Notes

Prologue: Toward Equality (1968)


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.
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.aauap.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.


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
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. 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 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.

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

I: 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 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.”
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 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 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 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 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.


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.


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


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


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

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


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


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

PATH train: Kelly interview.

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


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

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 Ram-singh 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).

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.


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*.

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

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.


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


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.


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.


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

“sacred trust”: Goodman interviews.

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

The story from two years before started to emerge: “Group Meets with McKay to Demand Women’s Rights,” Commentator, 11/6/68, p. 1.


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.

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

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

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.”

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.

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.

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


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

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


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. 75 fn 22. Further references will be cited as Markowitz, “In Pursuit.”

emissaries from NYU: Kelly interview.


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).

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.
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.
wondered why Nagler called her: Ginsburg interview.

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.

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.

“ice woman” . . . “a female lawyer with clout”: Diana J. Guza-Wells (formerly Rigelman), emails to author, 3/06.
sad story: Nora Simon, letter to “Dear Miss/Sir” at New Jersey ACLU, 7/23/70, in Ginsburg files.

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

For a month and a half she received no reply: L. Howard Bennett, letter to Ruth Bader Ginsburg, 9/18/70, in Ginsburg files.

“zippy” legal complaint: Ruth Bader Ginsburg, letter to Marc Adams Franklin, 10/6/70, in Ginsburg files.

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.

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.

Two weeks after the Army relented: John G. Kester (Office of the Army), letter to Ruth Bader Ginsburg, 10/15/70, in Ginsburg files.


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.

“Marty” . . . “you know I have no time to read tax cases”: Ginsburg interview.

“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).

Moments after . . . crank calls . . . best stationery . . . 100 percent concession: Martin Ginsburg interview.

at her office door appeared: Wulf interview.

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.”

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.”


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.”


“plucked Ruth Ginsburg from obscurity”: Wulf interview.

“some down and dirty women’s rights work” . . . “the lofty aeries”: Wulf interview.

male-female pair, each as irrational as the other: Ginsburg interview.

Recalling Mel in his valorous Ruddigore role: Ruth Bader Ginsburg, letter to author, 8/7/03.

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.
“docketing statement”: in Ginsburg files.


offered to settle for a dollar: Martin Ginsburg interview.


As she read the jurisdictional statement . . . shortcomings: Ginsburg interview.


“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.

Within three days, Wulf called: Ruth Bader Ginsburg, letter to Leo Kanowitz, 4/15/71, in Ginsburg files.

seeking a role in Reed was one of the key decisions: Panel discussion at Columbia Law School, 11/19/93.

“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


“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).

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.’ ”


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.

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).


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-


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


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.
four women students: All are named in Wulf-Ginsburg Brief for Sally Reed.


calling out, “BOO”: Goodman interviews.

“educate the court on everything” and Brandeis: Goodman interviews.


“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.

they presumed, she would fix their footnotes . . . “We just dumped it on her”: Goodman interviews.

underestimated Ginsburg: See later discussion of Wulf’s proposed role for Eleanor Holmes Norton in *Reed*.

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.

A needy male married to a wealthy woman . . . “Nobody could see anything wrong”: Martin Ginsburg interview.

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.


“what better place to catch a man?”: Markowitz interview with Ginsburg; confirmed by Ruth Bader Ginsburg, letter to author, 7/8/03.


he would feel uncomfortable: Markowitz interview with Ginsburg.

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.


strong language . . . inhibited: Markowitz interview with Ginsburg.


justices were men . . . “What is this sex discrimination?”: Ginsburg interview.

ranging from 1908 . . . to as recent as 1961: Wulf-Ginsburg Brief for Sally Reed, p. 41.


“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 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 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 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 in private conference: Douglas papers.
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*.

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*.


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


“The ACLU underestimated her”: Goodman interviews.

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

opening analogy: Markowitz interview with Ginsburg.

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).

Ginsburg was appalled: Markowitz interview with Ginsburg.

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/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.

“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.

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

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

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

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.

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

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


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 . . . “

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).


two Supreme Court cases on sex discrimination: Markowitz, “In Pursuit,” p. 80.

“I knew when I was outclassed”: Wulf interview.

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.

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.

“the year of the woman”: Ginsburg interview.

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

case of Susan Struck: For most details of Struck, see Markowitz, “In Pursuit,” pp. 80–81.


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

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

special medical leaves: Markowitz, “In Pursuit,” p. 81.


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


just one chance: Markowitz, “In Pursuit,” p. 81.

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


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).


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.

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

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

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


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

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

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.


“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.


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

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  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  when the justices considered whether to hear Frontiero’s case: tally of votes on jurisdictional statement in Frontiero, undated, in Brennan papers.
55  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).
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  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.
Byron White was inclined to agree: Justice Byron R. White, letter to Justice William J. Brennan Jr., 2/15/73, in Marshall papers.

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

“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.


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

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).

“on account of sex”: Babcock and others, Sex Discrimination (1975), p. 129.


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.

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


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


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.


Wiesenfeld was the perfect case: Ginsburg interview.


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


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


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


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


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).
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”).


4: *Wiesenfeld* Brings Reality

“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.”

“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.”

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.”


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).


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


students chose from among a menu: Freeman interview.

art historian: Ginsburg interview.

doctorate in French literature: Freeman interview.

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


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

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.

the rest of law school classes, where the abstract could crowd out the human: Panel discussion at Columbia Law School, 11/19/93.
Students saw letters: Interview with Sandra Grayson, Manhasset, New York, by phone, 2/25/94; she recalled the letter about nannies.

“Having gone through more helpers and housekeepers”: Ruth Bader Ginsburg, letter to Stephen Wiesenfeld, 1/10/73, in Wiesenfeld files.

Ginsburg’s vision of an ideal society . . . “illustrative of what Ruth has been saying her whole life”: Freeman interview.


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).


Ginsburg argued for strict scrutiny: Ruth Bader Ginsburg, letter to author, 8/7/03.

Wiesenfeld heard the government make an argument: Wiesenfeld interview.


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).


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.

tricky specifications: Wiesenfeld interview.

he would sell high-grade bicycles . . . Fuji bikes: Details of the store are from Wiesenfeld interview.


“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.

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.)

never told Ginsburg: Ginsburg interview and Wiesenfeld interview.

“She was the kind of person”: Wiesenfeld interview.


somewhat obscure position: Caplan, Tenth Justice, p. 3.


Office of the Solicitor General . . . opposed the district court’s ruling: Jurisdictional Statement by


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 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 “had to be the perfect case”: Ginsburg interview.


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 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.
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, Oviedo, 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
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

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

rear-ended by another car . . . mother . . . woke up blind: Armendariz interview.


miscarriage . . . not even wash dishes: Aiello complaint.


May of 1972, Sally's husband had just become unemployed . . . eight-month-old son . . . $394 monthly salary: Aiello complaint.


Young Christian Workers . . . demanded an appeal . . . voluntary? . . . “all the time”: Armendariz interview.

California Rural Legal Assistance: Wendy Webster Williams, letter to author, 6/10/05.

“the guys”: Armendariz interview.

One of the first guys . . . one of his fellow clerks: Weiner interview.

federal fellowships . . . poverty law: Wendy Webster Williams, letter to author, 6/10/05.

then husband enrolled in Hastings: Wendy Webster Williams, letter to author, 6/10/05.

talk to him about his work: Dunlap interview.


belonged at home . . . wasting spaces: Dunlap interview.

“strict scrutiny” . . . “not in our lifetimes”: Ross and Williams interview.


inspired by Amelia Earhart, she flew: Wendy Webster Williams, letter to author, 6/10/05.

no organization at Boalt Hall . . . discuss the status of women: Kay interview.


no group gathered university women . . . someone in the president’s office . . . “Dear Boalt Hall Girl”: Kay interview.

summers registering voters in Mississippi: Kay interview.

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

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.


tall woman stood out . . . urgency and energy . . . “Question Authority!”: Kay interview.


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

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


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

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

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

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


“the smarmiest thing”: Dunlap interview.

Women’s Association resolved . . . Kay gave guidance: Kay interview.

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.

Sail’er Inn lawyers . . . used the Boalt Hall brief . . . “Hi! This is Ray Peters”: Williams, in Ross and Williams interview.

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

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


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.

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

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

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.

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

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

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.

Carolyn Aiello . . . ectopic pregnancy: Aiello complaint.


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.

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

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

The shock waves from Aiello: Greenberger interviews.

Ruth Weyand: See Chapter 7 in the book.


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.
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: Wil-
liams, in Ross and Williams interview.
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.
which she could no longer use: Wendy Webster Williams, letter to author, 6/10/05.
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
“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).
breakthrough . . . new lawyer: Susan Deller Ross, letter to author, 8/8/05, and see Part 1 in the
book.
late February of 1973, Williams appeared at the U.S. courthouse: Brief for the State of California
Wendy did a great job: Armendariz interview.
May 31, 1973, . . . opinion, written by Alfonso Zirpoli: Quotations from Aiello opinions, unless
(N. D. Cal. 1973).
dissenting).
Supremes . . . men on the high court: Williams, in Ross and Williams interview.
another California woman: Rentzer v. Unemployment Insurance Appeals Board, 32 Cal. App. 3d
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
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.
compensate “in part” for wage loss . . . “abnormal pregnancy with involuntary implications” . . . “nor-
mal pregnancy and delivery”: California Jurisdictional Statement in Geduldig v. Aiello, pp. 8, 41, 49.
Armendariz, for example, received $84: Armendariz interview.
Some two hundred thousand working women in California gave birth each year: Aiello complaint.
When Jacqueline Jaramillo’s IUD failed: Jaramillo interviews and Aiello complaint.
“cradle Catholic” . . . worry that abortion might be her only chance: Jaramillo interviews.
In late 1973 when the Supreme Court announced it would hear: Probable jurisdiction noted, 12/17/73,
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).
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.

Weiner and Williams arrived in DC in late March: Weiner interview.

Center for Law and Social Policy . . . imperfect case: Greenberger interviews.


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*.

“redhead” and “B+”: Blackmun’s oral argument notes in Blackmun papers.

$120 million: Supreme Court transcript of *Geduldig v. Aiello*, p. 3.


women already derived more benefit: Supreme Court transcript of *Geduldig v. Aiello*, p. 14.

enriched women would then choose not to return to their jobs: Supreme Court transcript of *Geduldig v. Aiello*, p. 46.

On crutches . . . None asked: Ross and Williams interview.

Blackmun scribbled “B.” . . . “long stringy hair”: Blackmun’s oral argument notes in Blackmun papers.

women’s disability leave would average half as long: Supreme Court transcript of *Geduldig v. Aiello*, p. 26.

“pay in more and get out less”: Supreme Court transcript of *Geduldig v. Aiello*, p. 25.

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*.


In the conference for discussion of *Geduldig v. Aiello*: Tally sheet in Blackmun papers and memos in Brennan papers.

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.

only if a state started protecting pregnant men . . . pregnant women: Susan Deller Ross, letter to author, 8/8/05.

“skirted discussion of sex discrimination”: RR [apparently Robert I. Richter], memo to Justice Harry A. Blackmun, 5/15/74, in Blackmun papers.

Justice White, after reading Stewart’s draft, replied: Justice Byron White, memo to Potter Stewart, 5/17/74, in Brennan papers.


twenty-four-line footnote: Quotations from the footnote are from Justice Potter Stewart, “3rd DRAFT,” circulated 6/12/74, in Brennan papers.
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.

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.


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

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


late 1940s . . . with Thurgood Marshall: Interview with Phineas Indritz, Silver Spring, Maryland, by phone, 9/15/95, and see *Shelly 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.”


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


Weyand chose not to use anesthesia: Greenberger interviews.


“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.


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.


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


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

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


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

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


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

114 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.


“boredom” to “virulent hostility”: Aileen Hernandez, quoted in Harrison, On Account of Sex, p. 187.

first executive director . . . “the Commission is very much aware”: Harrison, On Account of Sex, p. 187.

“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.

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


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).


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.

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

“I hear you’re one of those feminists” . . . What if you have a construction company: Ross and Williams interview.

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.

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


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.


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.

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).

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


“friendly judge”: Weyand interview, p. 4-43.

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


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


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

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


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


GE’s lawyers appeared jubilant: Dorian interview.

One moment that stood out for Dorian: Dorian interview.


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

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.

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

Bea Rosenberg at the EEOC agreed: Dorian interview.


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).

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

“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).
Ruth Weyand’s ever-expanding brief . . . now 266 pages long: *Gilbert* brief.


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

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.


“didn’t want the government to participate”: Dorian interview.


“tighten your brief again”: Dorian interview.


*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.


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

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


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

Blackmun’s notes . . . “pass”: Conference notes in Blackmun papers; conference notes are thin in Brennan papers.

“Our I recuse”? : Justice Harry A. Blackmun, handwritten note to self, 9/18/76, in Blackmun papers.

“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.
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.

Rosenberg . . . sought to assure Weyand . . . “OK, Linda, here’s the deal”: Dorian interview.

reputation for making sex discrimination a priority in the Civil Rights Division: Brian K. Landsberg,
email to author, 5/7/03.

He had pressed to end discrimination against women in universities: Ginsburg interview.

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.

Baffled when invited to join the reargument . . . “doomed mission”: Pottinger interview.

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).

turning red in the face: Dorian interview.

“Boy this is just exactly”: Pottinger interview.


Weyand had lost her poise but Pottinger had kept his . . . “Linda” . . . “he didn’t want the govern-
ment involved”: Dorian interview.

Blackmun . . . remained a hope: Interview with Seymour DuBow, by Thomas J. Moore, Washington,
DC, 3/23/77, in Weyand files.

“pretty bad”: Justice Blackmun, handwritten notes during oral argument, 10/13/76, in Blackmun
papers.


justices’ conference in October . . . “still not firm” . . . “still is correct”: Justice Blackmun, conference
notes in Blackmun papers.

Brennan, preparing to dissent: Justice William J. Brennan Jr., letter to Justices Marshall and Stevens,
10/20/76, in Marshall papers.

“culminated” in the 1972 EEOC guidelines: General Electric v. Gilbert, 429 U.S. 125, 156 (1976) (Bren-
nan dissenting), identical text to first draft of dissent, circulated 11/23/76, p. 12, in Brennan papers.

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.

Allied with her . . . William Block: William H. Block, typed memo to Justice Blackmun, 11/8/76, in
Blackmun papers.

Blackmun proposed to Rehnquist with a hint: Justice Harry A. Blackmun, letter to Justice William
Rehnquist, 11/22/76, in Blackmun papers.

Stewart urged Rehnquist to follow Blackmun’s: Potter Stewart, letter to William Rehnquist, 11/22/76,
in Blackmun papers.

In his opinion, Rehnquist: Details and quotations are from General Electric v. Gilbert, 429 U.S.
125 (1976).

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.
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.

8: The Final Pregnancy Battle: Beyond the Supreme Court


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.


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 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 long-term planning: Dorian interview.

137 took a “dive”: Pottinger interview.


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

**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
- 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.
144 business and constitutional law . . . easier than at Barnard . . . “finite”: Blank interviews.
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 interview; 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.”
Did her husband . . . want her to be a lawyer: Diane Blank, personal journal entry, 6/11/73, in Blank files.
Kelly began encountering odd reactions: Kelly interviews and Mary F. Kelly, letter to author, 5/13/05.
“valiant Christian women”: Kelly interviews.
“ladies day” . . . abortion and rape and sexual imagery: Kelly interviews.
Root-Tilden: see Part 1 in the book.
be a wonderful secretary: Kelly interviews.
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.
women got together . . . lounge at the ladies’ bathroom: Blank interviews.
From sixty-seven students: Blank letter to Graff, 2/4/70.
those three men worked as writers under her: Blank interviews.
“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.
pages of charts: Diane Blank, chart of men and women, “interviewed and not interviewed” c. 10/2/69, in Blank files.
“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.
Ginsburg could not . . . interview for a Supreme Court clerkship: See Part 1 in the book.
“the prejudice encountered by girl students”: “Group Meets with McKay to Demand Women’s Rights,” *Commentator*, 11/6/68, p. 1.
In the fall of 1969 . . . no one knew: Cooper interview; see also McCollam, “Taking It,” pp. 122–123.
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.
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.
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.


1969 in Diane Blank’s kitchen: Blank interviews.


700 questionnaires: Details of and quoted responses from the questionnaire are from NYU Women’s Rights Committee, “Pilot Study.”


“we hire some women”: NYU Women’s Rights Committee, “Pilot Study,” p. 15.

“Are you planning to have children?”: NYU Women’s Rights Committee, “Pilot Study,” p. 22.

“we don’t like to hire women”: NYU Women’s Rights Committee, “Pilot Study,” p. 26.

“Clients wouldn’t like it”: NYU Women’s Rights Committee, “Pilot Study,” p. 6.


A few days later at the ACLU . . . forty-six women employees at Newsweek: Brownmiller, In Our Time, p. 140.

“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.


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.


Kelly . . . represent NYU in the nationals: Bob Newman, “Two Women Compete for NYU in Nationals,” Commentator, 10/13/70, p. 3.


Isn’t motherhood the greatest goal . . . “politically educated”: Dolkart interview.

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.


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.

why a nice lady like you: Kelly interviews.

 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.


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.


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


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.


censored by: Cooper interview.


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

family friend of the dean: Rabb interview.


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

“saving the world from reactionaries”: Rabb, quoted in Robertson, Girls in the Balcony, p. 162.


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.


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

“My dear”: Bazelon, quoted in Robertson, Girls in the Balcony, p. 163.


cought George Cooper by surprise: Cooper interview.

“was like a gift”: Dolkart interview.

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.

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


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.


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


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

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


“always one woman” . . . “Shit may hit the fan”: Cooper interview.

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


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


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


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


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

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

only woman among the court’s twenty-seven judges: Kwitny, “Law Firm Is Stung.”

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.


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


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

allowing Motley to remark: Motley interview.

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.


“ugliest case”: Diane Blank, personal journal entry, 4/8/75, in Blank files.


she had expected lawyers to “misbehave” . . . no lawyer had ever tried to get her to leave a case: Motley interview.

“there would not be any judge”: Harriet Rabb, letter to the Hon. Constance Baker Motley, 4/17/75, in NARA files.


legal deposition . . . London began: Quotations from and details on the deposition of Blank, unless indicated otherwise, are from Blank 1975 deposition.

“I feel like this horrible inevitable thing”: Diane Blank, personal journal entry, 4/23/75, in Blank files.


Jan Goodman had teamed with Mary Kelly: See Part 1 in the book.

“Ms. Blank has embarked on a career of a certain kind”: Blank 1975 deposition.

London asked Blank if she could name one of those applicants. “No,” she said: Blank 1975 deposition, p. 177.


Steinbock got the impression: Moss interviews.


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.


All sides understood that the future of the case hung in the balance: Arthur H. Dean, “Affidavit

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

“All right ladies”: Blank transcript 6/2/75.


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

Steinbock was shocked: Moss interviews.


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

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

“Oh my god”: Moss interviews.

“job was to stall”: Motley interview.

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

“barratrous and champertous plan”: Blank transcript 6/2/75, p. 10, and see also p. 27.


archaic: Moss interviews.

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


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

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.

“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.


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


“Dear Ms. Rabb, don’t bother” . . . what was a *yahoo*: *Blank* transcript 6/2/75, p. 19.


in which a lawyer” . . . “We don’t conduct any cases like that”: *Blank* transcript 6/2/75, pp. 20–21.

She had doubts he would try such tactics before a male judge: Motley interview.

“You know how everybody talks” . . . knew was improper . . . contempt of court: Motley interview.


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.

Motley went looking for courage . . . Judge Leon Higginbotham: Motley interview.


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.


Judge Motley would not be disqualified: Motley interview.
“not so strong” . . . “stronger each time he showed up” . . . Steinbock’s favorite line: Moss inter-
views.

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

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.

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

From the start, London had fought against handing over data: Harriet Rabb, “Plaintiff’s First Inter-
rogatories 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.

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, in NARA files.

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

Among Rabb’s questions . . . why was each woman not offered the opportunity to become a part-
ner: Harriet Rabb, “Plaintiff’s First Interrogatories and Request for Production of Documents,” to
in Blank v. Sullivan & Cromwell, 75 Civ. 189 (S.D. N.Y. 1977), order defendants to respond to
interrogatories, 11/22/76.

“Title VII does not require an offer of partnership”: Ephraim London, “Affidavit: Objections to


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.

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.

“partners and partnerships are not within the purview” . . . “choosing to do business in the partner-
ship 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.

“Title VII did not make it unlawful”: Defendant’s Brief in Opposition to Motion for Rehearing and
files.

“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.

“It is difficult to conceive of anything more telling”: Order of 1/7/75, by Judge Morris Lasker, in
189 (S.D. N.Y. 1977), order defendants to respond to interrogatories, 11/22/76.

Time to Settle

By late spring of 1977, a proposed settlement: Agreement, signed by Diane Blank, Harriet Rabb,


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.

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.


Blank received $2,000: Blank interviews.


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.

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.”


13: The Chief Justice’s Second Draft


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


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.


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

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.


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.


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


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
Barry interviews
Blackmun papers
Brennan papers
Burns interviews
Catharine MacKinnon files
Catharine MacKinnon interview(s)
George MacKinnon papers
Katz interview
Lenhoff interviews

Files of Patricia J. Barry as of 3/19/93
Interviews with Patricia J. Barry, Los Angeles, 3/17–19/93
Papers of Justice Harry A. Blackmun, Library of Congress
Papers of William J. Brennan Jr., Library of Congress
Interviews with Sarah E. Burns, New York City, by phone, 2/11/93 and 6/15/93
Files of Catharine A. MacKinnon as of 5/11/95
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 E. MacKinnon Papers, Minnesota Historical Society
Interview with Debra Katz, Washington, DC, by phone, 8/20/93
Interviews with Donna Lenhoff, Washington, DC, by phone, 8/17/93 and 8/18/93
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<td>Ludwic interview</td>
<td>Interview with Judith Ludwic, Washington, DC, 4/6/93</td>
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<td>Meyer interview</td>
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<td>Nemy interview</td>
<td>Interview with Enid Nemy, New York City, by phone, 6/22/05</td>
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<td>Sauvigné files</td>
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<td>Sauvigné interview</td>
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<td>Semonoff interview</td>
<td>Interview with Ellen Semonoff, Cambridge, Massachusetts, by phone, 5/6/98</td>
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<td>Singer interview</td>
<td>Interview with Linda Singer, Washington, DC, by phone, 2/6/98</td>
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<tr>
<td>Vinson DC transcript</td>
<td>District court transcript in <em>Vinson v. Taylor</em>, 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.</td>
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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 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


go far”: Vinson DC transcript, 1/29/80, p. 25.

dapper: Meisburg interview.
gentlemanly: Vinson DC transcript, 1/22/80, p. 18, and 1/24/80, p. 33.
first black assistant manager for any major savings association: Vinson DC transcript, 1/28/80, p. 16.
wife and seven children: Vinson DC transcript, 1/28/80, p. 3.
proud . . . create jobs for young black employees: Vinson DC transcript, Sidney Taylor, 1/28/80, p. 16–19.

Mr. Taylor, as she always called him: Ludwic interview.
even during her initial ninety-day probationary period . . . began to wonder: Vinson DC transcript, 1/22/80, p. 33.

“prettying up”: Vinson interview.
Chinese restaurant: Vinson DC transcript, 1/22/80, p. 50.
“You all have worked so good . . . gave you the overtime”: Vinson DC transcript, 1/22/80, p. 47.
“Oh Christina . . . just don’t know”: Vinson interview.
Christina’s bottom . . . breasts: Vinson DC transcript, 1/22/80, p. 33.
“Your eyes may shine”: Vinson interview.
ladies’ bathroom . . . shake it at Christina . . . “Excuse me”: Vinson DC transcript, 1/22/80, pp. 33–35.

“you see and you don’t say”: Vinson interview.
“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.

Next week, Christina didn’t have a job: Vinson DC transcript, 1/21/80, pp. 84–90; Vinson interview.
Sidney Taylor would deny most of it: Vinson DC transcript, 1/29/80, pp. 13–14.

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.
giving her $120: Vinson DC transcript, 1/22/80, p. 48.
join him for dinner: Vinson DC transcript, 1/24/80, p. 45.
“Mechelle, I have been good to you”: Vinson DC transcript, 1/22/80, p. 49.
bed with him: Vinson DC transcript, 1/22/80, p. 50.

“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.
212 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.
216 early 1970s . . . teller named Margaret Miller: Mary C. Dunlap, “Are We Integrated Yet? Pursuing


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


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.


15: Naming 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 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 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 did not know her new boss well: Wood unemployment hearing, p. 12.
“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.

“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.

peering through a glass partition . . . alone in an elevator . . . tried to kiss her: Korbel affidavit, pp. 3–4.

“he grabbed my arms” . . . “During the course of the dance”: Wood affidavit, p. 4.


“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).


Not long after the Christmas party, Wood began intensifying her efforts: Wood brief, p. 3.

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.

psychotherapist told her: Wood brief, p. 6.


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.


“not a bra burner”: Meyer interview. For a fascinating narrative of how Lindsey Van Gelder, as cub

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 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 inspirational professor Leo Weinstein . . . mailed her paper to Emerson: Catharine MacKinnon interviews.


227 “he took me seriously”: Catharine MacKinnon interviews.

227 study both law and politics: Catharine MacKinnon, letter to author, 4/2/04.


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.
In 1972 Yale Law admitted her . . . applied for the fall of 1975: Catharine MacKinnon interviews.

“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.

reason was opposition to her feminism: Catharine MacKinnon, email to author, 6/18/05.


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


What MacKinnon encountered in her 1975 course troubled her: Catharine MacKinnon interviews.


MacKinnon believed . . . “disadvantagement” because of sex: MacKinnon interviews; Catharine MacKinnon, letter to author, 2/25/04.

“about everything the situation of women was really about”: Catharine MacKinnon interviews.


folding chairs . . . basketball hoops: snapshots in Working Women files.

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?”

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.


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.


“Old racism”: Loving v. Virginia, 388 U.S. 1, 3 (1967), which quotes the lower court.


concept of “suspect classification” had functioned as a substantive classification for blacks: MacKinnon, “Sexual Harassment,” typescript, 1976, p. 34.


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 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 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.”


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 in the pivotal segregation cases that became Brown, Robinson provided that polish . . . first argument: Kluger, Simple Justice, pp. 645, 667.

17: Mechelle Vinson Goes to Trial

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.

“Born a feminist”: Ludwic interview.

“looked like a starlet”: Barry interviews.


“Oh, is this the way”: Barry interviews.

“a federal judge held that sexual advances”: MacKinnon, Sexual Harassment (1979), p. 63.

“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.

*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).

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).


“nothing more than”: Judge Bazelon, memo to Judges MacKinnon and Robinson, 1/28/76, in George MacKinnon papers.

66
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.

“hopefully” would reply within two weeks: Memo from Judge Robinson, 3/19/76, in George MacKinnon papers.

clerks came to believe: Semonoff interview.

need nine months: “Proposed opinion” by Judge Robinson, 12/16/76, in George MacKinnon papers.

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.

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.

he conferred with his secretary . . . let one clerk know: Interview with Barbara Childs Wallace, Jackson, Mississippi, by phone, 5/5/98.

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.

One of his female clerks . . . not give her a ride home . . . she understood: Semonoff interview.

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.”

“proposed opinion”: Quotations from this opinion are from “Proposed opinion” by Judge Robinson, 12/16/76, in George MacKinnon papers.

“your eloquent opinion”: Memo from Judge Bazelon to Judges Robinson and MacKinnon, 1/17/77, in George MacKinnon papers.

“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.

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.

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.


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.

If its employee made a sexual advance . . . Master: Judge MacKinnon *Barnes* concurrence, pp. 995–996.


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).

“no suggestion that the sexual harassment”: Judge MacKinnon *Barnes* concurrence, p. 995.

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.”

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.)

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.”

“At the least” . . . “1) posts the firm’s (or government’s) policy . . . remaining anonymous”: Judge MacKinnon *Barnes* concurrence, pp. 1000–1001.


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.”

They never discussed the decision privately: Catharine MacKinnon, email to author, 8/6/05.

“just took a tort approach”: Catharine MacKinnon interview, 12/16/90.


“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.

“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).

“We cannot accept this analysis”: *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).


judge who, as she would later say, “got it”: Catharine MacKinnon interview, 3/14/98.

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.

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.

t travesty of civil rights: Catharine MacKinnon, email to author, 6/9/05.

never seen such a turnaround: Catharine MacKinnon interviews.

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.

told two friends in confidence: Catharine MacKinnon, letter to author, 4/2/04. See also Catharine MacKinnon, letter to Karen Sauvagné, 12/31/77, in Catharine MacKinnon files.

“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.

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.

“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.

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.


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. Castle, 561 F.2d 983, 989 (D.C. Cir. 1977).


“personal relationship” . . . “coercive power”: Barry interviews.

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.

the situation in which sexual harassment”: MacKinnon, Sexual Harassment (1979), p. 40.

John Meisburg . . . found two women willing to testify: Meisburg interviews; Cochran, Sexual Harassment, pp. 60, 66.

Malone stated . . . saw that Mr. Taylor “disrespected”: Vinson DC transcript, 1/21/80, p. 15.

“Objection. What’s her age” . . . “the environment was ripe”: Vinson DC transcript, 1/21/80, p. 5.

“had big hairy legs” . . . “he would put his hands on my breasts”: Vinson DC transcript, 1/21/80, p. 21.

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).


“To get anywhere in the bank you had to . . . go to bed with him”: Vinson DC transcript, 1/21/80, p. 30.

Malone said, “Yes” . . . “what Mr. Taylor did with this witness”: Vinson DC transcript, 1/21/80, p. 52.

“pattern and practice” . . . “even if he treats them violently”: Vinson DC transcript, 1/21/80, p. 79.
“suggestive comments”. . . read Penthouse. . . nude pictures: Vinson DC transcript, 1/23/80, 3:50 p.m. session, pp. 15, 16–17, 39, 44–45.

“been touching me”: Vinson DC transcript, 1/28/80, p. 38.

did not go to bed”: Vinson DC transcript, 1/28/80, p. 8.

“Mechelle was not the only victim”: Barry interviews.

“had a chance to observe this or not”: Vinson DC transcript, 1/21/80, p. 21.

Judge Penn offered Barry the possibility . . . bank said it would object: Vinson DC transcript, 1/21/80, pp. 80–81.

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.

“so humiliated”: Barry interviews.


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.

“Mr. Taylor touching Christina on her back”: Vinson DC transcript, 1/22/80, p. 33.

bitch: Vinson DC transcript, 1/22/80, p. 41.

drove her to a hotel: Vinson DC transcript, 1/22/80, p. 51–53.


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).)

“did work pretty close . . . very explosive”: Vinson DC transcript, 1/30/80, p. 14.

“a lot of sexual fantasies”: Vinson DC transcript, 1/30/80, p. 23.

“sexually fondling”: Vinson DC transcript, 1/31/80, 1:45 p.m., p. 19.


Taylor did not get the chance to explain: Vinson DC transcript, 1/29/80, p. 14.


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.

“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.”


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”).

“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.”

Her friends disagreed . . . From her boyfriend: Barry interviews.

Barry was broke: Patricia J. Barry, letter to Mechelle Vinson, 5/20/81, in Barry files.

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

one-room apartment—she could no longer afford to rent her office: Barry interviews.

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.


“exposed for what that trial showed”: Barry interviews.

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.

“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.

She got it in late: Barry interviews.

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.

“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.

“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.

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.

Barry thought he did a great job. She wished she had done as well: Barry interviews.


Vinson couldn’t find bank jobs . . . enrolled in nursing school but had to drop out: Vinson interview.


Vinson received a call . . . “the decision” . . . “Oh come on, you’re playing” . . . “WE DID IT” . . . “Yes, it’s great”: Vinson interview.
“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).

Robinson had to find a route to steer: Vinson v. Taylor, 753 F.2d 141, 144 (D.C. Cir 1985).


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.


MacKinnon had not heard about the guidelines . . . generally liked: Interview with Catharine MacKinnon, by email, 8/27/98.


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.

“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).


“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).


“Because the relationship was voluntary”: Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985).

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%.)

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.

testimony about Vinson . . . that the bank had raised on appeal: Vinson v. Taylor, 753 F.2d 141, 146n36 (D.C. Cir. 1985).

“Oh boy, here we go”: Barry interviews.


lost with dignity . . . “bad law”: Barry interviews.

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.

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.


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.)

first course in the Women’s Studies Program at Yale: Interview with Professor Nancy Cott, New Haven, Connecticut, by phone, 11/16/90.


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).


law students at Yale began pressing: Catharine MacKinnon interview, 10/18/95, supplemented by Catharine MacKinnon, letter to author, 4/2/04.

“didn’t have the patience”: Interview with Guido Calabresi, New Haven, Connecticut, 11/20/90.

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 *Merit 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 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.”


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 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.


Lenhoff heard that staffers . . . had lobbied: Lenhoff interviews.

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.


“the distinction between invited . . . and flatly rejected sexual advances”: *Meritor* Brief for the United States, p. 13.


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.

rented cabin: Catharine MacKinnon, letter to author, 4/2/04.

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.”

full transcript would cost up to $3,000 . . . total to $650: Sarah E. Burns, assistant director, George-town University Law Center Sex Discrimination Clinic, letter to Joseph F. Spaniol Jr., Clerk of the Court (Supreme Court), 2/10/86, in Barry files.

club called Tracks: Katz interview.

draft one day . . . another draft: Catharine MacKinnon, letters to Patricia J. Barry, 1/13/86 and 1/15/86, in Barry files.

“that, if a sex act” . . . “is a metaphysical riddle” . . . “Yea!” . . . “Catharine!”: Barry marginalia on draft brief, 1/15/86, p. 32, in Barry files.


MacKinnon’s brief: Quotations from the brief, unless indicated otherwise, are from Vinson Supreme Court brief.

“finds no facts at all”: Vinson Supreme Court brief, pp. 10–11.


“seems to be” . . . “If an employer”: Vinson Supreme Court brief, pp. 39–40.

“once forced” . . . “the vicious paradox”: Vinson Supreme Court brief, pp. 44–45.

“if you’re fucked”: Catharine MacKinnon, letter to author, 4/2/04.

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?”


“doing a lot of self-sabotaging” . . . “like I didn’t have an oral argument”: Barry interviews.

declined an offer: Patricia J. Barry, letter to Professor Laurence Tribe, 10/25/85, in Barry files.

tried arguing on the basis of California law: Katz interview.

terrifying: Catharine MacKinnon, letter to Patricia J. Barry, 8/6/87, in Barry files; Katz interview.

“mannerisms”: Vinson interview.

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.”

talked to her mother . . . asked friends . . . glory and excitement . . . “Mechelle and I would be eternally grateful”: Barry interviews.

Unnerved . . . another moot court: Patricia J. Barry, email to author, 8/19/05.

At the Supreme Court

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”).

MacKinnon . . . being told by a clerk how to proceed: Catharine MacKinnon, letter to author, 4/2/04.

Barry did not see Vinson: Patricia J. Barry, emails to author, 8/19/05 and 9/24/05.

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.

“consented”: Meritor transcript, p. 4.
“voluntary”: Meritor transcript, p. 6.

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.


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.

“Mr. Troll”: Meritor transcript, p. 7.

tangible job detriment”: Meritor transcript, p. 8.

“Yes, we do”: Meritor transcript, p. 9.


“there is something, we submit, very unfair”: Meritor transcript, p. 23.


Getting prepared for this question: Patricia J. Barry, letter to author, 9/24/05.

“Defendant Taylor has also sexually harassed”: Meritor transcript, p. 26.


“conjure up inside the courtroom” . . . “they stopped their fidgeting” . . . “The angels are certainly blessing us”: Vinson interview.

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.supremecourts.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.

“voluntariness”: Meritor transcript, p. 27.

“It’s been suggested”: Meritor transcript, p. 28.
“So you say, then”: *Meritor* transcript, p. 31.

“the California Rules of Evidence”: *Meritor* transcript, p. 31.

“Miss Barry”: *Meritor* transcript, p. 32.

“this case would not make any substantial law” . . . “whether she wore these kinds of clothing”: *Meritor* transcript, pp. 32, 37.

“Well” . . . “you don’t have to use that sort of evidence”: *Meritor* transcript, p. 39.


conducted herself toward her supervisor . . . “what happened between Ms. Vinson and Mr. Taylor”: *Meritor* transcript, pp. 40–41.

“then what they’re saying”: *Meritor* transcript, pp. 41–42.

“when he was out at the motel” . . . “Like I have the power to hire you”: *Meritor* transcript, pp. 42–43.

“It was OK, it’s Justice Marshall”: Barry interviews.

“Suppose” . . . “Mr. Taylor was embezzling”: *Meritor* transcript, p. 47.

“Mr. Taylor was the bank”: *Meritor* transcript, p. 48.

“I thought . . . divine Father”: Vinson interview.

“excellent”: Catharine MacKinnon, letter to Patricia J. Barry, 8/6/87, in Barry files.

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.


“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.”

“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.

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.”


Burger and White . . . “voluntariness” was relevant . . . O’Connor . . . “conduct was relevant”: Brennan papers.


“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.

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.


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.


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.

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.


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.

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.

reputation for adjusting his vote in order to control assignment: Woodward and Armstrong, Brethren, p. 70.


settlement: For discussion of the route to settlement, 8/22/91, see Cochran, Sexual Harassment, pp. 122–127.

 tuition for nursing school . . . never disclose the dollar figure: Vinson interview.


Pat Barry went bankrupt in 1988: Barry interviews.


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 Marilyn Loftus, New Jersey, by phone, 7/29/98
Legal Momentum files of Legal Momentum (formerly NOW Legal Defense), Washington, DC, as of 4/18/97
Legal Momentum 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

21: A Challenge for a Young Lawyer

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.
But Andover ended the game: Goldfarb-Nourse-Reuss interview and Victoria Nourse, email to author, 9/27/05.

Wendy Webster Williams... *Sail’er Inn*: See Part 2 in the book.


Nourse did not go to law school to study women’s issues: Goldfarb-Nourse-Reuss interview.

Nourse liked research: Nourse interviews.

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.


Klain had an extra task: Nourse interviews and Klain interview.


Klain read... Heinzerling: Klain interview.


“This wasn’t a hard sell”: Klain interview.

It did not occur to Klain... to ask Nourse: Klain interview.

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.

Law Library Reading Room: Description and details of the room and Nourse’s experience are from author visit, 6/6/97, and Nourse interviews.

*book*: Nourse interviews


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.

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 “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 “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 “Now they were on my side”: Estrich, “Rape” (1986), pp. 1087–1088.


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).

“Hers is the reaction of ‘sissies’”; Estrich, “Rape” (1986), p. 1111.


“I was trying all the time”: Estrich, “Rape” (1986), p. 1122.

“But 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).


Model Penal Code: See Estrich, “Rape” (1986), p. 1134. See also Berger, “Man’s Trial,” p. 7n44.


Estrich’s discussion of the Code became an important reference: Nourse interviews.

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 Although no state law had required prompt complaint . . . within one month: Estrich, “Rape” (1986), p. 1139n164.


321 “the woman’s attitude may be deeply ambivalent”: Model Penal Code, quoted in Estrich, “Rape” (1986), p. 1136.

321 “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 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 classic elaboration, cited by the Model Penal Code and courts . . . 1952 article in the Yale Law Jour-
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).


to Nourse’s disappointment: Nourse interviews.

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 . . .”


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.’”


Estrich was making recommendations for state laws: Estrich, “Rape” (1986), p. 1182.


California Supreme Court had unearthed: People v. Rincon-Pineda, 538 P.2d 247 (1975).


volumes too obscure to be reprinted: Nourse interviews; author’s search in Lexis for *Florida Law Review*, 8/24/97.


“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).


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.


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.


most persistent . . . law in force in the 1990s, was Delaware: Todd Spangler, “Senator Takes Aim at

330 hook the attention of . . . Nourse’s boss: Nourse interviews.
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.
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 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 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 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.
dissent . . . sixty typed pages: Garrow, Liberty and Sexuality, p. 190.

“emanates from the totality”: Garrow, Liberty and Sexuality, p. 194.


“I like all of it—it emancipates femininity and protects masculinity”: Garrow, Liberty and Sexuality, p. 248.

“one man one vote” . . . “one man one child”: Garrow, Liberty and Sexuality, p. 244.

defending the marital rape exemption as a defense against intrusion by government: People v. Liberta, 64 N.Y.2d 152, 165 (1984).

“In this light”: MacKinnon, Feminism Unmodified, p. 100.

“too cute”: West interview.

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.”

Nourse knew that the heart of a legislative effort: Nourse interviews.

West had based her “Privacy Act” . . . legislation proposed earlier by Catharine MacKinnon: West interview.

MacKinnon, working with feminist theorist Andrea Dworkin: Catharine MacKinnon interviews, and interview with Andrea Dworkin, Brooklyn, 11/14/95.


pornography was a form of speech: American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), affirmed 475 U.S. 1001 (1986).

MacKinnon’s theories . . . Rick Cudahy: Nourse interviews.


traveled widely to give lectures, compiled in 1987: MacKinnon, Feminism Unmodified, p. 307.

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).

Nourse saw the potential for creating a strong law: Goldfarb-Nourse-Reuss interview.


22: Using Civil Rights to Combat Violence


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.

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).


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).

lone dissent... “special favorite of the laws”: Civil Rights Cases, 109 U.S. 3 (1883).

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.

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.

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).


“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.”

a provision of the 1871 Civil Rights Act that had survived: Griffin v. Breckenridge, 403 U.S. 88, 92, 99 (1971).

deprivation of her civil rights: Nourse, “Where Violence.”

The other staffer: Nourse interviews.

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).

“things that are wrong”: Nourse interviews.

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 “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 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 “we have ignored”: Judiciary hearings, Women and Violence, Part 1, p. 11.


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).


346 “Don’t you people” . . . strong bladder: Goldfarb interviews.


347 The next three meetings: Sally Goldfarb, “Minutes from Task Force on Violence Against Women Act


Goldfarb was organized but no organizer: Goldfarb interviews.

Goldfarb was organized but no organizer: Goldfarb interviews.

Goldfarb was organized but no organizer: Goldfarb interviews.

Reuss was running out of money: Neuborne interview.

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.

“good kids”: Goldfarb-Nourse-Reuss interview.

NOW Legal Defense was also running low on money and had closed its offices in DC: Neuborne interview.

fuchsia and lime . . . granola bar . . . “eat this”: Goldfarb interviews.


“Another one of your best-sellers, Victoria?”: Nourse interviews.

the grassroots were going berserk: Goldfarb-Nourse-Reuss interview.


23: Judges Strike Back


Victoria Nourse and her allies were shocked: Nourse interviews.


his nomination, announced two days earlier, to become chief justice: See Part 4 in the book.


never imagined that it might involve America’s chief justice: Nourse interviews.


Nourse . . . failed to realize that judges might try to influence legislation: Victoria Nourse, letter to author, 9/27/05.

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.


“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.


“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.


(Report was considered and a vote taken by 9/24/91; committee had been announced 8/19/91.)

Judicial Conference . . . twenty-seven judges . . . like the judiciary was more than 90 percent male: Resnik, “Naturally,” pp. 1705–1706.


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.


seemed uncoordinated . . . tried to respond: Nourse interviews.


“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.


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.

controversy over Thomas’ lack of support for affirmative action: Mayer and Abramson, Strange Justice, p. 214.


Was Hill credible? . . . “It was immoral”: The narrative closely follows that of Mayer and Abramson, Strange Justice, pp. 237–238.

Reuss and others tried to get Ron Klain . . . experts on the stand: Goldfarb-Nourse-Reuss interview and Klain interview.

As Biden was ending the Thomas hearings: The hearings ended Monday, 10/14/91. Mayer and Abramson, Strange Justice, p. 345.

Judicial Conference . . . condemn significant parts of VAWA: L. Ralph Mecham, letter to Joseph Biden, 10/10/91, in Nourse files.

he chaired the conference: Resnik, “Programmatic Judiciary,” p. 271.


Senator Biden’s words to the contrary: Joseph Biden, letter to Judge Thomas M. Reavley, 9/20/91, in Legal Momentum NY files.


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.

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.

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.

“train time”: Nourse interviews.


At ten o’clock that morning: *House Crime Hearings 1992, Violence Against Women*, held 2/6/92.

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).

“Chuck Schumer’s two rows behind me” . . . “You bet your booty”: Goldfarb-Nourse-Reuss interview.

“I don’t know that much about it”: Goldfarb-Nourse-Reuss interview. (Quotations are Goldfarb’s colloquial recollection and are not verbatim from Schumer.)

“that cute, young, smart David Yassky” . . . “I’m sitting in while they’re”: Goldfarb-Nourse-Reuss interview.

“Oh yeah, like Catharine MacKinnon’s theories!”: Goldfarb interviews.

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.

Yassky . . . joined Schumer’s staff in September of 1991 . . . enthusiastic . . . law clinic: Yassky
interview.

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.

“Ku Klux Act of 1868 [sic]”: Usually referred to as the Civil Rights Act of 1871 or the Ku Klux Act
of 1871.

scheduled the hearings: House Crime Hearings 1992, Violence Against Women; hearing held
2/6/92.

“Oh, Joe” . . . “let me sit next to the pretty girl” . . . “She’s my chief aide” . . . “true believers from
the federalist pantheon”: Nourse interviews.

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.

“We have got a Chief Justice who . . . does not know what he is talking about”: House Crime Hear-

“speech writers have not done their homework”: Typescript in Nourse files.

“going on and on”: Nourse interviews.


the story that had led Nourse to opine: Nourse interviews.

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

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.

by a ratio of 10 to 1 . . . almost 14 to 1: Resnik, “Naturally,” p. 1705.

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.

Its newsletter was called: Counterbalance, available at www.nawj.org (visited 1/20/05).

NAWJ . . . origins in 1979: Klein interviews.

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

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

Approximately one hundred women . . . women law students volunteered to assist: Klein interviews

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 Wis-

laughed and cried and stayed up late and drank jugs of wine: Jobes interview.
“war stories” . . . chased around a judge’s desk . . . “a good-lookin’ kid”: Klein interviews.


a year earlier in 1978: “Presiding Justice Joan Dempsey Klein,” biography available at www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/judices/klein.htm (visited 5/2/06).

girly pix” . . . “There will be no women clerks here”: Klein interviews.

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.


“As more than 100 women judges”: Kessler, “Foreword,” p. 474.


descended from California’s first judge: Klein interviews.


“to promote the administration of justice”: Kessler, “Foreword,” p. 475.


became founding members . . . Sandra Day O’Connor: Klein interviews.

county judge from Arizona . . . as a state senator, she had written President Richard Nixon: Biskupic, O’Connor, pp. 65–68.

In favor of a woman were his wife, his daughters: Dean, Rehnquist Choice, pp. 63, 82, 157–158.

chance to win votes in the next election: Dean, Rehnquist Choice, p. 113.


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.


“a result of your doing”: Biskupic, O’Connor, p. 47.

“Would we ever” . . . began buying food to cook: Biskupic, O’Connor, p. 68.

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.


Klein, who was said to have Republican connections: Biskupic, O’Connor, p. 3.

O’Connor, who seemed to come from nowhere . . . chief justice worked to plant her name: Biskupic, O’Connor, pp. 72–78.
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.”


“A large number of women”: Margolick, “Women Find Bar,” p. 16.


decision made by Judge Marilyn Loftus... no invitation... “We’re all judges”: Loftus interview.

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.

one of the earliest sex discrimination cases: Weeks v. Southern Bell, 408 F.2d 228 (5th Cir. 1969).


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.


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.”


asked the NAWJ... brief debate: Lynn Hecht Schafran, letter to author, 8/10/05, p. 2.

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.


Lynn Hecht Schafran: Story of Lynn Hecht Schafran and Norma Wikler draws on Schafran interview and Schafran letters to author, 8/8–10/05.

drafter for Wiesenfeld . . . at first refused to hire her: Interview with Marsha Berzon, San Francisco, 5/16/95, and see Part 1.

berated her: Schafran, letter to author, 8/10/05.

“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.

Federation of Women Lawyers Judicial Screening Committee: Lynn Hecht Schafran, letter to author, 8/10/05.


“not being treated equally”: Loftus interview.

Judge Loftus contacted Robert Lipscher: Loftus interview. See also Schafran, “Educating,” p. 117.


“What” . . . “do you mean whether?”: Loftus interview.


not from New Jersey: Schafran interview.


“problems” . . . “women are the problem” . . . “the conduct of male counsel” . . . “most sexism and resentment”: Schafran, “Educating,” pp. 120–121, 137.

task force had a statistician: Loftus interview.

71 percent of women but only 30 percent of men: “First Year New Jersey Task Force,” pp. 137–140.

83 percent of women and 47 percent of men: “First Year New Jersey Task Force,” p. 137.

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.

69 percent of women and 40 percent of men: “First Year New Jersey Task Force,” p. 140.


“very very careful” . . . “You sit down”: Loftus interview.


scheduled a press conference: Schafran interview.

sitting throughout the main presentations . . . the back of the room . . . skipped the press conference: Loftus interview.


begin their own task forces in the 1990s: Judith Resnik, letter to author, 3/23/06.

It appointed as its chair Judge Clarence Thomas. (Nothing happened . . .): Schafran, “California,” p. 163.


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


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.”

“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.

Judge Cara Lee Neville . . . Schafran asked: Schafran interview.

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.


“unexpected controversy”: Victoria Nourse, memo to unnamed recipients, 2/13/92, in Schafran files.


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.

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.

Florida’s chief justice told a story: Lederman interview.


above all, stand up for other women: Lederman interview.

The board voted to present a resolution supporting VAWA: Lynn Hecht Schafran, letter to Barbara Mendel Mayden, 3/17/92, in Schafran files.


The showdown would come . . . in San Francisco: Lynn Hecht Schafran, letter to author, 8/20/05.

if America’s lawyers would not defend . . . withering: Nourse interviews.

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.


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.

$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.


“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

“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.

“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.


In 1978, President Jimmy Carter . . . Sandra Day O’Connor: Biskupic, O’Connor, p. 68.

no fear of speaking her mind: Schroeder interview.


Schroeder knew the value of federal gender-bias task forces directly . . . doubts about its language: Schroeder interview.


appropriate for the federal courts . . . violence against women: Resnik interviews.

phone call from NAWJ’s president-elect: Schroeder interview.


“bottom of the judicial heap”: Murray interview.

Brenda Murray suggested . . . the only one that could talk to all: Schroeder interview.

Schroeder was not just at the top of the judicial heap: Murray interview.

two-part challenge: Schroeder interview.


Lederman . . . support Title III as written: Lederman interview.

other judges hesitated, including Norma Shapiro: Lynn Hecht Schafran, handwritten notes, 7/13/92, in Schafran files.

Shapiro, a federal district court judge from Philadelphia: Lynn Hecht Schafran, letter to author, 8/20/05.


delegate . . . instructed: Lynn Hecht Schafran, memo to Sally Goldfarb, 7/30/92, in Schafran files and Legal Momentum DC files.

Third . . . Judge Schroeder: Schroeder interview and Murray interview.


far from idyllic by smoke spreading overhead from summer fires: Resnik interviews.


published reports in twenty-one states: Lynn Hecht Schafran, letter to author, 8/10/05.


half the members of the “ad hoc committee on gender-based violence”: Judith Resnik, letter to author, 3/23/06.


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.

discussing VAWA at Rymer’s home: Lynn Hecht Schafran, letter to Sally Goldfarb, 5/25/92, in Schafran files; Resnik interview, 7/18/97.

Rothstein would wind up talking . . . Helen Neuborne: Neuborne interview.

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.


Judge Shapiro, as agreed: “Re: NAWJ Resolution,” 7/25/92, in files of Lynn Hecht Schafran at Legal Momentum as of 6/2/97.
Despite some worries . . . thankful for the NAWJ: Lynn Hecht Schafran, handwritten notes on phone conversation with Victoria Nourse, 8/7/92, in Schafran files.

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.

“in an emergency c/o Judge Richard Cudahy in Winnetka” . . . running joke: Nourse interviews.


Saturday, August 8 . . . defer: Lynn Hecht Schafran, handwritten notes, 8/8/92, in Schafran files.


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.

The task of marshaling opposition fell to Schafran . . . allies ready: Sally Goldfarb, fax to Lynn Hecht Schafran, 8/11/92, in Schafran files.

Schafran sat taking notes: Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.

Brooksley Born, whom she had first worked with: Lynn Hecht Schafran, letter to author and email to author, 8/10/05.


“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.

Judge Shapiro . . . “crimes of violence” and “motivated by gender”: Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.


Born rose to address the House of Delegates . . . “More votes this time” . . . 2:53 p.m. (also under-scored), August 12, 1992: Lynn Hecht Schafran, handwritten notes, 8/12/92, in Schafran files.


Resnik . . . came to admire . . . spoke not just to him . . . larger committee of the Judicial Conference: Resnik interviews.

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 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 “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 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 Nourse, in her earliest drafting . . . defined a “crime of violence” . . . dropped out of VAWA months later: Nourse, “Where Violence,” pp. 7, 12.
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.


Both Congress and the Kennedy-Johnson administrations grounded the 1964 Civil Rights Act on two sources of constitutional authority: Balkin, “History Lesson.”

power to regulate interstate commerce extended even to wheat grown at home: Wickard v. Filburn, 317 U.S. 111, 125 (1942).

swerved . . . affirmed the civil rights act using only the commerce clause: Balkin, “History Lesson.”


recently graduated from Stanford Law School: Hall, Oxford Companion.

“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.”

“smeared the reputation of a great justice” . . . “we are no more dedicated”: Kluger, Simple Justice, p. 609.

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.”


“confronting and overturning” . . . begin to cut away civil rights: Balkin, “History Lesson.”

“wrong the day it was decided”: Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992).

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).

Nineteen years had passed since Wendy Williams . . . “pregnant women and nonpregnant persons”: See Part 2 in the book.


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.

“we need proper historical sources here” . . . appealing language concerning *animus*: Schroeder interview.


Judge Marcus read aloud . . . “a purpose that focuses”: Sally Goldfarb, notes dated 4/26/93, in Legal Momentum NY files.

These judges, Nourse was coming to believe . . . “I really think I saw a light go off”: Goldfarb-Nourse-Reuss interview.

Goldfarb lay out the argument . . . cracks of American civil rights law: Sally Goldfarb, letter to author, 8/12/05.

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.

“language won’t be perfect”: Sally Goldfarb, notes dated 4/26/93.

She appreciated that . . . easing her burden: Goldfarb interviews.

professorial . . . avuncular: Goldfarb-Nourse-Reuss interview.


“the feminists, for lack of a better word” . . . “brilliant young woman” . . . “extremely knowledgeable” . . . “worked so hard” . . . “because I wanted the federal government”: Schroeder interview.


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 CUCKED Case,” *Washington Post*, 10/30/94, pp. A1, A28.

“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.”


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


“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).

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.”

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.


“is the only violent felony”: Brzonkala, Fourth Circuit (1997), p. 954.


“a mere technicality to cure the school’s error”: Brzonkala, Fourth Circuit (1997), p. 954.


“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).

She learned from a sports page: Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949, 955 (4th Cir. 1997).


no judge doubted that they met VAWA’s definition of gender-motivated violence: Sally Goldfarb, letter to author, 8/12/05.

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).


“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.


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).


Luttig... crash course in constitutional law... clerk to Antonin Scalia... and to Warren Burger: Mayer and Abramson, Strange Justice, p. 211.


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).

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).


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.


“will generally not be favorably inclined”: Dean, *Rehnquist Choice*, pp. 16 and 295n51.

1969 to 1971 to appoint four such justices, in two pairs: Dean, *Rehnquist Choice*, p. xv.

“if she’s a conservative. Now if she’s a liberal, the hell with it”: Dean, *Rehnquist Choice*, p. 113.

“I’m not a woman, and I’m not mediocre”: “The President’s Two Nominees,” *Time*, 11/1/71; Dean, *Rehnquist Choice*, p. 191.

Nixon joked that maybe Rehnquist could “get a sex change”: Dean, *Rehnquist Choice*, p. 139.


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* (Evaston: 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.supremecourts.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.

“Federal domestic relations law” . . . Scalia interrupted . . . vehemence: “I’m aware”: Voices from oral


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).


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.


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).


“all but preordained”: See Brzonkala, Fourth Circuit en banc (1999), p. 825: “As even the United States and appellant Brzonkala appear resignedly to recognize . . .”


temperatures just above freezing . . . sixty people . . . opposite the chief justice, was Senator Joseph Biden: Reporting by author, 1/11/00.

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.


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.

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.

Unable to study after an attack . . . stopped attending classes . . . left the school: Brzonkala, Fourth Circuit (1997), pp. 953–955.

out of state to get a job . . . in a bar: Brzonkala interview.


Less publicly, as they walked . . . wondered aloud: Interviews with Sally Goldfarb and Judith Resnik, Washington, DC, 1/11/00.

As the day turned from drizzle . . . “when a woman is raped” . . . “Women rule”: Reporting by author, 1/11/00.

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).


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.


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).


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.


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).

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.


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.

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presidential tapes, first available in late 2000: Dean, Rehnquist Choice, p. 287.

“screen” . . . “playing around”: Nixon tapes, No. 11–1, quoted in Biskupic, O’Connor, pp. 41, 350n12.

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.

pressure from his wife and also from O’Connor: Greenburg, Supreme Conflict, p. 213; Toobin, Nine, p. 282.


Miers’ few weeks as a nominee: Greenburg, Supreme Conflict, pp. 270–284.

result that she and much of the president’s staff originally sought: Greenburg, Supreme Conflict, pp. 284, 289; Toobin, Nine, p. 298.

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.

she might have won enough votes in the Senate: Toobin, Nine, p. 296.

Burger in the 1970s when he threatened to resign: Dean, Rehnquist Choice, pp. 91, 179–180. And see Part 3 in the book.

Rehnquist maneuvered O’Connor out: Greenburg, Supreme Conflict, p. 20; Toobin, Nine, p. 252.
“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.


