p. 33.

210 self-made . . . janitor: *Vinson* DC transcript, 1/28/80, pp. 3–4.

210 first black assistant manager for any major savings association: *Vinson* DC transcript, 1/28/80, p. 16.

210 wife and seven children: *Vinson* DC transcript, 1/28/80, p. 3.

210 proud . . . create jobs for young black employees: *Vinson* DC transcript, Sidney Taylor, 1/28/80, p. 16–19.

210 Mr. Taylor, as she always called him: Ludwic interview.

210 even during her initial ninety-day probationary period . . . began to wonder: *Vinson* DC transcript, 1/22/80, p. 33.

211 "prettying up": Vinson interview.

211 Chinese restaurant: *Vinson* DC transcript, 1/22/80, p. 50.

211 "You all have worked so good . . . gave you the overtime": *Vinson* DC transcript, 1/22/80, p. 47.

211 "Oh Christina . . . just don't know": Vinson interview.

211 Christina's bottom . . . breasts: *Vinson* DC transcript, 1/22/80, p. 33.

211 "Your eyes may shine": Vinson interview.

211 ladies' bathroom . . . shake it at Christina . . . "Excuse me": *Vinson* DC transcript, 1/22/80, pp. 33–35.

211 "you see and you don't say": Vinson interview.

212 "You're gonna settle this goddamn sheet" . . . stormed out the door: *Vinson* DC transcript, 1/22/80, p. 41, and 1/24/80, p. 21; Vinson interview.

212 Next week, Christina didn't have a job: *Vinson* DC transcript, 1/21/80, pp. 84–90; Vinson interview.

212 Sidney Taylor would deny most of it: *Vinson* DC transcript, 1/29/80, pp. 13–14.

212 stories have never been verified: This has been well stated by Augustus B. Cochran III in his fine history, *Sexual Harassment and the Law: The Mechelle Vinson Case* (Lawrence: University Press of Kansas, 2004), p. 3: "The reader is strongly advised to suspend judgment about the particular facts of this case and to treat all disputed facts as unproved." In this case, "a series of rulings, appeals, and remands left the factual issues ultimately unresolved; the truth or falsity of the parties' various versions of events was never definitively established by a court of law. The Supreme Court did not rule on the veracity of any version of the facts." See also Cochran's "cautionary note to the reader" on p. 57, which says, in part, "Readers should not assume that any particulars of this story are verified truth and should be aware that the facts of this case, by and large, have never been authoritatively established." Further references will be cited as Cochran, *Sexual Harassment*.

212 giving her $120: *Vinson* DC transcript, 1/22/80, p. 48.

212 join him for dinner: *Vinson* DC transcript, 1/24/80, p. 45.

212 "Mechelle, I have been good to you": *Vinson* DC transcript, 1/22/80, p. 49.

212 bed with him: *Vinson* DC transcript, 1/22/80, p. 50.

212 "just like he hired me, he would fire me": *Vinson* DC transcript, 1/24/80, p. 47.

212 "he put his penis in": *Vinson* DC transcript, 1/22/80, p. 53.

212 "there was never a time that I indulged in sex": See *Vinson* DC transcript, 1/29/80, pp. 13–14, with questions by one of Sidney L. Taylor's attorneys, Karen Smith Woodson, and answers by Taylor: "Q: Now, did there come a time in May of 1975 that you indulged in sexual intercourse with Ms. Vinson? A: No. There was never a time that I indulged in sex with Ms. Vinson. Q: Did there come a time in May of 1975 that you had dinner at a Chinese restaurant with Ms. Vinson? A: Not Ms. Vinson. Maybe with Ms. Vinson and Ms. Malone, but never with Ms. Vinson alone. I do remember taking—having dinner with them at a restaurant on Rhode Island Avenue, but we were all there together and it wasn't dinner. They were going to eat Chinese food. I eat in the area, so I stopped by and had a beer and I went on home. Q: Did you purchase this dinner for them? A: No, I did not. Q: Now, did there come a time when you, in May of 1975, took Ms. Vinson to a hotel in or around New York Avenue? A: No, I never have. Q: Did there come a period of time in May of 1975 when Ms. Vinson made sexual overtures to you? A: Well that has happened several times. Really since I have had to have Ms. Vinson and Ms. Malone go back home and change clothes because their form of dress was really wrong for the type of atmosphere that we were working under."

213 "I felt I didn't owe him anything": Vinson interview.

213 next morning at work . . . do what he wanted: *Vinson* DC transcript, 1/22/80, pp. 58–59.

213 sex many times: *Vinson* DC transcript, 1/22/80, pp. 64–75.

213 "the vault door closed": *Vinson* DC transcript, 1/22/80, pp. 77–78.

213 put his hands on her body: *Vinson* DC transcript, 1/22/80, pp. 68–70.

213 "dick sucked" . . . "You are going to fuck me" . . . "I give you a paycheck": *Vinson* DC transcript, 1/22/80, pp. 68–70, 77–78.

214 "outside women": *Vinson* DC transcript, Mechelle Vinson, 1/22/80, pp. 59–61.

214 "tired of Mr. Taylor touching them" . . . "relaxing" . . . "get the hell out": *Vinson* DC transcript, 1/23/80, 11:00 a.m., p. 48.

214 "Because he had told me": *Vinson* DC transcript, 1/24/80, p. 47.

214 September of 1978: *Vinson* DC transcript, 1/23/80, 1:40 p.m. session, pp. 53, 60–61.

214 about fifteen years old . . . problems, some violent: *Vinson* DC transcript, 1/24/80, pp. 5–6. See also *Vinson* DC transcript, 1/29/80, p. 6.

214 "low-cost divorces": Ludwic interview and Vinson interview.

214 hair was falling out . . . "I have a boss that's bothering me" . . . never intended to divulge . . . "What locked in my mind" . . . "On what legal ground": Ludwic interview.

215 no law to help her: Women complaining of what amounted to sexual harassment (a term they did not use; see later) had lost the only two cases decided by the spring of 1975: *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, decided 8/9/74, and *Corne v. Bausch and Lomb*, 390 F. Supp. 161 (Arizona 1975), decided 3/14/75.

215 "sexual favors": *Barnes v. Costle*, 561 F.2d 983, 985 (D.C. Cir. 1977); and *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, decided 8/9/74 by Judge John Lewis Smith Jr., United States District Court for the District of Columbia.

216 "verbal and physical sexual advances": *Corne v. Bausch and Lomb*, 390 F. Supp. 161 (Arizona 1975).

216 "wanted to lay me" . . . "working relationship" . . . "restrained me": Adrienne Tomkins, "Sex Discrimination," *Civil Liberties Review*, September–October 1978, pp. 19–22.

216 "working relationship" . . . transferred . . . fired: *Tomkins v. Public Serv. Elec. & Gas*, 422 F. Supp. 553 (D. N.J. 1976).

216 early 1970s . . . teller named Margaret Miller: Mary C. Dunlap, "Are We Integrated Yet? Pursuing

the Complex Question of Values, Demographics and Personalities," 29 *University of San Francisco Law Review* 693 (1995).

216 "cooperative" . . . "felt this way about a black chick": *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

216 Justice Department: *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

216 "Seldom a day goes by" . . . "harassment and humiliation": *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

216 but "the subtleties": *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123.

216 "every time any employee": *Corne v. Bausch and Lomb*, 390 F. Supp. 161 (Arizona 1975).

216 Tomkins: Nadine Taub, the attorney asked by a district court judge to represent Tomkins, was director of the women's rights litigation clinic at Rutgers. He told Taub that for students the case should be "educational," as she later recalled, and she inferred he meant that case would interest students but not real lawyers. Interview with Nadine Taub, Monticello, New York, 7/10/94. See also Brownmiller, *In Our Time*, p. 285.

216 "if an inebriated approach": *Tomkins v. Public Serv. Elec. & Gas*, 422 F. Supp. 553 (D. N.J. 1976).

217 "a natural sex phenomenon": *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976).

217 "gal" clerks: Mary C. Dunlap, "Are We Integrated Yet? Pursuing the Complex Question of Values, Demographics and Personalities," 29 *University of San Francisco Law Review* 693 (1995), p. 703.

15: Naming Sexual Harassment

218 events in early 1975: This section draws on Meyer interview, Sauvigné interview, Sauvigné files, Working Women files, and Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw-Hill, 1978). Further references will be cited as Farley, *Sexual Shakedown*. It also gained from an excellent history that appeared as this book was going to press: Carrie N. Baker, *The Women's Movement against Sexual Harassment* (Cambridge: Cambridge University Press, 2008). Further references will be cited as Baker, *Women's Movement against Sexual Harassment*.

218 a letter of late March in 1975 . . . "Dear Sisters": Lin Farley, Susan Meyer, Karen Sauvigné, letter to "Dear Sisters," undated (apparently March 1975), in Catharine MacKinnon files. MacKinnon may have saved the only copy still in existence; with it in her files, which she generously allowed me to sort through for days, sometimes discarding the remains of nests made by mice, is a note to her teacher at Yale Law School, Barbara Underwood, saying, "Attached is the original letter I got about the Cornell sexual harassment problem." (See also later discussion of MacKinnon's suggestion to Underwood about how to use this letter to create an exam question for Underwood's course, Sex Discrimination, at Yale Law School in the spring of 1975.) I did not find a copy of this letter in the Working Women files or Sauvigné files.) Date of late March in 1975 is inferred from phrase "two weeks ago" combined with three sources: 3/7/75 decision against Carmita Wood (Robert B. Hardy, Referee, New York State Department of Labor, "Decision and Notice of Decision," 3/7/75, in Working Women files), which this letter follows; statement that it was "about this time" (3/7/75) that Carmita Wood came to the Human Affairs Program (in Lin Farley, "Special Disadvantages of Women in Male-Dominated Work Settings," p. 8, in testimony given before the Commission on Human Rights of the City of New York, in "Hearings on Women in Blue-Collar, Service, and Clerical Occupations," 4/21/75, typescript in Working Women files; further references will be cited as Farley, "Special Disadvantages"); and Human Affairs Program, "For Immediate Release: Working Women Join to

Fight Sexual Exploitation," 4/3/75, in Working Women files, press release announcing the creation of Working Women United. Catharine MacKinnon, in *Sexual Harassment of Working Women: A Case of Discrimination* (New Haven: Yale University Press, 1979), credits Working Women United as the first to use *sexual harassment* as "anything approaching a term of art" (p. 250n13) and gives the date of 10/6/75 (p. 253n61). Further references will be cited as MacKinnon, *Sexual Harassment* (1979). MacKinnon also gives credit for development of the concept to the Alliance against Sexual Coercion of Cambridge, Massachusetts. Date of late March in 1975 for term *sexual harassment* is slightly earlier than implied by Susan Brownmiller's excellent chapter, "Its Name Is Sexual Harassment," in *In Our Time*, pp. 279–294, in which Karen Sauvigné links the choice of the term *sexual harassment* to preparation for the speak-out of 5/4/75 (p. 281), and earlier than suggested in Jeffrey Toobin, "The Trouble with Sex," *New Yorker*, 2/9/98, p. 50, which says that the "first use of that precise term [sexual harassment] seems to have been at a 1975 conference at Cornell when a group of feminists based in Ithaca held a 'Speak-Out on Sexual Harassment.'" The earliest use of "sexual harassment" [spelled "harrasment"—an indicator of its novelty] in a non-public letter may occur in Karen Sauvigné, letter to Maurie E. Heins, 3/28/75, in Working Women files; another indicator of novelty is that Heins, the attorney who agreed to represent Carmita Wood, is addressed as "Dear Mauri"; see also Baker, *Women's Movement against Sexual Harassment*, pp. 30–31, 207n17.

218 Human Affairs Program: Sauvigné interview; Meyer interview; Brownmiller, *In Our Time*, p. 279ff.; Baker, *Women's Movement against Sexual Harassment*, p. 28ff.

219 "consciousness-raising" . . . "a remarkable tool" . . . "Each one of us had already quit": Farley, *Sexual Shakedown*, pp. xi–xiii.

219 Farley began asking: Farley, "Special Disadvantages," p. 6 ("we have been searching for more than six months"). And see Farley, *Sexual Shakedown*, p. xi.

219 Carmita Wood came to Farley: Date of March 1975 based on same information that determines date (see above) of "Dear Sisters" letter.

220 Wood's story . . . legal documents: Working Women files and Catharine MacKinnon files. A valuable collection of documents is available online, including Carmita Wood, "Woman Alone," *Labor Pains* 1, no. 1 (August 1975), p. 5, reprinted online as document 6I in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?" in Kathryn Sklar and Thomas Dublin, eds., *Women and Social Movements in the United States, 1600–2000*, Vol. 2 (Binghamton, State University of New York at Binghamton, Center for the Historical Study of Women and Gender, 1998), at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc6I.htm (visited 3/31/06). Further references will be cited as Sklar and Dublin, *Women and Social Movements*.

220 never be able to prove conclusively: No court ever ruled on these allegations; they are not legally proved.

220 begun working eight years earlier, in 1966: Hearing before Referee Robert Hardy Jr., 2/18/75, In the Matter of the Claim for benefits under Article 18 of the labor law made by Carmita L. Wood, Case No. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, pp. 11–12, in Working Women files. Further references will be cited as Wood unemployment hearing.

220 promotion in 1968 and another in 1971 . . . first woman to hold the post of administrative assistant . . . Ithaca Management Club . . . $10,000 loan: Affidavit of Henry E. Doney, In the Matter of the Claim for benefits under Article 18 of the labor law made by Carmita L. Wood, Case No. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, dated 7/28/75, in Working Women files. See Farley, "Special Disadvantages," and Farley, *Sexual Shakedown*, p. 83.

220 did not know her new boss well: Wood unemployment hearing, p. 12.

220 "Good evening" . . . hand on her bottom . . . Wood quickly stepped away: Brief on Behalf of Claimant-Appellant [Carmita Wood], In the Matter of the Claim of Carmita Wood for Unemployment Insurance benefits pursuant to Article 18 of the Labor Law, case no. 75–92437, New York State Department of Labor Unemployment Insurance Appeals Board, by Maurie E. Heins, Susan K. Horn, attorneys for Claimant-Appellant; Ellen Yacknin on the brief, undated but apparently c. June 1975, pp. 1–2, in Catharine MacKinnon files. Further references will be cited as Wood brief.

220 "stand with his hands shaking": Affidavit of Carmita Wood, In the Matter of Carmita L. Wood, Ref. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, undated but apparently c. May 1975, p. 3, in Catharine MacKinnon files; further references will be cited as Wood affidavit. See also affidavit of Pamela Henderson, In the Matter of Carmita L. Wood, Ref. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, undated but apparently c. May 1975, p. 3, in Catharine MacKinnon files; further references will be cited as Henderson affidavit. And see affidavit of Connie M. Korbel, In the Matter of Carmita L. Wood, Ref. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, dated 4/29/75, p. 3; further references will be cited as Korbel affidavit.

220 peering through a glass partition . . . alone in an elevator . . . tried to kiss her: Korbel affidavit, pp. 3–4.

221 "he grabbed my arms" . . . "During the course of the dance": Wood affidavit, p. 4.

221 "about to cry" . . . "nerve": Korbel affidavit, p. 2.

221 "looked at her and made her feel uncomfortable" . . . "dismissed" . . . "a diversion she enjoyed": Affidavit of Henry E. Doney, In the Matter of the Claim for benefits under Article 18 of the labor law made by Carmita L. Wood, Case No. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, dated 7/28/75, pp. 8–9, in Working Women files. In this affidavit, Doney also stated that he believed Carmita Wood's allegations against their boss were "complete fabrications" (p. 7); he also said that his comments at Wood's unemployment hearing of 2/18/75 were badly transcribed but that he had not submitted corrections (p. 7).

221 hockey practice . . . "very capable women" . . . "capable of taking care of themselves, so to speak" . . . "try not to get into those situations": Henry E. Doney, in Hearing before Referee Robert Hardy, Jr., 2/18/75, In the Matter of the Claim for benefits under Article 18 of the labor law made by Carmita L. Wood, Case No. 75–92437, New York State Department of Labor Unemployment Insurance Appeal Board, pp. 33–34, in Working Women files. Further references will be cited as Wood unemployment hearing.

221 Not long after the Christmas party, Wood began intensifying her efforts: Wood brief, p. 3.

221 experiencing pain in her hand and arm, which became excruciating . . . hoping the warmer climate would ease her physical pain: Wood brief, pp. 4–5. See also Wood affidavit, p. 5, and Henderson affidavit, p. 2.

222 psychotherapist told her: Wood brief, p. 6.

222 "for health reasons" . . . "didn't sell a thing": Carmita Wood, "Summary of Interview, New York State Department of Labor," 12/16/74, two handwritten pages, in Working Women files.

222 "You quit your job without good cause": New York State Department of Labor (signature not legible), "Notice of Determination to Claimant," 12/30/74, in Working Women files.

222 appeal to a referee . . . two coworkers as witnesses . . . her direct supervisor . . . satisfactory employee . . . recommend for further work: Wood unemployment hearing, title page, pp. 9–11, 21–26.

223 "So you're saying, in effect": Wood unemployment hearing, pp. 14–15, 19.

223 "personal non-compelling reasons": Robert B. Hardy, Referee, New York State Department of Labor, "Decision and Notice of Decision," 3/7/75, in Working Women files.

223 "not a bra burner": Meyer interview. For a fascinating narrative of how Lindsey Van Gelder, as cub

reporter in 1968 for the *New York Post*, accidentally invented a myth of bra burning, see Brownmiller, *In Our Time*, p. 37; see also Robin Morgan, ed., *Sisterhood Is Powerful* (New York: Random House, 1970), p. 521.

223 Seeking a name: Sauvigné interview; Meyer interview; Brownmiller, *In Our Time*, p. 281. The question of who created the phrase *sexual harassment* has led to controversy. Meyer and Sauvigné, when interviewed, credit the group at the meeting. Farley, who has been quoted that "it hit me—it's harassment!" (interview in Peter Wyden, "Sexual Harassment," *Good Housekeeping*, July 1993, p. 121), has taken some individual credit. Eventually the three had "an unfortunate falling-out," according to Susan Brownmiller, "an escalation of their long-running quarrel over who actually named sexual harassment." Brownmiller, *In Our Time*, p. 285.

223 this problem: For a narrative of alleged harassment in 1974–75 by a professor of Gwendolyn Mink, then a graduate student at Cornell, see Gwendolyn Mink, *Hostile Environment: The Political Betrayal of Sexually Harassed Women* (Ithaca: Cornell University Press, 2000), pp. 8–20, including the comment that she was "oblivious" (p. 20) to the Working Women United effort for Carmita Wood.

224 "We understand": This and subsequent quotations from the letter are from Lin Farley, Susan Meyer, Karen Sauvigné, letter to "Dear Sisters," undated (apparently March 1975), in Catharine MacKinnon files.

224 boss assuming he could just pop upstairs: Sauvigné interview.

224 "girl Friday": Meyer interview.

225 names of these "Dear Sisters" had been gathered: Sauvigné interview.

225 ACLU, where she worked for Ruth Bader Ginsburg: Karen Sauvigné, email to author, 8/21/07.

225 only one lawyer wrote back: Sauvigné interview.

225 singer and guitar player: Catharine MacKinnon, letter to author, 2/25/04.

225 "just exploded in my mind": Catharine MacKinnon interview, 10/5/90.

226 MacKinnon . . . Nixon . . . Taft-Hartley . . . Hiss: "Appellate Judge G.E. MacKinnon Dies at Age 89," *Washington Post*, 5/2/95, p. B07; David Chanen, "U.S. Appeals Judge George MacKinnon, of St. Paul, Dies at 89," *Minneapolis Star Tribune*, 5/3/95, p. 6B; David Binder, "George E. MacKinnon, 89, Dies; Was Appeals Judge for 25 Years," *New York Times*, 5/3/95, p. D21; "Let George Do It," *Legal Times*, 5/7/90.

226 MacKinnon lost his bid for re-election: David Chanen, "U.S. Appeals Judge George MacKinnon, of St. Paul, Dies at 89," *Minneapolis Star Tribune*, 5/3/95, p. 6B.

226 public school that was good enough . . . "life's work" . . . "that women were real" . . . took her to the offices where he worked: Catharine MacKinnon interviews.

227 "put Kid Cann in jail" . . . run for governor: David Chanen, "U.S. Appeals Judge George MacKinnon, of St. Paul, Dies at 89," *Minneapolis Star Tribune*, 5/3/95, p. 6B.

227 inspirational professor Leo Weinstein . . . mailed her paper to Emerson: Catharine MacKinnon interviews.

227 Emerson, whom Thurgood Marshall of the NAACP had enlisted: Kluger, *Simple Justice*, p. 275.

227 "he took me seriously": Catharine MacKinnon interviews.

227 study both law and politics: Catharine MacKinnon, letter to author, 4/2/04.

227 enrollment was 87 percent male: "Statement of Mrs. Diane Blank and Mrs. Susan D. Ross, Women's Rights Committee of New York University Law School," House Committee on Education and Labor, Special Subcommittee on Education, *Discrimination against Women: Hearings on Section 805 of H.R. 16098*, 91st Cong., 2d sess., 1970, p. 592.

227 "By the time you applied" . . . B at Smith College in graphic arts . . . black women and to men returning from Vietnam: Catharine MacKinnon, email to author, 6/17/05.

228 In 1972 Yale Law admitted her . . . applied for the fall of 1975: Catharine MacKinnon interviews.

228 "it's in opposition to the whole purpose" . . . her previous applications had not received a full review: Catharine MacKinnon interview, 4/2/04; Catharine MacKinnon, email to author, 6/18/05; interview with James A. Thomas, Madison, Connecticut, by phone, 5/17/06.

228 reason was opposition to her feminism: Catharine MacKinnon, email to author, 6/18/05.

228 New Haven trial of Bobby Seale: John Taft, *Mayday at Yale: A Case Study in Student Radicalism* (Boulder, CO: Westview Press, 1976), pp. 7, 50–51, 87.

228 met once a week for dinner . . . issue of *Rat* . . . "first feminist anything" . . . mimeographed copies: Catharine MacKinnon interviews. For more on *Rat*, see Brownmiller, *In Our Time*, p. 75ff.

16: Women and the Law

230 part of a course on sex discrimination: Catharine MacKinnon interviews; *Bulletin of Yale Law School*, 1974–75, p. 37, Sex Discrimination Seminar taught by Professor B. D. Underwood, spring term 1975.

230 new textbook . . . *Babcock, Freedman, Norton, and Ross*: Interview with Barbara Underwood, New York City, by phone, 11/16/90.

230 What MacKinnon encountered in her 1975 course troubled her: Catharine MacKinnon interviews.

231 "similarly circumstanced": *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

231 "similarly situated": *Reed v. Reed*, 404 U.S. 71, 77 (1971). The legal use of "similarly situated" extends back in U.S. law to the early nineteenth century; see *Mutual Assurance Society v. Faxon*, 19 U.S. 606 (1821).

231 MacKinnon believed . . . "disadvantagement" because of sex: MacKinnon interviews; Catharine MacKinnon, letter to author, 2/25/04.

231 "about everything the situation of women was really about": Catharine MacKinnon interviews.

231 copy . . . to Underwood . . . "How is this sex discrimination?" . . . "*conditions of work*": Catharine MacKinnon, letter to Barbara Underwood, undated but apparently the spring of 1975, in Catharine MacKinnon files.

231 group calling itself: Working Women United, "Who Are We," 5/4/75 (but undated), in Catharine MacKinnon files.

231 275 women: Julie Friedman, "Speak Out Draws Tears and Anger," *Labor Pains* 1, no. 1 (August 1975), p. 1, in Catharine MacKinnon files, reprinted online as document 6A in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?" in Sklar and Dublin, *Women and Social Movements*, Vol. 2, at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc6A.htm (visited 3/31/06). For estimate of "nearly 300" women, see Brownmiller, *In Our Time*, p. 282.

231 folding chairs . . . basketball hoops: snapshots in Working Women files.

232 no agreement for making their testimony public . . . half a year to complete a transcript: Karen Sauvigné, letters to Catharine MacKinnon, 1/5/76 and 3/8/76, in Catharine MacKinnon files. The 68-page transcript of the speak-out for years was not readily available. (In June 1993, for example, Karen Sauvigné generously permitted me to read those pages from her copy that contained testimony by women whom she knew had spoken publicly on other occasions.) The transcript is "Speak-Out on Sexual Harassment of Women at Work," Ithaca, New York, 5/4/75, Karen Sauvigné Papers, Brooklyn, New York, Private Collection; reprinted online as document 5 in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?"

in Kathryn Sklar and Thomas Dublin, eds., *Women and Social Movements in the United States, 1600–2000*, Vol. 2 (Binghamton, State University of New York at Binghamton, Center for the Historical Study of Women and Gender, 1998), at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc5.htm (visited 3/31/06). Further references will be cited as Sklar and Dublin, *Women and Social Movements*.

232 governmental hearing on women's rights, probably the first in America: Lester, *Fire in My Soul*, p. 160.

232 hearings . . . caught the attention of Nemy: She is not certain whether she attended the hearings, but she did attend the speak-out, as confirmed by Meyer interview. For a fine narrative, including the statement that Nemy attended the New York City hearings, see Brownmiller, *In Our Time*, p. 283.

232 invited Lin Farley to give testimony: Farley, "Special Disadvantages."

232 "continually but peripherally" . . . "penalties you paid for being a woman in the workplace": Nemy interview.

232 "you aren't in any position": Subsequent quotations from Nemy's article are from Enid Nemy, "Women Begin to Speak Out against Sexual Harassment," *New York Times,* 8/19/75, p. 38.

233 read Nemy's article and read also the first issue of a newsletter: Copies in Catharine MacKinnon files; confirmed by Catharine MacKinnon, letter to author, 4/2/04.

233 first issue . . . *Labor Pains,* which arrived in her Yale mailbox: *Labor Pains* 1, no. 1 (August 1975), in Catharine MacKinnon files. See also Julie Friedman, "Speak Out Draws Tears and Anger," *Labor Pains* 1, no. 1 (August 1975), p. 1, reprinted online as document 6A in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?" in Sklar and Dublin, *Women and Social Movements*, Vol. 2, at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc6A.htm (visited 3/31/06). Carmita Wood, "Woman Alone," *Labor Pains* 1, no. 1 (August 1975), p. 5, reprinted online as document 6I in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?" in Sklar and Dublin, *Women and Social Movements*, Vol. 2, at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc6I.htm (visited 3/31/06).

233 "become a public figure" . . . "It's rough" . . . "Inside myself there was fear": Carmita Wood, "Woman Alone," *Labor Pains* 1, no. 1 (August 1975), p. 5, reprinted online as document 6I in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harrassment?" in Sklar and Dublin, *Women and Social Movements*, Vol. 2 at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc6I.htm (visited 3/31/06).

234 MacKinnon called Karen Sauvigné: Letter of 1/28/78, Catharine MacKinnon to Karen Sauvigné, in Catharine MacKinnon files.

234 final attempt by Working Women United . . . had been rejected: In re Carmita Wood, App. No. 207, 958, New York State Department of Labor, Unemployment Insurance Appeals Board (October 6, 1975), p. 2, in Catharine MacKinnon files.

234 MacKinnon penned . . . "not energy to appeal": *Labor Pains* 1, no. 1 (August 1975), p. 3, with MacKinnon's marginalia, in Catharine MacKinnon files.

234 paper that she titled: All quotations from MacKinnon's "Sexual Harassment" paper, unless otherwise indicated, are from Catharine A. MacKinnon, "Sexual Harassment of Working Women: A Case of Sex Discrimination," typescript with cover page notation "Catharine A. MacKinnon, Yale Law School, Supervised Analytic Writing [for] Professor Thomas Emerson, Supervisor, Spring, 1976"; this copy, with Emerson's handwritten comments, is in Catharine MacKinnon files. (MacKinnon generously let me review this version of her drafting, marked on its title page as "Tom's copy"; the

library of Yale Law School has a copy without Emerson's notes.) Completion date for this draft, based on footnotes (e.g. to *New York Times* of 8/22/76), seems to have been late summer or early fall 1976. Further references will be cited as MacKinnon, "Sexual Harassment," typescript, 1976.

235 "disadvantagement": MacKinnon, "Sexual Harassment," typescript, 1976, pp. 33, 48, 57–58. (Although MacKinnon used the term *disadvantagement* in her 1976 paper, she now prefers simply *disadvantage*. Catharine MacKinnon, letter to author, 4/2/04.)

235 "has emerged as a response": MacKinnon, "Sexual Harassment," typescript, 1976, p. 31.

235 "How many employers": MacKinnon, "Sexual Harassment," typescript, 1976, p. 13.

235 MacKinnon juxtaposed three legal opinions: MacKinnon, "Sexual Harassment," typescript, 1976; cases are quoted on p. 38. Full citations appear in MacKinnon, *Sexual Harassment*, p. 278.

235 "Old sexism": *Bradwell v. Illinois*, 83 U.S. 130 (1872). Date of opinion in Illinois is from In the Matter of the Application of Myra Bradwell to Obtain a License to Practice as an Attorney at Law, Supreme Court of Illinois, September Term, 1869, as cited in Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge: Harvard University Press, 1998), p. 17.

236 "Old racism": *Loving v. Virginia*, 388 U.S. 1, 3 (1967), which quotes the lower court.

236 "Modern sexism": *State v. Bearcub*, 1 Or. App. 579 (1970), quoted in MacKinnon, "Sexual Harassment," typescript, 1976, p. 38.

237 "Everyone knows" . . . "badges of servitude": *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896), quoted in MacKinnon, "Sexual Harassment," typescript, 1976, p. 34.

238 concept of "suspect classification" had functioned as a substantive classification for blacks: MacKinnon, "Sexual Harassment," typescript, 1976, p. 34.

238 Discrimination against women was acceptable if . . . not "arbitrary": MacKinnon, "Sexual Harassment," typescript, 1976, p. 48.

238 "must be reasonable": *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

239 "that being looked at": MacKinnon, "Sexual Harassment," typescript, 1976, p. 13.

239 "not because she was a woman" . . . "evidence an arbitrary barrier": *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123. Decided 8/9/74 by Judge John Lewis Smith Jr., United States District Court for the District of Columbia.

239 "formal equality": MacKinnon, *Sexual Harassment* (1979), p. 33.

240 "because of the physical impossibility": MacKinnon, "Sexual Harassment," typescript, 1976, pp. 57–58.

240 answer to questions about the Supreme Court's blindness: MacKinnon, "Sexual Harassment," typescript, 1976, p. 59.

241 "turns upon whether the practice or rule": MacKinnon, "Sexual Harassment," typescript, 1976, p. 57.

241 "will any man himself ever be disadvantaged": MacKinnon, "Sexual Harassment," typescript, 1976, p. 59.

241 "separate and subordinate, not equal": MacKinnon, "Sexual Harassment," typescript, 1976, p. 105.

241 "judicial participation in the subordination of blacks": MacKinnon, "Sexual Harassment," typescript, 1976, p. 37.

241 No federal court opinion had used the term *sexual harassment*: The earliest federal case that uses the term *sexual harassment* is apparently (based on Lexis search by author) *Capaci v. Katz & Besthoff*, 472 F.R.D. 71 (E.D. La. 1976), decided 7/31/76. The first use of *sexual harassment* in federal court apparently comes in this paragraph in *Capaci v. Katz & Besthoff*: "The defendant asks this Court to focus upon plaintiff's charges of untoward sexual advances and thereby find that plaintiff's claims

are personal and not shared by other members of the purported class. The Court cannot do this without ignoring the broad class allegations of plaintiff's complaint. Plaintiff's case is not limited to personal sexual harassment grievances."

241 term *sexual blackmail:* Jack Wheeler, bench memo to George E. MacKinnon, 12/16/75, for *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), in George MacKinnon papers.

241 *Barnes* had been scheduled for argument: *Barnes v. Costle*, 561 F.2d 983, 985 (D.C. Cir. 1977), argued 12/17/75, decided 7/27/77.

242 new and expensive machine, called Lexis: For a history by one of its creators, see William G. Harrington, "A Brief History of Computer-Assisted Legal Research," 77 *Law Library Journal* 543 (1984–1985).

242 perhaps the Friday after Christmas in 1975: Most details come from Catharine MacKinnon interview, 4/2/04; from her subsequent review of her 1975 date book; from her emails to author of 4/9/04 and 6/9/05; and from her annotations on fact-checking drafts of 2/25/04 and 8/4/05. In her email of 4/9/04, she said she believed her father recommended the Friday after a holiday as a day when few people would want to use the Lexis machine; in 1975 both Thanksgiving and Christmas came on Thursdays. Her date book shows that she arrived in Washington to visit her parents on the Wednesdays before both holidays and that possible dates for her visits to the courthouse include Friday 11/28/75 and Friday 12/26/75 (as well as Wednesday 12/24/75 and Monday 12/29/75). A week before Thanksgiving Judge Spottswood Robinson, as screening judge, had assigned *Barnes* to the court's "summary calendar" for argument on 12/17/75; see "Confidential Screening Memorandum," of Judge Robinson for *Barnes*, 11/20/75, in George MacKinnon papers. A likely date for a private conference of the three judges, according to an oral history by George E. MacKinnon, is 12/24/75, a date when he recalls the following: "Kitty . . . came down from Yale, and she came in at noon on the last day before Christmas vacation [in 1975]. She was going to stay with us for the holidays. And as she came in, I had just walked out of a conference on *Barnes v. Costle*, which is a sex discrimination case, and we hadn't really settled on the case at the conference." (See George E. MacKinnon interview for the District of Columbia Circuit Oral History Project, 2/18/94. Final copy available from Library of Congress. Raw transcript with annotations by George E. MacKinnon available from Minnesota Historical Society.) Catharine MacKinnon apparently had not seen her father's papers at the Minnesota Historical Society before the author sent her some copies while checking facts for this book. See author's letter to Catharine MacKinnon, 6/9/05, and MacKinnon, email to author, 8/6/05: "wow, this is really fascinating!"

242 screened in advance and assigned to the court's summary calendar: "Confidential Screening Memorandum," of Judge Robinson for *Barnes*, 11/20/75, in George MacKinnon papers.

242 summary calendar—used for cases that the screening judge felt were less important and deserved less time: Interview with Susan Low Bloch, Washington, DC, by email, 7/11/05.

242 not announced in advance: Policy of the court, according to the attorney who argued *Barnes*, Linda Singer, was not to announce the panel in advance of the argument. Singer interview.

242 "that was all he knew": Catharine MacKinnon interview, 3/14/98.

242 nothing came back: Search for *sexual harassment* in federal courts before December 1975 produces nothing. Confirmed by Catharine MacKinnon, letter to author, 4/2/04.

242 Suddenly a young woman in a dark suit: The narrative of MacKinnon's interaction with this woman comes from recollections of Catharine MacKinnon in the form of interviews (particularly 4/2/04), follow-up emails, and annotations by Catharine MacKinnon on fact-checking drafts of 2/25/04 and 8/4/05. Confirming this narrative of MacKinnon handing her law school paper to a young woman who said she worked with Judge Robinson has proved fascinating but difficult. The two women who were Judge Robinson's only clerks in the fall of 1975 are Susan Low Bloch, now a law professor

at Georgetown, and Faith Hochberg, now judge at the United States District Court for the District of New Jersey. In interviews, they could recall neither this meeting in the Lexis room nor working on *Barnes*. (For Hochberg's recollection, see text below at "being so tenacious.") The one woman clerking for Judge Robinson the next year, Ellen Semonoff, believes that either Bloch or Hochberg did some drafting on *Barnes*. By phone, Judge Robinson declined to comment, saying that there was "no harm in asking" but that he made a "firm policy not to discuss work for the court." Efforts to check this narrative—which may never be fully confirmed—included interviews with the following: Judge Spottswood W. Robinson III, Richmond, Virginia, by phone, 6/14/93; Susan Low Bloch (Robinson clerk, 1975–76), Washington, DC, by phone, 3/19/98 and 5/14/98; Faith Hochberg (Robinson clerk, 1975–76), New Jersey, by phone, 3/31/98, with follow-up emails, April 1998; Ellen Semonoff (Robinson clerk, 1976–77), Cambridge, Massachusetts, by phone, 5/6/98; John P. (Jack) Wheeler III (MacKinnon clerk who worked on *Barnes*, 1975–76), New York City, by phone, 8/18/98; Tom Campbell (MacKinnon clerk who worked on *Barnes*, 1976–77), San Jose, California, by email, 6/21–27/05; Barbara Childs Wallace (MacKinnon clerk, 1979–80), Jackson, Mississippi, by phone, 5/5/98; Lynn Bregman (Bazelon clerk, 1975–76), Washington, DC, by email, 3/25–28/98; E. Donald Elliott (Bazelon clerk, 1975–76), New Haven, Connecticut, and Washington, DC, by phone, 4/1/98 and 5/4/98; and David Silberman (Bazelon clerk, 1975–76), Washington, DC, by phone, 3/31/98.

242 woman said she worked with Judge Robinson: This phrasing is based on Catharine MacKinnon interview, 4/2/04: "I remember her saying: I work with Judge Robinson. And I took that to mean his clerk. And if I described to anyone thereafter, I would have said she was Judge Robinson's clerk. But that isn't what she said. She said: I work with Judge Robinson." In a later note to author, 4/17/06, MacKinnon wrote, "She might have said, 'I work with the judges here.' "

243 If somebody is making sexual advances . . . sex discrimination?: Catharine MacKinnon, email to author, 8/6/05.

243 Do you have anything written . . . I don't have a copy: Catharine MacKinnon interview, 3/14/98, and Catharine MacKinnon, email to author, 8/6/05.

243 (in words MacKinnon would long recall as verbatim), "it's got to be more than we've got" . . . "This is my shot": Catharine MacKinnon interview, 3/14/98; MacKinnon, letter to author, 4/2/04.

243 handed to her by her father: Catharine MacKinnon does not know what her father knew about the envelope he brought her. As she put it in one interview, on 4/2/04, "I don't know how it got to my Dad, but my Dad got it to me, and it was in an enclosed envelope. . . . So he just handed back my paper. He said someone's name—and I think it was the name of [his] secretary at the time—said this is for you."

243 Robinson, whom her father . . . often called "Spotts": Catharine MacKinnon interview, 4/2/04.

244 "to learn how to bend the law to the needs of blacks": Kluger, *Simple Justice*, p. 128. I am indebted to *Simple Justice* for much of the background on Judge Spottswood W. Robinson III.

244 turning point in his life . . . idol . . . highest grade-point average: Laura A. Kiernan, "The Fire Still Burns," *Washington Post*, 5/27/81, p. A1.

244 turned away from segregated lunch counters . . . first black judge on the United States District Court for the District of Columbia . . . any federal court of appeals: Laura A. Kiernan, "The Fire Still Burns," *Washington Post*, 5/27/81, p. A1.

244 in the pivotal segregation cases that became *Brown*, Robinson provided that polish . . . first argument: Kluger, *Simple Justice*, pp. 645, 667.

245 extraordinary scholarship . . . "Mr. Footnote": Susan Low Bloch, quoted in Kenneth Karpay, "Waiting for Robinson; Circuit Judge Toils to Clear Backlog," *Legal Times*, 6/22/87, p. 1. When Robinson left active duty on the court, Judge MacKinnon wondered whether he "took all his footnotes with him." Letter of 12/11/91, in George MacKinnon papers.

17: Mechelle Vinson Goes to Trial

246 another feminist lawyer: Most biographical information on and quotations from Barry, unless otherwise indicated, are from Barry interviews and Patricia J. Barry, letter to author, 9/24/05.
246 "Born a feminist": Ludwic interview.
247 "looked like a starlet": Barry interviews.
247 "cavalierly" . . . "much less cavalier toward *Hoyt*": Supreme Court transcript of *Edwards v. Healy*, 421 U.S. 772 (1975), argued 10/16/74.
248 "Oh, is this is the way": Barry interviews.
248 chemist from India: *Kulkarni v. Alexander*, 662 F.2d 758 (D.C. Cir. 1978).
248 "You're the best attorney I've ever seen": Barry interviews.
248 call from an attorney named John Marshall Meisburg: Barry interviews.
248 Meisburg, who had spent most of his career in government: Meisburg interview.
248 "He had said" . . . lawyer with a totally different style: Vinson interview.
248 friends serve their side's subpoenas: Patricia J. Barry, letter to author, 9/24/05.
249 only law book on the subject—*Sexual Harassment of Working Women*: In Farley, *Sexual Shakedown*, pp. 125–146; Chapter 7 is called "The Law: Civil Remedies." After describing the few existing cases, it relies on a law professor named John J. Pemberton Jr. to predict briefly (pp. 145–146) where the law will go. He says that a long-range solution will occur when there are "a lot more women lawyers to take these cases."
249 some of it went to Professor Nadine Taub: Interview with Nadine Taub, Monticello, New York, 7/10/94; Nadine Taub, "Memorandum in Opposition to Defendant Company's Motion to Dismiss Plaintiff's Title VII Claim," *Tomkins v. Public Serv. Elec. & Gas*, 422 F. Supp. 553 (D. N.J. 1976), date obscured but apparently November 1976, in files of Nadine Taub as of 7/10/94.
249 Professor Emerson . . . no theoretical opposition: MacKinnon, "Sexual Harassment," typescript, 1976.
249 paper past 230 pages: Thomas Emerson, handwritten notes for Catharine MacKinnon, 7/21/77 (based on related document), in Catharine MacKinnon files, on her typescript through p. 237.
249 suggestion by one of her political science professors, Robert Dahl: Catharine MacKinnon, letter to author, 4/2/04.
249 secretary finally returned the manuscript: Catharine MacKinnon interviews.
249 last weeks of 1977, MacKinnon signed a contract: Catharine MacKinnon, letter to Karen Sauvigné, 12/31/77, in Catharine MacKinnon files.
249 "the big case in the sky": Barry interviews.
250 year would pass: Patricia J. Barry, letter to Mechelle Vinson, 10/14/80, in Barry files: "Enclosed is a retainer agreement. . . . I don't think we reduced any agreement to writing."
250 In April of 1976, Diane Williams had won: *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), decided 4/20/76.
250 "a federal judge held that sexual advances": MacKinnon, *Sexual Harassment* (1979), p. 63.
250 "Judge Richey called up" . . . "Well, that's a big relief": Catharine MacKinnon interview, 4/2/04, and Catharine MacKinnon, letter to author, 4/24/06. Judge MacKinnon linked a meeting with Judge Richey to Catharine MacKinnon's creation of *Sexual Harassment of Working Women*, but on at least two occasions he remembered incorrectly that Richey had been a judge on the *Vinson* case. See George E. MacKinnon interview for the District of Columbia Circuit Oral History Project, 2/18/94. Final copy available from Library of Congress. Raw transcript with annotations by George E. MacKinnon available from Minnesota Historical Society. See also Judge MacKinnon, letter to Judge Charles Richey, 1/17/95, in George MacKinnon papers.

250 decision in *Barnes*: *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), argued 12/17/75, decided 7/27/77.

250 *Barnes* had followed a long path: Most of the narrative of *Barnes* comes from interviews with clerks and from documents preserved in the George MacKinnon papers. The Bazelon papers in the Biddle Law Library of the University of Pennsylvania Law School apparently do not contain information on *Barnes* (phone request by author, 3/17/98). Judge Robinson's papers are not available, although Howard University has requested them in the past, according to Joellen ElBashir, Curator of Manuscripts, Howard University (phone request by author, 6/8/06).

250 on December 17, 1975, the panel split: The panel seems first to have agreed on a technicality and then split on the question of discrimination, according to typed notes (with no indication of author) dated 12/17/75 for judges' conference following oral argument for *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). Before describing the split, the notes state agreement ("It was agreed . . .") on the preliminary issue of whether to await a decision from the Supreme Court in a different case that concerned a technical question: Were federal employees such as Paulette Barnes, who had been reviewed in a Civil Service process before taking a case to district court, entitled to a new trial (*trial de novo*) in district court that could include new evidence? After stating agreement to let the Supreme Court resolve this question (as it eventually did, in favor of employees such as Barnes), the typed notes for the three-judge panel continue, "we will take up the entire case later after more consideration as to the arguments. Judge Robinson leaned to reverse and Judges Bazelon and MacKinnon leaned to affirm with the latter two being cognizant that further analysis might be helpful." Robinson's intention to reverse on grounds that Barnes suffered discrimination—thus apparently splitting the panel—is stated more fully by Judge MacKinnon in what seem to be his handwritten notes on the judges' conference, which begin, "SR [Spottswood Robinson] would reverse. If he was forcing men [a reference to a challenge by Judge Bazelon, at the start of oral argument, when Bazelon asked what if a man were forcing sex not on a woman but on a man] SR said that would still be sex discrimination. SR said it did not depend on stereotype. Hold *another conference* [emphasis by underlining in original]." George MacKinnon papers. As of 1/28/76, a second conference evidently had not been held, because Judge Bazelon concludes his note stating reluctance to find that Barnes had suffered sex discrimination ("I am most reluctant to elevate this plainly unconscionable conduct to the level of 'sex discrimination.'") with the following paragraph: "My recollection of our conference is that your tentative views were less tentative than mine. I think it would be useful to air them either by memorandum or at a second conference, before the opinion is assigned. Please advise me how you wish to proceed." Judge Bazelon, memo to Judges George E. MacKinnon and Spottswood Robinson, 1/28/76, in George MacKinnon papers. As of 3/17/76, a second conference still seems not to have occurred (Judge MacKinnon, memo to Robinson and Bazelon, 3/17/76, in George MacKinnon papers), and on 3/19/76, without any indication that a second conference has occurred, Judge Robinson sends a memo that he has begun "researching the problems presented by this case" (Judge Robinson, memo to MacKinnon and Bazelon, 3/19/76, in George MacKinnon papers).

250 "discrimination here" . . . "only imposed on some women" . . . "*Geduldig v. Aiello*" . . . "I question . . . whether it is sex discrimination": Handwritten notes of Judge MacKinnon dated 12/17/75, written during oral argument that day for *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). George MacKinnon papers.

251 MacKinnon, whose nomination by Richard Nixon . . . resist the liberalism of judges like Bazelon: "Let George Do It," *Legal Times*, 5/7/90.

251 "nothing more than": Judge Bazelon, memo to Judges MacKinnon and Robinson, 1/28/76, in George MacKinnon papers.

251 a memo restating his belief . . . "a better job": Judge MacKinnon, memo to Robinson and Bazelon, 3/17/76. In a letter of 5/29/85, MacKinnon recalled that because he and Bazelon were having doubts that "any theory could support a finding of gender based 'sex discrimination'" in *Barnes*, "we assigned the opinion" to Robinson. Letter of George E. MacKinnon to Prof. Kenneth Culp Davis, 5/29/85. All are in George MacKinnon papers.

251 "hopefully" would reply within two weeks: Memo from Judge Robinson, 3/19/76, in George MacKinnon papers.

251 clerks came to believe: Semonoff interview.

251 need nine months: "Proposed opinion" by Judge Robinson, 12/16/76, in George MacKinnon papers.

251 Of their five clerks, three were women: Clerking for Robinson were Faith Hochberg and Susan Low Bloch; for Bazelon were Donald Elliott, Lynn Bregman, and David Silberman (whose wife, Ellen Semonoff, clerked the next year for Robinson). The clerk who recalls Bazelon asking about clerks' sexual harassment is Elliott. Interviews with E. Donald Elliott, New Haven, Connecticut, and Washington, DC, by phone, 4/1/98 and 5/4/98.

251 MacKinnon had only male clerks: Clerking for him were Jack Wheeler and Mark Peterson. Interview with John P. (Jack) Wheeler III, New York City, by phone, 8/18/98. Although Wheeler could not recall working on *Barnes*, his bench memo of 12/16/75, the day before oral argument, is in George MacKinnon papers. That memo expressed doubt that what Wheeler called "sexual blackmail" was covered by Title VII, but urged further analysis of the legislative history.

252 he conferred with his secretary . . . let one clerk know: Interview with Barbara Childs Wallace, Jackson, Mississippi, by phone, 5/5/98.

252 In contrast, if Judge Robinson had doubts . . . his clerks could not recall hearing them: Semonoff interview; interview with Faith Hochberg, New Jersey, by phone, 3/31/98; interviews with Susan Low Bloch, Washington, DC, by phone, 3/19/98 and 5/14/98.

252 One of his female clerks . . . not give her a ride home . . . she understood: Semonoff interview.

252 what she saw as an odd role . . . "go sit with" . . . "work with": Semonoff interview. "I wouldn't have done it [talked to another judge about a case] without Judge Robinson knowing about it," she recalled. "I was pretty straight."

252 "proposed opinion": Quotations from this opinion are from "Proposed opinion" by Judge Robinson, 12/16/76, in George MacKinnon papers.

253 "your eloquent opinion": Memo from Judge Bazelon to Judges Robinson and MacKinnon, 1/17/77, in George MacKinnon papers.

253 "Abuse of his *position* but not sexual *discrimination*": Italics here represent underlining in Judge MacKinnon's handwriting. Written in margin of p. 6 of "proposed opinion" by Judge Robinson, 12/16/76, in George MacKinnon papers.

253 Judge MacKinnon instructed his clerk to draft a separate opinion, narrower than Robinson's: Memo from Tom Campbell to Judge MacKinnon, 4/13/77, in George MacKinnon papers.

253 supervisor should be charged with attempted rape: Oral argument recollection from Singer interview; handwritten note of George E. MacKinnon, undated (but perhaps c. 12/17/75), in George MacKinnon papers.

253 "long association with business": George E. MacKinnon interview for the District of Columbia Circuit Oral History Project, 2/18/94, p. 52 in final copy available from Library of Congress.

253 MacKinnon's opinion: Quotations from this opinion, unless indicated otherwise, are from *Barnes v. Costle*, 561 F.2d 983, 995, 999–1001 (D.C. Cir. 1977) (MacKinnon concurrence). Further references will be cited as Judge MacKinnon *Barnes* concurrence. Language in the published opinion of 7/27/77 is narrower than in the memo from Tom Campbell to Judge MacKinnon, 4/13/77.

254 "Let the master respond": *Black's Law Dictionary*, 6th ed. (St. Paul: West Group, 1990), pp. 1311–1312.

254 If its employee made a sexual advance . . . Master: Judge MacKinnon *Barnes* concurrence, pp. 995–996.

254 promulgated by the American Law Institute: *Black's Law Dictionary*, 6th ed. (St. Paul: West Group, 1990), "Restatement." (The Judge MacKinnon *Barnes* concurrence cites to the Restatement (Second) of Agency (1958), which is a product of the American Law Institute.)

254 woman who lost her job: See "appellant's complaint that her job at the Environmental Protection Agency was abolished because she repulsed her male superior's sexual advances." *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

254 "no suggestion that the sexual harassment": Judge MacKinnon *Barnes* concurrence, p. 995.

254 conclusion might have meant that even though she was discriminated against based on her sex, her employer could not be compelled under Title VII to offer her any relief, such as restoration of her job or lost pay: This observation comes from Catharine MacKinnon, email to author, 8/6/05: "no employer liability for it; it could still be sex discrimination. It's a separate issue."

254 could not be compelled under Title VII to offer her any relief: For a discussion of problem of getting "relief," see Babcock and others, *Sex Discrimination* (1975), p. 413, quoting George Cooper and Harriet Rabb, *Equal Employment Law and Litigation* (New York: Equal Employment Rights Project Columbia Law School, 1972), p. 410, as follows: "All the effort that goes into building a case and proving violations are for naught if an effective remedy is not obtained. . . . This remedial relief is not limited merely to stopping unlawful practices." (And see Babcock and others, p. 422, for paying lost salary.)

254 four exceptions . . . dismissing the first three: Judge MacKinnon *Barnes* concurrence, p. 995: "The first three involve situations where culpability would naturally apply to the principal: '(a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master. . . .' None of these are here relevant."

255 "At the least" . . . "1) posts the firm's (or government's) policy . . . remaining anonymous": Judge MacKinnon *Barnes* concurrence, pp. 1000–1001.

255 "ratified the discrimination" . . . "social patterns": Judge MacKinnon *Barnes* concurrence, p. 1001.

256 most of his dissents eventually gained the support of majorities at the Supreme Court: "Let George Do It," *Legal Times*, 5/7/90. It reports that "according to a study by Rep. Tom Campbell (R-Calif.), a former MacKinnon clerk, some 29 cases in which MacKinnon dissented were taken by the Supreme Court. Of those, 25 were reversed and remanded, three others were reversed in part, and only one was affirmed."

256 They never discussed the decision privately: Catharine MacKinnon, email to author, 8/6/05.

256 "just took a tort approach": Catharine MacKinnon interview, 12/16/90.

256 "one appellate judge" . . . "fundamentally insufficient": MacKinnon, *Sexual Harassment* (1979), p. 165; Judge MacKinnon is named in an endnote, p. 283.

256 "sexual harassment in virtually all cases": MacKinnon, "Sexual Harassment," typescript, 1976. Because the draft of the paper that I rely on for this narrative carries the date "Spring, 1976" and seems to have received revisions as late as September of 1976, it evidently predates Judge Robinson's opinion of 7/27/77 but would not be the version handed to a clerk in late 1975.

256 "was discriminated against, not because she was a woman": *Barnes v. Train*, Civ. No. 1828–73 (D.D.C.) (order of 8/9/74), p. 3; quoted in *Barnes v. Costle*, 561 F.2d 983, 986 (D.C. Cir. 1977).

257 "We cannot accept this analysis": *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

257 "separate and subordinate": MacKinnon, "Sexual Harassment," typescript, 1976, p. 105.

257 several citations, including some relatively obscure cases: Interview with Catharine MacKinnon, by email, 6/16/05. Cases cited both by Catharine MacKinnon in her "Sexual Harassment" typescript (1976) and by Judge Robinson's opinion of 7/27/77 in *Barnes* include (in addition to obvious cases on sexual harassment) *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (1973); *Douglas v. Hampton*, 512 F.2d 976, 981 (1975); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (1973); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234–236 (5th Cir. 1969); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 108 (5th Cir. en banc 1975). Source: comparison by author of Robinson opinion in *Barnes v. Costle* (561 F.2d 983) to MacKinnon's "Sexual Harassment" typescript dated "Spring, 1976," in Catharine MacKinnon files, copy in library of Yale Law School.

257 "marked disadvantage": *Barnes v. Costle*, 561 F.2d 983, 991 (D.C. Cir. 1977).

257 judge who, as she would later say, "got it": Catharine MacKinnon interview, 3/14/98.

257 direct report of the effectiveness of her law school paper in an account by her father: Catharine MacKinnon, emails to author, 8/6/05 and 4/29/08.

257 in 1975, . . . Robinson had expressed doubt: This preliminary discussion could have occurred on or near 11/20/75 when Judge Robinson assigned *Barnes* to the summary calendar (for less important cases). It might have occurred before oral argument (12/17/75) and presumably before discussion in conference (apparently 12/24/75, according to Judge MacKinnon's interview for the District of Columbia Circuit Oral History Project, 2/18/94), at which Robinson apparently contended that Barnes had been subjected to sex discrimination. This timing suggests that a handover of Catharine MacKinnon's paper might have needed to occur not on the Friday after Christmas (12/26/75) but on the Friday after Thanksgiving (11/28/75), a possible date according to her date book: Catharine MacKinnon interview, 4/2/04, and her email of 4/9/04 after she checked her date book.

257 travesty of civil rights: Catharine MacKinnon, email to author, 6/9/05.

257 never seen such a turnaround: Catharine MacKinnon interviews.

257 believed his daughter's work affected the *Barnes* opinion . . . "just walked out of a conference" . . . "the same conclusion": George E. MacKinnon interview for the District of Columbia Circuit Oral History Project, 2/18/94. Final copy available from Library of Congress. He recalls the day that he "just walked out of a conference on *Barnes*" as the "last day before Christmas vacation"; her date book shows that she arrived in Washington from Yale and went to his chambers on the last day before Christmas, Wednesday, 12/24/75. Although I have found no documents showing that *Barnes* (argued 12/17/75) was the subject of a conference a week later (12/24), the dates seem reasonable. A former clerk who recalls hearing the story that Catharine MacKinnon's paper influenced the court on sexual harassment is Barbara Childs Wallace, clerk to Judge MacKinnon in 1979–80. She says, "I have heard a version of that story, and I always have understood that his [Judge MacKinnon's] understanding of sexual harassment and some of the understanding of the District of Columbia Circuit came from something that Kitty had done early on. I can't do anything else other than to confirm that I had heard that story way back in 1979." Interview with Barbara Childs Wallace, Jackson, Mississippi, by phone, 5/5/98.

258 told two friends in confidence: Catharine MacKinnon, letter to author, 4/2/04. See also Catharine MacKinnon, letter to Karen Sauvigné, 12/31/77, in Catharine MacKinnon files.

258 "the basis": Jeffrey Toobin, "The Trouble with Sex," *New Yorker*, 2/9/98, p. 50. He writes, "MacKinnon gave a copy of her paper to a law clerk on the case in the federal appeals court, and, she claims, 'it became the basis of the decision'" in *Barnes* at the Court of Appeals.

258 later that year he died: Eric Pace, "Spottswood W. Robinson 3d, Civil Rights Lawyer, Dies at 82," *Washington Post*, 10/13/98, p. B11.

258 neither of the women who had worked as his clerks: Susan Low Bloch recalls that the clerk on *Barnes* was Faith (Shapiro) Hochberg. Interviews with Susan Low Bloch, Washington, DC, by phone, 3/19/98 and 5/14/98.

258 "teasing me about being so tenacious" . . . "except the vague sense": Interview with Faith Hochberg, New Jersey, by phone, 3/31/98, and follow-up email of 4/6/98.

258 cases whose facts . . . fit the term . . . *quid pro quo*: See, for example, *Henson v. Dundee*, 682 F.2d 897, United States Court of Appeals for the Eleventh Circuit, 8/9/82.

258 Catharine MacKinnon had introduced . . . *quid pro quo* sexual harassment: MacKinnon, "Sexual Harassment," typescript, 1976, p. 15; MacKinnon, *Sexual Harassment* (1979), p. 32. For a similar and earlier use of *quid pro quo*, see Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975), p. 401, "*quid pro quo*—rape in exchange for life."

259 Barnes . . . lost her job: Barnes "lost her job" in the sense that her position was eliminated and she was thus demoted. See opinion by Judge Robinson: "Nor can it be doubted that the action effected a 'discrimination'—a difference in treatment—against appellant [Barnes] vis-à-vis other employees of the Agency, since there is no indication that the position of any other employee of the agency was similarly eliminated." *Barnes v. Costle*, 561 F.2d 983, 989 (D.C. Cir. 1977).

259 No woman had ever won . . . admitted to having slept with her boss: Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), p. 109 and p. 254n18. Further references will be cited as MacKinnon, *Feminism Unmodified*.

259 "personal relationship" . . . "coercive power": Barry interviews.

259 Barry opened her case: Quotations from Barry's opening statement and witnesses' testimony during the trial, unless otherwise indicated, are from *Vinson* DC transcript, 1/21/80.

259 "the situation in which sexual harassment": MacKinnon, *Sexual Harassment* (1979), p. 40.

260 John Meisburg . . . found two women willing to testify: Meisburg interviews; Cochran, *Sexual Harassment*, pp. 60, 66.

260 Malone stated . . . saw that Mr. Taylor "disrespected": *Vinson* DC transcript, 1/21/80, p. 15.

260 "Objection. What's her age" . . . "the environment was ripe": *Vinson* DC transcript, 1/21/80, p. 5.

260 "had big hairy legs" . . . "he would put his hands on my breasts": *Vinson* DC transcript, 1/21/80, p. 21.

260 *pattern and practice* (from the Civil Rights Act of 1964): The language of the Civil Rights Act of 1964 states that "whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice [of employment discrimination] . . . the Attorney General may bring a civil action." As of 3/24/72, an amendment to the Civil Rights Act extended to the EEOC "authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved." Title VII of the Civil Rights Act of 1964, available at www.eeoc.gov/policy/vii.html (visited 5/19/05).

261 *pattern and practice* . . . discrimination against a class of women: Complaint of Margaret Kohn, dated 5/27/71, partly reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 376–377.

261 "To get anywhere in the bank you had to . . . go to bed with him": *Vinson* DC transcript, 1/21/80, p. 30.

261 Malone said, "Yes" . . . "what Mr. Taylor did with this witness": *Vinson* DC transcript, 1/21/80, p. 52.

261 "pattern and practice" . . . "even if he treats them violently": *Vinson* DC transcript, 1/21/80, p. 79.

261 "suggestive comments" . . . read *Penthouse* . . . nude pictures: *Vinson* DC transcript, 1/23/80, 3:50 p.m. session, pp. 15, 16–17, 39, 44–45.

261 "been touching me": *Vinson* DC transcript, 1/28/80, p. 38.

261 "did not go to bed": *Vinson* DC transcript, 1/28/80, p. 8.

262 "Mechelle was not the only victim": Barry interviews.

262 "had a chance to observe this or not": *Vinson* DC transcript, 1/21/80, p. 21.

262 Judge Penn offered Barry the possibility . . . bank said it would object: *Vinson* DC transcript, 1/21/80, pp. 80–81.

262 had run out of funds to pay witness fees: Brief for Mechelle Vinson by Patricia Barry to Court of Appeals, dated 8/14/81, in *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), pp. 39–40.

262 "so humiliated": Barry interviews.

262 "the making of improper sexual advances" . . . "terms, conditions, or privileges of employment": *Bundy v. Jackson*, 19 Fair Empl. Prac. Cas. (BNA) 828, decided 4/25/79, United States District Court for the District of Columbia.

263 Penn's refusal to hear evidence about the environment: In one exchange, he limited testimony from Christine Malone about what he called "the environment" at the bank. See *Vinson* DC transcript, 1/21/80, p. 21. He described such limitations as his refusal to "allow plaintiff to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief." *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), fn1.

263 "Mr. Taylor touching Christina on her back": *Vinson* DC transcript, 1/22/80, p. 33.

263 bitch: *Vinson* DC transcript, 1/22/80, p. 41.

263 drove her to a hotel: *Vinson* DC transcript, 1/22/80, p. 51–53.

263 "indulged in sex": *Vinson* DC transcript, 1/29/80, p. 14.

263 teller named Dorethea McCallum: *Vinson* DC transcript, 1/30/80, pp. 14, 23. Her name appears with variant spellings in court documents. The opinion of the district court, for example, calls her both Dorothy McCallam (p. 7) and Dorethea McCallum (p. 22). I have used the latter here. (The *Vinson* DC transcript says "Dorothea McCallum" early (1/24/80) but "Doretha McCallum" when she testifies (1/30/80).)

263 "did work pretty close . . . very exposive": *Vinson* DC transcript, 1/30/80, p. 14.

263 "a lot of sexual fantasies": *Vinson* DC transcript, 1/30/80, p. 23.

263 "sexually fondling": *Vinson* DC transcript, 1/31/80, 1:45 p.m., p. 19.

263 "low-cut dresses" . . . "extremely tight pants": *Vinson* DC transcript, 1/31/80, 1:45 p.m., p. 14.

263 "Did there come a period" . . . "Well, that has happened": *Vinson* DC transcript, 1/29/80, p. 14.

264 Taylor did not get the chance to explain: *Vinson* DC transcript, 1/29/80, p. 14.

264 Judge Penn issued his opinion: Quotations from the opinion are from *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), decided 2/26/80.

264 Barry scrawled, in oversized letters: This and what she scrawled are from Barry's annotated copy of opinion by Judge Penn, *Vinson v. Taylor*, 2/26/80, in Barry files.

264 "wholesale evidence of a pattern and practice": *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980). Judge Penn's footnote also said that "plaintiff, in her rebuttal, did not seek to offer evidence to establish any pattern or practice by the defendant Taylor."

265 "finding of fact" . . . "If the plaintiff [Mechelle Vinson]": *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

265 Taylor's denial would need to be kept fully in mind by any future reader: See Cochran, *Sexual Harassment*, p. 3 ("The reader is strongly advised to suspend judgment about the particular facts of this case and to treat all disputed facts as unproved") and p. 57 ("Readers should not assume that

any particulars of this story are verified truth and should be aware that the facts of this case, by and large, have never been authoritatively established").
265 "hypothetical finding of fact": Patricia J. Barry, letter to Joan Vermeulen, 6/6/80, in Barry files, including "[Judge Penn] made an inappropriate finding of fact. . . . hypothetical finding of fact." Barry interviews: " 'If there was sex it was voluntary'—that's what drove me to the court of appeals."
265 Her friends disagreed . . . From her boyfriend: Barry interviews.
265 Barry was broke: Patricia J. Barry, letter to Mechelle Vinson, 5/20/81, in Barry files.
265 Her friends had seen her . . . "Why do I have to be in on time" . . . give it up . . . "That judge didn't do his job": Barry interviews.

18: Appeal to a Higher Court

267 one-room apartment—she could no longer afford to rent her office: Barry interviews.
267 Barry requested . . . *in forma pauperis*: Plaintiff's Affidavit in Support of Her Motion for Leave to Appeal in Forma Pauperis, *Vinson v. Taylor*, filed 3/18/80, in files of district court for the District of Columbia.
267 "cannot find this appeal presents a substantial question": *Vinson v. Taylor*, 27 Fair Empl. Prac. Cas. (BNA) 948 (D.D.C. 1980), decided 6/10/80, motion to appeal *in forma pauperis*.
267 "exposed for what that trial showed": Barry interviews.
267 court of appeals ruled that she could proceed to appeal without the transcript: Patricia J. Barry, letter to Mechelle Vinson, 5/8/81, in Barry files.
267 "Unless you can get me $300": Patricia J. Barry, letter to Mechelle Vinson, 5/20/81, in Barry files. As of the end of 1981, according to Barry's records, Vinson's total payment to Barry was $170. Letter, 7/21/91, in Barry files.
268 She got it in late: Barry interviews.
268 typo here and an omission there: Brief for Mechelle Vinson by Patricia Barry to Court of Appeals, dated 8/14/81, in *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985). For typos and omissions, see, for example, pp. 30 and 39–40.
268 "Prior to trial": This and subsequent quotations from Barry's brief are from Brief for Mechelle Vinson by Patricia Barry to Court of Appeals, dated 8/14/81, in *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), pp. 39–40.
268 "Vinson and her counsel were demoralized": In a later interview, Pat Barry acknowledged that witnesses including Malone had also become demoralized. As Barry put it, "I couldn't spend more [to pay for witness fees]. But the real problem was: why would these women want to get on the stand after they've come on once and been so humiliated? They're not gonna come back on rebuttal." Barry interviews.
268 Back when she was beginning her appeal, she wrote for help: Patricia J. Barry, letter to Joan Vermeulen, Working Women's Institute, 593 Park Avenue, New York City, 6/6/80, in Barry files.
269 Barry thought he did a great job. She wished she had done as well: Barry interviews.
269 fell ill . . . surgery: Kenneth Karpay, "Waiting for Robinson; Circuit Judge Toils to Clear Backlog," *Legal Times*, 6/22/87, p. 1.
269 Vinson couldn't find bank jobs . . . enrolled in nursing school but had to drop out: Vinson interview.
269 "Well," . . . "call the court of appeals, Mechelle": Barry interviews.
269 Vinson received a call . . . "the decision" . . . "Oh come on, you're playing" . . . "WE DID IT" . . . "Yes, it's great": Vinson interview.

270 "was not required to grant Taylor" . . . "was not the victim of sexual harassment": *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

270 Robinson had to find a route to steer: *Vinson v. Taylor*, 753 F.2d 141, 144 (D.C. Cir 1985).

270 breakthrough came in March of 1980: "EEOC Interim Interpretive Guidelines on Sexual Harassment," *Daily Labor Report*, 3/11/80, p. E-1, in Working Women files.

270 Eleanor Holmes Norton . . . who wanted to encourage women: Interview with Eleanor Holmes Norton, driving to Hartford, Connecticut, 5/22/05. See also Lester, *Fire in My Soul*, pp. 206–207.

270 "conduct has the purpose": "EEOC Interim Interpretive Guidelines on Sexual Harassment," *Daily Labor Report*, 3/11/80, p. E-1, in Working Women files.

271 "condition of work": MacKinnon, "Sexual Harassment," typescript, 1976, p. 15; MacKinnon, *Sexual Harassment* (1979), p. 32.

271 MacKinnon had not heard about the guidelines . . . generally liked: Interview with Catharine MacKinnon, by email, 8/27/98.

271 appeal for Sandra Bundy: *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1977).

271 "the making of improper sexual advances": This and subsequent quotations from the district court's *Bundy* case and ruling are from *Bundy v. Jackson*, 19 Fair Empl. Prac. Cas. (BNA) 828, decided 4/25/79, United States District Court for the District of Columbia.

272 "Bundy's supervisors did not take": These and other quotations from the court of appeals ruling, unless otherwise indicated, are from *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1977).

272 " 'terms, conditions, or privileges' ": *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971). See also MacKinnon, *Sexual Harassment* (1979), pp. 210–211.

273 "grants an employee": *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1977).

273 "Should women be required" . . . "in order to force" . . . Reprinting the long last sentence: MacKinnon, *Sexual Harassment* (1979), pp. 46–47; *Bundy v. Jackson*, 641 F.2d 934, 945–946 (D.C. Cir. 1977).

274 "victim of a pattern or practice of sexual harassment": *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir 1977), 948 and 953.

274 "was not required to grant Taylor": This and subsequent quotations of the court's opinions are from *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

275 "*Barnes*-type" . . . "*Bundy*-type": *Vinson v. Taylor*, 753 F.2d 141, 146n30 (D.C. Cir. 1985).

275 "This finding leaves us uncertain": *Vinson v. Taylor*, 753 F.2d 141, 145–146 (D.C. Cir. 1985).

275 "Because the relationship was voluntary": *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985).

276 success only rarely (probably less than one chance in 250): See Micheal W. Giles, Virginia A. Hettinger, Christopher Zorn, and Todd C. Peppers, "The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals," *American Journal of Political Science* 51, no. 3 (July 2007): 449–463. The authors report that throughout the 1980s the court of appeals for the District of Columbia never reheard more than 10 cases *en banc* in a year. Nationwide in 1999 (the only full year reported in the article), the authors report that "while the Courts of Appeals decided nearly 27,000 cases after oral argument or submission of briefs in 1999, only 94 cases, less than 1%, were decided en banc in that year." (To be precise, 94 of 27,000 would be .35%.)

277 a "plaintiff's voluntariness": This and subsequent quotations from Bork's dissent are from *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985), 5/14/85, dissent by Judge Bork, circuit judge, with whom Circuit Judges Scalia and Starr join, dissenting from the denial of rehearing *en banc*.

277 testimony about Vinson . . . that the bank had raised on appeal: *Vinson v. Taylor*, 753 F.2d 141, 146n36 (D.C. Cir. 1985).

278 "4,000 federal trial judges instead of some 400": *Tomkins v. Public Serv. Elec. & Gas*, 422 F. Supp. 553 (D.C. N.J. 1976), decided 11/22/76.

278 "Oh boy, here we go": Barry interviews.
278 By a vote of 5 to 4, Barry failed to extend the right of jury trial: *Lehman v. Nakshian*, 453 U.S. 156 (1981), decided 6/26/81.
279 lost with dignity . . . "bad law": Barry interviews.
279 argument (already late): Supreme Court docketing statement for *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) shows at 8/21/85 an "order further extending time" until 8/26 for Barry's response; her response was filed 8/27/85.
279 With Bork's dissent on her mind, she sent out a letter . . . MacKinnon: Patricia J. Barry, letter to Catharine MacKinnon, 8/23/85, in Barry files.
279 financially desperate: Catharine MacKinnon interviews, 10/21–24/90, and Catharine MacKinnon, letter to author, 4/2/04.
279 in the spring of 1974 she began teaching: *Curriculum vitae* for Catharine MacKinnon, email to author, 4/8/04, from Karym Koiffman, assistant to Prof. Catharine A. MacKinnon, University of Michigan Law School. (Earlier, from 1972 to 1973, she was a teaching fellow in political science. From 1977 to 1980, she taught as a lecturer in the Political Science Department and the Women's Studies Program at Yale.)
279 first course in the Women's Studies Program at Yale: Interview with Professor Nancy Cott, New Haven, Connecticut, by phone, 11/16/90.
279 lawyer's collective: *Alexander v. Yale*: Collected Documents from the Yale Undergraduate Women's Caucus and Grievance Committee, 1978, reprinted online as document 26 in "How Did Diverse Activists in the Second Wave of the Women's Movement Shape Emerging Public Policy on Sexual Harassment?" in Sklar and Dublin, *Women and Social Movements*, Vol. 2, at www.alexanderstreet6.com/wasm/wasmrestricted/DP71/doc26.htm (visited 8/16/07).
279 Some claims were declared moot because students had graduated . . . trial judge apparently did not believe: *Alexander v. Yale University*, 631 F.2d 178, 183–184 (2d Cir. 1980).
279 first decision in federal court affirming: *Alexander v. Yale*, 459 F. Supp. 1, 8–9 (D. Conn. 1977), citing *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), including Judge MacKinnon's concurrence (pp. 1000–1001). See also MacKinnon, *Sexual Harassment* (1979), p. 34.
279 law students at Yale began pressing: Catharine MacKinnon interview, 10/18/95, supplemented by Catharine MacKinnon, letter to author, 4/2/04.
280 "didn't have the patience": Interview with Guido Calabresi, New Haven, Connecticut, 11/20/90.
280 cabin . . . Without office: Catharine MacKinnon, letter to author, 4/2/04.
280 agreed to work on *Vinson*: At some point a controversy developed about who would assist Barry as co-counsel at the Supreme Court. Although MacKinnon says that she "took the case as co-counsel" (Catharine MacKinnon, letter to author, 4/2/04, comments on fact-checking draft dated 3/31/04, p. 102), Barry believes she did not ask MacKinnon to be co-counsel (Patricia J. Barry, letter to author, 9/24/05, comments on fact-checking draft dated 8/5/05, p. 23). Barry wrote to Catharine MacKinnon to ask for her assistance (Patricia J. Barry, letter to Catharine MacKinnon, 8/23/85, in Barry files) and then to thank her for her support (Patricia J. Barry, letter to Catharine MacKinnon, 9/7/85, in Barry files). A month later, Barry wrote to an ally (Patricia J. Barry, letter to Judith Kurtz of Equal Rights Advocates, 10/24/85, in Barry files), sending copies to MacKinnon and others, that "John Meisburg will be cocounseling the case." The next day, Barry wrote to Professor Laurence Tribe of Harvard (Patricia J. Barry, letter to Professor Laurence Tribe, 10/25/85, in Barry files), declining his offer of help and saying, "I have however decided I will write the brief." Eventually Barry asked MacKinnon to write the brief (Patricia J. Barry, letter to author, 9/24/05), which she did (Catharine MacKinnon, letters to Patricia J. Barry, 1/13/86 and 1/15/86, in Barry files), conferring with Barry

(Patricia J. Barry, letter to Catharine MacKinnon, handwritten, 2/1/86, in Barry files). MacKinnon notes, in *Feminism Unmodified*, (p. 103), that she represented Mechelle Vinson as co-counsel.

19: To the Supreme Court

281 asking for more help: Patricia J. Barry, letter to Judith Kurtz of Equal Rights Advocates, 10/24/85, in Barry files.

281 *Vinson*: At the Supreme Court the case that had been called *Vinson v. Taylor* in lower courts was renamed *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

281 awful case: Burns interviews, Lenhoff interviews, and Katz interview.

281 "bad woman" . . . "been afforded the opportunity": Burns interviews.

282 *amicae*: Patricia J. Barry, letter to Michael Leach, 12/17/85, in Barry files.

282 prepared the groundwork: "Memorandum of EEOC General Counsel Johnny J. Butler, October 24, 1985," *Daily Labor Report*, 10/30/85.

282 Silberman . . . "one overriding objective": "Memorandum of Commissioner Rosalie Gaull Silberman, October 28, 1985," *Daily Labor Report*, 10/30/85, p. E-1.

282 attack Judge Robinson's opinion to save . . . the guidelines: In her memo of 10/28/85, Commissioner Rosalie Gaull Silberman described her strategy as designed to "strongly support our guidelines on strict liability, explaining that the facts of this case do not fall within the guidelines." She characterized Vinson as someone "engaged in a private relationship that the trial court found to be voluntary until the plaintiff [Vinson] opted out." She argued that "under the narrow set of facts in Vinson . . . the employer should not be held strictly liable."

282 "relies upon what I believe is": "Memorandum of Commissioner Rosalie Gaull Silberman, October 28, 1985," *Daily Labor Report*, 10/30/85, p. E-1.

283 "Controversy Builds At EEOC over Upcoming Sexual Harassment Case": *Daily Labor Report*, 10/29/85, p. A-4. The article reported that "Commissioner Ricky Silberman will be pushing her fellow panel members to adopt the defendant employer's position" and that "the EEOC general counsel's office will argue against Silberman's interpretation."

283 "the elimination of personal slights": Paul Taylor, "Thomas's View of Harassment Said to Evolve; His Record at EEOC Is Source of Dispute," *Washington Post*, 10/11/91, p. A10. According to Jane Mayer and Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* (Boston: Houghton Mifflin, 1994), at p. 368 in an endnote for p. 73, "this transition memo was made available to the Judiciary Committee when Thomas was nominated to the Supreme Court." Further references will be cited as Mayer and Abramson, *Strange Justice*.

283 Hill . . . joined the EEOC in 1982: Mayer and Abramson, *Strange Justice*, pp. 100–101.

283 review the EEOC's official stance on sexual harassment: Anita Hill, *Speaking Truth to Power* (New York: Doubleday, 1997), pp. 77–78.

283 Thomas' hearings for confirmation to the Supreme Court . . . "became even more strained": Hearings before the Senate Committee on the Judiciary (Pt. 4), 102d Cong. 36–41 (1999). Available at http://gos.sbc.edu/h/hill.html.

284 "as though I had been dipped in a vat" . . . "grumbled and muttered": Anita Hill, *Speaking Truth to Power* (New York: Doubleday, 1997), pp. 77–78.

284 commissioners . . . closed session: "Controversy Builds at EEOC over Upcoming Sexual Harassment Case," *Daily Labor Report*, 10/29/85, p. A-4.

284 vote said to be 3–2: "Government Joins Employer's Side in Sex Harassment Case before Supreme Court," *Daily Labor Report*, 12/16/85, p. A-5.

284 Lenhoff heard that staffers . . . had lobbied: Lenhoff interviews.

284 brief . . . against Vinson: The head notes of the Supreme Court opinion list the *Meritor* Brief for the United States as one of the briefs "urging reversal" of the opinion favoring Vinson by Judge Robinson in the court of appeals. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). A different view, one that did not mention opposition to Vinson's case or Robinson's opinion, was later offered by Charles Fried in support of the nomination of Clarence Thomas to the Supreme Court. Fried argued that the brief supported the guidelines of the EEOC and that Thomas had "made a strong and very persuasive argument that sexual harassment is properly considered a form of discrimination," as quoted in Paul Taylor, "Thomas's View of Harassment Said to Evolve; His Record at EEOC Is Source of Dispute," *Washington Post*, 10/11/91, p. A10; see also Mayer and Abramson, *Strange Justice*, pp. 125–126. For a discussion of Charles Fried and the *Vinson* case and of views at the Supreme Court that Fried had become an advocate for the Reagan administration rather than a balanced solicitor general, see Caplan, *Tenth Justice*, pp. 253–254 and 264–267.

284 "ensure that sexual harassment charges do not become a tool": This and subsequent quotations from the government's brief are from Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae by Charles Fried, Solicitor General, et al. to Supreme Court, dated 12/11/85, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), p. 15. Further references will be cited as *Meritor* Brief for the United States.

284 "the naturalness": *Meritor* Brief for the United States, p. 26.

284 "the distinction between invited . . . and flatly rejected sexual advances": *Meritor* Brief for the United States, p. 13.

285 "I really despise": Barry marginalia in *Meritor* Brief for the United States, pp. 22–23, in Barry files.

285 Writing the brief for Mechelle Vinson became, at Barry's request, MacKinnon's task: Patricia J. Barry, letter to author, 9/24/05; Barry interviews.

285 rented cabin: Catharine MacKinnon, letter to author, 4/2/04.

285 Fragments of transcript . . . had been created for the bank: Brief for the American Federation of Labor and Congress of Industrial Organizations . . . As Amici Curiae, at pp. 19–20, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). It states, in part, "The only transcript before the Court of Appeals . . . included those portions of the proceedings the Bank chose to provide. The Bank chose *not* to provide such key transcripts as those covering the testimony of Taylor and selected the cross-examination of Vinson for transcription but not her direct testimony."

285 full transcript would cost up to $3,000 . . . total to $650: Sarah E. Burns, assistant director, Georgetown University Law Center Sex Discrimination Clinic, letter to Joseph F. Spaniol Jr., Clerk of the Court (Supreme Court), 2/10/86, in Barry files.

285 club called Tracks: Katz interview.

285 draft one day . . . another draft: Catharine MacKinnon, letters to Patricia J. Barry, 1/13/86 and 1/15/86, in Barry files.

286 "that, if a sex act" . . . "is a metaphysical riddle" . . . "Yea!" . . . "Catharine!": Barry marginalia on draft brief, 1/15/86, p. 32, in Barry files.

286 "acts of discrimination against other women in the environment" . . . "the daily environment": Brief for Mechelle Vinson by Patricia J. Barry and Catharine A. MacKinnon to Supreme Court, pp. 19–20, dated 2/11/86, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Further references will be cited as Vinson Supreme Court brief.

286 "hit the court" . . . "Don't you think" . . . "I remain optimistic": Patricia J. Barry, letter to Catharine MacKinnon, 2/1/86, in Barry files.

287 MacKinnon's brief: Quotations from the brief, unless indicated otherwise, are from Vinson Supreme Court brief.
287 "finds no facts at all": Vinson Supreme Court brief, pp. 10–11.
287 "generally secretive" . . . "welcomed, desirable, and proper": Brief for Meritor Savings Bank by F. Robert Troll Jr., et. al. to Supreme Court, p. 37, dated 12/11/85, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
287 "sexual activity is special" . . . "render sexual harassment an injury" . . . "Whatever specialness inheres in sex": Vinson Supreme Court brief, pp. 15–18.
288 "seems to be" . . . "If an employer": Vinson Supreme Court brief, pp. 39–40.
288 "once forced" . . . "the vicious paradox": Vinson Supreme Court brief, pp. 44–45.
289 "if you're fucked": Catharine MacKinnon, letter to author, 4/2/04.
289 Georgetown law school to face two days of "moot court": Burns interviews and Katz interview. And see Patricia J. Barry, letter to Catharine MacKinnon, apparently from early 1986, in Barry files: "are you coming to DC on 3/6 to assist me in preparation for oral argument?"
289 Hovering over many of the *amicae*: Karen Malkin, "*Meritor Savings Bank, FSB v. Mechelle Vinson*: A Tale of Litigation," unpublished paper written February 1987 for Gender and the Law Seminar, Professors Susan Deller Ross and Wendy Webster Williams, Georgetown University Law Center. See note 290 concerning "Strategy Tape #2, March 7, 1986" (taped by Sarah Burns at a meeting of *amicae*).
290 "doing a lot of self-sabotaging" . . . "like I didn't have an oral argument": Barry interviews.
290 declined an offer: Patricia J. Barry, letter to Professor Laurence Tribe, 10/25/85, in Barry files.
290 tried arguing on the basis of California law: Katz interview.
290 terrifying: Catharine MacKinnon, letter to Patricia J. Barry, 8/6/87, in Barry files; Katz interview.
290 "mannerisms": Vinson interview.
290 After the moot court, some *amicae* urged that Laurence Tribe should argue: Burns interviews, Katz interview, and Catharine MacKinnon, letter to Patricia J. Barry, 8/6/87, in Barry files: "I continue to be amazed that you do not realize that Larry Tribe's experience and qualifications to argue before the Supreme Court were obviously superior to yours. They were superior to mine. . . . We had a chance for the best possible."
290 talked to her mother . . . asked friends . . . glory and excitement . . . "Mechelle and I would be eternally grateful": Barry interviews.
291 Unnerved . . . another moot court: Patricia J. Barry, email to author, 8/19/05.

20: At the Supreme Court

292 readying herself for a question . . . Barry arrived: Patricia J. Barry, email to author, 8/19/05 ("I came in late with my mother"), and letter to author, 9/24/05 ("I was almost late for *Vinson* because I wanted to document my answer to a question MacKinnon's group had not asked me in moot court and I was certain would be asked").
292 MacKinnon . . . being told by a clerk how to proceed: Catharine MacKinnon, letter to author, 4/2/04.
292 Barry did not see Vinson: Patricia J. Barry, emails to author, 8/19/05 and 9/24/05.
292 Oral argument began, soon after ten o'clock: Quotations from oral arguments, unless indicated otherwise, are from Supreme Court transcript of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), argued 3/25/86, p. 3. Further references will be cited as *Meritor* transcript.
293 "consented": *Meritor* transcript, p. 4.

293 “voluntary”: *Meritor* transcript, p. 6.

293 O’Connor was one of a few women judges who were sufficiently conservative: Attorney General William French Smith presented Reagan with a list that included four women who might be nominated; see Lou Cannon, “When Ronnie Met Sandy,” *New York Times* , 7/7/05, p. A23. For comment by a Justice Department official that “a large number of women who have the required experience do not share the President’s strict constructionist political philosophy,” see David Margolick, “Women Find Bar to Bench a Far Journey,” *New York Times*, 10/17/82, p. 16. See also discussion in Part 5 in the book.

293 classmate whom she had dated . . . Rehnquist: While promoting her book, *Lazy B*, Sandra Day O’Connor told NBC’s *Dateline* that she and Justice Rehnquist dated and “went to a few movies and one thing or another.” See Associated Press, “Justice’s Memoirs Chronicle Youth on Her Family’s Ranch,” 1/27/02, available at http://archive.columbiatribune.com/2002/Jan/020127News029.asp (visited 7/17/05).

293 graduation from law school in 1952 near the top of her class . . . denied work with private law firms: Biskupic, *O’Connor*, pp. 28 and 348n24; Greenburg, *Supreme Conflict*, p. 10.

293 “Mr. Troll”: *Meritor* transcript, p. 7.

293 “tangible job detriment”: *Meritor* transcript, p. 8.

294 “Yes, we do”: *Meritor* transcript, p. 9.

294 women in 1986 constituted fewer than 7 percent of all federal judges: Judith Resnik, “ ‘Naturally’ without Gender: Women, Jurisdiction, and the Federal Courts,” 66 *New York University Law Review* 1682 (1991), Appendix III.

294 “there is something, we submit, very unfair”: *Meritor* transcript, p. 23.

294 “proceeding on a hostile environment theory”: *Meritor* transcript, p. 24.

294 “pattern and practice” . . . “the poison environment”: *Meritor* transcript, p. 24.

294 Justice Powell insisted: For identity of Powell as questioner, I rely on interviews with Patricia J. Barry, Los Angeles, 3/17–19/93. See also Cochran, *Sexual Harassment*, p. 106. For names of questioners I have relied partly on interviews with Pat Barry and Catharine MacKinnon and on audio file “*Meritor Savings Bank v. Vinson*—Oral Argument,” available at www.oyez.org/cases/1980–1989/1985/1985_84_1979/argument (visited 6/9/07); anonymity of justices speaking in oral argument was preserved in official Supreme Court transcripts prior to October 2004.

294 Getting prepared for this question: Patricia J. Barry, letter to author, 9/24/05.

295 “Defendant Taylor has also sexually harassed”: *Meritor* transcript, p. 26.

295 “no mention of environment” . . . “That’s correct, Your Honor”: *Meritor* transcript, p. 26. I have deduced that this question came from Justice Powell based on listening to the audio file “*Meritor Savings Bank v. Vinson*—Oral Argument,” available at www.oyez.org/cases/1980–1989/1985/1985_84_1979/argument (visited 6/9/07); another possibility might be Justice Blackmun.

295 “the daily environment”: *Meritor* transcript, p. 26.

295 “conjure up inside the courtroom” . . . “they stopped their fidgeting” . . . “The angels are certainly blessing us”: Vinson interview.

296 one justice asked: Anonymity of justices speaking in oral argument was preserved in official Supreme Court transcripts prior to October 2004; see “Supreme Court of the United States Argument Transcripts,” available at www.supremecourtus.gov/oral_arguments/argument_transcripts.html (visited 8/16/06). Where I write “one justice,” I have found no clues that make possible a positive identification of the justice.

296 “voluntariness”: *Meritor* transcript, p. 27.

296 “It’s been suggested”: *Meritor* transcript, p. 28.

296 “So you say, then”: *Meritor* transcript, p. 31.
297 “the California Rules of Evidence”: *Meritor* transcript, p. 31.
297 “Miss Barry”: *Meritor* transcript, p. 32.
297 “this case would not make any substantial law” . . . “whether she wore these kinds of clothing”: *Meritor* transcript, pp. 32, 37.
297 “Well” . . . “you don’t have to use that sort of evidence”: *Meritor* transcript, p. 39.
298 “I’m not sure the cases” . . . “Well, Justice Rehnquist”: *Meritor* transcript, pp. 39–40.
298 conducted herself toward her supervisor . . . “what happened between Ms. Vinson and Mr. Taylor”: *Meritor* transcript, pp. 40–41.
298 “then what they’re saying”: *Meritor* transcript, pp. 41–42.
298 “when he was out at the motel” . . . “Like I have the power to hire you”: *Meritor* transcript, pp. 42–43.
299 “It was OK, it’s Justice Marshall”: Barry interviews.
299 “Suppose” . . . “Mr. Taylor was embezzling”: *Meritor* transcript, p. 47.
299 “Mr. Taylor was the bank”: *Meritor* transcript, p. 48.
299 “I thought . . . divine Father”: Vinson interview.
299 “excellent”: Catharine MacKinnon, letter to Patricia J. Barry, 8/6/87, in Barry files.
299 unanimous . . . front-page news: Although the opinion shows Justice William Rehnquist with six votes and a separate concurrence with four votes (and Stevens giving his vote to both opinion and concurrence), newspapers reported the decision as unanimous. See, for example, “The Supreme Court ruled unanimously today that sexual harassment of an employee by a supervisor violates the Federal law against sex discrimination in the workplace.” Stuart Taylor Jr., “Sex Harassment on Job Is Illegal,” *New York Times*, 6/20/86, p. A1. “The Supreme Court, in a unanimous ruling hailed by women’s groups as a major victory, decided yesterday that businesses may be held liable for sexual harassment by supervisors even if the company is unaware of such conduct.” Al Kamen, “Court Rules Firms May Be Liable for Sexual Harassment,” *Washington Post*, 6/20/86, p. A1.
299 “Without question” . . . “when a supervisor sexually harasses”: *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 and 67 (1986), decided 6/19/86.
300 “came as a pleasant surprise” . . . “issued an opinion on our side” . . . only two days: “A Surprise from Justice Rehnquist,” *Washington Post*, 6/20/86, p. A18: “This week, only two days after he [Justice William Rehnquist] was nominated to head the court, an opinion he had written was handed down that gives approval to a broad definition of sexual harassment.”
300 “We all know why Rehnquist wrote the decision”: Barry interviews. Reasons for women’s groups to oppose Rehnquist included his critique of the equal rights amendment in 1970 while he was working as assistant attorney general under Richard Nixon: the ERA could turn “holy wedlock” into “holy deadlock,” and ERA supporters seemed to have “a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes.” William Rehnquist, “ERA Would Threaten Family Unit,” reprinted in *Legal Times*, 9/15/86, p. 4, as cited in Robert C. Post and Reva B. Siegel, “Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act,” 112 *Yale Law Journal* 1943 (2003), p. 1992n146.
300 Vinson seemed to be winning . . . “core question” . . . “I wouldn’t give her a second bite at the apple”: Brennan papers. For an almost complete transcription, see Cochran, *Sexual Harassment*, pp. 110–113, and see p. 117 for observation that Rehnquist’s draft “split the court.”
301 “Finding of voluntariness” . . . Justice Stevens . . . “hostile environment theory” . . . Justice O’Connor . . . “adequate complaint system”: Brennan papers.

301 Rehnquist's draft reached the court on April 22 . . . "Join??? but wait!!": Chief Justice William Rehnquist, "1st DRAFT," 4/22/86, in Marshall papers, with handwritten date and Marshall's annotation on first page.

301 Burger and White . . . "voluntariness" was relevant . . . O'Connor . . . "conduct was relevant": Brennan papers.

302 "strictly liable" . . . "state of the record" . . . "the Court of Appeals erred" . . . "agree with the EEOC" . . . same work by the American Law Institute: *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70–72 (1986).

302 "As I understand the cases" . . . "the Courts of Appeals": Justice John Paul Stevens, letter to Chief Justice William Rehnquist, 4/24/86, in Marshall papers.

303 Marshall and Blackmun were inclined to follow: Justice William J. Brennan Jr., letter to Chief Justice William Rehnquist, 4/24/86, and Justice Thurgood Marshall, letter to Chief Justice William Rehnquist, 5/1/86, both in Marshall papers.

303 "willing to make a sixth vote, but not a fifth one": Justice William Rehnquist, letter to John Paul Stevens, 4/24/86, in Marshall papers.

303 Rehnquist was willing to sacrifice a legal view in order to stay in the majority: For an argument that Rehnquist made a similar sacrifice that kept him in control of an opinion concerning women's rights a few years later, see the comment of Professor Akhil Amar of Yale Law School concerning a case that protected the Family and Medical Leave Act (*Nevada Department of Human Resources v. Hibbs*, 536 U.S. 938 (2002)). "Rehnquist was willing to be the sixth vote, but it's not clear that he would have been the fifth," said Amar, as quoted in Jeffrey Rosen, "Is Rehnquist a Feminist? Sister Act," *New Republic*, 6/16/03. Rosen goes on to argue that control of the opinion allowed Rehnquist, although forced to join the five other colleagues including Sandra Day O'Connor and Ruth Bader Ginsburg who supported the Family and Medical Leave Act, to steer the opinion in a way that would permit curtailment of Congress's future ability to enact civil rights legislation. Rosen notes that Rehnquist's opinion, if accepted in 1978, might have given the Court grounds to overturn the Pregnancy Discrimination Act—a law that (as Rosen does not mention; see Part 2 in this book) had overturned an earlier decision by Rehnquist. Tweaking Rehnquist, Rosen suggests that he "seemed to be channeling Betty Friedan" in his opinion with language that attacks outdated "stereotypes about women's domestic roles" that are "reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men." Rosen does not suggest that the channeling of Friedan might have been part of an effort to keep his voting aligned with O'Connor's on women's issues where he could not win her to his side. Nor does he speculate what language in support of civil rights might have entered a decision written by Ruth Bader Ginsburg, for example, had Rehnquist joined his frequent allies—Scalia, Thomas, and Kennedy—as a losing fourth vote. For discussion of similar tactical maneuvering employed by Chief Justice Warren Burger to control opinions, see Woodward and Armstrong, *Brethren*, p. 70. For brief mention by Chief Justice John Roberts of Rehnquist's willingness to become a sixth vote joining opinions with which he disagreed, see Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (New York: Times Books, 2007), p. 233.

303 Powell: Lewis F. Powell Jr., letter to Chief Justice William Rehnquist, 4/28/86, in Marshall papers.

303 best chance for a fifth vote was apparently Sandra Day O'Connor: See HM [a clerk, apparently Helane L. Morrison], memo to Justice Harry A. Blackmun, 4/29/86, in Blackmun papers, listing judges already favoring the "strict liability approach" (Stevens, Brennan, and Marshall), urging Blackmun to join them, and saying O'Connor "might favor" it.

303 "Please join me": Sandra Day O'Connor, letter to Chief Justice William Rehnquist, 5/8/86, in Marshall papers.

303 Chief Justice Burger joining on May 27: Chief Justice Warren Burger, letter to Justice Rehnquist, 5/27/86, in Marshall papers.

303 May 27 . . . told President Reagan that he wished to resign: David Hoffman, "Reagan Relied on His Instincts," *Washington Post*, 6/18/86, p. A1: "Chief Justice Warren E. Burger's plans to retire came to the attention of the White House late last month when, using former White House counsel Fred F. Fielding, he arranged a meeting with Reagan for May 27, officials said." Thus Rehnquist almost surely knew the chief justice was resigning about a month after he offered to be "a sixth vote" but "not a fifth one" and thus stay in the majority of all components in the decision regarding Mechelle Vinson; Rehnquist may have known far earlier that the position of chief justice was about to become open.

303 Stevens' reservation became a rebuke by Justice Marshall: The clerk who drafted the opinion for Marshall, Jonathan Weinberg, suggests the drafting may have gone to Marshall's chambers based on which justice felt most strongly or "whose chambers had the most free time at a busy point in the calendar." Jonathan Weinberg, email to author, 8/17/07.

303 "circulate a dissent": Justice Thurgood Marshall, letter to Justice William Rehnquist, 5/28/86, in Marshall papers.

303 technically impossible so long as he still voted with the judgment for Vinson. Marshall's first draft, labeled a "concurrence" by his clerks . . . "concurring in the judgment" only . . . clerks know that he was angry: Interview with Jonathan Weinberg, Detroit, by phone, 8/17/07.

304 Joining his narrow concurrence . . . Stevens: Stevens wrote his own concurrence also, saying he did "not see any inconsistency between the two opinions" of Rehnquist and Marshall. Professor Jonathan Weinberg of Wayne State University, who clerked for Marshall, suggests that Stevens may have been attempting, in a complicated tactical maneuver, to signal to lower courts that Marshall's argument advocating absolute liability might not be a minority view and might be acceptable to a majority of the court. Interview with Jonathan Weinberg, Detroit, by phone, 8/17/07.

304 reputation for adjusting his vote in order to control assignment: Woodward and Armstrong, *Brethren*, p. 70.

304 In a front-page headline: Stuart Taylor Jr., "Sex Harassment on Job Is Illegal," *New York Times*, 6/20/86, p. A1.

304 settlement: For discussion of the route to settlement, 8/22/91, see Cochran, *Sexual Harassment*, pp. 122–127.

304 tuition for nursing school . . . never disclose the dollar figure: Vinson interview.

305 nurse, helping victims of abuse: Sheila Weller, "These Women Changed Your Life," *Glamour*, September 2005, pp. 267–268.

305 Sidney Taylor went to jail in 1988 for embezzling: Jay Mallin, "Man Gets Prison Term for Bilking Elderly Woman," *Washington Times*, 4/20/88.

305 Pat Barry went bankrupt in 1988: Barry interviews.

305 MacKinnon in 1990 became a tenured professor: Fred Strebeigh, "Defining Law on the Feminist Frontier: Prof. Catharine A. MacKinnon," *New York Times Magazine*, 10/6/91, p. 28.

Part Five
VIOLENCE (1990–2000)

In this part, I rely on the papers of and interviews with Sally Goldfarb, Victoria Nourse, and Lynn Hecht Schafran, including documents in the files of Legal Momentum in New York City and Washington, DC, and on interviews with members of the National Association of Women Judges, many conducted during the association's twentieth annual conference in St. Louis, 10/10/98. Important primary sources,

particularly interviews and collections of documents, are listed below, with the abbreviations used in the endnotes that follow. Other primary sources and important secondary sources appear with full citations in the endnotes.

Brennan papers	Papers of William J. Brennan Jr., Library of Congress
Brzonkala interview	Interview with Christy Brzonkala, Washington, DC, 1/11/00
Ellerin interview	Interview with Judge Betty Ellerin, New York City, by phone, 8/13/97
Emerson interview	Interview with Ruth Emerson, New Haven, Connecticut, by phone, 8/26/97
Goldfarb interviews	Interviews with Sally Goldfarb, New Jersey, by phone, 3/11/97, and New York City, 5/13/97
Goldfarb-Nourse-Reuss interview	Interview with Sally Goldfarb, Victoria Nourse, and Pat Reuss, Washington, DC, 4/17/97
Jobes interview	Interview with Judge Clarice Jobes, Washington, DC, by phone, 2/4/99
Klain interview	Interview with Ronald A. Klain, Washington, DC, by phone, 6/14/06
Klein interviews	Interviews with Justice Joan Dempsey Klein, St. Louis, Missouri, 10/10/98, and Los Angeles, by phone, 5/3/06
Lederman interview	Interview with Judge Cindy Lederman, St. Louis, 10/10/98
Legal Momentum DC files	Files of Legal Momentum (formerly NOW Legal Defense), Washington, DC, as of 4/18/97
Legal Momentum NY files	Files of Legal Momentum (formerly NOW Legal Defense), New York City, as of 5/13/97
Loftus interview	Interview with Judge Marilyn Loftus, New Jersey, by phone, 7/29/98
MacKinnon interviews	Interviews with Catharine MacKinnon, California, 10/18–21/95
Murray interview	Interview with Judge Brenda Murray, St. Louis, 10/10/98
Neuborne interview	Interview with Helen Neuborne, New York, by phone, 8/6/97
Nourse files	Files of Victoria Nourse as of 8/8/97
Nourse interviews	Interviews with Victoria Nourse, Maryland, by phone, 3/21/97; Washington, DC, 6/4–6/6/97; Maryland, by phone, 9/20/97
Resnik interviews	Interviews with Judith Resnik, New Haven, Connecticut, by phone, 7/18/97, and driving in Massachusetts, by phone, 7/15/06
Schafran files	Files of Lynn Hecht Schafran as of 6/2/97
Schafran interview	Interview with Lynn Hecht Schafran, New York City, 7/6/97
Schroeder interview	Interview with Judge Mary Schroeder, Phoenix, by phone, 7/7/1997
Shapiro interview	Interview with Judge Norma Shapiro, St. Louis, 10/10/98
West interview	Interview with Robin West, New Haven, Connecticut, 9/12/97
Wulf interview	Interview with Mel Wulf, New York City, 3/4/94
Yassky files	Files of David Yassky as of 6/2/97
Yassky interview	Interview with David Yassky, Washington, DC, by phone, 6/2/97

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309 new staffer: Nourse interviews and Goldfarb-Nourse-Reuss interview.
309 only woman lawyer . . . opinion backward: Victoria Nourse, email to author, 9/27/05.
309 Nourse worked so late she fell asleep in the courthouse: Nourse interviews.
309 New York law firms, which tended to trust someone who could cut it with Judge Weinfeld: Nourse interviews.
310 "green or purple": Nourse interviews.

310 But Andover ended the game: Goldfarb-Nourse-Reuss interview and Victoria Nourse, email to author, 9/27/05.

310 Wendy Webster Williams . . . *Sail'er Inn*: See Part 2 in the book.

310 first textbook: First textbook by publication date is Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, *Text, Cases, and Materials on Sex-Based Discrimination*, 1st ed. (St. Paul: West Publishing, 1974). The second is Babcock and others, *Sex Discrimination* (1975). A "collection of reading lists" on women and the law, gathered and copyrighted in April of 1971 by the four *Sex Discrimination* authors, was circulating in typescript at a conference at Yale Law School in December of 1971 when Kay and Ginsburg decided to begin work on what became their text. For reading lists, see "Women & the Law: A Collection of Reading Lists, April 1971" copyright Barbara Bowman [Babcock], Ann Freedman, Eleanor Norton, and Susan Ross (mimeo circulated at conference at Yale Law School, December 1971), in files of Ann E. Freedman as of 6/1/98. For a fine discussion of early textbooks, see Linda K. Kerber, "Writing Feminist Justice: Writing Our Own Rare Books," 14 *Yale Journal of Law and Feminism* 429 (2002).

310 in 1992 would become Dean Kay: Katherine Bishop, "Sweet Victory for Feminist Pioneer at Law School," *New York Times*, 4/3/92, p. A19.

310 Nourse did not go to law school to study women's issues: Goldfarb-Nourse-Reuss interview.

310 Nourse liked research: Nourse interviews.

310 Paul, Weiss . . . "Iran Contra" affair . . . Senate Judiciary Committee: Details on Paul, Weiss's involvement with the Iran Contra investigation, Nourse's experience in Washington, and Nourse's path from Paul, Weiss to the Senate Judiciary Committee including work on *habeas corpus* are from Nourse interviews; see also Arthur L. Liman, *Lawyer: A Life of Counsel and Controversy* (New York: Public Affairs, 1998), p. 300ff.

311 *habeas corpus* : Hall, *Oxford Companion*, pp. 357–378.

312 Klain had an extra task: Nourse interviews and Klain interview.

312 On that committee in 1981 . . . "Damn it" . . . "you kind of expect" . . . part of American culture: Joe Biden, *Promises to Keep: On Life and Politics* (New York: Random House, 2007), pp. 239–240. Further references will be cited as Biden, *Promises to Keep*.

312 Klain read . . . Heinzerling: Klain interview.

312 "Last December": Lisa Heinzerling, "So Rape Isn't Hatred?" *Los Angeles Times*, 5/4/90, p. B7.

313 "This wasn't a hard sell": Klain interview.

313 It did not occur to Klain . . . to ask Nourse: Klain interview.

313 probing the law of rape and violence against women: For a history, much occurring outside of law schools and influential on them, see Brownmiller, *In Our Time*, p. 194ff.

313 Law Library Reading Room: Description and details of the room and Nourse's experience are from author visit, 6/6/97, and Nourse interviews.

313 *hook*: Nourse interviews

314 *Text, Cases, and Materials on Sex-Based Discrimination* . . . 1974: Herma Hill Kay, *Text, Cases, and Materials on Sex-Based Discrimination*, 3rd ed. (St. Paul: West Publishing, 1988), p. ii.

314 textbook . . . had begun planning with Ginsburg in 1971: Interview with Ruth Bader Ginsburg conducted by Deborah L. Markowitz with Susan Deller Ross and Wendy Webster Williams, Washington, DC, 2/24/86 (see Part 1 in the book), saying, "Herma got to me [about creating a textbook] at that Yale conference"; see also "Conference Participants" (mimeo prepared for women and law teaching conference at Yale Law School), date c. December 1971, in files of Ann E. Freedman as of 6/1/98.

314 rape law from seventeenth-century: Vivian Berger, "Man's Trial, Woman's Tribulation: Rape Cases

in the Courtroom," 77 *Columbia Law Review* 1 (1977), p. 3n8, quoting Lord Coke (1628), and p. 10n69, quoting Lord Hale (1646). Further references will be cited as Berger, "Man's Trial."

314 Hale, who died in 1676: "Sir Matthew Hale," *Encyclopædia Britannica Online*, available at http://search.eb.com/eb/article-9038866 (visited 1/11/08).

314 "easily to be made": Matthew Hale, *The History of the Pleas of the Crown* (1736), Vol. 1, p. 635.

314 nineteenth century, state courts embraced . . . the "Lord Hale instruction": For California, see *People v. Rincon-Pineda*, 538 P.2d 247, 252 (1975); in general, see A. Thomas Morris, "Note: The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform," 1988 *Duke Law Journal* 154 (1988), p. 155.

314 "one of the most oftquoted passages": *United States v. Wiley*, 492 F.2d 547 (D.C. Cir. 1973) (Judge David L. Bazelon, concurring). In *Wiley*, Judge Bazelon and another judge voted, against strong dissent by a colleague on a three-judge panel, to overturn a man's sexual assault conviction on the grounds that a twelve-year-old girl's testimony that he attacked her, although it had convinced a jury, lacked sufficient corroboration. A few years later, as narrated in the text of Part 4 in the book, Judge Bazelon required convincing by Judge Spottswood Robinson and by law clerks before he agreed that sexual harassment could constitute sex discrimination. For a discussion of *Wiley*, see Babcock and others, *Sex Discrimination* (1975), p. 843ff., which calls *Wiley* "an example of a judicially created corroboration requirement" (p. 851).

314 1970s did little to protect women from being beaten by their husbands: S. Rpt. 101–545 on S. 2754, "Violence Against Women Act of 1990," 10/19/90, p. 36: "Up until as late as 15 years ago, many jurisdictions refused to arrest and prosecute spouse abusers, even though a comparable assault on the street by a stranger would have led to a lengthy jail term."

314 common-law rules that permitted a husband: Reva B. Siegel, " 'The Rule of Love': Wife Beating as Prerogative," 105 *Yale Law Journal* 2117 (1996), p. 2118.

314 "a switch no larger than his thumb": *State v. Rhodes*, 61 N.C. (Phil. Law) 453 (1868). For the argument that the phrase "rule of thumb" did not originate in such judicial beliefs, see Henry Ansgar Kelly, "Rule of Thumb and the Folklaw of the Husband's Stick," 44 *Journal of Legal Education* 341 (1994). Kelly's article reprints a 1782 caricature of a British judge, nicknamed Judge Thumb, who according to his biographer had asserted that a "husband could thrash his wife with impunity provided that the stick was no bigger than his thumb."

315 found a major article: All quotations describing Estrich's experience and analysis, unless indicated otherwise, are from Susan Estrich, "Rape," 95 *Yale Law Journal* 1087 (1986). Further references will be cited as Estrich, "Rape" (1986).

315 working toward tenure . . . risky: Mary Battiata, "Susan Estrich and the Marathon Call," *Washington Post*, 10/16/87, p. D1.

315 "Eleven years ago": Estrich, "Rape" (1986), p. 1087.

315 "Now they were on my side": Estrich, "Rape" (1986), pp. 1087–1088.

316 longer than Ruth Bader Ginsburg's 116-page textbook: Estrich, "Rape," has count of 61,699 words in Lexis citation; Ruth Bader Ginsburg, *Text, Cases, and Materials on Constitutional Aspects of Sex-Based Discrimination* (St. Paul: West Publishing, 1974), with word estimate by author.

316 force and . . . consent: Estrich, "Rape" (1986), p. 1093.

316 "seized his victim": Estrich, "Rape" (1986), p. 1106, citing *Mills v. United States*, 164 U.S. 644 (1897).

316 "More force is necessary": Estrich, "Rape" (1986), pp. 1107–1108, quoting *Mills v. United States*, 164 U.S. 644 (1897).

316 Lest she be accused: Estrich, "Rape" (1986), p. 1107n47.

316 "a psychologist conducting": Estrich, "Rape" (1986), p. 1116, quoting *People v. Evans* 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (Sup. Ct. 1975), aff'd, 55 A.D. 2d 858, 390 N.Y.S.2d 768 (1976).

317 "So bachelors" . . . "Abominable Snowman": *People v. Evans*, 85 Misc. 2d 1088, 1095; 379 N.Y.S.2d 912, 922 (Sup. Ct. 1975), aff'd, 55 A.D. 2d 858, 390 N.Y.S.2d 768 (1976).

317 "been involved": Estrich, "Rape" (1986), p. 1108, discussing *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984).

317 "blocked her path" . . . "asked her if she was 'ready'": Estrich, "Rape" (1986), p. 1108, discussing *State v. Alston*, 310 N.C. 399, 401–403; 312 S.E.2d 470, 471–473 (1984).

317 appeals court agreed: Estrich, "Rape" (1986), p. 1108, citing *State v. Alston*, 61 N.C. App. 454, 300 S.E.2d 857 (1983), rev'd, 310 N.C. 399, 312 S.E.2d 470 (1984).

318 "her testimony provided" . . . "The victim did not 'resist'": Estrich, "Rape" (1986), p. 1108, citing *State v. Alston*, 310 N.C. 399, 408; 312 S.E.2d 470, 476 (1984).

318 hitting her—or threatening to change the look of her face—had to be part of actually forcing sex: *State of North Carolina v. Edward Alston*, 310 N.C. 399, 408–409 (1984).

318 "Hers is the reaction of 'sissies'": Estrich, "Rape" (1986), p. 1111.

318 proving force . . . proving non-consent: Estrich, "Rape" (1986), p. 1121.

319 "afraid enough": Estrich, "Rape" (1986), p. 1101.

319 "I was trying all the time": Estrich, "Rape" (1986), p. 1122.

319 "Not only must there be" . . . "must be the most vehement": Estrich, "Rape" (1986), p. 1123, quoting *Brown v. State*, 127 Wis. 193, 199; 106 N.W. 536, 538 (1906).

319 "Medical writers insist": Estrich, "Rape" (1986), p. 1123, quoting *Brown v. State*, 127 Wis. 193, 199–200; 106 N.W. 536, 538 (1906).

320 The consent standard for rape shifted . . . to *earnest* or sometimes *reasonable* resistance: Estrich, "Rape" (1986), p. 1099.

320 "earnest resistance" . . . "the victim's pleas": Estrich, "Rape" (1986), pp. 1124–1125, citing *State v. Lima*, 2 Hawaii App. 19, 624 P.2d 1374 (1981), rev'd., 64 Hawaii 470, 643 P.2d 536 (1982).

320 isolated house: Estrich, "Rape" (1986), pp. 1116–1117.

320 "the extent of her ability at the time": Estrich, "Rape" (1986), p. 1125, citing *Goldberg v. State*, 41 Md. App. at 68, 395 A.2d at 1219.

320 by 1980 . . . most states had made some attempt to reform their rape laws: Estrich, "Rape" (1986), p. 1133.

320 Model Penal Code: See Estrich, "Rape" (1986), p. 1134. See also Berger, "Man's Trial," p. 7n44.

320 Model Penal Code. Begun in the 1950s: Roswell B. Perkins, "Herbert Wechsler December 4, 1909–April 26, 2000," *ALI Reporter*, Spring 2001, available at www.ali.org/ali/R2303_memorial.htm (visited 1/9/08). See also Linda R. Hirshman and Jane E. Larson, *Hard Bargains: The Politics of Sex* (New York: Oxford University Press, 1998), pp. 185–187.

320 American Law Institute—a members-only assembly of judges, lawyers, and scholars: American Law Institute, available at www.ali.org (visited 1/9/2008).

320 Estrich's discussion of the Code became an important reference: Nourse interviews.

321 drafters and commentators, all male for its section on "Sexual Offenses": The four members of the "Reportorial Staff for Model Penal Code" were Chief Reporter, Herbert Wechsler, Columbia University School of Law; Reporter, Louis B. Schwartz, University of Pennsylvania Law School; Associate Reporters, Morris Ploscowe, New York, New York, and Paul W. Tappan, New York University. Of the five members of the "Reportorial Staff for Revision of the Commentaries," one was a woman, Professor Malvina Halberstam, Cardozo School of Law, who did not work on the section on "Sexual Offenses." For guidance the American Law Institute also designated fifty-four more consultants and

advisors, including physicians and a professor of English; all were male. See "Model Penal Code and Commentaries," available at www.ali.org/ali/stu_mod_pen.htm (visited 1/9/08).

321 "avoid making the imposition-consent inquiry entirely on a subjective basis" . . . three rules: Estrich, "Rape" (1986), p. 1136ff.

321 must be corroborated: Model Penal Code of 1980, quoted in Estrich "Rape," p. 1135n144. See also "Corroboration Gone Amok: The New York Experience," in Babcock and others, *Sex Discrimination* (1975), p. 853ff.

321 beyond the British Common Law, which had not explicitly required: Estrich, "Rape" (1986), p. 1137.

321 "only a particular implementation of the general policy" . . . "skew resolution": Model Penal Code, quoted in Estrich, "Rape" (1986), p. 1138.

321 pressure on the drafters . . . who helped shape the Code's view of sex, "simply following" . . . "uncorroborated testimony of a strumpet": Linda R. Hirshman and Jane E. Larson, *Hard Bargains: The Politics of Sex* (New York: Oxford University Press, 1998), pp. 187–191, 204; William M. Freeman, "Ex-Magistrate Ploscowe Dies; Criminal-Law Expert Was 71," *New York Times*, 9/22/75, p. 36.

321 Ploscowe, a New York magistrate and adjunct associate law professor at NYU: Morris Ploscowe, "Sex Offenses," 25 *Law and Contemporary Problems* 217 (1960).

321 demanded corroboration *only* for rape and sexual assault: Estrich, "Rape" (1986), p. 1137.

321 Although no state law had required prompt complaint . . . within one month: Estrich, "Rape" (1986), p. 1139n164.

322 "The requirement of prompt complaint" . . . "fear that unwanted pregnancy": Model Penal Code, quoted in Estrich, "Rape" (1986), pp. 1139–1140.

322 "to evaluate the testimony": Model Penal Code, quoted in Estrich, "Rape" (1986), p. 1135n144.

322 "the woman's attitude may be deeply ambivalent": Model Penal Code, quoted in Estrich, "Rape" (1986), p. 1136.

322 "no need to cite any authority whatsoever": Estrich, "Rape" (1986), p. 1136n150.

323 "Dean Wigmore": See, for example, Berger, "Man's Trial," p. 9n67.

323 In 1904 . . . published the first volumes: "John Henry Wigmore," *Encyclopædia Britannica* (2005), available at http://search.eb.com/eb/article?tocId=9076953 (visited 2/23/05).

323 dean of Northwestern . . . *Wigmore on Evidence*: "Wigmore on Evidence, Vols. 1 and 1A, Tillers Revision," 70 *American Bar Association Journal* 90 (June 1984).

323 Wigmore instructed . . . "unchastity": Berger, "Man's Trial," p. 16 (for three ways offered by Wigmore to prove "unchastity," including reputation).

323 efforts of feminists beginning in the 1970s: See Berger, "Man's Trial," p. 3n12, for discussion of the first "total rape law reform," by nonlawyers in the Michigan Women's Task Force on Rape; and see p. 32ff. for a discussion of "rape shield" laws. For a proposed shield, see Anthony Amsterdam and Barbara Babcock, "Proposed Position on Issues Raised by the Administration of Laws against Rape," Memorandum of the ACLU of Northern California, April 1974, reprinted in Babcock and others, *Sex Discrimination* (1975), pp. 840–842.

323 most states had taken action to modernize their rape laws: Estrich, "Rape" (1986), p. 1133.

323 "psychic complexes are multifarious" . . . no rape case should go to trial until: Estrich, "Rape" (1986), p. 1127n125.

324 partial revision of *Wigmore on Evidence* in 1970 by Professor James H. Chadbourn: Estrich, "Rape" (1986), p. 1127n125, and "James Chadbourn, Retired Professor, Dies of Cancer," *Harvard Crimson Online*, 9/30/82, available at www.thecrimson.com/article.aspx?ref=238265 (visited 5/7/06).

324 classic elaboration, cited by the Model Penal Code and courts . . . 1952 article in the *Yale Law Jour-*

nal: Estrich, "Rape" (1986), p. 1090n6, citing "Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 *Yale Law Journal* 55 (1952). See also American Law Institute, *Model Penal Code and Commentaries* (Philadelphia: The Institute, 1980), p. 80.

324 writing anonymously, as was the custom: Anonymity has been traditional for students writing law review "notes," including some of great length such as the highly influential "Note, Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969).

324 "woman's need for sexual satisfaction" . . . "fairness to the male": Estrich, "Rape" (1986), p. 1129n130, quoting "Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 *Yale Law Journal* 55 (1952), pp. 67–68.

324 "Although a woman may desire": Estrich, "Rape" (1986), p. 1128n127, quoting "Note, The Resistance Standard in Rape Legislation," 18 *Stanford Law Review* 680 (1966), p. 682n6.

325 "stories of rape are frequently lies or fantasies": Estrich, "Rape" (1986), p. 1138n157, quoting "Note, Corroborating Charges of Rape," 67 *Columbia Law Review* 1137 (1967), pp. 1137–1138.

325 "about women's rape fantasies" . . . "A man engages in sex": Estrich, "Rape" (1986), pp. 1140–1141.

325 "To examine rape": Estrich, "Rape" (1986), p. 1090.

325 first woman president of the *Harvard Law Review* . . . clerking at the Supreme Court . . . Kennedy's presidential attempt . . . Mondale's presidential campaign: Mary Battiata, "Susan Estrich and the Marathon Call," *Washington Post*, 10/16/87, p. D1; Bella Stumbo, "Dukakis Aide Estrich," *Los Angeles Times*, 6/4/88, p. 1.

325 to Nourse's disappointment: Nourse interviews.

326 before publication . . . heard criticism: Estrich, "Rape" (1986), p. 1182: "If we are not at the point where it is appropriate for the law to presume nonconsent from silence, and the reactions I have received to this Article suggest that we are not . . ."

326 "the criminal law ought to say" . . . "For the present": Estrich, "Rape" (1986), p. 1182.

326 "conquest by con job": Estrich, "Rape" (1986), p. 1116, quoting *People v. Evans* 85 Misc. 2d 1088, 1095; 379 N.Y.S.2d 912, 920 (Sup. Ct. 1975), aff'd, 55 A.D. 2d 858, 390 N.Y.S.2d 768 (1976).

326 as if he had gone after the college student's money: For an earlier discussion along similar lines, see Berger, "Man's Trial," p. 26: "A man who flashes a roll of hundred dollar bills is also probably courting trouble, yet no one suggests that he cannot later cry, 'I was robbed.' "

326 "I am arguing that 'consent' ": Estrich, "Rape" (1986), p. 1182.

326 Estrich was making recommendations for *state* laws: Estrich, "Rape" (1986), p. 1182.

327 *Duke Law Journal* of 1988: A. Thomas Morris, "Note: The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform," 1988 *Duke Law Journal* 154 (1988).

327 Arkansas in 1973: "Such a charge": *Williams v. State*, 254 Ark. 940, 943, 497 S.W.2d 11, 13 (1973), quoted in A. Thomas Morris, "Note: The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform," 1988 Duke Law Journal 154, 155n5 (1988).

327 California in 1974: "A charge such": California Jury Instructions as of 1974, quoted in *People v. Rincon-Pineda*, 538 P.2d 247, 252 (1975).

327 Idaho in 1978: "A charge such": *State v. Smoot*, 99 Idaho 855, 863, 590 P.2d 1001, 1009 (1978), quoted in A. Thomas Morris, "Note: The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform," 1988 Duke Law Journal 154, 155n5 (1988).

327 California Supreme Court had unearthed: *People v. Rincon-Pineda*, 538 P.2d 247 (1975).

327 whether a girl so young . . . allowed to testify: *People v. Rincon-Pineda*, 538 P.2d 247, 254 (1975).

327 "It is true rape is a most detestable crime": *People v. Rincon-Pineda*, 538 P.2d 247, 254 (1975), quoting Matthew Hale, *The History of the Pleas of the Crown* (1736), Vol. 1, p. 635.

328 The sleuthing into Hale conducted by the California court . . . "over half of the states allow the cautionary instruction" . . . activists should go after state legislatures: A. Thomas Morris, "Note: The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform," 1988 *Duke Law Journal* 154 (1988).

328 volumes too obscure to be reprinted: Nourse interviews; author's search in Lexis for *Florida Law Review*, 8/24/97.

328 series of talks prepared for . . . "Florida Supreme Court Gender Bias Study Commission": Edward P. Mullins, "Acknowledgments," 42 *Florida Law Review* 45 (1990), before p. 1.

328 "in which a state supreme court task force": Lynn Hecht Schafran, "Gender and Justice: Florida and the Nation," 42 *Florida Law Review* 181 (1990).

328 marital rape exemption—the law's ancient rule: Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," 88 *California Law Review* 1373 (2000), p. 1392ff.

328 definition of rape . . . "A male who has": Estrich, "Rape" (1986), p. 1135n143.

329 "If you can't rape your wife, who can you rape?": See, for example, Michael D. A. Freeman, " 'But If You Can't Rape Your Wife, Whom Can You Rape?': The Marital Rape Exemption Re-examined," 15 *Family Law Quarterly* 1 (1981).

329 "The so-called marital rape exemption" . . . "the marital rape exemption denies": Robin West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment," 42 *Florida Law Review* 45 (1990) 45–51, 63–71. Further references will be cited as West, "Equality Theory."

329 clearly not rational . . . this particular irrational distinction: West, "Equality Theory," pp. 45–51, 63–71.

329 State courts were moving slowly: Senate Committee on the Judiciary, *The Violence Against Women Act of 1991*, 102d Cong., 1st sess., 1991, S. Rep No. 197, p. 45n50: "As of 1990, seven states still do not include marital rape as a prosecutable offense, and an additional 26 states allowed prosecutions only under restricted circumstances." Further references will be cited as Senate Judiciary, *VAWA of 1991*.

330 Judge Sol Wachtler: West, "Equality Theory," pp. 45–51, 63–71; *People v. Liberta*, 64 N.Y.2d 152 (1984).

330 Judge Wachtler's opinion: *People v. Liberta*, 64 N.Y.2d 152, 158–160 (1984).

330 "husband cannot be guilty": *People v. Liberta*, 64 N.Y.2d 152, 162 (1984), citing Matthew Hale, *The History of the Pleas of the Crown* (1736), Vol. 1, p. 629.

330 moved New York into a progressive minority: *People v. Liberta*, 64 N.Y.2d 152, 163n6 (1984).

330 majority of states continued, by a wide variety of legal means: West, "Equality Theory," p. 46n6.

330 if a man merely cohabited with a woman, he could gain protection from charges of rape: West, "Equality Theory," p. 48n11; West lists Connecticut, Kentucky, Montana, New Mexico, and Pennsylvania.

330 language of the Model Penal Code . . . "voluntary social companion": Estrich, "Rape," p. 1135n143.

330 a few states had also created a form of date-rape protection: "Note: Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?" 117 *Harvard Law Review* 234 (2004), at n15; the note lists Delaware, Hawaii, Maine, and West Virginia.

330 "voluntary social companion": Joseph R. Biden Jr., "Congress and the Courts: Our Mutual Obligation," 46 *Stanford Law Review* 1285 (1994), n102.

330 most persistent . . . law in force in the 1990s, was Delaware: Todd Spangler, "Senator Takes Aim at

Out-of-Date Rape Statute Still on the Books," *Daily Record* (Baltimore), 9/24/97, p. 24; Deborah W. Denno, "Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced," 1 *Ohio State Journal of Criminal Law* 207 (2003), p. 210; "Note: Acquaintance Rape and Degrees of Consent: 'No' Means 'No,' but What Does 'Yes' Mean?" 117 *Harvard Law Review* 234 (2004), at n15.

330 hook the attention of . . . Nourse's boss: Nourse interviews.

330 Forget going after the federal courts: West, "Equality Theory," pp. 50–51.

331 Robin West seemed to be speaking directly: Nourse interviews.

331 "Whether or not the U.S. Supreme Court": West, "Equality Theory," p. 76.

331 "equal protection of the laws" . . . section 1 as the goal but section 5 as the means: West, "Equality Theory," p. 52.

331 Civil Rights Act of 1871: Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988), p. 458ff. Further references will be cited as Foner, *Reconstruction*. See also *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 345 (1993): "The Reconstruction Congress enacted the Civil Rights Act of 1871, also known as the Ku Klux Act (Act) . . . to combat the chaos that paralyzed the post-War South."

331 Civil Rights Act of 1875: Foner, *Reconstruction*, p. 555ff.

332 A Married Women's Privacy Act . . . "guarantee protection": West, "Equality Theory," p. 76.

332 right to privacy: Much of this narrative relies on Garrow, *Liberty and Sexuality*, which, unless otherwise indicated, is also the source of quotations in this discussion. For take legal shape in the 1950s, see p. 145ff.

332 Rather than argue for equality: A woman attorney who worked on an early case, Ruth Calvin Emerson (see Garrow, *Liberty and Sexuality*, p. 170), recalls no one making an argument about equality. Emerson interview. In addition to Garrow's history, for later discussion see MacKinnon, *Feminism Unmodified*, pp. 250–251, and Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* 375 (1985).

332 in 1959 . . . *Poe v. Ullman*, "the right to engage in normal marital relations" . . . "freedom or privilege to procreate or not procreate" . . . "long arm of the law": These and other quotations and details from Fowler Harper's jurisdictional statement are from Garrow, *Liberty and Sexuality*, pp. 167, 763n61.

333 ACLU legal director in 1971: Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), p. 186, and see Part 1.

333 Wulf argued . . . "the Fourteenth Amendment protects" . . . "abstaining entirely": Garrow, *Liberty and Sexuality*, pp. 171–172. (Although Garrow describes the brief as the work of Mel Wulf and Ruth Emerson, Emerson recalls that Wulf did not use much of her writing. Emerson interview.)

333 "I was then a single man": Garrow, *Liberty and Sexuality*, p. 172. For similar analysis, see the view of Andrea Dworkin, quoted in MacKinnon, *Feminism Unmodified*, p. 99, that men supported abortion because "getting laid was at stake."

333 "invented the right to privacy": Wulf interview.

333 a Fourteenth Amendment guarantee of liberty . . . "substantive due process": Garrow, *Liberty and Sexuality*, p. 168ff.

334 development of legally protected *privacy*: Garrow, *Liberty and Sexuality*, p. 167ff.

334 Charles Fried . . . "execrable" jurisdictional statement in the *Poe* case . . . "follow their inclinations and consciences without interference" . . . "right to privacy": Garrow, *Liberty and Sexuality*, p. 174.

334 later to become solicitor general: See Part 4 in the book, including brief against Mechelle Vinson.

334 "right to be let alone": Garrow, *Liberty and Sexuality*, p. 184.

334 dissent . . . sixty typed pages: Garrow, *Liberty and Sexuality*, p. 190.
334 "emanates from the totality": Garrow, *Liberty and Sexuality*, p. 194.
334 "we deal with a right of association" . . . "The prospects of police": Garrow, *Liberty and Sexuality*, pp. 245–246; *Griswold v. Connecticut*, 381 U.S. 479 (1965).
335 "I like all of it—it emancipates femininity and protects masculinity": Garrow, *Liberty and Sexuality*, p. 248.
335 "one man one vote" . . . "one man one child": Garrow, *Liberty and Sexuality*, p. 244.
335 defending the marital rape exemption as a defense against intrusion by government: *People v. Liberta*, 64 N.Y.2d 152, 165 (1984).
335 "In this light": MacKinnon, *Feminism Unmodified*, p. 100.
335 "too cute": West interview.
335 West never envisioned her article would be picked up, within a few weeks of publication, by a Senate staffer: West interview; when told, West said she was "blown away" and "thrilled."
335 Nourse knew that the heart of a legislative effort: Nourse interviews.
336 West had based her "Privacy Act" . . . legislation proposed earlier by Catharine MacKinnon: West interview.
336 MacKinnon, working with feminist theorist Andrea Dworkin: Catharine MacKinnon interviews, and interview with Andrea Dworkin, Brooklyn, 11/14/95.
336 "a law that recognizes pornography" . . . "we're talking rape, torture": MacKinnon, *Feminism Unmodified*, p. 210. See also Catharine MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge: Harvard University Press, 1997), p. 426ff.
336 pornography was a form of speech: *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), affirmed 475 U.S. 1001 (1986).
336 MacKinnon's theories . . . Rick Cudahy: Nourse interviews.
337 Pornography Victims Protection Act, introduced in 1984: Catharine MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge: Harvard University Press, 1997), p. 16n50–51, citing *Congressional Record* of 10/3/84 and of 6/22/89 for Pornography Victims Compensation Act.
337 traveled widely to give lectures, compiled in 1987: MacKinnon, *Feminism Unmodified*, p. 307.
337 voting against it was Judge Richard Cudahy: *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), affirmed 475 U.S. 1001 (1986).
337 Nourse saw the potential for creating a strong law: Goldfarb-Nourse-Reuss interview.
337 "violence against women" . . . "violation of the civil rights of women" . . . "victims a civil action": MacKinnon, *Feminism Unmodified*, p. 210.

22: Using Civil Rights to Combat Violence

338 Biden introduced the "Violence Against Women Act" on June 19, 1990: Victoria F. Nourse, "Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy," 11 *Wisconsin Women's Law Journal* 1 (Summer 1996). Further references will be cited as Nourse, "Where Violence."
338 provisions [of the Violence Against Women Act]: Nourse, "Where Violence."
338 Title III, "Civil Rights" . . . "equal protection of the laws": Wording in the bill is from Senate Committee on the Judiciary, *Women and Violence, Part 2: Hearings on Legislation to Reduce the Growing Problem of Violent Crime against Women*, 101st Cong., 2d sess., 1990, Serial No. J-101–80, pp. 221–223; Biden, *Promises to Keep*, p. 244.

338 VAWA's civil rights section: This section was formally called Title III of the Violence Against Women Act. It was informally referred to by drafters as the "civil rights remedy" because it tried to offer victims of gender-based violence what law calls a *civil remedy*: "The remedy afforded by law to a private person in the civil courts in so far as his private and individual rights have been injured . . . as distinct from the remedy by criminal prosecution for the injury to the rights of the public." *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990), p. 1294.

339 after the Civil War, many states put laws: The following discussion relies on Foner, *Reconstruction*, particularly pp. 425–444 and 504–590. Also useful are the history sections of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

339 conspired to deprive anyone of the "equal protection of the laws": Ku Klux Klan Act of 1871, quoted in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 313 (1993).

339 Under the direction of a committed attorney general: Foner, *Reconstruction*, pp. 457–458.

340 great civil rights acts of the nineteenth century: In addition to Foner, *Reconstruction*, see Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport, CT: Greenwood Press, 2000), and Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Virginia Law Review* 1045 (2001).

340 man known as R. G. Harris . . . Court concluded: Quotations on the *Harris* decision are from *United States v. Harris*, 106 U.S. 629, 638–639 (1883).

341 lone dissent . . . "special favorite of the laws": *Civil Rights Cases*, 109 U.S. 3 (1883).

341 Supreme Court's destruction in 1883 . . . followed current events and Court decisions: Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Virginia Law Review* 1045 (2001), quoting C. Vann Woodward, *Origins of the New South, 1877–1913* (Baton Rouge: Louisiana State University Press, 1971), p. 216, that the *Civil Rights Cases* were the "judicial fulfillment of the Compromise of 1877." For linkage of *Civil Rights Cases* (1883) to *Slaughter-House Cases* (1873) as weakeners of the Fourteenth Amendment, see Hall, *Oxford Companion*, 149.

341 In 1876, the Republican Party . . . "to conciliate the white men": See Foner, *Reconstruction*, pp. 504–587, for a narrative of the retreat from what Foner calls the "idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens," and see p. 582, where Foner quotes the Kansas politician of 1877.

341 defined the rights of blacks in narrow terms . . . waterways: See Foner, *Reconstruction*, particularly pp. 529–531; see also dissent by Justice Field, *In Re Slaughter-House Cases*, 83 U.S. 36 (1872).

342 "to prevent the emergence of 'Jim Crow' apartheid in the South": Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, NY: Foundation Press, 1988), p. 1695n16.

342 "the special favorite of the laws": Jack Balkin, "History Lesson," *Legal Affairs*, July–August 2002, pp. 44–49. Further references will be cited as Balkin, "History Lesson."

342 a provision of the 1871 Civil Rights Act that had survived: *Griffin v. Breckenridge*, 403 U.S. 88, 92, 99 (1971).

342 deprivation of her civil rights: Nourse, "Where Violence."

342 The other staffer: Nourse interviews.

343 reduced charge if she was a social companion: *Darrell W. Stevens v. Delaware Correctional Center*, 295 F.3d 361, 365n2 (3d Cir. 2002); see also Joseph R. Biden Jr., "Congress and the Courts: Our Mutual Obligation," 46 *Stanford Law Review* 1285 (1994).

343 "things that are wrong": Nourse interviews.

343 Nourse began calling . . . NOW Legal Defense: Goldfarb-Nourse-Reuss interview. See also Biden, *Promises to Keep*, pp. 242–243, for story of resistance from what he calls "the inside-the-beltway women's groups" when Nourse spoke to them on his behalf: "I knew these groups didn't entirely

trust me . . . 'Oh, Victoria, you're a nice little girl, but you work for Joseph Biden,' a Washington women's group member said to my lead staffer on the Violence Against Women Act. 'Why should we believe you?'"

343 "NOW Legal Defense" . . . had been created: Lynn Hecht Schafran, "Educating the Judiciary about Gender Bias," 9 *Women's Rights Law Reporter* 109 (1986), p. 112. Further references will be cited as Schafran, "Educating."

343 "Legal Momentum": Lynn Hecht Schafran, letter to author, 8/20/05.

343 Nourse's call went to . . . Sally Goldfarb: Goldfarb-Nourse-Reuss interview.

343 Goldfarb had developed a specialty . . . sexual abuse . . . Feminist Legal Strategies Project: Goldfarb interviews.

343 "Wow—where did this woman come from?": Goldfarb-Nourse-Reuss interview.

343 Goldfarb . . . valedictorian . . . played viola: Sally Goldfarb, letter to author, 8/12/05.

343 majored in English: *Yale College Yearbook*, 1978.

343 Phi Beta Kappa: Biography, Sally Goldfarb, available at www.camlaw.rutgers.edu/bio/938 (visited 2/20/05).

343 analyzing rape as a violation of the civil rights of women: MacKinnon interviews; see also MacKinnon, *Feminism Unmodified*, p. 81 (reprinting a lecture of 11/16/81).

344 "First time she taught": Goldfarb interviews.

344 After talking to Nourse . . . "If Biden wants to do something": Interview with Catharine MacKinnon, New Haven, 9/16/2008.

344 Goldfarb drafted testimony: Goldfarb interviews and Goldfarb, letter to author, 8/12/05.

344 Biden convened the hearings in mid-June: Biden's words, Goldfarb's language, and the judges' testimony to the state task forces are quoted from Senate Committee on the Judiciary, *Women and Violence, Part 1: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong., 2d sess., 1990, Serial No. J-101–80, p. 11. Further references will be cited as Judiciary hearings, *Women and Violence, Part 1*.

344 "we have ignored": Judiciary hearings, *Women and Violence, Part 1*, p. 11.

345 "Just as a democratic": Judiciary hearings, *Women and Violence, Part 1*, p. 57.

345 professor at the University of Kentucky: Sally Goldfarb, letter to author, 8/12/05.

345 Task forces on gender bias in the courts: Judiciary hearings, *Women and Violence, Part 1*, p. 64. For a full list of task forces, see *United States v. Morrison*, 529 U.S. 598, 631n7 (2000).

345 New York task force . . . "There are still all too many": Judiciary hearings, *Women and Violence, Part 1*, p. 66.

345 Minnesota task force: " 'Acquaintance rape' promises": Judiciary hearings, *Women and Violence, Part 1*, p. 67.

345 Maryland task force: "I don't believe": Judiciary hearings, *Women and Violence, Part 1*, p. 65.

346 outpouring of support: Senate Committee on the Judiciary, *Women and Violence, Part 2: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong., 2d sess., 1990, Serial No. J-101–80, p. 2.

346 "Don't you people" . . . strong bladder: Goldfarb interviews.

346 "task force with committees": Sally Goldfarb, letter to "Dear Friend," 8/23/90, in Legal Momentum NY files.

346 first week of September . . . "trustworthy": Sally Goldfarb, "Minutes from Task Force on Violence Against Women Act September 5, 1990," 9/13/90, in files of NOW Legal Defense, New York City, as of 5/21/97. For Goldfarb minutes from task forces.

347 The next three meetings: Sally Goldfarb, "Minutes from Task Force on Violence Against Women Act

September 25, 1990," 9/25/90; "Minutes from Task Force on Violence Against Women Act October 22, 1990," 10/22/90; "Minutes from Task Force on Violence Against Women Act November 19, 1990," 11/19/90; all in Legal Momentum NY files.

347 November meeting . . . "1) The homicide case in Canada": Sally Goldfarb, "Minutes from Task Force on Violence Against Women Act November 19, 1990," 11/19/90, in Legal Momentum NY files. (For discussion of homicide case in Canada, see Lisa Heinzerling, "So Rape Isn't Hatred?" *Los Angeles Times*, 5/4/90, p. B7.)

348 Goldfarb was organized but no organizer: Goldfarb interviews.

348 legislative director . . . WEAL: Margalit Fox, "Molly Yard, Advocate for Liberal Causes, Dies at 93," *New York Times*, 9/22/05, p. 19.

349 Reuss was running out of money: Neuborne interview.

349 WEAL had folded . . . Women's Political Caucus . . . fired Reuss along with five other staffers . . . unemployed and divorced mother . . . $1,600 a month . . . Reuss did love VAWA: Goldfarb-Nourse-Reuss interview.

349 "good kids": Goldfarb-Nourse-Reuss interview.

349 NOW Legal Defense was also running low on money and had closed its offices in DC: Neuborne interview.

350 fuchsia and lime . . . granola bar . . . "eat this": Goldfarb interviews.

350 Groups endorsing VAWA: "List Of Organization Endorsements (as of 2/5/91), Violence Against Women Act," 2/5/91, typescript in Legal Momentum NY files.

350 "Another one of your best-sellers, Victoria?": Nourse interviews.

350 the grassroots were going berserk: Goldfarb-Nourse-Reuss interview.

350 By early 1992, VAWA's list of cosponsors: House Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, *Violence Against Women*, 102d Cong., 2d sess., 1992, Serial No. 42, pp. 9 and 12. Further references will be cited as House Crime Hearings 1992, *Violence Against Women*.

351 "In Georgia": Senate Committee on the Judiciary, *The Violence Against Women Act of 1991*, 102d Cong., 1st sess., 1991, S. Rep. No. 197, p. 34. Further references will be cited as Senate Judiciary, *VAWA of 1991*.

23: Judges Strike Back

352 On the last day of 1991, the chief justice attacked: Rehnquist, "1991 Year-End Report," in Legal Momentum NY files; reprinted in *Third Branch: The Newsletter of the Federal Courts*, January 1992, and in *Congressional Record* 138, E746, 747 (3/19/92). Further references will be cited as Rehnquist, "1991 Year-End Report." See also Biden, *Promises to Keep*, p. 245.

352 Victoria Nourse and her allies were shocked: Nourse interviews.

352 "a virtually fanatical desire": Memorandum from William Rehnquist, assistant attorney general, to Leonard Garment, special counsel to the president, reprinted in "Rehnquist: ERA Would Threaten Family Unit," *Legal Times*, 9/15/86, p. 4, as quoted in Robert C. Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," 112 *Yale Law Journal* 1943 (2003), p. 1992n146.

352 his nomination, announced two days earlier, to become chief justice: See Part 4 in the book.

353 rare departure . . . attack proposed legislation before it could become law: See Judith Resnik, "The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act," 74 *Southern California Law Review* 269 (2000), p. 271. Further references will be cited as Resnik, "Programmatic Judiciary."

353 "year-end report on the federal judiciary" . . . "State of the Judiciary" addresses . . . "difficult and complex": Analysis of report and addresses can be found in Judith Resnik, " 'Naturally' without Gender: Women, Jurisdiction, and the Federal Courts," 66 *New York University Law Review* 1682 (1991), p. 1732. Further references will be cited as Resnik, "Naturally."

353 "broad definition of criminal conduct": Rehnquist, "1991 Year-End Report," p. 5.

354 never imagined that it might involve America's chief justice: Nourse interviews.

354 in 1991, the nation's gender disparity on the courts: Resnik, "Naturally," p. 1705.

354 Nourse . . . failed to realize that judges might try to influence legislation: Victoria Nourse, letter to author, 9/27/05.

355 Department of Justice . . . detailed critique: Bruce C. Navarro, United States Department of Justice, letter to Joseph Biden, receipt stamped 10/9/90, in Nourse files.

355 Association of Attorneys General . . . unanimous support: Resolution dated 12/7/90, reprinted in Senate Committee on the Judiciary, *Violence Against Women: Victims of the System*, 102d Cong., 1st sess., Senate Hearing 369, 1991, p. 37.

355 "Resolution X" . . . "WHEREAS": Conference of Chief Justices, Resolution X [concerning] S. 15, Violence Against Women Act, "adopted as proposed . . . January 31, 1991," in Schafran files.

355 Goldfarb thought the chief justices were misinterpreting: Goldfarb interviews and NOW Legal Defense, "The Violence Against Women Act: Facts on the Impact on State and Federal Courts," undated but c. January 1992, in Schafran files.

356 "add a new count to many if not most": Vincent L. McKusick, president, Conference of Chief Justices, letter to Joseph R. Biden Jr., 2/22/91, in Schafran files.

356 "The implication that vengeful wives": NOW Legal Defense, "The Violence Against Women Act: Facts on the Impact on State and Federal Courts," undated but c. January 1992, in Schafran files.

356 director is an appointee of the chief justice: Judith Resnik, "Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power," 78 *Indiana Law Journal* 223 (2003), p. 292.

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357 triple the annual estimate for the Civil Rights Act of 1991 . . . challenge them in court: Office of Judicial Impact Assessment, Administrative Office of the U.S. Courts, Judicial Impact Statement: Civil Rights Act of 1991, S. 1745 (Enacted) P.L. 102–166, March 19, 1992, pp. 1–4, in Legal Momentum DC files.

357 three-quarters of the alleged attackers . . . public defenders: Office of Judicial Impact Assessment, Administrative Office of the U.S. Courts, Judicial Impact Statement, Violence Against Women Act of 1991, S. 15 as reported (June 8, 1992), pp. 12–13, in Legal Momentum DC files. The first Judicial Impact Statement on VAWA on 4/8/91 assumed that 4% of civil cases would go to trial; by 6/8/92 it had raised that to 7%, raising its estimate of the cost of VAWA.

357 VAWA would add more than 14,000 suits to the federal caseload, an increase of about 4 percent of all cases: Administrative Office of the U.S. Courts, "Report of the Proceedings of the Judicial Conference of the United States," 9/23–24/91, under heading "Committee on Federal-State Jurisdiction, Violence Against Women Act," in Legal Momentum NY files.

357 August of 1991 . . . "ad hoc committee" . . . "charged with coordinating the Conference's views": Memorandum from L. Ralph Mecham, Director, Administrative Office of the United States Courts, 8/19/91, in Legal Momentum NY files.

357 preparation of a resolution, in about a month: Administrative Office of the U.S. Courts, "Report of the Proceedings of the Judicial Conference of the United States," 9/23–24/91, under heading "Committee on Federal-State Jurisdiction, Violence Against Women Act," in Legal Momentum NY files. (Report was considered and a vote taken by 9/24/91; committee had been announced 8/19/91.)

358 Judicial Conference . . . twenty-seven judges . . . like the judiciary was more than 90 percent male: Resnik, "Naturally," pp. 1705–1706.

358 Judicial Conference . . . sets policy for America's federal courts: Resnik, "Programmatic Judiciary," p. 271.

358 conference's one gender-balanced committee: Resnik, "Naturally," p. 1711n143.

358 Tailhook Association . . . arrayed in a gantlet apparently assaulted: Eric Schmitt, "Military Court Assails Navy in Ruling on Tailhook," *New York Times*, 1/12/94, p. A16; Neil A. Lewis, "Officer Cleared in Main Tailhook Case," *New York Times*, 10/22/93, p. 12.

358 the committee reported to the chief justice: Quotations from the report are in "Special Report, Gender-Based Violence, September 1991, Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence," 7-page typescript, in Legal Momentum NY files.

359 "I have to tell you": Herb Jaffe, "Federal Judges Assail 'Disastrous' Crime Bills," *Newark Star Ledger*, 9/16/91, p. 1.

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360 seemed uncoordinated . . . tried to respond: Nourse interviews.

360 all-male committee on Federal-State Jurisdiction: Resnik, "Naturally," p. 1711n142.

360 "I will not mince words" . . . "is a civil rights provision" . . . "It is one thing": Joseph Biden, letter to Judge Thomas M. Reavley, 9/20/91, in Legal Momentum NY files.

361 Judges . . . lobbying: For a discussion of the growth and mechanisms of judicial lobbying, I've benefited from Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States," a talk first presented at the symposium "The Chief Justice and the Institutional Judiciary" in November 2005, at the University of Pennsylvania Law School; typescript on file with author.

361 George H. W. Bush had nominated . . . Clarence Thomas: This narrative relies on, and unless otherwise indicated, the quotations are from Mayer and Abramson, *Strange Justice*.

361 controversy over Thomas' lack of support for affirmative action: Mayer and Abramson, *Strange Justice*, p. 214.

361 September 23 . . . "group sex or rape scenes": Mayer and Abramson, *Strange Justice*, pp. 242–243.

361 Was Hill credible? . . . "It was immoral": The narrative closely follows that of Mayer and Abramson, *Strange Justice*, pp. 237–238.

362 Reuss and others tried to get Ron Klain . . . experts on the stand: Goldfarb-Nourse-Reuss interview and Klain interview.

362 As Biden was ending the Thomas hearings: The hearings ended Monday, 10/14/91. Mayer and Abramson, *Strange Justice*, p. 345.

362 Judicial Conference . . . condemn significant parts of VAWA: L. Ralph Mecham, letter to Joseph Biden, 10/10/91, in Nourse files.

362 vote of 52 to 48, the narrowest in a century: Hall, *Oxford Companion*, p. 348.
362 he chaired the conference: Resnik, "Programmatic Judiciary," p. 271.
362 "long-accepted concepts of federalism": Rehnquist, "1991 Year-End Report," p. 5.
362 *federalism* was a code word . . . not for strengthening the national government but for limiting its strength: See John T. Noonan Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002), pp. 2–3. And see Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton, 2005), p. 250. Further references will be cited as Tushnet, *Court Divided*.
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363 The Civil War represented a contest over *federalism*: Hall, *Oxford Companion*, p. 282.
363 "the federal courts' limited role": Rehnquist, "1991 Year-End Report," p. 3.
363 editorial supporting Rehnquist: "Federal Courts, Local Cases," *Washington Post*, 1/5/92.
363 Senator Biden's words to the contrary: Joseph Biden, letter to Judge Thomas M. Reavley, 9/20/91, in Legal Momentum NY files.
363 "so sweeping": Chief Justice William Rehnquist, "Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting," Dallas, Texas, 2/4/92, pp. 12–13, typescript, in Legal Momentum NY files.
363 chief justice was lobbying: Cris Carmody, "While Rehnquist Sings Caseload Blues," *Chicago Daily Law Bulletin*, 2/4/92, p. 1.
363 voted at that mid-year meeting to oppose VAWA's civil rights section: The Conference of Federal Trial Judges, "Resolution," 2/1/92, fax, in Legal Momentum NY files.
363 What none of VAWA's drafters anticipated: Victoria Nourse, memo to unnamed recipients, 2/13/92, in Schafran files; Sally Goldfarb, memo to Pat Reuss, Ruth Jones, and Lynn Hecht Schafran, 3/17/92, in Schafran files; Lynn Hecht Schafran, memo to Helen Neuborne, Deb Ellis, Sally Goldfarb, Ruth Jones, and Pat Reuss, 7/7/92, in Legal Momentum DC files.
363 in concert with the strong urging of the chief justice: Chief Justice William Rehnquist, "Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting," Dallas, Texas, 2/4/92, typescript, in Legal Momentum NY files.
363 "train time": Nourse interviews.
363 On most mornings, Biden caught an early-morning Amtrak: Mayer and Abramson, *Strange Justice*, p. 213.
364 At ten o'clock that morning: House Crime Hearings 1992, *Violence Against Women*, held 2/6/92.
364 Months earlier: Approximate timing based on Sally Goldfarb, letter to author, 8/12/05, and on David Yassky, memo to Charles Schumer, 9-page typescript, 10/21/91, in Yassky files, copy in files of author (a memo that followed the conversation of Goldfarb and Schumer).
364 "Chuck Schumer's two rows behind me" . . . "You bet your booty": Goldfarb-Nourse-Reuss interview.
364 "I don't know that much about it": Goldfarb-Nourse-Reuss interview. (Quotations are Goldfarb's colloquial recollection and are not verbatim from Schumer.)
365 "that cute, young, smart David Yassky" . . . "I'm sitting in while they're": Goldfarb-Nourse-Reuss interview.
365 "Oh yeah, like Catharine MacKinnon's theories!": Goldfarb interviews.
365 Yassky had taken MacKinnon's last in her final term: Yassky interview; *curriculum vitae* for Catha-

rine MacKinnon, email to author, 4/8/04, from Karym Koiffman, assistant to Prof. Catharine A. MacKinnon, University of Michigan Law School.

365 Yassky . . . joined Schumer's staff in September of 1991 . . . enthusiastic . . . law clinic: Yassky interview.

366 an overly long memo: Quotations from the memo are from David Yassky, memo to Charles Schumer, 9-page typescript, 10/21/91, in Yassky files.

366 "Ku Klux Act of 1868 [*sic*]": Usually referred to as the Civil Rights Act of 1871 or the Ku Klux Act of 1871.

367 scheduled the hearings: House Crime Hearings 1992, *Violence Against Women*; hearing held 2/6/92.

367 "Oh, Joe" . . . "let me sit next to the pretty girl" . . . "She's my chief aide" . . . "true believers from the federalist pantheon": Nourse interviews.

368 Just after ten in the morning on February 6, 1992, the hearings: Quotations from testimony at the hearings, unless otherwise indicated, are from House Crime Hearings 1992, *Violence Against Women*, pp. 1, 7–13; Biden, Promises to Keep, pp. 245–246.

368 "We have got a Chief Justice who . . . does not know what he is talking about": House Crime Hearings 1992, *Violence Against Women*, p. 7.

368 "*speech writers* have not done their homework": Typescript in Nourse files.

368 "going on and on": Nourse interviews.

369 "I find it interesting": House Crime Hearings 1992, *Violence Against Women*, p. 10.

369 the story that had led Nourse to opine: Nourse interviews.

370 I didn't know he was also going to take on the Reavley Committee . . . his line in the sand: Nourse interviews.

24: Seeking Equal Judicial Firepower

371 Three days after . . . Reuss announced that she wasn't afraid . . . "Fight fire with fire": Minutes of meeting of National Task Force on the Violence Against Women Act, NOW Legal Defense, 2/9/92, handwritten on lined paper, in Legal Momentum DC files.

372 by a ratio of 10 to 1 . . . almost 14 to 1: Resnik, "Naturally," p. 1705.

372 Goldfarb could think of only one group: She credits Lynn Hecht Schafran for suggesting the National Association of Women Judges. Sally Goldfarb, letter to author, 8/12/05.

372 Its newsletter was called: *Counterbalance*, available at www.nawj.org (visited 1/20/05).

372 NAWJ . . . origins in 1979: Klein interviews.

372 No official listings existed of women judges in America: Klein interviews, and Judge Gladys Kessler, "Foreword," Symposium Issue, National Association of Women Judges, 14 *Golden Gate University Law Review* 473 (1984), p. 474. Further references will be cited as Kessler, "Foreword."

372 America had perhaps three hundred women judges . . . federal court system had only twenty-eight women judges . . . from 1976 to 1979: Jeffrey Kaye, "Women Judges Urge Naming One of Their Own as Justice," *Washington Post*, 10/29/79, p. A7.

372 Approximately one hundred women . . . women law students volunteered to assist: Klein interviews and Kessler, "Foreword," p. 473.

372 At this first meeting: Videotapes of this meeting are available at the Schlesinger Library at Radcliffe; see Linda C. Morrison, "The National Association of Women Judges: Agent of Change," 17 *Wisconsin Women's Law Journal* 291 (2002), pp. 300–301.

372 laughed and cried and stayed up late and drank jugs of wine: Jobes interview.

372 "war stories" . . . chased around a judge's desk . . . "a good-lookin' kid": Klein interviews.
373 stories of women in court being called "honey" or "dear": Klein interviews; see also Michael Kernan, "For Her Honors; Sisterhood on the Bench; Joan Dempsey Klein & The Judges' Network," *Washington Post*, 10/4/80, p. F1 (style section), and David Margolick, "Women Find Bar to Bench a Far Journey," *New York Times*, 10/17/82, p. 16. Further references will be cited as Kernan, "For Her Honors," and Margolick, "Women Find Bar."
373 "streety" . . . "bitches": Jobes interview.
373 a year earlier in 1978: "Presiding Justice Joan Dempsey Klein," biography available at www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/justices/klein.htm (visited 5/2/06).
373 "girly pix" . . . "There will be no women clerks here": Klein interviews.
373 Kessler . . . teamed up with . . . Ross to teach one of the earliest courses on women in the law: "Courses on Women and the Law" (mimeo prepared for women and law teaching conference at Yale Law School), date c. December 1971, in files of Ann E. Freedman, as of 6/1/98; and Gladys Kessler, letter to author, 10/2/98. For Kessler's role as attorney in two early sex discrimination cases, see Brownmiller, *In Our Time*, pp. 141 and 154.
373 on the Superior Court of the District of Columbia: Kessler, "Foreword," p. 473.
374 "As more than 100 women judges": Kessler, "Foreword," p. 474.
374 "very lonely, very isolated lives of those women judges": Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to Present* (New York: Random House, 1986), p. 245.
374 As president, they elected Justice Joan Dempsey Klein: Jeffrey Kaye, "Women Judges Urge Naming One of Their Own as Justice," *Washington Post*, 10/29/79, p. A7.
374 descended from California's first judge: Klein interviews.
374 "That's what girls do": Kernan, "For Her Honors," p. F1.
374 "to promote the administration of justice": Kessler, "Foreword," p. 475.
375 Approximately fifty judges . . . founding members: Kessler, "Foreword," p. 473.
375 became founding members . . . Sandra Day O'Connor: Klein interviews.
375 county judge from Arizona . . . as a state senator, she had written President Richard Nixon: Biskupic, *O'Connor*, pp. 40, 65–68.
375 In favor of a woman were his wife, his daughters: Dean, *Rehnquist Choice*, pp. 63, 82, 157–158.
375 chance to win votes in the next election: Dean, *Rehnquist Choice*, p. 113.
375 Burger . . . "couldn't work with" a woman justice . . . threatened to resign: Dean, *Rehnquist Choice*, pp. 91, 179–180. See Part 3.
375 O'Connor: The narrative of Sandra Day O'Connor's letter to Nixon, of the friendship of the O'Connor and Rehnquist families, and of O'Connor's work to support his nomination relies on the fine research in Biskupic, *O'Connor*, pp. 37–50.
375 O'Connor had dated Rehnquist . . . holiday to her family's Arizona ranch: William Rehnquist, interview with Mike Eagan, "One-on-One with the Chief," *Stanford Lawyer*, Spring 2005, p. 26, available at www.law.stanford.edu/publications/lawyer/issues/72/1on1Rehnquist.html (visited 3/25/06).
375 "a result of your doing": Biskupic, *O'Connor*, p. 47.
376 "Would we ever" . . . began buying food to cook: Biskupic, *O'Connor*, p. 68.
376 conference on Anglo-American law, as a representative of America's judges: Biskupic, *O'Connor*, p. 69; Aric Press, "A Woman for the Court," *Newsweek*, 7/20/81, p. 16.
376 Ronald Reagan made a surprising announcement: Biskupic, *O'Connor*, p. 71.
376 Klein, who was said to have Republican connections: Biskupic, *O'Connor*, p. 3.
376 O'Connor, who seemed to come from nowhere . . . chief justice worked to plant her name: Biskupic, *O'Connor*, pp. 72–78.

376 Apparently unknown to outsiders and the press was that she had dated a future justice . . . entertained the current chief justice: See, for example, Aric Press, "A Woman for the Court," *Newsweek*, 7/20/81, p. 16: "O'Connor's name turned up on both lists [to Reagan of potential nominees]. Exactly how she got there is not clear, but given her remarkable connections it was hardly surprising. She had known Chief Justice Burger for some time, cementing their friendship last summer during weeks at an Anglo-American judicial exchange. And she was a classmate at Stanford and longtime personal friend of another Justice, William H. Rehnquist."

377 he appointed few women: Elizabeth Kastor, "Courting Ritual: Women Jurists Salute Congresswomen," *Washington Post*, 3/27/85, p. B2 (style section), quoting Judge Martha Craig Daughtrey.

377 "A large number of women": Margolick, "Women Find Bar," p. 16.

377 Daughtrey led a delegation . . . "bachelor's paradise" . . . "I just want to know what a lady judge looks like": Elizabeth Kastor, "Courting Ritual: Women Jurists Salute Congresswomen," *Washington Post*, 3/27/85, p. B2 (style section).

377 decision made by Judge Marilyn Loftus . . . no invitation . . . "We're all judges": Loftus interview.

378 Detroit in the autumn of 1981. . . Judge Hortense Gabel of the New York State Supreme Court and Professor Norma Wikler of the University of California: Lynn Hecht Schafran, letter to author, 8/10/05.

378 one of the earliest sex discrimination cases: *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969).

378 "didn't even know how to fix his own air conditioner" . . . "I realized then and there": Sylvia Roberts, in conversation with Lynn Hecht Schafran, 3/6/1985, quoted in Schafran, "Educating," pp. 111–112.

378 Bell . . . attorney general of the United States, became a partner in the law firm that lost at the Supreme Court in 1984: See end of Part 3 in the book.

379 train judges: Lynn Hecht Schafran, "Gender Bias in the Courts: An Emerging Focus for Judicial Reform," 21 *Arizona State University Law Journal* 237 (1989), pp. 242–243. And see Schafran, "California: First as Usual," 22 *Women's Rights Law Reporter* 159 (2001), p. 160. Further references will be cited as Schafran, "California."

379 " 'sexism'—the making of unjustified": John A. Johnston Jr. and Charles L. Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 *New York University Law Review* 675 (1971).

379 funders . . . unbiased by definition: Lynn Hecht Schafran, "Gender Bias in the Courts: An Emerging Focus for Judicial Reform," 21 *Arizona State University Law Journal* 237 (1989), p. 244. See also Schafran, "California," p. 160, including "Potential funders claimed such a project was unnecessary because judges are impartial as dictated by their job descriptions."

379 "court watchers" . . . "attempted seduction" . . . "normally" . . . "You can't blame": Schafran, "Educating," p. 112, which cites Phyllis Segal, "Proposed Project on Judicial Attitudes toward Women: An Introductory Overview," NOW Legal Defense and Education Fund (1978), pp. 5–6.

379 Finally in 1980 . . . National Judicial Education: Norma J. Wikler, "On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts," 64 *Judicature* 202 (1980), pp. 208–209; Schafran, "Educating," p. 111.

379 asked the NAWJ . . . brief debate: Lynn Hecht Schafran, letter to author, 8/10/05, p. 2.

380 three state supreme court justices . . . throwing spitballs: Schafran interview; confirmed by Schafran in letter to author, 8/10/05. For a report of the November 1980 meeting but not the spitballs, see Schafran, "Educating," p. 114.

380 successor as director: Schafran, "California," p. 160.

380 Lynn Hecht Schafran: Story of Lynn Hecht Schafran and Norma Wikler draws on Schafran interview and Schafran letters to author, 8/8–10/05.

380 Schafran told Ginsburg the story: Lynn Hecht Schafran, letter to Ruth Bader Ginsburg, 4/4/75, in personal files of Justice Ruth Bader Ginsburg, consulted August 1994 and January 1995, in the justice's storage room at the Supreme Court; and see Part 1.

380 drafter for *Wiesenfeld* . . . at first refused to hire her: Interview with Marsha Berzon, San Francisco, 5/16/95, and see Part 1.

381 berated her: Schafran, letter to author, 8/10/05.

381 "If you think that's what the law is all about": Lynn Hecht Schafran, panel discussion at Columbia Law School, 11/19/93, videotape recorded by author.

381 Federation of Women Lawyers Judicial Screening Committee: Lynn Hecht Schafran, letter to author, 8/10/05.

381 "never met a judge": Schafran, "Educating," p. 113.

381 "not being treated equally": Loftus interview.

381 Judge Loftus contacted Robert Lipscher: Loftus interview. See also Schafran, "Educating," p. 117.

382 "whether gender bias exists": Schafran, "Educating," p. 117.

382 "What" . . . "do you mean *whether*?": Loftus interview.

382 thirteen state judges and another twenty members: "The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts—June 1984," 9 *Women's Rights Law Reporter* 129 (1986), p. 131. Further references will be cited as "First Year New Jersey Task Force."

382 not from New Jersey: Schafran interview.

382 850 attorneys responded: Schafran, "Educating," p. 135.

383 "problems" . . . "women are the problem" . . . "the conduct of male counsel" . . . "most sexism and resentment": Schafran, "Educating," pp. 120–121, 137.

383 task force had a statistician: Loftus interview.

383 71 percent of women but only 30 percent of men: "First Year New Jersey Task Force," pp. 137–140.

383 83 percent of women and 47 percent of men: "First Year New Jersey Task Force," p. 137.

383 41 percent of women and 9 percent of men . . . 61 percent of women and 15 percent of men: "First Year New Jersey Task Force," p. 138.

383 69 percent of women and 40 percent of men: "First Year New Jersey Task Force," p. 140.

383 In November of 1983: Norma Juliet Wikler and Lynn Hecht Schafran, "Learning from the New Jersey Supreme Court Task Force on Women in the Courts," 12 *Women's Rights Law Reporter* 313 (1991), p. 369.

383 "very very careful" . . . "You sit down": Loftus interview.

384 "Gender bias is a national problem" . . . "Stereotyped myths": Robert Hanley, "Panel in Jersey Finds Bias against Women in the State Courts," *New York Times*, 11/22/83, p. A1.

384 scheduled a press conference: Schafran interview.

384 sitting throughout the main presentations . . . the back of the room . . . skipped the press conference: Loftus interview.

384 "Panel in Jersey" . . . "'There's no room for gender bias'": Robert Hanley, "Panel in Jersey Finds Bias against Women in the State Courts," *New York Times*, 11/22/83, p. A1.

385 Chief Judge Laurence H. Cooke: Ellerin interview and "Report of the New York Task Force on Women in the Courts," available in 15 *Fordham Urban Law Journal* 11 (1986–87).

385 behest of Supreme Court Judge Betty Ellerin: Lynn Hecht Schafran, "Preamble to Justice Ginsburg," 36 *University of Toledo Law Review* 848 (2005).

385 "The Task Force has concluded": Huttner's testimony and words from the New York task force report are from "Report of the New York Task Force on Women in the Courts," reprinted in 15 *Fordham Urban Law Journal* 11 (1986–1987).

385 New Jersey created a rather slim report: Norma J. Wikler and Lynn Hecht Schafran, *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (1986), available at http://womenlaw.stanford.edu/gender-bias.pdf (visited 2/26/05), Appendix K. (New Jersey report was 112 pages plus one appendix; New York report was 273 pages plus seven appendices.)

386 "Why don't they just get up and leave?": "Report of the New York Task Force on Women in the Courts," reprinted in 15 *Fordham Urban Law Journal* 11 (1986–87), p. 33.

386 "rape is a violent crime": "Report of the New York Task Force on Women in the Courts," reprinted in 15 *Fordham Urban Law Journal* 11 (1986–87), p. 65.

386 74 percent of women and 53 percent of men: "Report of the New York Task Force on Women in the Courts," reprinted in 15 *Fordham Urban Law Journal* 11 (1986–87), p. 80n137.

386 1985 . . . National Task Force: Lynn Hecht Schafran, letter to author, 8/10/05. See also Lynn Hecht Schafran, "Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts," 32 *University of Richmond Law Review* 615 (1998), p. 619. Further references will be cited as Schafran, "Will Inquiry."

386 By 1988, the Conference of Chief Justices: Schafran, "Will Inquiry," p. 621.

387 By 1990 states publishing: National Judicial Education Program, "How to Obtain the Final and Implementation Reports of the State and Federal Task Forces on Gender Bias in the Courts, published as of September 1997," in Schafran files.

387 Not until 1987 did a federal court invite . . . Marilyn Patel: Schafran, "Will Inquiry," p. 619.

387 former NOW Legal Defense board member: Lynn Hecht Schafran, "Women Shaping the Legal Process: Judicial Gender Bias as Grounds for Reversal," 84 *Kentucky Law Journal* 1153 (1996), p. 1155.

387 "the quality of the federal bench": Schafran, "Will Inquiry," p. 621n19, citing Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (Philadelphia: Federal Courts Study Committee, 1990), p. 169.

387 begin their own task forces in the 1990s: Judith Resnik, letter to author, 3/23/06.

387 It appointed as its chair Judge Clarence Thomas. (Nothing happened . . .): Schafran, "California," p. 163.

387 Ninth Circuit Task Force on Gender Bias in the Courts: For a narrative, see Schafran, "Will Inquiry," pp. 618–621.

387 Most attorneys, judges, and law professors never saw that impressive display. . . . Not until Victoria Nourse . . . did the task forces' reports as a unified body of work gain a significant audience: Lynn Hecht Schafran, letter to author, 8/20/05.

25: Women Judges to the Rescue

389 reports of judicial gender bias that helped shape the Violence Against Women Act: Senate Committee on the Judiciary, *Violence Against Women Act of 1990*, 101st Cong., 2d sess., 1990, S. Rep. 101–545 on S. 2754, p. 41, of 10/19/90 cites gender-bias task forces from New York and Florida. Lynn Hecht Schafran, on 3/21/91, sent to Victoria Nourse sections of reports from the following states: Colorado, Florida, Illinois, Massachusetts, Michigan, Minnesota, New York, Utah, Washington, Wisconsin; see Lynn Hecht Schafran, letter to Victoria Nourse, 3/21/91, in Schafran files. Many gender-bias task forces are cited 10/29/91 in Senate Judiciary, *VAWA of 1991*, pp. 43–44.

389 VAWA might evaporate: Nourse interviews; Biden, *Promises to Keep*, p. 245; NOW Legal Defense and Education Fund, "Violence Against Women Act," memo by Sally Goldfarb for distribution at meeting of American Bar Association in advance of vote in House of Delegates, created 8/11/92 (no date on document), in Schafran files. The memo says that "ABA approval of the JAD [Judicial

Administration Division] resolution in either original or amended form would severely weaken the prospects for passage of the Violence Against Women Act."

390 "much-needed perspective": Sally Goldfarb, memo to Judges Cara Lee Neville, Roslyn Bell, and Mary M. Schroeder, 12/11/91, in Legal Momentum DC files.

390 Judge Cara Lee Neville . . . Schafran asked: Schafran interview.

390 Nourse got word . . . "*LYNN*, could you please help with this?": Sally Goldfarb, memo to Pat Reuss, Ruth Jones, and Lynn Hecht Schafran, 3/17/92, in Schafran files.

390 packet arrived from Schafran: Lynn Hecht Schafran, letter to board of National Association of Women Judges, 2/28/92, in Schafran files.

390 "unexpected controversy": Victoria Nourse, memo to unnamed recipients, 2/13/92, in Schafran files.

390 detailed rebuttal by Goldfarb . . . "pernicious sexual stereotype" . . . "misread": NOW Legal Defense, "The Violence Against Women Act: Facts on the Impact on State and Federal Courts," undated but c. January 1992, in Schafran files.

391 At the board meeting: Lederman interview and Murray interview; Lynn Hecht Schafran, notes on phone conversation with board member of National Association of Women Judges, 5/1/92, in Schafran files.

391 while still working as an attorney in Miami . . . convincing the state's chief justice . . . insisted there was no gender bias in his state courts: Lederman interview.

391 Florida's chief justice told a story: Lederman interview.

392 appointed a judge . . . Dade County: Tristram Korten, "Courting Disaster: Judge Cindy Lederman, Champion of Justice and Advocate Extraordinaire, Bends the Rules on the Bench," *Miami New Times*, 3/23/00.

392 above all, stand up for other women: Lederman interview.

392 The board voted to present a resolution supporting VAWA: Lynn Hecht Schafran, letter to Barbara Mendel Mayden, 3/17/92, in Schafran files.

392 NAWJ would defend VAWA: Judge Judith Billings, "Violence Against Women Act," *Counterbalance*, Summer 1993.

392 The showdown would come . . . in San Francisco: Lynn Hecht Schafran, letter to author, 8/20/05.

392 if America's lawyers would not defend . . . withering: Nourse interviews.

392 She had little time to think of VAWA: Sally Goldfarb, memo to Pat Reuss, Ruth Jones, and Lynn Hecht Schafran, 3/17/92, in Schafran files.

392 51 cosponsors in the Senate and 182 in the House: Ruth Jones and Sally Goldfarb, "Minutes of the Feb. 11, 1992 Task Force Meeting," 3/3/92, in Legal Momentum DC files.

392 which had been coordinated within the Judicial Administration Division: Lynn Hecht Schafran, memo to Helen Neuborne, Deb Ellis, Sally Goldfarb, Ruth Jones, and Pat Reuss, 7/7/92, in Legal Momentum DC files.

392 $43.5 million . . . every woman who was raped or assaulted would sue: National Task Force on the Elimination of Violence Against Women, "The Violence Against Women Act," undated but c. July 1992, 4 pages beginning "Violence Against Women has reached epidemic proportions . . . ," in Legal Momentum DC files, p. 3.

393 disrupt state and federal courts . . . "crime of violence" as overbroad: Theodore A. Kolb, chair, "American Bar Association Judicial Administration Division Standing Committee on Federal Judicial Improvements, Report to the House of Delegates," 6/25/92, in Legal Momentum DC files.

393 "divorce or other domestic relations" . . . "Just as prior civil rights statutes" . . . "will play a similarly important role": National Task Force on the Elimination of Violence Against Women, "The Violence

Against Women Act," undated but c. July 1992, 4 pages beginning "Violence Against Women has reached epidemic proportions . . . ,"in Legal Momentum DC files.

394 "we are way behind": Lynn Hecht Schafran, memo to Helen Neuborne, Deb Ellis, Sally Goldfarb, Ruth Jones, and Pat Reuss, 7/7/92, in Legal Momentum DC files.

394 "Did these people go to law school": Pat Reuss and Kate Duba, letter to Sally Goldfarb, Ruth Jones, and Lynn Hecht Schafran, 7/3/92, in Schafran files.

394 "beating a path to the doors": Mary M. Schroeder, "Judging with a Difference," 14 *Yale Journal of Law and Feminism* 255 (2002), p. 261.

394 In 1978, President Jimmy Carter . . . Sandra Day O'Connor: Biskupic, *O'Connor*, p. 68.

394 no fear of speaking her mind: Schroeder interview.

395 earlier involvement . . . confer briefly with Schafran: Lynn Hecht Schafran, notes on phone conversation with Mary Schroeder, 6/5/91, discussing Lynn Hecht Schafran, "Proposed Draft," 5/31/91, in Schafran files.

395 Schroeder knew the value of federal gender-bias task forces directly . . . doubts about its language: Schroeder interview.

395 faxing comments on VAWA to Schafran: Judith Resnik, fax to Lynn Hecht Schafran, 6/4/91, discussing Lynn Hecht Schafran, "Proposed Draft," 5/31/91, in Schafran files.

395 gathering hard-to-find data: Resnik, "Naturally," Appendix III, Gender and the Article III Judiciary.

395 defending the decision of a local Rotary Club: *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

395 ninth circuit's gender-bias task force, on which she served as one of eight official members: "The Effects of Gender in the Federal Courts; the Final Report of the Ninth Circuit Gender Bias Task Force," reprinted in 67 *Southern California Law Review* 745 (1994).

395 appropriate for the federal courts . . . violence against women: Resnik interviews.

395 phone call from NAWJ's president-elect: Schroeder interview.

395 administrative law judge with the Security and Exchange Commission in Washington, Brenda Murray: Judith Resnik, letter to author, 3/23/06.

395 "bottom of the judicial heap": Murray interview.

395 Brenda Murray suggested . . . the only one that could talk to all: Schroeder interview.

396 Schroeder was not just at the top of the judicial heap: Murray interview.

396 two-part challenge: Schroeder interview.

396 Judicial Administration Division would make its final push: Theodore A. Kolb, chair, "American Bar Association Judicial Administration Division Standing Committee on the Federal Judicial Improvements, Report to the House of Delegates," 6/25/92, in Legal Momentum DC files.

396 "BE IT RESOLVED": "Re: NAWJ Resolution," 7/25/92, in Schafran files.

396 Lederman . . . support Title III as written: Lederman interview.

396 other judges hesitated, including Norma Shapiro: Lynn Hecht Schafran, handwritten notes, 7/13/92, in Schafran files.

396 Shapiro, a federal district court judge from Philadelphia: Lynn Hecht Schafran, letter to author, 8/20/05.

396 one of the early law school courses on women in law, in 1971: "Courses on Women and the Law" (mimeo prepared for conference at Yale Law School), date c. December 1971, in files of Ann E. Freedman, as of 6/1/98.

397 delegate . . . *instructed*: Lynn Hecht Schafran, memo to Sally Goldfarb, 7/30/92, in Schafran files and Legal Momentum DC files.

397 multistep compromise . . . First . . . "in principle" . . . "narrowly tailored": "Re: NAWJ Resolution," 7/25/92, in Schafran files and Nourse files; Lynn Hecht Schafran, letter to Judge Norma Shapiro, 8/25/92, in Schafran files; Shapiro interview.

397 Third . . . Judge Schroeder: Schroeder interview and Murray interview.

397 In the first week of August in 1992, Schroeder, Resnik, and Schafran: 1992 Ninth Circuit Judicial Conference, Sun Valley, Idaho, 8/3–6/92, program in Schafran files. Resnik, Schafran, and Babcock spoke on an 8/5 panel, "How Gender Bias Affects Ninth Circuit Courts."

397 Sun Valley: "The Effects of Gender in the Federal Courts; the Final Report of the Ninth Circuit Gender Bias Task Force," reprinted in 67 *Southern California Law Review* 745 (1994).

397 far from idyllic by smoke spreading overhead from summer fires: Resnik interviews.

397 On August 5, for the first time: Judith Resnik, "Gender Bias: From Classes to Courts," 45 *Stanford Law Review* 2195 (1993), p. 2197. See also "The Effects of Gender Bias in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force," July 1993, p. C1, in library of Yale Law School: "The Ninth Circuit Gender Bias Task Force's 1992 Preliminary Report was the first report to provide information . . . on the effects of gender in the federal system."

397 drafted report on gender bias in their courts: "The Preliminary Report of the Ninth Circuit Gender Bias Task Force: Discussion Draft," July 1992, in library of Yale Law School.

397 from the first sex discrimination courses: Babcock and others, *Sex Discrimination* (1975), p. v.

398 "The task force movement has many links": "Report of the Ninth Circuit Gender Bias Task Force: Introduction: Gender Bias in the Courts and Civic and Legal Education," 45 *Stanford Law Review* 2143 (1993), p. 2143.

398 Ninth Circuit Gender Bias Task Force: Discussion Draft," title page, July 1992, in library of Yale Law School.

398 "Be careful" . . . "Don't teach": This and subsequent quotations from Resnik's speech are in Judith Resnik, "Gender Bias: From Classes to Courts," 45 *Stanford Law Review* 2195 (1993), pp. 2195–2196.

399 published reports in twenty-one states: Lynn Hecht Schafran, letter to author, 8/10/05.

400 "long-accepted concepts of federalism" . . . "the federal courts' limited role": Rehnquist, "1991 Year-End Report," pp. 3–5.

400 half the members of the "ad hoc committee on gender-based violence": Judith Resnik, letter to author, 3/23/06.

400 Rymer . . . assisted the work of the task force: *The Preliminary Report of the Ninth Circuit Gender Bias Task Force:* "Discussion Draft," July 1992, p. F-22 (copy in library of Yale Law School).

400 both judges spent time in conversation: Resnik interviews and Judith Resnik, email to author, 7/11/06. See also Lynn Hecht Schafran, handwritten notes on phone conversation with Sally Goldfarb, 8/5/92, and with Victoria Nourse, 8/7/92; and Schafran, fax to Chris Schroeder and Victoria Nourse, 8/19/92, in Schafran files.

400 discussing VAWA at Rymer's home: Lynn Hecht Schafran, letter to Sally Goldfarb, 5/25/92, in Schafran files; Resnik interview, 7/18/97.

400 Rothstein would wind up talking . . . Helen Neuborne: Neuborne interview.

400 Nourse quickly responded that Biden would be pleased: Lynn Hecht Schafran, handwritten notes on phone conversation with Victoria Nourse, 8/7/92, in Schafran files.

401 "A couple of years ago": Quotations from O'Connor's talk are from "The Effects of Gender in the Federal Courts; the Final Report of the Ninth Circuit Gender Bias Task Force," reprinted in 67 *Southern California Law Review* 745 (1994).

401 Judge Shapiro, as agreed: "Re: NAWJ Resolution," 7/25/92, in files of Lynn Hecht Schafran at Legal Momentum as of 6/2/97.

401 Despite some worries . . . thankful for the NAWJ: Lynn Hecht Schafran, handwritten notes on phone conversation with Victoria Nourse, 8/7/92, in Schafran files.

402 Biden was tied up in Senate discussions: Victoria Nourse, fax to Lynn Hecht Schafran and Sally Goldfarb, c. 8/7/92, undated, in Schafran files.

402 "in an emergency c/o Judge Richard Cudahy in Winnetka" . . . running joke: Nourse interviews.

402 Zobel . . . chair of the Conference of Federal Trial Judges in February of 1992: National Association of Women Judges, 20th Annual Conference 1998, "The Education of a Judge," Presenter Biographies, 10/11/98, in files of author.

402 Saturday, August 8 . . . defer: Lynn Hecht Schafran, handwritten notes, 8/8/92, in Schafran files.

402 Monday, August 10 . . . Later on August 10 . . . "unless the legislation": Lynn Hecht Schafran, handwritten notes on conference call with Chris Schroeder, Victoria Nourse, and Sally Goldfarb, 8/10/92, and Lynn Hecht Schafran, handwritten notes, 8/12/92, all in Schafran files.

403 Tuesday, August 11, about 9:00 a.m.: Lynn Hecht Schafran, handwritten notes on two phone calls with Sally Goldfarb, 8/11/92, in Schafran files.

403 The task of marshaling opposition fell to Schafran . . . allies ready: Sally Goldfarb, fax to Lynn Hecht Schafran, 8/11/92, in Schafran files.

403 Schafran sat taking notes: Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.

404 Brooksley Born, whom she had first worked with: Lynn Hecht Schafran, letter to author and email to author, 8/10/05.

404 Born was then the first woman member . . . rewritten long-standing ABA rules: "Legends in the Law: A Conversation with Brooksley Born," *Washington Lawyer*, October 2003, available at www.dcbar.org/for_lawyers/resources/legends_in_the_law/born.cfm (visited 2/20/05).

404 "All the men" . . . "with both barrels": Lynn Hecht Schafran, handwritten notes, phone conversation with Brooksley Born, 7/15/92, in Schafran files; confirmed by Brooksley Born, letter to author, 8/23/05.

405 Judge Shapiro . . . "crimes of violence" and "motivated by gender": Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.

405 first in her class at Stanford Law in 1964 . . . calls from home to clients: Susan Wood, "My Job, My Self," *Washington Post Magazine*, 6/24/79, p. 10; Brooksley Born, letter to author, 8/23/05.

405 "absolute wreck" . . . "A considerable body of thought" . . . "a mistake had been made" . . . "I don't know": Born quoted in Laura A. Kiernan, "Lawyers Juggle Career, Family Demands," *Washington Post*, 9/29/80, p. 28.

406 Born rose to address the House of Delegates . . . "More votes this time" . . . *2:53 p.m.* (also underscored), August 12, 1992: Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.

407 conference had permitted its committee to continue dialog with VAWA's sponsors: Administrative Office of the U.S. Courts, "Report of the Proceedings of the Judicial Conference of the United States," 9/23–24/91, under heading "Committee on Federal-State Jurisdiction, Violence Against Women Act," in Legal Momentum NY files.

407 Harvard Law and a former federal prosecutor from Florida . . . Marcus had won the esteem of lawyers who practiced before him: *Almanac of the Federal Judiciary* (New York: Aspen Law and Business, 1995), Vol. 1, p. 44.

407 Resnik . . . came to admire . . . spoke not just to him . . . larger committee of the Judicial Conference: Resnik interviews.

408 Schroeder sometimes felt she was speaking to him daily . . . breakthrough that Schroeder saw as a "miracle": Schroeder interview. Judge Marcus declined to be interviewed on the grounds that it would

be "inappropriate to comment on a matter of legislation"; Judge Stanley Marcus, phone message to author, 8/20/97.

408 lobby, as Chief Justice Rehnquist had: Cris Carmody, "While Rehnquist Sings Caseload Blues," *Chicago Daily Law Bulletin*, 2/4/92, p. 1.

408 shifted from opposition to no position: Judge Stanley Marcus, letter to Honorable Don Edwards, 11/16/83, reprinted in Hearing before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, *Crimes of Violence Motivated by Gender*, 103d Cong., 1st sess., 1993, Serial No. 51, pp. 70–71. Further references will be cited as Judiciary hearing, *Crimes of Violence* (1993).

408 April 26, 1993: Sally Goldfarb, notes dated 4/26/93, in Legal Momentum NY files. Author reviewed these 5 pages of handwritten notes with Goldfarb, New York City, 5/13/97.

408 "the dark room": Goldfarb-Nourse-Reuss interview.

408 "the feminists": Schroeder interview.

409 meeting areas were taken: Nourse interviews.

409 room . . . SD G19. . . scuffed cranberry: Author visit, 6/6/97.

409 "Rumpus room": Nourse interviews.

409 "would try to bully us" . . . "nothing is going to happen" . . . "lawyer's lawyer meeting": Goldfarb-Nourse-Reuss interview and Nourse interviews.

410 "felony" . . . "pendent jurisdiction" . . . seriousness of a felony . . . not give jurisdiction to federal courts: In addition to Sally Goldfarb, notes dated 4/26/93, see also Judge Stanley Marcus, letter to Honorable Don Edwards, 11/16/83, reprinted in Judiciary hearing, *Crimes of Violence* (1993), pp. 70–71.

410 not cover "random" crimes: Senate Judiciary, *VAWA of 1991*, p. 69; House Crime Hearings 1992, *Violence Against Women*, p. 11.

410 "Motivated by gender means" . . . "a clear distinction between misogyny": Sally Goldfarb, fax to Judge Mary Schroeder, 12/1/92, in Legal Momentum DC files.

411 Judge Marcus met earlier in the year: Pat Reuss, draft memo to Violence Against Women Task Force, 2/24/93, in Legal Momentum DC files. Reuss' memo is cover sheet for memo beginning "You have asked for thoughts," which she describes as "Judges' suggestions for changes in the VAW (as passed out to House staff during visits by Judge Marcus, representing the U.S. Judicial Conference)."

411 "You have asked for thoughts": 5-page typescript (no author listed and no title), apparently from early 1993 (certainly later than 9/19/92 and before 2/24/93), in Legal Momentum DC files.

411 phrasing that Goldfarb and NOW Legal Defense could not accept: Pat Reuss, draft memo to Violence Against Women Task Force, 2/24/93, in Legal Momentum DC files.

411 Since January, both judges had thought in detail and conferred often about VAWA's language: Schroeder interview.

411 "invidiously discriminatory animus" . . . "some racial": Sally Goldfarb, notes dated 4/26/93; *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

411 *Griffin* relied on the same anticonspiracy section of the 1871 Civil Rights Act that helped inspire VAWA: Sally Goldfarb, letter to author, 8/12/05; Nourse, "Where Violence," p. 8.

412 "animus and effect" . . . "to strike down the citizen": *Griffin v. Breckenridge*, 403 U.S. 88, 100 (1971).

412 "just and equal on their face": *Congressional Globe*, 42d Cong., 1st sess., App. 153 (Apr. 4, 1871) (remarks of Rep. Garfield), cited in *Carpenters v. Scott*, 463 U.S. 825, 845 (1983).

412 Nourse, in her earliest drafting . . . defined a "crime of violence" . . . dropped out of VAWA months later: Nourse, "Where Violence," pp. 7, 12.

412 the civil rights acts of 1871 and 1875 had been nearly destroyed by retrograde Supreme Court cases of 1883: See discussion of the Supreme Court's 1883 destruction of the Civil Rights Act of 1871 and 1875 in Chapter 22 in the book.

412 case called *Guest* . . . "a majority of the Court today": *United States v. Guest*, 383 U.S. 745 (1966).

413 resembled the ban on discrimination in . . . Civil Rights Act of 1875: For language of Civil Rights Act of 1875, section 1, see *Civil Rights Cases*, 109 U.S. 3, 8 (1883): "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement." For similarity of provisions in the 1875 Act to those upheld under Civil Rights Act of 1964, see Catharine MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," 114 *Harvard Law Review* 135 (2000).

413 Both Congress and the Kennedy-Johnson administrations grounded the 1964 Civil Rights Act on two sources of constitutional authority: Balkin, "History Lesson."

413 power to regulate interstate commerce extended even to wheat grown at home: *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

413 swerved . . . affirmed the civil rights act using only the commerce clause: Balkin, "History Lesson."

414 oral arguments in both 1952 and 1953 (by, among others, Thurgood Marshall and Spottswood Robinson): Kluger, *Simple Justice*, pp. 563–667.

414 "no place" in the area of "public education": *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

414 recently graduated from Stanford Law School: Hall, *Oxford Companion*.

414 "I think *Plessy v. Ferguson* was right and should be reaffirmed": For the classic discussion of the Rehnquist memo of 1952, see Kluger, *Simple Justice*, pp. 606–609. Kluger concludes that Rehnquist's memo "was an accurate statement of his own views on segregation" (p. 609). For an analysis drawing on more recent evidence, see Tushnet, *Court Divided*, pp. 18–21, which argues that "Rehnquist took the opportunity provided by Jackson's ambivalence about judicial activism to put down on paper his own views about the Constitution and civil rights."

414 "smeared the reputation of a great justice" . . . "we are no more dedicated": Kluger, *Simple Justice*, p. 609.

414 Rehnquist admitted that he might have defended *Plessy* among fellow clerks: Davis, *Justice Rehnquist*, p. 194. See also Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (New York: Times Books, 2007), pp. 186, 255n7, citing Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), p. 309. Rosen writes that Rehnquist "appears to have been the only Supreme Court clerk during the 1952 term who supported *Plessy v. Ferguson*."

414 Writing in the *Arizona Republic* . . . "opposed to all civil rights laws": Sue Davis, *Justice Rehnquist and the Constitution* (Princeton: Princeton University Press, 1989), p. 6. Further references will be cited as Davis, *Justice Rehnquist*.

414 "confronting and overturning" . . . begin to cut away civil rights: Balkin, "History Lesson."

415 "wrong the day it was decided": *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992).

415 Scalia ruled: All quotations from the *Bray* case, unless otherwise indicated, are from *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

416 Nineteen years had passed since Wendy Williams . . . "pregnant women and nonpregnant persons": See Part 2 in the book.

416 "Nowhere is the economic discrimination" . . . "able-bodied women": Supreme Court transcript of *Geduldig v. Aiello*, 417 U.S. 484 (1974), argued 3/26/74, pp. 29–30.

416 Potter Stewart . . . "pregnant women and nonpregnant persons": *Geduldig v. Aiello*, 417 U.S. 484, 497n20 (1974), and see Part 2.

417 "Congress understood *Geduldig*" . . . "characteristic that formed the basis" . . . "continuing vitality": *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993).

417 "tending to excite odium": *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993).

418 hateful animus . . . Nourse and Goldfarb had refused to accept: Sally Goldfarb, "Possible Changes in the Violence Against Women Act," 4/22/93, in Legal Momentum DC files.

418 "we need proper historical sources here" . . . appealing language concerning *animus*: Schroeder interview.

418 "We do not think that the 'animus'" . . . "does demand, however, at least a purpose": *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–270 (1993).

419 Judge Marcus read aloud . . . "a purpose that focuses": Sally Goldfarb, notes dated 4/26/93, in Legal Momentum NY files.

419 These judges, Nourse was coming to believe . . . "I really think I saw a light go off": Goldfarb-Nourse-Reuss interview.

419 Goldfarb lay out the argument . . . cracks of American civil rights law: Sally Goldfarb, letter to author, 8/12/05.

419 A few days before, Judge Schroeder had suggested . . . "motivated at least in part by animus against the gender of the victim": Sally Goldfarb, "Possible Changes in the Violence Against Women Act," 4/22/93, in Legal Momentum DC files.

419 "language won't be perfect": Sally Goldfarb, notes dated 4/26/93.

419 She appreciated that . . . easing her burden: Goldfarb interviews.

419 *professorial* . . . *avuncular*: Goldfarb-Nourse-Reuss interview.

420 Judge Marcus later reported in a formal letter to the House Judiciary Committee: Judge Stanley Marcus, letter to Honorable Don Edwards, 11/16/93, reprinted in Judiciary hearing, *Crimes of Violence* (1993), pp. 70–71.

420 "the feminists, for lack of a better word" . . . "brilliant young woman" . . . "extremely knowledgeable" . . . "worked so hard" . . . "because I wanted the federal government": Schroeder interview.

421 Judge Marcus mentioned with apparent approval: Judge Stanley Marcus, letter to Honorable Don Edwards, 11/16/93, reprinted in Judiciary hearing, *Crimes of Violence* (1993), pp. 70–71.

421 tightened definition of crimes that VAWA covered: Events at about the same time continued to suggest VAWA might be needed. In April 1993, a judge named Thomas Bollinger in Maryland gave only probation to a 44-year-old rapist who took advantage of his 18-year-old victim when she was passed out, drunk. Such a victim, the judge reportedly observed, was the "the dream" of "a lot of males." Lynn Hecht Schafran, "There's No Accounting for Judges," 58 *Albany Law Review* 1063 (1995), p. 1076n75, citing Karl Vick, "Maryland Judge Taking Heat in Cuckolded Killer Case," *Washington Post*, 10/30/94, pp. A1, A28.

421 "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": Nourse, "Where Violence."

421 no-amendment policy of Senators Joseph Biden and Orrin Hatch: Nourse, "Where Violence," p. 27.

421 September 13, 1994, the Violence Against Women Act became law: Nourse, "Where Violence," p. 1n1. Final votes in favor of VAWA's civil rights section, as part of the Violent Crime Control and Law Enforcement Act of 1994, were 235 to 195 in the House and 61 to 38 in the Senate. For details of a late effort in the House to remove the civil rights section, see the closing pages of Nourse, "Where Violence."

26: Reckoning at the Supreme Court

422 Violence Against Women Act reached the Supreme Court: *United States v. Morrison*, 529 U.S. 598 (2000).

422 case brought by Christy Brzonkala: It carried the title *Brzonkala v. Virginia Polytechnic Institute and State University* through most of its history in federal courts before becoming, at the Supreme Court, *United States v. Morrison*. For a history of how the name changed, see Catharine MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," 114 *Harvard Law Review* 135 (2000), p. 177n18.

422 "accept as true": *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949, 953 (4th Cir. 1997). Further references will be cited as *Brzonkala,* Fourth Circuit (1997).

422 Opposing lawyers were making their primary legal challenge . . . against the law on which her case relied: *United States v. Morrison*, 529 U.S. 598, 604 (2000), which states that "Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's [VAWA's] civil remedy is unconstitutional."

422 The story of Christy Brzonkala: All information and quotations relaying the story told by Motz are from *Brzonkala,* Fourth Circuit (1997), pp. 953–956, unless otherwise indicated.

422 "On the evening of September 21, 1994" . . . "Brzonkala and another female student": *Brzonkala*, Fourth Circuit (1997), p. 953.

423 "is the only violent felony": *Brzonkala,* Fourth Circuit (1997), p. 954.

423 sexual intercourse with Christy Brzonkala even though she said "no": *Brzonkala,* Fourth Circuit (1997), p. 954.

424 "a mere technicality to cure the school's error": *Brzonkala,* Fourth Circuit (1997), p. 954.

424 "In contrast" . . . "ample time to procure the sworn affidavits" . . . "exacerbated this difficulty": *Brzonkala,* Fourth Circuit (1997), p. 955.

424 "violated the University's Abusive Conduct Policy": *Brzonkala,* Fourth Circuit (1997), p. 955.

424 "excessive" . . . "deferred": *Brzonkala,* Fourth Circuit (1997), p. 955.

424 "did not elaborate on the 'other cases'": *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 908 (4th Cir. 1999) (Motz dissenting).

424 She learned from a sports page: *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949, 955 (4th Cir. 1997).

424 "return to school also means a return to football": "Virginia Tech LB Returns," *Washington Post*, 8/22/95, p. E03; *Brzonkala,* Fourth Circuit (1997), p. 955.

425 breaking the door of a bar: Richard Jerome and Mary Esselman, "No Justice, No Peace," *People*, 3/11/96, p. 45.

425 hit-and-run . . . missed Tech's big game: Associated Press, "Virginia Tech Aims to Raise Image to Level of Its Game," *New York Times*, 9/7/97, p. 3.

425 no judge doubted that they met VAWA's definition of gender-motivated violence: Sally Goldfarb, letter to author, 8/12/05.

425 first federal judge . . . "indicates a conspiracy of disrespect": This and subsequent quotations from Judge Kiser's ruling are from *Brzonkala v. Virginia Polytechnic Institute and State University*, 935 F. Supp. 772, 784–785, 801 (W.D. Va. 1996).

425 "better not have any fucking diseases" . . . "I like to get girls drunk" . . . "I hate women": *Brzonkala v. Virginia Polytechnic Institute and State University*, 935 F. Supp. 772, 782–785 (W.D. Va. 1996).

425 "if our federal system is to survive" . . . "cure all of the ills of mankind": *Brzonkala v. Virginia Polytechnic Institute and State University*, 935 F. Supp. 772, 801 (W.D. Va. 1996).

426 athlete she had been . . . state championships: Sean Burke, “Virginia AAA Girls; Salem Outlasts Woodson in 2 Overtimes for Title,” *Washington Post*, 3/12/94, p. D7.

426 “It’s too traumatic”: Quotations from and details of the press conference are from a transcript by author from videotape, “Gender-Based Violence: *Brzonkala v. Morrison,*” 1/7/00, Washington, DC, C-SPAN ID 154583.

426 seventeen wins and only two losses: NOW Legal Defense and Education Fund, “Summary, *Brzonkala v. Morrison*,” available at www.nowldef.org/html/courts/brzsumm.htm (visited 12/27/99).

426 won before the panel of three judges at the court of appeals: *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949 (4th Cir. 1997).

426 Judge Michael Luttig . . . appointed to the court of appeals in 1991: “Luttig, J. Michael,” available at www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/allJudgeByCircuit.asp?CircuitId=4 (visited 2/21/05).

426 it then had no women: “Women Stronger Than Ever in the Judiciary, Panel Says,” posted 9/30/03, available at www.law.virginia.edu/home2002/html/news/03_fall/womenjudiciary_print.htm (visited 2/20/05).

426 Luttig . . . crash course in constitutional law . . . clerk to Antonin Scalia . . . and to Warren Burger: Mayer and Abramson, *Strange Justice*, p. 211.

426 “These people have destroyed my life”: John C. Danforth, *Resurrection: The Confirmation of Clarence Thomas* (New York: Viking, 1994), p. 108.

427 “This would not have been possible”: Deborah Sontag, “The Power of the Fourth,” *New York Times Magazine*, 3/9/03, p. 40.

427 *en banc* . . . seven judges . . . to four . . . “We the people, distrustful of power”: *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999). Further references will be cited as *Brzonkala,* Fourth Circuit *en banc* (1999).

427 seven judges (including one woman) to four judges (including one woman, Judge Motz): For surnames of judges and their votes, see *Brzonkala,* Fourth Circuit *en banc* (1999); for full names of judges, see United States Court of Appeals for the Fourth Circuit, available at http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fourth_Circuit (visited 8/16/06).

427 *Lopez* . . . Gun-Free School Zones Act: *United States v. Lopez*, 514 U.S. 549 (1995).

427 regulating guns, which the federal government had done for years: Joan Biskupic, “Justices to Consider if Congress Overstepped in Banning Guns near Schools,” *Washington Post*, 4/19/94, p. A7, quoting the legislative counsel for the National Rifle Association that the court of appeals opinion in *Lopez* “was the first time in a long, long time that seriously addressed the question of whether there are limits” on federal gun control.

427 procedural lapse: Congress did not make findings: Supreme Court transcript of *United States v. Lopez*, 514 U.S. 549 (1995), argued 11/8/94, p. 1, argument of Drew S. Days III: “The court of appeals held the statute unconstitutional because neither the statute nor its legislative history contained express congressional findings identifying the nexus between interstate commerce and gun possession in schoolyards.”

428 authority under the commerce clause . . . half a century: Linda Greenhouse, “High Court Kills Law Banning Guns in a School Zone,” *New York Times*, 4/27/95, p. 1.

428 “extraordinary step” . . . “concerned that the original understandings”: Supreme Court transcript of *United States v. Lopez*, 514 U.S. 549 (1995), argued 11/8/94, pp. 1–2.

428 Years earlier . . . “this Court will in time again assume its constitutional responsibility”: *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 579 (1985), and see Linda Greenhouse, “Justices Step In as Federalism’s Referee,” *New York Times*, 4/28/95, p. A1.

428 "strict constructionist" . . . "if she's a conservative": Dean, *Rehnquist Choice*, pp. xv, 5–6, 16, 45, 113, 295n51.

428 "will generally not be favorably inclined": Dean, *Rehnquist Choice*, pp. 16 and 295n51.

428 1969 to 1971 to appoint four such justices, in two pairs: Dean, *Rehnquist Choice*, p. xv.

428 "if she's a conservative. Now if she's a liberal, the hell with it": Dean, *Rehnquist Choice*, p. 113.

428 "I'm not a woman, and I'm not mediocre": "The President's Two Nominees," *Time*, 11/1/71; Dean, *Rehnquist Choice*, p. 191.

428 Nixon joked that maybe Rehnquist could "get a sex change": Dean, *Rehnquist Choice*, p. 139.

428 "never" . . . "find a conservative enough woman": Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Virginia Law Review* 1045 (2001), p. 1072n115, citing David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999), pp. 55–61, quoting H. R. Haldeman, *The Haldeman Diaries: Inside the White House* (New York: G. P. Putnam's, 1994), p. 365 (diary entry of 10/15/71).

429 "strict constructionist political philosophy": Margolick, "Women Find Bar," p. 16.

429 conference on federalism: John R. Pagan, "Introduction," 22 *William and Mary Law Review* 599 (1981), pp. 599–600.

429 law review article . . . keep civil rights cases out of federal courts . . . quoted Justice Rehnquist: Sandra Day O'Connor, "Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge," 22 *William and Mary Law Review* 801 (1981), pp. 810, 815; for discussion of the article at the time of her nomination, see "Testimony of Lynn Hecht Schafran, Esq., National Director, Federation of Women Lawyers' Judicial Screening Panel" (Sandra Day O'Connor hearings in 1981), available at www.gpoaccess.gov/congress/senate/judiciary/sh-j-97–51/402–411 .pdf (visited 1/27/08); see also Aric Press, "A Woman for the Court," *Newsweek*, 7/20/81, p. 16.

429 they would agree in 70 percent of non-unanimous cases: Mark Tushnet, "Taking Sides," *Legal Affairs*, March–April 2005, p. 39. See also analysis by *Harvard Law Review* that in her first 20 years on the court she voted more frequently with Rehnquist than with any other colleague, cited in Herman Schwartz, "Lady Day," *Nation*, 8/4/03, pp. 34–40.

429 voted more often with her than with any other justice: Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (New York: Times Books, 2007), p. 206.

429 During oral argument in *Lopez*, O'Connor and Rehnquist . . . Scalia: Quotations from the oral argument are from Supreme Court transcript of *United States v. Lopez*, 514 U.S. 549 (1995), argued 11/8/94, which does not state which justices are asking questions. I have added names based on listening to recorded argument in Jerry Goldman, ed., *The Supreme Court's Greatest Hits 2.0* (Evanston: Northwestern University Press, 2002). CD-ROM. Anonymity of justices speaking in oral argument was preserved in official Supreme Court transcripts prior to October 2004; see "Supreme Court of the United States Argument Transcripts," available at www.supremecourtus.gov/oral_arguments/argument_transcripts.html (visited 8/16/06). According to the public information office of the Court, there is no way to identify justices speaking in oral argument prior to October 2004 except to read a transcript (hoping that an attorney addressed a justice by name), listen to an official audio recording such as those reproduced on *The Supreme Court's Greatest Hits* (hoping to identify a justice by tone of voice), or review press reports (hoping that some newspaper managed to report who was speaking); interview with Ed Turner, deputy public information officer, Supreme Court, Washington, DC, by phone, 8/18/06. In this book I have used all the methods suggested by Mr. Turner, hoping to avoid errors of the sort that the Court's change in policy has averted since 2004.

429 "Federal domestic relations law" . . . Scalia interrupted . . . vehemence: "I'm aware": Voices from oral

argument on Jerry Goldman, ed., *The Supreme Court's Greatest Hits 2.0* (Evanston: Northwestern University Press, 2002), minute 15. CD-ROM.

429 VAWA had become law eight weeks before: The passage on September 13, 1994, of the Violent Crime Control and Law Enforcement Act of 1994, which contained VAWA, is noted also by Chief Justice Rehnquist in *United States v. Lopez*, 514 U.S. 549, 563 (1995). *Lopez* was argued 11/8/94.

429 chief justice announced: Quotations from the *Lopez* decision, including the dissent, unless otherwise indicated, are from *United States v. Lopez*, 514 U.S. 549 (1995).

430 rare move of reading aloud from his dissent: Linda Greenhouse, "High Court Kills Law Banning Guns in a School Zone," *New York Times*, 4/27/95, p. 1.

430 Speaking at greater length than the chief justice . . . "consistent with, if not dictated by": Timing and transcription by author of reading by justices in Jerry Goldman, ed., *The Supreme Court's Greatest Hits 2.0* (Evanston: Northwestern University Press, 2002). CD-ROM.

430 "first principles" . . . James Madison . . . "nothing to do with 'commerce'": *United States v. Lopez*, 514 U.S. 549, 552 (1995).

430 aimed at the nascent Violence Against Women Act: The chief justice's mention of "violent crime" linked his concerns to VAWA. His phrase "domestic relations" from 1991 linked to a complex question that interacted with VAWA: did there exist a "domestic relations exception" that allows federal courts to avoid cases dealing with divorce and alimony? In 1992, in a case that had nothing to do with divorce or alimony, the Supreme Court ruled 6–3 that such an exception exists: *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). The chief justice's awareness of VAWA may also show in his treatment of congressional findings in the crime bill, which his opinion notes was signed two months before the *Lopez* oral argument and which included findings designed to link the commerce clause to both the Gun-Free School Zones Act and the Violence Against Women Act. He took "note" of such findings, abundant in VAWA, but avoided saying if they might suffice.

430 "the original understanding of that Clause": *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas dissenting).

430 "first principles": *United States v. Lopez*, 514 U.S. 549, 552 (1995).

430 "the Federal judiciary's policy-making": Linda Greenhouse, "Justices Step In as Federalism's Referee," *New York Times*, 4/28/95, p. A1.

431 "relatively narrow decision": Ann Devroy and Al Kamen, "Clinton Says Gun Ruling Is a Threat," *Washington Post*, 4/30/95, p. A1.

431 second foundation-shifting case: *City of Boerne v. Flores*, 521 U.S. 507 (1997).

431 The case began . . . peyote as a sacrament: *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

431 fired . . . "private drug rehabilitation agency": John T. Noonan Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002), pp. 23–27.

431 the Court sided with Oregon . . . "compelling interest": Joan Biskupic, "Supreme Court Overturns Religious Freedom Statute," *Washington Post*, 6/26/97, p. A1, and Linda Greenhouse, "Laws Are Urged to Protect Religion," *New York Times*, 7/15/97, p. A15.

431 Pregnancy Discrimination Act in 1978: See Part 2 in the book.

431 Religious Freedom Restoration Act: Quotations from the Act and from the Supreme Court decision, unless indicated otherwise, are from *City of Boerne v. Flores*, 521 U.S. 507 (1997).

431 "compelling governmental interest": *City of Boerne v. Flores*, 521 U.S. 507, 515–516 (1997).

432 all but three senators and unanimity in the House . . . "enforce" guarantees: Linda Greenhouse, "Defending the Judiciary; High Court Voids a Law Expanding Religious Rights," *New York Times*, 6/26/97, p. A1.

432 "a congruence and proportionality": *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

432 "all but preordained": See *Brzonkala,* Fourth Circuit *en banc* (1999), p. 825: "As even the United States and appellant Brzonkala appear resignedly to recognize. . . ."

432 "marital rape exemption": *Brzonkala,* Fourth Circuit *en banc* (1999), p. 843. Judge Luttig pointed out that as of 1990, seven states still prohibited prosecuting a man for marital rape and thirty-three states restricted prosecution of marital rape.

433 temperatures just above freezing . . . sixty people . . . opposite the chief justice, was Senator Joseph Biden: Reporting by author, 1/11/00.

433 oral argument: Quotations from oral arguments, and descriptions, unless otherwise indicated, are from Supreme Court transcript of *United States v. Morrison*, 529 U.S. 598 (2000), argued 1/11/00, and author's reporting at oral argument.

434 attorneys general from thirty-eight states supported VAWA in a letter to Congress: Judiciary hearing, *Crimes of Violence* (1993), pp. 34–36.

434 thirty-six had submitted a brief on its behalf to the Supreme Court: Brief of the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico, as Amici Curiae in Support of Petitioners' Brief on the Merits, dated November 12, 1999, in *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99–5 & 99–29).

435 another justice broke in: As stated earlier, anonymity of justices speaking in oral argument was preserved in official Supreme Court transcripts prior to October 2004. Although I attended the argument in *United States v. Morrison* on 1/11/00, along with many reporters I sat in a side gallery with little view of the justices. Because reporters often cannot see who is speaking, members of the Court staff walk along the rows of seats, attempting to whisper names of whichever justice is asking a question. The whispering is often inaudible or otherwise unsuccessful, as when this justice spoke. In this case, none of the strategies proposed by the Court's public-information office—hope that an attorney addressed a justice by name, hope to identify a justice by tone of voice, or hope that some newspaper managed to report which justice was speaking—proved sufficient. Interview with Ed Turner, deputy public information officer, Supreme Court, Washington, DC, by phone, 8/18/06.

435 a jurisdictional hook: For a discussion of such hooks or triggers, see Tushnet, *Court Divided*, p. 260, on "what constitutional scholars call a jurisdictional trigger." Tushnet describes the addition, after Supreme Court overrulings, of such a trigger or hook to the Gun-Free School Zones Act. And see Tushnet's p. 271 for discussion of the addition of a trigger in an effort restore part of the overruled Religious Freedom Restoration Act.

436 Unable to study after an attack . . . stopped attending classes . . . left the school: *Brzonkala,* Fourth Circuit (1997), pp. 953–955.

436 out of state to get a job . . . in a bar: Brzonkala interview.

436 Outdoors on the steps . . . "Men don't choose" . . . "women do alter" . . . "empowers my daughter" . . . "titanic struggle": Reporting by author, 1/11/00.

437 Less publicly, as they walked . . . wondered aloud: Interviews with Sally Goldfarb and Judith Resnik, Washington, DC, 1/11/00.

437 As the day turned from drizzle . . . "when a woman is raped" . . . "Women rule": Reporting by author, 1/11/00.

437 lobbied her . . . "Well, we got it": Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of*

the Struggle for the Control of the United States Supreme Court (New York: Penguin Press, 2007), pp. 16–17. Further references will be cited as Greenburg, *Supreme Conflict*.

438 lobbied her: For narrative of Rehnquist's efforts to hold O'Connor's vote in another context (not assigning opinions to Justice Scalia when Scalia and O'Connor were in a "feud"), see Kim Isaac Eisler, "Majority of Two," *Washingtonian*, December 1996, p. 78.

438 In the opening paragraph of his opinion: Quotations from the majority and dissenting opinions, unless otherwise indicated, are from *United States v. Morrison*, 529 U.S. 598 (2000).

438 "Brzonkala alleges that, within 30 minutes": *United States v. Morrison*, 529 U.S. 598, 602 (2000).

439 "You better not have any . . . diseases" . . . "boasting, debased remarks": *United States v. Morrison*, 529 U.S. 598, 602 (2000).

439 "fuck the shit out of them": *Brzonkala,* Fourth Circuit (1997), p. 953.

439 "economic activity": *United States v. Morrison*, 529 U.S. 598, 613 (2000).

439 "Although *Lopez* makes clear" . . . "Congress elected": *United States v. Morrison*, 529 U.S. 598, 613 (2000).

439 Court's consistent record of deferring to Congress in its enforcement of the commerce clause: *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Souter dissenting).

439 Four dissenting justices: *United States v. Morrison*, 529 U.S. 598, 628ff. (2000) (Souter dissenting).

439 "would have passed muster": *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter dissenting).

439 "Supply and demand for goods": *United States v. Morrison*, 529 U.S. 598, 636 (2000) (Souter dissenting).

440 "crimes of violence motivated by gender": *United States v. Morrison*, 529 U.S. 598, 634 (2000) (Souter dissenting).

440 Until thirty years earlier . . . rational-basis scrutiny: *Reed v. Reed*, 404 U.S. 71 (1971), and see Part 1 in the book.

440 asking Congress to have more than a rational basis: *United States v. Morrison*, 529 U.S. 598, 638 (2000) (Souter dissenting).

441 "where the laws are just and equal on their face" . . . "a dead letter": *United States v. Morrison*, 529 U.S. 598, 625 (2000).

441 Sumner . . . died fighting for: Foner, *Reconstruction*, p. 533.

441 "private persons" . . . "we concluded": *United States v. Morrison*, 529 U.S. 598, 621 (2000).

442 those later cases gave support to the anti-black laws of the Jim Crow era: Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, NY: Foundation Press, 1988), p. 1695.

442 not since 1913 had a majority of the Supreme Court explicitly followed either *Harris* or the *Civil Rights Cases*: According to Shepard's (visited 6/2/04 via Lexis), the Supreme Court had not followed the *Civil Rights Cases* since *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126 (1913); it had not followed *Harris* since *United States v. Stanley*, 109 U.S. 3 (1883).

442 six justices who had sought: *United States v. Guest*, 383 U.S. 745 (1966).

443 "empowers the Congress": *United States v. Guest*, 383 U.S. 745, 762 (1966).

443 "the special favorite of the laws": *Civil Rights Cases*, 109 U.S. 3 (1883).

443 lynching of blacks had become, itself, an ordinary mode: See, for example, "Lynching in the United States," available at http://en.wikipedia.org/wiki/Lynching (visited 8/16/06).

443 "Man is, or should be" . . . "paramount destiny": *Bradwell v. Illinois*, 83 U.S. 130, and see Part 1.

444 "old debris": Brief for Appellant (Sally Reed) to Supreme Court, filed 6/25/71, in *Reed v. Reed*, 404 U.S. 71 (1971), p. 46.

444 most important section: Biden, *Promises to Keep*, p. 244.

444 "single most important legislative accomplishment": Joe Biden, "The Fight Against domestic Violence," *Huffington Post*, 10/18/07, available at www.huffingtonpost.com/joe-biden/the-fight-against-domesti_b_69000.html (visited 8/23/2008).

444 James Crawford . . . charge that they raped a female student . . . suspended by the college: Angie Watts, "Va. Tech Players Arrested; Edmonds, Crawford Deny Rape Charges," *Washington Post*, 12/17/96, p. E01; Angie Watts, "Va. Tech Players Suing Accuser; 2 Suspended from Team," *Washington Post*, 12/18/96, p. C01.

444 denying guilt . . . admitted the prosecution had sufficient evidence . . . aggravated sexual battery: Tony Ayala Jr., "Cases Involving Athletes and Sexual Assault," *USA Today*, 12/21/03, available at www.usatoday.com/sports/03–12–22-athletes-assault-side_x.htm (visited 9/1/06).

444 paid her $75,000 while denying all wrongdoing: Brooke A. Masters, " 'No Winners' in Rape Lawsuit; Two Students Forever Changed by Case That Went to Supreme Court," *Washington Post*, 5/20/00, p. B01.

444 regions that began drafting local laws modeled on VAWA's civil rights section: Sally Goldfarb, "No Civilized System of Justice: The Fate of the Violence Against Women Act," 102 *West Virginia Law Review* 499 (2000), p. 544n362.

444 Rehnquist, who had once written in support of segregation—of *Plessy* and its separate-but-equal doctrine: See earlier discussion of Rehnquist's memo, including, "I think *Plessy v. Ferguson* was right and should be reaffirmed"; and see Kluger, *Simple Justice*, pp. 606–609.

Postscript: Toward Equality (Twenty-first Century)

445 disproportion unseen in entering classes of law schools since 1971: "First Year and Total J.D. Enrollment by Gender 1947–2005," available at www.abanet.org/legaled/statistics/charts/enrollmentbygender.pdf (visited 5/19/07).

445 presidential tapes, first available in late 2000: Dean, *Rehnquist Choice*, p. 287.

445 "screen" . . . "playing around": Nixon tapes, No. 11–1, quoted in Biskupic, *O'Connor*, pp. 41, 350n12.

445 in 2005 President George W. Bush, when he had Supreme Court openings: See Greenburg, *Supreme Conflict*, pp. 248–284; my postscript's narrative of the Miers' nomination follows Greenburg's chronology and supposes that future historians may learn still more than already appears in her invaluable reporting.

445 pressure from his wife and also from O'Connor: Greenburg, *Supreme Conflict*, p. 213; Toobin, *Nine*, p. 282.

445 "devoted her life": Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007), p. 284. Further references will be cited as Toobin, *Nine*.

446 Miers' few weeks as a nominee: Greenburg, *Supreme Conflict*, pp. 270–284.

446 result that she and much of the president's staff originally sought: Greenburg, *Supreme Conflict*, pp. 284, 289; Toobin, *Nine*, p. 298.

446 Gore's presidential campaign . . . amendment banning abortion . . . right to privacy . . . constitutional law for confirmation hearings . . . accurate dates . . . public excoriation: Greenburg, *Supreme Conflict*, pp. 280–284.

446 she might have won enough votes in the Senate: Toobin, *Nine*, p. 296.

447 Burger in the 1970s when he threatened to resign: Dean, *Rehnquist Choice*, pp. 91, 179–180. And see Part 3 in the book.

447 Rehnquist maneuvered O'Connor out: Greenburg, *Supreme Conflict*, p. 20; Toobin, *Nine*, p. 252.

447 "good in every way, except he's not a woman": Dan Balz and Darryl Fears, "Some Disappointed Nominee Won't Add Diversity to Court: O'Connor Was among Those Hoping for a Woman or Minority," *Washington Post*, 7/21/05, p. A15.

447 "the bond of love" . . . "ancient notions" . . . "about women's place": *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634, 1649 (2007).

447 "the special favorite of the laws": *Civil Rights Cases*, 109 U.S. 3 (1883). See Part 5 in the book.

447 47 percent of students: "Legal Education Statistics Enrollment 2005–2006, American Bar Association Section of Legal Education and Admissions to the Bar," available at www.abanet.org/legaled/statistics/charts/enrollmentbygender.pdf, cited in American Bar Association Commission on Women in the Profession, "A Current Glance at Women in the Law 2006," available at www.abanet.org/women/CurrentGlanceStatistics2006.pdf (visited 8/26/07).

447 35 percent of faculty: "Law School Staff by Gender and Ethnicity 2002–2005, American Bar Association Section of Legal Education and Admissions to the Bar," available at www.abanet.org/legaled/statistics/charts/facultyinformationbygender.pdf, cited in American Bar Association Commission on Women in the Profession, "A Current Glance at Women in the Law 2006," available at www.abanet.org/women/CurrentGlanceStatistics2006.pdf (visited 8/26/07).

447 American Bar Association has reached 30 percent: American Bar Association Commission on Women in the Profession, "A Current Glance at Women in the Law 2006," available at www.abanet.org/women/CurrentGlanceStatistics2006.pdf (visited 8/26/07).

447 Women now hold 23 percent of judgeships in federal courts: Alliance for Justice Judicial Selection Database: Demographic Overview of the Federal Judiciary, as of 6/2/06, available at www.afj.org/judicial/judicial_selection_resources/selection_database/byCourtRaceGender.asp, quoted in American Bar Association Commission on Women in the Profession, "A Current Glance at Women in the Law 2006," available at www.abanet.org/women/CurrentGlanceStatistics2006.pdf (visited 8/26/07).