CRIMES OF VIOLENCE MOTIVATED BY GENDER

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CRIMES OF VIOLENCE MOTIVATED BY GENDER

TUESDAY, NOVEMBER 16, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:35 p.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Patricia Schroeder, Barney Frank, Jerrold Nadler, Henry J. Hyde, Howard Coble, and Charles T. Canady.

Also present: Catherine LeRoy, counsel, Virginia Sloan, assistant counsel; James X. Dempsey, assistant counsel; and Kathryn Hazeem, minority counsel.

OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. EDWARDS. This is an oversight hearing on crimes of violence motivated by gender.

As you can see from the schedule, we had scheduled as our first witness James Turner, Acting Assistant Attorney General of the Civil Rights Division. He is en route.

In the meantime, will panel number one come to the witness table—Sally Goldfarb, senior staff attorney, National Organization for Women, Legal Defense and Education Fund, from New York; Elizabeth Symonds, legislative counsel, American Civil Liberties Union, here in Washington, DC; Bruce Fein, attorney at law, Great Falls, VA.

We welcome all of you. We have some time restraints, because Mr. Schumer's Subcommittee on Crime and Criminal Justice will meet within an hour and a half or so, and we have to adjourn for the markup of some very important bills. So we're going to try to limit you to around 5 or 6 minutes. We'll be as generous as we can with the time. You'll see the little red light go on, which means you can sort of wind up.

Ms. Goldfarb, you are welcome. Without objection, all three of your statements will be made a part of the record in full. Ms. Goldfarb, you may proceed.

STATEMENT OF SALLY GOLDFARB, SENIOR STAFF ATTORNEY, NOW LEGAL DEFENSE AND EDUCATION FUND

Ms. GOLDFARB. Thank you, Mr. Chairman and members of the subcommittee. I am Sally Goldfarb, senior staff attorney of the NOW Legal Defense and Education Fund.

On behalf of the NOW Legal Defense and Education Fund, I chair a national task force of hundreds of religious, labor, medical, mental health, aging, civil rights, women's, children's and victims' rights organizations, all of which are concerned about the impact of violence on the lives of women and girls. NOW LDEF strongly urges you to support the civil rights provision of the Violence Against Women Act, which we view as a major step forward for women's equality.

Currently, there is an epidemic of violent crime against women, and women and girls are targets for many types of violence because of their sex. It is certainly true that many men are victims of crime, and this is a source of concern as well.

However, women must fear not only the crimes that confront all members of society, but also those that are inflicted exclusively or predominantly on the female half of our population. When half of our society is at risk of terror, brutality, serious injury and even death just because they are female, that is a form of discrimination.

In recent years, we have made dramatic progress toward legal equality for women. But existing laws are worth little if women just jeopardize their physical safety to seek out the opportunities that are open to them at home, work, school, and in the community.

The Violence Against Women Act would declare that crimes of violence motivated by gender are discriminatory and violate the victim's civil rights under Federal law. It would provide a civil cause of action for the deprivation of this right.

Both H.R. 1133 and S. 11, which are under consideration in the Senate, contain several important limitations that curtail the scope of this new Federal remedy. The bills do not confer jurisdiction on Federal courts to decide divorce or domestic relations cases. Cases filed in State court may not be removed to Federal court.

The civil rights remedy will cover only those acts that rise to the level of a felony under State or Federal law, and the burden rests on the plaintiff at all times to prove by a preponderance of the evidence that the crime was motivated by gender. Thus, it's very clear that not every crime against a woman would qualify for relief under the bill.

However, there are also differences between the House and Senate bills. In May of this year, S. 11 was narrowed in several significant ways in an effort to clarify the cause of action. As a result, title III in the Senate bill now provides that only crimes against a person and crimes against property that pose a risk of physical injury to a person are covered.

The Senate bill has deleted the presumption that rape and sexual assault are motivated by gender, and the Senate bill has added a requirement that in order to meet the definition of crime of violence motivated by gender, the plaintiff must prove that the crime was due at least in part to an animus based on gender.

All of these changes were adopted after extensive discussions with Federal judges, civil liberties groups, and others concerned about the scope of the proposed civil rights remedy.

NOW Legal Defense and Education Fund strongly supports title III of H.R. 1133 in its present form. We feel that it is clear, workable, and sound public policy. However, we have also endorsed the Senate bill, S. 11. Therefore, if it is necessary to modify the House bill along the lines already adopted in the Senate, NOW LDEF will continue to support this legislation.

Some have asked how the Violence Against Women Act's civil rights remedy will apply in practice. A very good analogy is provided by looking at how people prove that a crime is racially motivated under civil rights laws that exist today.

The evidence typically presented in those cases includes racially derogatory remarks made by the assailant, membership of the victim in a different racial group than the assailant, a history of similar attacks by that assailant against other members of the victim's racial group, a pattern of attacks in a certain neighborhood or time period, lack of provocation, use of excessive force and so on. No one of these elements is indispensable, and each case is judged on the totality of its own facts.

Nevertheless, it's clear that if you substitute the word gender in place of race in that list, many but not all crimes against women will qualify as crimes of violence motivated by gender.

Enactment of title III of the Violence Against Women Act would convey a very powerful message that violence motivated by gender is not just an individual crime or personal injury, but is a form of discrimination. It's an assault on our publicly shared idea of equality.

But the impact of this legislation will not be purely symbolic. Many victims who are currently denied access to justice under State criminal and civil laws would for the first time have the opportunity to seek legal redress.

The Congress has a historic opportunity to play a crucial role in the effort both to combat crime and to redress discrimination against women. We urge you to support the Violence Against Women Act. Thank you.

I will be happy to answer any questions you might have.

Mr. EDWARDS. Thank you very much.

[The prepared statement of Ms. Goldfarb follows:]

PREPARED STATEMENT OF SALLY GOLDFARB, SENIOR STAFF ATTORNEY, NOW LEGAL DEFENSE AND EDUCATION FUND

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you to discuss the Violence Against Women Act, H.R.1133. I am Sally Goldfarb, Senior Staff Attorney of the NOW Legal Defense and Education Fund (NOW LDEF). NOW LDEF is an independent, non-profit public interest legal organization dedicated to eliminating sex discrimination and securing equality for women and girls. Violence against women is one of NOW LDEF's chief concerns, and we have been working for several years to support the enactment of the Violence Against Women Act.

On behalf of NOW LDEF, I chair a national task force of almost one thousand organizations and individuals concerned about the epidemic of violence currently facing American women. The task force includes groups from the religious, labor, medical, mental health, aging, civil rights, women's, children's and victims' rights communities, all of which are united by a concern about the impact of violence on the ability of women and girls to participate as equals in our society. I am here today, however, to present the views of the NOW Legal Defense and Education Fund on this important legislation. NOW LDEF strongly endorses the Violence Against Women Act and urges you to support it. I will focus my remarks today on Title III of the Act, which we view as a major step forward for women's equality.

The Epidemic of Violent Crime Against Women

In America today, a woman faces a startlingly high likelihood of being the victim of a violent crime. Grim statistics reveal the thread of violence that runs through the lives of American women.

- Every 15 seconds, a woman is beaten by her husband or boyfriend.[1]
- Every 6 minutes, a woman is forcibly raped.[2]
- One fifth to one half of American women were sexually abused as children, most of them by an older male relative.[3]
- One out of every eight adult women, or at least 12.1 million American women, has been the victim of forcible rape sometime in her lifetime.[4]

Women in all walks of life are at risk.

- One out of every four female college students will be sexually attacked before graduating; one in seven will be raped.[5]
- The murder rate for women aged 65 and older has climbed by 30 percent since 1974, while the murder rate for men in the same age group has dropped by 6 percent.[6]

* African-American women are almost twice as likely to be raped as white women. Yet rapes of African-American women are less likely than rapes of white women to result in prosecution, conviction, and stern sentences.[7]

* Domestic violence cuts across all racial, religious, ethnic and socioeconomic lines.[8]

Gender-Motivated Violence: An Assault on Women's Right to Equality

Women and girls are targets for many types of violence because of their sex. It is certainly true that many men are victims of crime, and this is a source of concern as well. However, women must fear not only the crimes that confront all members of our society, but also those that are inflicted exclusively or overwhelmingly on the female half of our population.

* During the past decade, rape rates have risen nearly 4 times as fast as the total crime rate.[9]

* Since 1974, the rates for assault and many other violent crimes against women have increased dramatically, while the rates for the same crimes against men have actually declined.[10]

* Girls are estimated to be two to ten times more likely to suifer childhood sexual abuse than boys.[11]

When half the members of our society are at greater risk of terror, brutality, serious injury and even death just because they are female, that is a form of discrimination. Moreover, violent attacks reinforce and maintain the disadvantaged status of women as a group.

* Empirical studies of convicted rapists demonstrate that they hold extreme attitudes about men's right to dominate women and women's inherent inferiority.[12]

* In December 1989, a man murdered fourteen female engineering students in Montreal after proclaiming his vicious hatred of all women and especially of "feminists."[13]

* Much like racial attacks, attacks on individual women create a climate of terror that makes all women afraid to step "out of line." Pervasive fear of sexual assault and other crimes forces women to take elaborate precautions that limit their options for education, employment, travel, and other activities.

In recent years, we have made dramatic progress toward legal equality for women. But existing laws against discrimination are worth little if women must jeopardize their physical safety to seek

out the opportunities that have been opened to them at home, work, school, and in the community.

The Violence Against Women Act's Civil Rights Provision

The versions of the Violence Against Women Act that are under consideration in the House (H.R. 1133) and the Senate (S. 11) both contain a civil rights provision in Title III. Both would declare that crimes of violence motivated by gender are discriminatory and violate the victim's civil rights under federal law. Both provide a civil cause of action for deprivation of this right. A person who proves that a crime of violence was motivated by gender is eligible to receive compensatory damages, punitive damages, injunctive relief and declaratory relief.

However, there are differences between the two bills. In May of this year, the Senate bill was narrowed in several significant ways in an effort to clarify and limit the cause of action provided. These changes were adopted after extensive discussions with federal judges, civil liberties groups, and others concerned about the scope of the proposed civil rights remedy. As a result, Title III of the Senate bill now provides that only crimes against a person, and crimes against property that pose a risk of physical injury to a person, are covered; deletes a presumption that rape and sexual assault are motivated by gender; and adds a requirement that, in order to meet the definition of "crime of violence motivated by gender," the plaintiff must prove that the crime was due, at least in part, to an animus based on gender.

The NOW Legal Defense and Education Fund strongly supports Title III of H.R. 1133 in its present form. We feel that the definition of "crime of violence motivated by gender" furnished in the bill is clear, workable, and sound public policy. However, we have also endorsed the Senate bill, S. 11. Therefore, if it is necessary to modify the House bill along the lines already adopted in the Senate, NOW LDEF will continue to support the legislation. If the term "animus" is adopted, it would be helpful to clarify that the term means simply intent or purpose, as it was originally used in the case Griffin v. Breckenridge, 403 U.S. 88 (1971).

Several important limitations already appear in both H.R. 1133 and S. 11. Both bills contain an explicit statement that the Violence Against Women Act does not confer jurisdiction on federal courts to decide divorce or domestic relations cases. In addition, the civil rights remedy extends only to acts that would rise to the level of a felony under state or federal law. It does not cover random acts of violence unrelated to gender. Thus, it is amply clear that not every crime against a woman would qualify. Indeed, the civil rights remedy is gender-neutral and is available to male or female victims of serious gender-motivated crimes.

The burden rests on the plaintiff to prove by a preponderance of the evidence that the crime was motivated by gender. Proving that a crime was gender-motivated under the new law will presumably be analogous to proving that a crime was racially motivated under existing laws. Evidence typically presented in civil rights cases alleging racial violence include: racially derogatory epithets used by the assailant, membership of the victim in a different racial group than the assailant, a history of similar attacks by the assailant against other members of the victim's racial group, a pattern of attacks against victims of a certain race in a certain neighborhood and time period, lack of provocation, use of force that is excessive in light of the absence of other motivations, etc.[14] By substituting "gender" for "race" in the foregoing list, it becomes apparent that many -- but not all -- crimes against women will qualify as crimes of violence motivated by gender.

Recognizing the gender-discriminatory element in some violent crimes is not radical or unprecedented. Not only does federal law already contain civil remedies for racially-discriminatory violence, but the Hate Crimes Sentencing Enhancement Act of 1993 (H.R. 1152), which passed this House in September and is under consideration as part of the Senate crime bill, provides increased sentences for defendants convicted in federal court of having selected a victim because of gender. The Violence Against Women Act simply takes this principle and applies it to a civil, rather than criminal, remedy. Moreover, unlike the Hate Crimes Sentencing Enhancement Act, application of the Violence Against Women Act is not limited to crimes occurring on federal lands.

To the extent that questions remain about how this cause of action will work in practice, this is to be expected with any cutting-edge legislation. As Judge Stanley Marcus, chair of the U.S. Judicial Conference Ad Hoc Committee on Gender-Based Violence, has helpfully pointed out, it is inevitable that there are some questions about legislation that cannot be answered until cases are litigated and judges have the opportunity to apply the law to specific facts.[15]

What Title III Will Accomplish

Because of gender-based violence, American women and girls are relegated to a form of second-class citizenship. Just as a democratic society cannot tolerate violence motivated by the victim's membership in a minority racial group, and must pass special laws to combat such oppression, so too we need effective federal laws to combat violent crimes motivated by the victim's gender.

The enactment of civil rights legislation would convey a powerful message: that violence motivated by gender is not merely an individual crime or a personal injury, but is a form of discrimination, an assault on a publicly-shared ideal of equality. When half of our citizens are not safe at home or on the streets

because of their sex, our entire society is diminished.

The impact of the legislation would not be purely symbolic, however. Federal recognition that gender-based violence is a form of discrimination is likely to alter the way both men and women regard sexual assault and domestic violence. The impact of this attitudinal change will be felt in homes, streets, and workplaces. It will also be felt in courtrooms. Currently, jury studies and research on gender bias in the judiciary have shown that the "boys will be boys"/"she must have asked for it" mentality that prevails in most sectors of our society has a direct, measurable effect on the outcome of cases involving sexual assault, domestic violence, and a host of other issues where men's violence toward women is directly or tangentially involved.[16] Thus, the educational power of the VAW Act is of immense practical importance to the development of American law.

In addition, many victims who are currently unable to succeed in state criminal and civil proceedings would, for the first time, have access to legal redress.

It is not true that all men who beat or rape women lack the resources to pay damages. In fact, violence against women is found at every socioeconomic level in America. For some victims, even a damages judgment that cannot be collected (or a judgment granting only declaratory or injunctive relief) will be seen as an immensely valuable vindication of their rights.

Enactment of the Violence Against Women Act will not eliminate rape, domestic violence, and other sex-based attacks on women, any more than passage of the civil rights legislation of the 19th century and the mid-20th century has eliminated racism. Nevertheless, the power of this proposed federal civil rights law to improve the prospects for social justice and equality are substantial.

State Criminal and Civil Laws Are Not Adequate to Protect Victims of Gender-Motivated Crime

The existence of state criminal and tort laws covering rape and domestic violence does not do away with the need for a federal civil rights remedy. First, a federal civil rights law would redress a different injury than the injuries that are at issue in state criminal and tort proceedings.[17]

In addition, gender-motivated crimes are currently not being adequately addressed in the state courts.

* A woman is forcibly raped by her husband. In over half the states, he is immune from prosecution under many or most circumstances -- for example, if the couple is living together and no divorce or separation papers have been filed.[18]

* A young woman is sexually assaulted by her boyfriend. Several states have statutes exempting cohabitants and dating companions from sexual assault laws.[19]

* A man brutally beats his wife, causing her severe injuries. Interspousal immunity doctrines in at least seven states prevent her from suing him to recover damages for her medical expenses and pain and suffering.[20]

* A teenage girl is subjected to incestuous sexual abuse by her father. In some states, strict statutes of limitations require her to bring suit within a few years -- which is virtually impossible for an emotionally and economically dependent young person -- or else lose forever the chance to pursue a civil legal remedy.[21]

* It was recently revealed that the Oakland, California, Police Department closed over 200 rape cases with little or no investigation in 1989 and 1990. The complaints involved rapes of prostitutes and drug users, as well as allegations of acquaintance rape.[22]

* A recent Senate Judiciary Committee study showed that only one in 100 forcible rapes results in a sentence of more than one year in prison.[23]

* State rape shield laws do not apply in civil cases. Thus, women bringing tort actions for sexual assault are routinely subjected to intrusive questions about consensual sexual activity unrelated to the attack.[24]

The laws on the books are only part of the problem. In states throughout the country, prosecutors, juries, and judges routinely subject female victims of rape and domestic violence to a wide range of unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes.[25] Although federal courts are not immune from these problems, the fact that federal judges are not elected, are subjected to a more rigorous selection process, and typically exercise greater control over courtroom procedures such as jury voir dire help to minimize these problems.

Federal civil rights laws passed since the mid-19th century have typically prohibited acts that were already illegal under state law. The reason for this is that federal remedies are needed to reinforce state remedies and to provide a "back-up" when the state justice system is unable to protect victims' rights adequately. In an eloquent testimony to the need for federal intervention, 41 state attorneys general have signed a letter to members of this House urging passage of the Violence Against Women Act.

The Violence Against Women Act Builds On and Complements Existing Federal Civil Rights Laws

Currently, American women are being attacked and killed because they are women. Over 100 years ago, following the Civil War, Congress responded to an epidemic of race-based violence by passing a series of federal laws to provide remedies against private individuals who deprive citizens of their civil rights. Similar legislation is needed today to protect citizens from an epidemic of gender-based violence.

Title III of the Violence Against Women Act is modeled on well-established federal civil rights laws. For example, the key phrase "because of...gender or on the basis of gender," which describes crimes of violence that are covered, is modeled on language found in Title VII of the Civil Rights Act of 1964, which is the leading federal statute prohibiting discrimination in employment.

Similarly, the basic concept of Title III resembles that of the Reconstruction-era civil rights laws. Like those earlier laws (42 U.S.C. §§ 1981, 1982, 1983, and 1985(3)), the Violence Against Women Act provides a federal civil remedy for deprivation of certain rights. The "animus" requirement, which has been added to S. 11, is derived from caselaw decided under 42 U.S.C. § 1985(3).

Title III is not identical to its predecessors, however. Each law has different technical legal requirements. For example, unlike § 1983, Title III does not require that the challenged actions were taken "under color of state law," and unlike § 1985(3), it does not require more than one wrongdoer. While Title III is thus broader in some respects than other civil rights laws, it is far narrower in other respects: it protects only against gender-motivated crimes of violence that rise to the level of a felony, whereas 42 U.S.C. §§ 1983 and 1985(3) protect disadvantaged groups from virtually any deprivations of rights, privileges and immunities.

The differences between Title III of the Violence Against Women Act and the nineteenth-century federal civil rights laws are necessary because gender-based violence typically differs from the types of racial violence directed against men. For instance, § 1985(3) was drafted to combat the Ku Klux Klan and similar conspiracies. The dangers confronting women of all races are often quite different. Conspiratorial group attacks on women are not the primary cause of gender violence. In fact, women are six times more likely than men to suffer a crime at the hands of someone they know.*

The Reconstruction-era civil rights laws were not designed with women in mind. For 120 years since they were passed, women of all races have lacked a meaningful civil rights remedy to protect them from pervasive anti-female violence. While §§ 1983 and 1985(3) fall short of providing ideal protection against discrimination based on race, religion, or national origin, they at least provide

a meaningful remedy for a significant percentage of such cases. The fact that these two statutes require the plaintiff to prove conspiracy or color of state law virtually eliminates the possibility that women of any race can redress what is arguably the most common and most damaging form of gender discrimination: acts of gender-motivated violence committed by private individuals.

This defect in existing civil rights laws has meant, among other things, that rape by individual white men acting in a private capacity, which has historically been a widespread form of oppression of African-American women, has never been actionable under the civil rights laws ostensibly designed to protect all African-Americans from racial terrorism. In short, most of the victimization that women experience because of their gender alone, or because of their gender in combination with their race, remains ignored by the federal civil rights laws currently on the books.

It should be noted that NOW LDEF would support broadening Title III of the Violence Against Women Act to provide the same civil remedy for victims of violent crime motivated by race, color, religion, national origin, ethnicity, and sexual orientation. However, if this is not feasible, we view the current focus on gender-motivated violence as appropriate. It would be a tragedy to delay this long-overdue response to a significant social problem because of concerns that it does not adequately address a host of other social problems that are beyond its scope.

A question has been raised as to whether the Violence Against Women Act will have a negative effect on enforcement of existing civil rights laws. This always been a primary consideration for the NOW Legal Defense and Education Fund. We have sought input from eminent scholars and civil rights experts throughout the country to ensure that this bill is drafted to create new rights without curtailing existing ones. No one has identified any way in which Title III of the Violence Against Women Act would have a damaging effect on the development of law under current civil rights statutes.

The Impact of Title III on the Courts

Some observers have suggested that lawsuits brought under the Violence Against Women Act will overwhelm the federal courts. In fact, the legislation will provide a significant new remedy without generating a large number of new cases.

For example, sexual assault is a tort in every state, but a study by Jury Verdict Research, Inc. found only 255 civil jury trials in sex assault cases over a ten-year period.[7] The inhospitability of state courts to such claims (see above) is doubtless one reason why this figure is so low, but there are other reasons that would be equally applicable to cases brought under federal law. One fact that is not going to change is that rape and domestic violence are

vastly underreported. The causes of this phenomenon are numerous and complex and include the severe stigma that still attaches to victims of these crimes. Women do not now, and will not in the future, rush to proclaim themselves as victims of sex crimes or of violence inflicted by family members.

Sexual harassment provides a useful analogy. A major study by the U.S. Merit Systems Protection Board found that 42% of women employed by the federal government had experienced sexual harassment, but despite the availability of legal remedies, only 5% of those who had been sexually harassed made any kind of formal complaint (including complaints in the workplace); an even smaller number actually filed a legal action.[28]

Moreover, a certain number of potential VAW Act defendants (though by no means all) are indigent, and many women and their attorneys may be unwilling to bring suit if there is no hope of collecting damages. And of course, a large number of violent gender-motivated crimes are committed by assailants who are never caught. As Prof. Cass Sunstein has pointed out, the fact that few cases will probably be filed under Title III of the VAW Act does not detract from its importance as an addition to the civil rights legal arsenal.[29]

The fact that a bill to enhance the rights of women is met with a concern for overloading the federal courts adds a disturbing note of sexism to the debate. In recent decades, when Congress was considering the Americans With Disabilities Act and other civil rights legislation that created private rights of action, this concern was heard only from staunch opponents of civil rights. In any event, the fact that violence against women is widespread would seem to argue in favor of, not against, passing legislation to remedy it.

The true burdens on the federal courts are a heavy criminal caseload, particularly drug-related cases, together with a large number of vacant judgeships. Keeping civil rights cases out of federal court will not solve these problems.

It should be noted that in March 1993, the U.S. Judicial Conference revoked its previous opposition to the Violence Against Women Act and specifically adopted a position of neutrality on this bill, with the exception that the organization now actively supports the portions of the bill regarding task forces on gender bias in the courts.[30] The National Association of Women Judges also supports the principles of Title III.[31] A recent Congressional Budget Office report estimates the cost of Title III to be far lower than previously projected.[32]

Finally, it has been suggested that money saved by not having federal courts hear civil rights cases could be redirected to battered women's shelters, local police departments, or other

programs that serve victims of violence. There is no realistic likelihood that funds not spent by the federal courts would wind up in the budgets of such unrelated entities. In any case, the Violence Against Women Act already contains grant programs designed to fund direct services. Furnishing civil rights redress for discrimination is a fundamentally different issue and should not be seen as a tradeoff against direct services to victims of violent crime.

Congress Has Constitutional Authority to Enact This Legislation

Federal legislation to remedy gender-based crime is amply justified by Congress's obligation to advance principles of equal rights under section 5 of the Fourteenth Amendment. Constitutional authority to enact this legislation is also conferred by the Commerce Clause, due to the damaging impact of gender-based crime on the national economy.

* On a national level, domestic violence costs employers 3 to 5 billion dollars annually due to worker absenteeism.[33]

* 30 percent of all women seeking treatment in hospital emergency rooms are victims of battering by a husband or boyfriend. Medical costs related to domestic abuse are estimated at $100 million a year.[34]

* High rates of rape and other crimes deter women from taking many types of jobs, including high-paying night jobs that would require travel on unsafe streets and public transportation. For instance, one rape survivor reported in testimony to the U.S. Senate Judiciary Committee that she had to give up plans for a career in real estate sales because she was afraid to be alone in an empty house with a stranger.[35]

* Homicide is the leading cause of death on the job for women. (For men, the leading cause is accidents.)[36]

* More than half of all homeless women have lost their housing because they are fleeing domestic violence.[37]

Leading scholars of constitutional law have testified in support of Congressional power to enact the Violence Against Women Act.[38]

Conclusion

The Congress has a historic opportunity to play a crucial role in the effort to reduce crime and combat discrimination against women. This long overdue legislation will recognize that violence motivated by gender is a deprivation of civil rights. We urge you to support the Violence Against Women Act. Thank you.

Endnotes

1. "NCADV Statistics May 1988," National Coalition Against Domestic Violence Newsletter 1 (Feb. 1990), citing Bureau of Justice Statistics, Preventing Domestic Violence Against Women, Special Report (Aug. 1986).

2. Federal Bureau of Investigation, Crime in the United States 66 (Aug. 5, 1990).

3. Paula Hawkins, Children at Risk 58 (1986) (former Senator Hawkins summarizing testimony on child sexual abuse received by U.S. Senate Subcommittee on Children, Family, Drugs and Alcoholism); Diana Russell, Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment 180-194 (1984); Roland Summit, "Recognition and Treatment of Child Sexual Abuse" at p. 117-18, in Coping With Pediatric Illness (C. Hollingsworth ed. 1983).

4. National Victim Center and Crime Victims Research and Treatment Center, Rape in America: A Report to the Nation 3 (Apr. 23, 1992).

5. Testimony of Mary P. Koss, Ph.D., on behalf of the American Psychological Association, before the U.S. Senate Judiciary Committee (Aug. 29, 1990).

6. U.S. Senate Judiciary Committee, Ten Facts About Violence Against Women (June 18, 1990) (attachment).

7. See, e.g., LaFree, Reskin and Visher, "Jurors' Response to Victims' Behavior and Legal Issues in Sexual Assault Trials," 32 Social Problems 389 (1985).

8. See generally U.S. Commission on Civil Rights, Battered Women: Issues of Public Policy (1978).

9. U.S. Senate Judiciary Committee, Ten Facts About Violence Against Women (June 18, 1990).

10. Id.

11. K. Swink and A. Leveille, "From Victim to Survivor: A New Look at the Issues and Recovery Process for Adult Incest Survivors," in The Dynamics of Feminist Therapy p. 119 (D. Howard ed. 1986).

12. See, e.g., Timothy Beneke, Men on Rape (1982).

13. Pitt, "Montreal Gunman Had Suicide Note," N.Y. Times, Dec. 8, 1989, at p. A9; "Gunman Kills 14 Women at Montreal University," N.Y. Times, Dec. 7, 1989, at p. A23.

14. See generally Center for Women Policy Studies, Violence Against Women as Bias Motivated Hate Crime: Defining the Issues (1991).

15. endnote to be added

16. endnote to be added

17. Only eight states (California, Connecticut, Iowa, Massachusetts, Michigan, New Jersey, Vermont and Washington) and the District of Columbia provide civil remedies for the discrimination inflicted by gender-based violence.

13. National Center on Women and Family Law, Marital Rape Exemption (1988).

19. See, e.g., Del. Code Ann. tit. 11, Sections 774, 775 (Supp. 1992).

20. Leonard Karp and Cheryl Karp, Domestic Torts (1989; 1993 Supp.).

21. See generally NOW Legal Defense and Education Fund, Legal Resource Kit On Incest and Child Sexual Abuse (1993).

22. endnote to be added

23. footnote to be added

24. endnote to be added

25. See generally Schafran, Overwhelming Evidence: Reports on Gender Bias in the Courts, Trial 28 (Feb. 1990).

26. Lewin, In Crime, Too, Some Gender-Related Inequities, N.Y. Times, Jan. 20, 1991 (citing Bureau of Justice Statistics study).

27. Senate Judiciary Committee Report, "The Violence Against Women Act of 1991," at 44 n. 43 (Oct. 22, 1991).

28. U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Government: An Update" (June 1988).

29. endnote to be added

30. See Summary of the Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence (March 1993).

31. See Judith Billings, "Violence Against Women Act," NAWJ Counterbalance at 2 (Summer 1993).

32. Congressional Budget Office, Cost Estimate [for S.11] (June 30, 1993).

33. Porter, "Help Is Available for Battered Women," Washington Star, Nov. 1, 1979.

34. Id.

35. Statement of Nancy Ziegenmeyer before the U.S. Senate Judiciary Committee (June 20, 1990).

36. "High Murder Rate for Women on the Job," N.Y. Times, Oct. 3, 1993, p. 29, col. 1.

37. U.S. Senate Judiciary Committee, Ten Facts About Domestic Violence Against Women, Dec. 11, 1990.

38. Statements of Prof. Burt Neuborne and Prof. Cass Sunstein before the U.S. Senate Judiciary Committee (April 9, 1991).

Mr. EDWARDS. We will have questions when the other two members of the panel have completed their testimony.

Next is Elizabeth Symonds, legislative counsel, American Civil Liberties Union, here in Washington. You may proceed.

STATEMENT OF ELIZABETH SYMONDS, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Ms. SYMONDS. Good afternoon.

My name is Elizabeth Symonds, and I'm legislative counsel with the American Civil Liberties Union, also representing today the Women's Rights Project of the ACLU.

I very much appreciate the opportunity to testify before you on the Violence Against Women Act, and on its title III provision.

The ACLU, of course, completely concurs that violence against women is an extraordinarily serious problem facing our society today, and that we need new and creative solutions to solve it. In fact, many of those solutions are presented in this legislation, and are solutions that we endorse.

However, title III that creates a new Federal right to be free from crimes motivated by gender raises a lot of questions for us which at this time prevent us from supporting that portion of the bill. Title III does not in our minds make clear the requisite intent needed by a plaintiff trying to prove this cause of action.

What does a crime motivated by gender due at least in part to animus based on the victim's gender really mean? That's the question that we've been asking ourselves for many months. What kinds of cases are actionable under this proposed law?

We're afraid that the vagueness of this standard will create confusion for litigants, for judges and for the poor juries who are going to need some guidance as to what this standard is really about. We've tried to ask ourselves a number of hypotheticals to determine what we think would actually be operative actions that would create a cause of action and civil liability.

So for instance, we have asked, is rape per se actionable? Or, if a man is convicted of raping a woman, goes to jail and rapes a male cellmate, is the second crime actionable under this measure? Should the first crime therefore have been actionable?

Or, if a woman knifes another woman because the second woman was sleeping with the first woman's husband, is that a crime of violence motivated by gender?

Obviously, juries make tough calls and tough decisions all the time. We all know that. Obviously, new statutes are always further refined by subsequent case law. Nonetheless, we fear that this threshold standard that's presented by the bill creates many more questions than it actually answers.

We're also not completely convinced that title III will be an effective mechanism for reducing violent crime. I think that's what all of us here want. I think we're in agreement that the goal of this bill is laudatory. We want to stop violent crime in America.

But will this effectively do so? Again, we posed to ourselves a number of questions. Will this civil cause of action deter perpetrators? Will defendants, many or most of whom are indigent, have the financial resources to actually pay damages awards? Can the defendants be identified in most cases?

When we compare this set of questions to the title VII context, we believe that in title VII most of these questions are answered in the affirmative. We're not as sure in this title III context. Of course, the ACLU treasures our existing Federal civil rights laws, and we utilize them all the time. We litigate daily under those laws. We would frankly be troubled if title III were relegated to a symbolic means of fighting discrimination.

Finally, title III raises the fundamental question of whether a new Federal civil rights action should be provided for women, but not for individuals victimized because of their race, their ethnicity, their religion or their sexual orientation.

In this city alone, as all of you know, hundreds of young black men are being harmed by violent crime at very alarming rates. Should they have the right to try to prove that in some instances, even if it's only a few instances, that they were the victims of racial bias?

We understand well the need for an incremental legislative approach in many areas. But we don't comprehend the reason for insisting upon it here.

In conclusion, we're convinced that this is certainly a well-intentioned attempt to rectify the horrible, the frightening issue of violent crime against women. Nonetheless, we ask you to consider the many questions we pose today. Those of you who cherish our civil rights laws and consider them a real essential tool of social justice simply can't settle for a new statute that might provide little redress.

Thank you very much.

Mr. EDWARDS. Thank you very much, Ms. Symonds.

[The prepared statement of Ms. Symonds follows:]

PREPARED STATEMENT OF ELIZABETH SYMONDS, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is pleased to have the opportunity to present testimony on H.R. 1133, The Violence Against Women Act. My name is Elizabeth Symonds, and I serve as a legislative counsel for the ACLU.

The ACLU wholeheartedly concurs with proponents of this legislation that violence against women is a critical problem facing our nation, and that Congress must devise new, creative solutions to reduce this type of crime. Indeed, we believe that many aspects of the bill -- including grants to train police and prosecutors to identify and respond more effectively to this type of violence, grants for rape prevention programs, education and training for judge and court personnel in state and federal courts -- provide innovative mechanisms for addressing this issue.

However, we believe that Title III of the bill, which creates a new federal right to be free from crimes of violence motivated by gender, raises a number of legal and policy questions, which prevent us from supporting this aspect of the legislation. Our testimony today will outline the issues that we have identified as we have analyzed this new civil rights proposal.

Before proceeding with our analysis of Title III, we would like to point out that while we neither support nor oppose that provision, we unequivocally oppose the numerous criminal justice provisions that appear in the Senate (or potentially) House versions of this legislation. These include increased sentences for repeat offenders, the expansion of pretrial detention, and a section that provides grants to governments that utilize mandatory arrest policies.

Turning now to Title III, the standard set forth in the bill ("a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender")[1] does not make clear the requisite intent or motive that the perpetrator must have had when committing the crime[2] (in order for the victim to succeed at his or her civil suit). Thus, although Title III is not intended to cover every act of violence committed against a woman, the standard does little to assist in determining which kinds of cases are in fact actionable. For example, the bill does not make clear whether all sexual assault crimes are considered to be per se "motivated by gender". Because the standard is vague, we fear that it will simply create massive confusion for litigants, judges and juries involved in these lawsuits.

This lack of clarity, particularly regarding how a plaintiff must prove the motive or intent of her assailant, may have troubling repercussions for other types of civil rights cases. We are concerned that rigid intent requirements applied to Title III cases might in some instances be adopted by judges construing other statutes. Of course, the question of a defendant's intent is often central to civil rights litigation, and permeates

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[1] This language does not appear in the bill as introduced, but was adopted by the Senate Judiciary Committee when it marked-up S. 11 and is the language in the bill passed by the Senate on November 4, 1993. Because we understand that House sponsors will probably adopt the Senate version of this civil rights claim, our comments in this testimony will focus on the Senate language.

[2] We note that a defendant in a Title III civil suit need not have been convicted of a crime in order to be found liable in the civil action. Although the standard for civil liability is often lower than the standard for criminal conviction, the question of how the underlying motivation or intent is to be discerned by the fact finder in Title III cases remains very much an open question.

the case law in the areas of voting rights, employment discrimination, and in interpretations of statutes such as 42 U.S.C. section 1985(3).

As currently written, the Title III standard raises more questions than it answers. What type of proof must a plaintiff present to win his or her case? Is rape, per se, a crime of violence committed because of gender? If a murderer separates male and female victims and kills only the females, did he commit this crime because of gender? What if the murderer in the preceding example is female? Is homosexual rape actionable? If a man is arrested, tried, and acquitted of killing three men and raping and killing two women during the course of a single incident, would there be a cause of action under Title III? If a husband becomes furious with his wife because she crashed his car, and he proceeds to beat her, are his actions committed because of gender and due to animus based on her gender?

Although civil juries must commonly make some very difficult decisions, it appears that in these types of actions they would have to decide whether a woman was attacked primarily because she was a woman (which would be actionable), because her attacker knew her and was angry at her (which might defeat the lawsuit), or because she appeared to be a vulnerable victim who the perpetrator could assault successfully. In the latter case, how will a jury determine whether the defendant's view of his victim's susceptibility was based on the mere fact that she was a woman (perhaps leading to a verdict that the crime was motivated by gender) or the fact that her individual physical characteristics (such as short stature) convinced him that he could physically overwhelm her?

Of course, all new civil rights laws will raise some questions of interpretation, which will in time be answered by a body of relevant case law. However, we believe that Title III offers startling little guidance to litigants, judges and juries who will participate in these lawsuits, and will be more effective if it can be written in a manner that will easily facilitate the ability to answer the questions outlined above.

If the committee does approve this measure, we believe that it is especially critical that the legislative history make clear the committee's intended definition of the word "animus" in this context. There appears to be a divergence of opinion on whether this word means simply "purpose" or whether it creates a standard requiring "hostility." Without this clarification, there will undoubtedly be protracted litigation over the meaning of this term.

Title III might also adversely affect other civil rights lawsuits (including statutory claims and constitutional challenges) because of its impact on the federal courts. By creating a new federal civil cause of action, it will generate a series of new cases for the federal courts, whose dockets are already swelled by the increase in criminal (mostly drug-related) matters.

The Administrative Office of the U.S. Courts has estimated that Title III could generate 13,450 federal civil tort cases, which "represents about two-tenths of 1 percent

of the annual number of violent victimizations of women."[3] These caseload estin were limited to the crimes of rape and sexual assault.

Furthermore, we are not convinced that this new federal claim presents an effective mechanism for reducing violent crimes against women. Many practical questions remain unanswered: Will potential perpetrators actually be deterred by concern for civil liability? Will defendants have the financial resources to pay damages awards?[4] The ACLU cherishes the civil rights laws that Congress has enacted, actively litigates cases utilizing these claims, and views them as an enormously effective, practical arsenal for eradicating injustice in our society. We would be troubled if the new civil rights claim embodied in Title III was relegated to only a symbolic means of fighting discrimination, because practical considerations render it ineffective for broadbased litigation purposes.

In addition, the potentially vast fiscal resources that the federal courts would require if Title III were enacted might be better spent on other programs that might

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[3] The Judicial Impact Office of the Administrative Office of the U.S. Courts, Judicial Impact Statement on Violence Against Women Act, H.R. 1502, 8 (June 8, 1992). The report notes that "[m]any of these crimes would involve attackers with limited assets (75 to 80 percent of current criminal cases require appointment of public defenders), which would discourage civil tort actions." Id. at 8-9.

[4] In its Judicial Impact Statement of the Violence Against Women Act, the Administrative Office of the U.S. Courts reported that "75 percent of those individuals prosecuted in criminal rape and assault trials are represented by Public Defenders and therefore would not have significant resources to warrant a civil suit." Id. at 12. Thus it appears that, even if this federal claim existed, the majority of rape victims would receive no damages if they proceeded to file suit, because the defendants in their cases would be judgment proof. Moreover, the same report reminds us that U.S. Bureau of Justice Statistics studies indicate that in cases of reported rapes, most attackers are unknown (139,900 out of a total of 155,000 in one recent study). Id.

more directly reduce violent crime.[5] Before approving this measure, shouldn't Congress consider whether funds would be better spent on alternatives such as additional police training or battered women's shelters, which might provide more direct benefits in this area?

Moreover, individuals who are the victims of violent crimes many bring civil tort actions in state court against their attackers. Are civil lawsuits at the state level a sufficient remedy that dispels the need for an additional federal claim? Are data available that demonstrate what percentage of victims bring such suits, and the average amount of a damages award? If state remedies are insufficient (because of spousal immunity laws or other barriers) can the federal government encourage states to rectify these problems?

Finally, Title III raises the fundamental question of whether it is appropriate to create a federal civil rights statute solely to provide a remedy for gender-based attacks by private individuals, and not to provide the same remedy for violence committed by private individuals against other victims based on race, ethnicity, religion or sexual orientation. Violent crime is a serious issue facing all members of our society. Further discussion is needed to explore whether, if a new federal civil remedy is created for female crime victims, it should be expanded to include other types of victims as well.

In conclusion, we are convinced that the Violence Against Women Act is a well-intentioned attempt to rectify the very troubling problem of violent crime in our country.

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[5] The Administrative Office of the Courts has estimated that the federal courts would need an additional $50.39 million annually if Title III is adopted. Id. at 10.

Nonetheless, we ask the committee to consider the many questions we have posed in our testimony today, and to find satisfactory answers to them before approving the Title III section of the bill. Those of us who treasure our civil rights laws and view them as essential tools of social justice cannot settle for a new statute that might provide little real redress.

Mr. EDWARDS. The last member of the panel to testify is Bruce Fein, attorney at law, Great Falls, VA. Welcome, Mr. Fein. You may proceed.

STATEMENT OF BRUCE FEIN, ATTORNEY AT LAW, GREAT FALLS, VA

Mr. FEIN. Thank you, Mr. Chairman and members of this subcommittee.

I would suggest that this committee should begin with the principle that was espoused by the Founding Fathers, Thomas Jefferson in particular, that mutability of the law is something unwanted, and that the presumption should be against creating new laws that have uncertainty, perhaps ramifications that can't be foreseen, given the limited capacity which we are all able to understand the future impact of a law, and that the burden of proof in considering this particular civil rights cause of action is really on those who subscribe to the necessity of going forward. In my judgment, that burden of proof has not been discharged.

First of all, the bill in my judgment skates close, if not over, a constitutional line. The findings of fact that are proposed in section 502 seem to me unsubstantiated, either by law or evidence.

For instance, it's stated that current State and Federal laws do not adequately protect against criminal violence against women. But indeed, this particular proposed Federal civil rights action pivots on the very existence of those Federal and State laws that do in fact punish violence against women.

It's stated that there is pervasive gender discrimination in the criminal justice system, in the prosecution of crimes against women. If that were true and proven in any particular case, it's been hornbook constitutional law since *Yick Wo* v. *Hopkins* over a century ago that if there is that invidious motive behind the enforcement of any law or series of laws, that is already unconstitutional, and this particular bill would not add or subtract to that particular prohibition.

It's stated in the findings that under current law, there is a civil rights remedy for gender crimes in the workplace, and that this particular proposal was simply designed to create a parity between crimes in the workplace and crimes in the street. But I think that finding may be a misunderstanding of current Federal civil rights laws.

There is a prohibition against employment discrimination based upon gender. But if an employee commits a rape in the workplace randomly without sponsorship of the employer, that certainly is a crime and would expose that individual to State tort sanctions under assault or battery rules. But it would not be a violation of title VII of the 1964 Civil Rights Act.

The other findings that purport to rest upon the idea that violent crimes against women have some more than ephemeral impact upon interstate commerce seem to me, given the current record, simply to be without either intuitive or factual foundation. I don't think it could be said, as it was said in the 1960's when this Congress nobly passed the 1964 Civil Rights Act, based substantially

on the understanding that many blacks declined to travel in interstate commerce because they would be victimized by racial discrimination in public accommodations and elsewhere that it can be said with anywhere near within the same universe of certainty or intuition that women in fact today are deterred from traveling in interstate commerce on the theory that they may be victimized by a crime that's motivated by animus based upon gender.

I think that it would be very foolhardy to go forward with this particular proposed civil rights remedy without looking very carefully at the constitutional justification under existing Supreme Court precedent.

And on that score, I think it's important to notice how the bill defines gender animus. It states that gender animus includes any part of a criminal's motivation in committing a crime against a woman, just any part.

For instance, suppose that a man was motivated in committing a crime against a woman 99½ percent by greed—he wanted money. Maybe he was a fledgling misogynist, and he had a half of a percent, and he disliked women.

This act would generate a civil rights remedy for that. That is, a scintilla of the motivation of an individual based upon gender animus triggers coverage. That would suggest that the bill is vastly overbroad, in my judgment, in terms of trying to capture those particular kinds of crimes that we think have been selected out, primarily because women are being treated as second-class citizens.

It may be useful to note that in comparison, in the civil rights area regarding racial discrimination, the Supreme Court has held that a substantial motivating factor must be proven in order for there to be a remedy. This bill just has any motivating factor.

It is also unclear to me how the act intends to limit its scope so as not to interfere with what one might call domestic relations provisions of State law. The claim that's created is defined as one that entrusts the Federal courts with jurisdiction over—and here I'm reading from the bill—"compensatory and punitive damages, injunctive relief, declaratory relief, or a combination of those."

Nevertheless, the bill goes on to say that the relief shall not pertain to jurisdiction over divorce, alimony, equitable distribution of marital property or child custody decrees. Now, that's an odd limitation, because the initial entrustment of Federal jurisdiction doesn't include any of those areas anyway. It suggests some confusion as to how broad the claim is to extend.

Why would you need a limitation on not interfering with child custody decrees when the jurisdiction of the Federal courts, at least on its face, doesn't extend that far anyway? It extends only to damages and injunctions or declaratory relief.

Finally, I think one provision of the bill intrudes into State law in a way that's clearly unmerited. A claim is created under the bill even though the conduct is not a crime, so long as the State law has chosen to grant spousal immunity. That would typically be the case, I suppose, where it's an alleged rape between married couples.

The State may choose, for a variety of reasons, not to make that a crime in part because they think the elements of proof are so horrendous that they don't want to criminalize that particular circumstance or otherwise.

But it seems to me highly improper for the Federal Government to be instructing the States as to how they ought to grant or withhold spousal immunity on something that's so peculiarly local and responsive to local customs and more.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. Fein.

We will temporarily recess this portion of our meeting today, and move back to the original bill, H.R. 1237.

[Recess.]

Mr. EDWARDS. We will now ask some questions of the panel. We thank you for your statement.

For a moment, before I turn to Mrs. Schroeder, let's walk through how the bill is going to operate. The original version was found to have problems because it seemed to make, or to federalize, almost any act of violence based on gender.

As I understand it, the Federal judges thought it was too broad. Although the Federal judges have not endorsed the bill, and as a matter of fact, they have not endorsed any bill, and neither has the Leadership Conference on Civil Rights or the NAACP Legal Defense Fund. We have asked them to testify, and they have said they can't come.

So let's walk through the bill, on how it will be, and we'll take a man or a woman. A woman is walking down the street, and is accosted and beaten up or raped by a man.

Now, the bill, as amended with the suggestions of the judges and others, goes one step further, though. It also requires animus, a class, creating a class of people, and there must also be, in addition to the beating, we'll say, there must be alleged action or proven or whatever that the person doing the beating up has this animus against, we'll say women, as a class. Is that correct?

Mr. FEIN. I don't think so, Mr. Chairman. That's because in the definitional section of the bill it states that if any element of the motivation is animus toward women, then it is qualification for a Federal civil rights remedy.

That seems to me that when you have mixed motivations for crime, which would not be atypical, you just need a scintilla of proof that some tiny portion of the motivation was animus toward women in order to come within the terms of the bill.

Mr. EDWARDS. Ms. Goldfarb, will you respond to that? Now, I'm referring to the Senate bill that did add the animus provision.

Ms. GOLDFARB. Right, the Senate bill requires that the plaintiff must prove that the crime of violence first of all would rise to the level of a felony under State or Federal law; secondly, that it was a crime against a person or with a risk of harm to a person; and thirdly, that it was committed because of or on the basis of sex and due at least in part to an animus based on gender, as you mentioned earlier.

Mr. EDWARDS. So the complaint for damages under this law by the woman who has been beaten up must also have two elements:

that she was beaten up by this guy, this person, and that he has this gender animus; is that correct?

Ms. GOLDFARB. Yes.

Mr. EDWARDS. How is that proven?

Ms. GOLDFARB. I believe it would be proven the same way that animus is currently proven under 42 U.S.C., section 1985(3), and the same way also in which racial bias is proven under State hate crimes laws, which tends to be by the kind of evidence I mentioned earlier, things like epithets, derogatory epithets, choice of victim that demonstrates targeting a certain class, a history of targeting attacks against that class and so on.

I would just add in terms of mixed motivation, it's very common in a racial context that a white supremacist does not lynch every African-American whom he encounters. He chooses his target for a variety of reasons.

It may be because that individual person refused to step off a sidewalk when a white person came along, or looked at a white woman in a way that this white supremacist thought was inappropriate. Mixed motive is absolutely run of the mill in racial violence cases, and that in itself should not prevent a civil rights remedy from being available.

Mr. FEIN. But the typical standard is a substantial motivating factor. The word "substantial" is in the requirement. This "any part" of the motivation is animus based. For instance, it would suggest that even if the crime would have been committed absent any gender animus, it's still covered. There isn't even a "but for" standard in the bill. If you put in "substantial" then I would agree with the observation that it would parallel the prohibitions on race discrimination.

Ms. GOLDFARB. I have to respectfully disagree with Mr. Fein's interpretation. The Senate bill specifically says because of or on the basis of gender and due at least in part to gender animus. I believe that covers the concern that's been expressed.

Mr. EDWARDS. Thank you.

Mrs. Schroeder.

Mrs. SCHROEDER. Well, I thank you very much, Mr. Chairman, and I thank our witnesses.

Maybe, Mr. Fein, there is some confusion because of this redrafting.

Mr. Chairman, I would like to put in the record this statement from the National Association of Women Judges, who looked very carefully at the civil rights issue.

[The prepared statement of Ms. Billings follows:]

National Association of Women Judges

UNITED STATES HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

VIOLENCE AGAINST WOMEN ACT OF 1993
TITLE V "CIVIL RIGHTS"
November 16, 1993

Statement of the Honorable Judith Billings, President of the National Association of Women Judges

I am Judith Billings, Judge of the Utah Court of Appeals and current President of the National Association of Women Judges. On behalf of the National Association of Women Judges, I am pleased to submit this statement to express our organization's support of the civil rights provision of the Violence Against Women Act of 1993.

We are an organization created in 1979 and dedicated to the improvement of the administration of justice in both the state and federal courts. Our organization now includes approximately 1,000 judges at all levels of the state and federal judiciary. The association includes both men and women of all races and ethnic backgrounds.

The goals of the Violence Against Women Act are among the most important goals of the National Association of Women Judges, which is committed to taking action to diminish violence against women and to eliminate the harmful effects of gender bias in our courts. Our organization works for promoting cooperation between state and federal judges, all of

The National Association of Women Judges ■ [illegible] N.W. ■ Suite [illegible] ■ Washington DC [illegible] ■ (202) [illegible] ■ Fax (202) 872-0965

whom need to respond to the problems of violence facing women across the country. The NAWJ was the first national judicial organization to endorse the Violence Against Women Act, and we did so by resolution adopted at our annual meeting in October 1992. The NAWJ voiced its support for all the aims of the Act, including the creation of a federal remedy for those whose civil rights have been violated by violent attacks motivated by the victim's gender. The NAWJ is especially sensitive to the need for Congress to recognize the problem of violence against women in order to complement the ever increasing work load of state courts in areas of traditional state court concern in criminal, personal injury and domestic relations law.

The civil rights provision you are considering include a number of measures which the NAWJ believes help ensure this complementary role, and help avoid the risk of overloading the federal courts with disputes that fall within traditional state court functions. The provisions in the Bill which help accomplish this include (1) limited the actionable crimes of violence to felonies; (2) excluding domestic relations matters, including custody, dissolution and property settlements; (3) providing for concurrent jurisdiction in federal and state courts coupled with the express limitation that actions brought in state court may not be removed to federal court; (4) limiting the

actionable conduct to crimes against a person rather than property; and (5) excluding random acts of violence unrelated to the gender while limiting the federal remedy to those cases in which some gender based animus can be demonstrated.

The National Associated of Women Judges believes that the creation of a federal civil rights remedy will provide needed congressional recognition that gender based violence is a national problem. The specific provision before you help achieve this without interfering with the administration of justice in either the state or federal courts.

The civil rights provisions are but a part of an act designed to help combat violence against women and eliminate bias on the basis of gender in our courts. These are important goals of the National Association of Women Judges and we urge the passage of this legislation.

Judith M. Billings
Utah Court of Appeals

JMB/hh

Mrs. SCHROEDER. If I may just read from their statement, it says, "They believe that the civil rights provision we're considering includes a number of measures that they think will help ensure a complementary wall and yet avoid the risk of overloading the Federal courts." They really felt that this was a good compromise that we're talking about, and have pointed out that we're excluding domestic relations matters, but that we are putting in actionable crimes of violence.

I think the bottom line is, if I might say, as you know, this committee has twice passed hate crimes sentencing enforcement, and yet we know that there are many hate crimes motivated by gender, but we have not had them go out and document these, because we figured there would be too many to put in.

So I think it's kind of interesting that it's almost an admission that there are indeed hate crimes out there against women, and they are very numerous, but we won't even document them because they are so numerous. I think that this compromise that we have is a very good one.

I must say, to the ACLU, I am frustrated by your reticence on this, because I know many times we have tried to meet and find out what the problems were. The judges did come forward and we worked with them, and other groups came forward. But every time we tried to meet, they canceled the appointment.

Ms. SYMONDS. I can only say that I have been assigned to this issue since probably last February, and all the activities that you suggest occurred must have occurred before I came on board on this issue.

I have had some very fruitful discussions with your staff, and I must say, with NOW Legal Defense Fund, who have been very patient with us as we have asked this litany of questions.

But certainly I have tried to be in contact with your staff, and your staff has been very helpful. We obviously would be happy to meet at any time with you to go over our concerns and to hear any concerns you may have about your position.

Mrs. SCHROEDER. Your point is not that you don't think that there are any civil rights violations against women? That's not your point, right?

Ms. SYMONDS. Certainly, we stand for the proposition that there are many existing civil rights violations against women in this country, and we litigate often to rectify that, and in many different areas.

Mrs. SCHROEDER. Doesn't it make sense when we have—I also have a statement here from State attorneys general endorsing this, saying this would be very helpful, if we could put that in, too.

Mr. EDWARDS. Without objection.

[The prepared statements follow:]

STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N.Y. 10271

ROBERT ABRAMS
ATTORNEY GENERAL

July 22, 1993

Hon. Jack Brooks
Chair, House Judiciary Committee
2449 Rayburn House Office Building
Washington, D.C. 20515-4309

Re: The Violence Against Women Act /H.R. 1133

Dear Congressman Brooks:

We are writing to express our strong support for the Violence Against Women Act, H.R. 1133, which is currently pending before your committee. We continue to believe the essential elements of this bill are sorely needed.

The National Association of Attorneys General ("NAAG") has been a strong supporter of this bill over the last several years. In 1990, NAAG passed a resolution in support of the Violence Against Women Act of 1990. In 1991, Illinois Attorney General Roland W. Burris and Iowa Attorney General Bonnie J. Campbell testified in support of the Violence Against Women Act before the Senate Judiciary Committee. Members of NAAG again endorsed the bill at our Spring Meeting in March, 1993, in a resolution entitled "Setting Forth Certain Elements For An Effective Federal Crime Bill". This letter reaffirms our long support for this bill.

In each of our states, we have experienced the results of the widespread incidence of violence against women - in the home, on the streets, in the workplace and on our college campuses. State and local governments, law enforcement agencies, courts, schools, domestic violence shelters and safe homes have borne the tremendous burdens caused by gender-based violence. States have

sought to meet the needs of the victims of this violence as well as to prosecute vigorously those who engage in violence against women.

We believe however, that the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds. H.R. 1133 would begin to meet those needs by, inter alia, providing funds for law enforcement training and assistance to prosecutors, by creating a specific federal civil rights remedy for the victims of gender-based crimes, by according full faith and credit to each state's protective orders, and by creating federal criminal penalties for interstate violations of orders of protection. In addition, the bill would provide funds for education of state court judges and court personnel.

We believe these and other provisions of the Violence Against Women Act would address some of critical challenges faced by the states, who have borne most of the responsibilities and costs of the devastating effects of violence against women.

We write today to reaffirm our support for the Violence Against Women Act, now H.R. 1133 /S. 11, and to urge your speedy passage of the bill.

Very truly yours,

Robert Abrams

ROBERT ABRAMS
Attorney General of New York

Attorney General of New Jersey

Bonnie J. Campbell
Attorney General of Iowa

Attorneys General signing the Abrams letter supporting VAWA

CONNECTICUT	Richard Blumenthal
DELAWARE	Charles M. Oberly, III
DISTRICT OF COLUMBIA	John Payton
FLORIDA	Robert A. Butterworth
GUAM	E. Barrett-Anderson
HAWAII	Robert A. Marks
IDAHO	Larry EchoHawk
ILLINOIS	Roland W. Burris
INDIANA	Pamela Carter
IOWA	Bonnie Campbell
KANSAS	Robert T. Stephan
KENTUCKY	Chris Gorman
LOUISIANA	Richard P. Ieyoub
MAINE	Michael E. Carpenter
MARYLAND	J. Joseph Curran Jr.
MASSACHUSETTS	Scott Harshbarger
MICHIGAN	Frank J. Kelley
MINNESOTA	Hubert H. Humphrey III
MONTANA	Joseph P. Mazurek
NEVADA	Frankie Sue Del Papa
NEW HAMPSHIRE	Jeffrey R. Howard
NEW JERSEY	Robert J. Del Tufo
NEW MEXICO	Tom Udall
NEW YORK	Robert Abrams
NORTH DAKOTA	Heidi Heitkamp
OHIO	Lee Fisher
OKLAHOMA	Susan B. Loving
OREGON	Theodore R. Kulongoski
PENNSYLVANIA	Ernest D. Preate Jr.
RHODE ISLAND	Jeffrey B. Pine
SOUTH CAROLINA	T. Travis Medlock
UTAH	Jan Graham
VERMONT	Jeffrey L. Amestoy
VIRGIN ISLANDS	Rosalie S. Ballentine
WASHINGTON	Christine O. Gregoire
WEST VIRGINIA	Darrell V. McGraw Jr.
WISCONSIN	James E. Doyle

State Attorneys General who have added their support for VAWA after the cutoff date to sign the Abrams letter:

MISSISSIPPI	Mike Moore
SOUTH DAKOTA	Mark Barnett
TEXAS	Dan Morales
VIRGINIA	Stephen D. Rosenthal

JUDICIAL CONFERENCE RESOLUTION ON VIOLENCE
AGAINST WOMEN
March 1993

After considering the report and recommendations of the Ad Hoc Committee on Gender-Based Violence, and as a result of the dialogue the Ad Hoc Committee has undertaken with the sponsors of the proposed Violence Against Women Act of 1991 (S. 15, 102d Congress) since the Judicial Conference adopted its resolution about the proposed 1991 Act, the Conference takes no position on specific provisions of the proposed Violence Against Women Act of 1993 (S. 11, 103d Congress). The Conference reiterates its concern expressed in our prior resolution and its general concerns about the trend toward federalization of state law crimes and causes of action.

At the same time, the Conference believes that the provisions of Title V of S. 11 encouraging circuit judicial councils to conduct studies with respect to gender bias in their respective circuits, has great merit and the Conference endorses that specific provision.

Statement of Burt Neuborne
in Support of the Civil
Rights Provisions of the
Violence Against Women Act
of 1991

April 9, 1991

Mr. Chairman and members of the Subcommittee:

My name is Burt Neuborne. I have been a Professor of Law at New York University since 1974. From 1982-1986, I served as National Legal Director of the American Civil Liberties Union. Since 1988, I have been a member of the New York City Commission on Human Rights, the body vested with responsibility for implementing New York City's Human Rights Law. I have spent much of my career seeking to enforce the promises of liberty and equality that are enshrined in our laws, but all too often are absent from our lives.

I am grateful for this opportunity to discuss Section 301 of the Violence Against Women Act of 1991, which establishes a federal civil cause of action for damages and injunctive relief on behalf of victims of violent gender-based assaults. The obvious intent of the provision is to provide victims with a federal remedy against gender-motivated violence that is analogous to, but less cumbersome than, the remedies against invidiously motivated violence provided by existing federal law. Eg. 18 U.S.C. §§241, 242, 245; 42 U.S.C. §§1983, 1985(3).

Section 301 differs from analogous federal statutes that have traditionally been invoked against racially motivated violent assaults in two significant ways. First, Section 301 provides relief against violent gender motivated assaults carried out by private individuals. Federal statutes like 18 U.S.C. §§241 and 242 and §§1983 and 1985(3), dating from the post-Civil War Reconstruction period, provide relief against certain private "conspiracies" and unlawful actions by government officials, but do not provide relief against individual actors. Section 301 builds on the model of 18 U.S.C. §245, enacted in 1975, to provide relief against individuals. Since the bulk of violent gender based assaults are perpetrated by individuals, the expanded reach of Section 301 is critical.

Second, unlike existing federal statutes that have been invoked against class based violence, Section 301 is not merely a means to enforce rights established by other provisions of law. The relationship between conduit remedial statutes, such as §1985(3), and the rights-generating provisions they are intended to enforce has generated enormous confusion. Section 301 avoids that confusion by itself creating a federal right to be free from gender motivated violent assault.

While I believe that Section 301 should have a criminal counterpart that would make possible a federal law enforcement response to gender-motivated violence and while I believe that existing overly technical federal protections against racially motivated violence should be similarly simplified, I fully

support the effort to provide victims of gender-motivated violence with an efficient and effective federal judicial remedy.

It is a shameful fact that millions of women in the United States cannot fully enjoy the promise of equality contained in the Equal Protection clause of the 14th Amendment and codified in Title VII of the Civil Rights Act of 1964 because they are forced to share their lives with the pervasive reality of gender-motivated violence. In the hour that we speak with you this morning, ten women will be raped and hundreds more assaulted or threatened because of their gender. Current estimates are that between one in three to one in ten women will be raped during their lives. Women have been subject to gender-based violence for so long and on such a scale in our society that we have difficulty perceiving the enormity of its impact. Worse, because gender-based violence has been a part of our society for so long, it appears to many to be a inescapable aspect of life in a complex society. It is long past time to recognize that gender-motivated violence is devastating to a woman's attempt to enjoy the equal privileges and immunities of citizenship and to deploy the full power of Congress against it.

Congress, in enacting Title VII, sought to guaranty women an equal opportunity to compete in the job market. But the reality of pervasive gender based violence forces millions of women to forego employment opportunities because of the dangers associated with working at certain hours or certain locations. When women do enter the workforce, their experience is often a nightmare of

fear, especially when they are asked to work late or to travel alone. Finally, victims of violent gender-based assault must carry their pain into the workplace, where it creates unique gender-based obstacles to maximum performance.

Similarly, the Constitution guarantees women equal access to our public sidewalks, means of transportation and parks. But the reality of pervasive gender-based violence excludes millions of American women from our parks and our streets, especially after dark. The freedom of movement and sense of physical security that any member of a civilized society should take for granted is denied to millions of women in this country solely on the basis of their gender.

It is, of course, the principal responsibility of state and local government to protect victims against gender-based violent assault. Unfortunately, a combination of resource scarcity and enduring insensitivity to the scope of the problem have rendered state and local responses to the problem of gender-motivated violence hopelessly inadequate. One has only to count the number of women murdered in the past year by subjects of outstanding orders of "protection" issued by local courts to realize the toothless quality of much state and local "protection".

In the past, when Congress has been confronted with settings in which vulnerable segments of the population have been denied the ability to enjoy equal access to the privileges and immunities of life in a civilized society, Congress has provided state and local governments with valuable reinforcement by

forbidding invidiously motivated violence directed at the vulnerable group. Given our past, racially motivated violence has been the the principal target of Congress' remedial legislation. It is now time to add victims of gender-based violence to the category of federally protected persons.

At least four sources of Congressional power exist to extend federal protection to the victims of gender-motivated violent assaults. First, the destructive impact of pervasive gender-based violence on the nation's labor market and on the performance of fifty per cent of its workforce provides Congress with ample authority to legislate under the Commerce Clause. Second, the devastating effect of gender-based violence on the ability of women to enjoy the values protected by Section 1 of the 14th Amendment provides Congress with ample authority to legislate under Section 5 of the 14th Amendment to prohibit private interference with the enjoyment of Section 1 values. Third, the destructive impact of gender-based violence on the ability of women to enjoy the privileges and immunities of national citizenship, including the right to enjoy the benefits of federal and state statutory rights, provides Congress with ample authority to outlaw gender motivated violent assaults. Finally, the physical subordination enforced by pervasive gender-based violence is as much a badge and incident of slavery within the meaning of the 13th Amendment as are despicable attempts to consign racial minorities to inferior status. Both are subject to a Congressional response.

A. Gender-Based Violent Assault and the Commerce Clause

Women constitute 50% of the nation's labor force and 36% of its business executives. As employers like Du Pont Corporation have recognized, employees who have been the victims of gender-based violent assaults suffer adverse physical and psychological affects on the job. In pure economic terms, the sheer loss of productivity attributable to violent gender-based assault is staggering, to say nothing of the victim's personal pain. Moreover, the economic loss caused by gender-based violence does not stop with the actual victims. The dislocation of the nation's labor force that is caused by fear of violent gender-based assault is enormous: women who do not enter or who leave the labor force because of fear: women whose choice of job is dictated by fear; women whose performance on the job is affected by fear.

Congress, in 1964, recognized that gender bias in the workplace is a massive drain on the nation's productive capacity. Accordingly, Congress, relying in part on its Commerce Clause power, enacted Title VII, forbidding private employers to discriminate on the basis of gender. Section 301 is equally supported by a need to eradicate the destructive affects of gender bias from our economic system.

The modern conception of Congress' power under the Commerce Clause begins in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1

(1937), when the Supreme Court upheld Congress' power to regulate any activity exerting a "substantial economic effect" on interstate commerce. In United States v. Darby, 312 U.S. 100 (1941), United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) and Wickard v. Filburn, 317 U.S. 111 (1942), the Court made clear that "economic effect" as used in Jones & Laughlin means the aggregate economic effect of the entire class of regulated behavior, as opposed to the effect of the single transaction before the Court.

In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Supreme Court accepted Congress' finding that racial discrimination in access to public accommodations affected interstate commerce in the aggregate and upheld the application of Title II to intra-state, as well as inter-state, travellers. Similarly, in Katzenbach v. McClung, 379 U.S. 294 (1964), the Court upheld the application of Title II to a local lunch stand because the aggregate economic impact of the class of regulated transactions affected interstate commerce. In Maryland v. Wirtz, 392 U.S. 183 (1968), the Court applied the aggregate economic effects test once again to uphold the application of minimum wage standards to local governments. Finally, in Perez v. United States, 402 U.S. 146 (1971), the Court upheld the application of federal racketeering laws to intra-state loan sharking because the aggregate economic effect of loan sharking affected interstate commerce.

Since it is clear that the aggregate economic effect of

gender-based violent assault exacts a terrible toll on our economic lives, with incaluable effects on the flow of interstate commerce, Congress is empowered to legislate against the practice without a showing that each assault itself affects commerce.

B. Section 5 of the 14th Amendment and Gender-Based Violence

Section 1 of the 14th Amendment forbids gender bias. Reed v. Reed, 404 U.S. 71 (1971). Section 5 of the 14th Amendment empowers Congress "to enforce, by appropriate legislation, the provisions of this Article."

Since the self-executing provisions of Section 1 of the 14th Amendment apply only against "state action", controversy has arisen over whether Congress may legislate under Section 5 against private conduct that interferes with the enjoyment of values protected against state interference by Section 1.

Despite 19th century support for the proposition that Congress' power under Section 5 is restricted to settings already reached by the self-executing provisions of Section 1, the modern Supreme Court has explicitly ruled that Congress' power under Section 5 exceeds the self-executing reach of Section 1 in two significant ways.

First, the Supreme Court has ruled that Congress may outlaw substantive practices that it deems violative of Section 1 regardless of whether the courts have reached a similar conclusion. Thus, in Katzenbach v. Morgan, 384 U.S. 641 (1966),

the Court upheld a Congressional ban on literacy tests for voting as a valid exercise of Section 5 power despite a Supreme Court decision upholding the use of literacy tests under Section 1. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). See also Oregon v. Mitchell, 400 U.S. 112 (1970); EEOC v. Wyoming, 460 U.S. 226 (1983). In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court took a similarly broad view of Congress' power under the enforcement clause of the 15th Amendment, upholding the Voting Rights Act of 1965 despite the absence of a judicially recognized violation of Section 1 of the 15th Amendment. Compare City of Mobile v. Bolden, 446 U.S. 55 (1980) with Thornburg v. Gingles, 478 U.S. 30 (1986).

Even more importantly in the context of Section 301, six members of the Supreme Court have explicitly approved the use of Section 5 of the 14th Amendment to enact legislation outlawing private interference with the enjoyment of equality values protected by Section 1. United States v. Guest, 383 U.S. 745 (1966). See also Griffin v. Breckenridge, 403 U.S. 88 (1971); District of Columbia v. Carter, 409 U.S. 418 (1973).

Guest and Breckenridge upheld federal criminal and civil statutes based on Section 5 of the 14th Amendment aimed at racially motivated violent assaults on Afro-Americans. Similar power exists to outlaw gender-motivated violent assaults that make it impossible for women to enjoy values protected against state interference by Section 1.

In United Brotherhood of Carpenters & Joiners v. Scott, 463

U.S. 825 (1983), the Court ruled that 42 U.S.C. §1985(3) does not provide a remedy for purely private conspiracies to deprive individuals of First Amendment rights because the First Amendment does not protect individuals against private action. Section 301, however, differs fundamentally from §1985(3). Unlike §1985(3), which was intended to operate solely as a conduit for substantive rights created elsewhere, Great American Savings & Loan Ass'n. v. Novotny, 442 U.S. 366 (1979), Section 301(b) is carefully designed to itself create a federal statutory right to be free from gender-motivated assault. As the Court noted in Scott, if §1985(3) had itself created the rights in question, either pursuant to the Commerce Clause or Section 5 of the 14th Amendment, instead of operating as a mere conduit for rights created elsewhere, Congress would have been clearly empowered to act against private violence. Thus, the Scott Court was careful to reaffirm cases like Griffin v. Breckenridge recognizing a §1985(3) claim against private action in derogation of rights protected by the 13th Amendment and the privileges and immunities clause. Since Section 301(b) explicitly creates rights against private persons, it is unaffected by Scott.

C. The Privileges and Immunities Clause and Gender-Based Violence

Congress possesses unquestioned power to provide remedies for private interference with rights protected by the privileges and immunities clause. Eg. Ex parte Yarbrough, 110 U.S. 651

(1884); Logan v. United States, 144 U.S. 263 (1892). Although the full scope of the privileges and immunities clause remains undeveloped, at a minmum, it protects the right to travel and the equal right to enjoy the benefits of federal and state statutory law.

When racially motivated violence threatened to deny victims the ability to travel freely or the equal ability to enjoy statutory rights based in state or federal law, the Supreme Court upheld Congressional sanctions - both civil and criminal - against the racially motivated violence. Similar power exists to enact Congressional sanctions against gender-motivated violence that prevents women from travelling freely and from enjoying statutory rights under both federal and state law.

In United States v. Johnson, 390 U.S. 563 (1968), for example, the Court upheld the federal criminal conviction of private persons for a violent assault aimed at depriving racial minorities of the enjoyment of equal access to places of public accommodation under Title II. In United States v. Guest, 383 U.S. 745 (1966), the Court upheld a federal criminal sanction against violent private conduct aimed at depriving racial minorities of the ability to travel freely. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court upheld a federal civil remedy for violent private conduct aimed at depriving racial minorities of the right to travel and the right to vote under state law.

Gender-motivated violence deprives women of the ability to travel freely; the ability to enjoy the benefit of federal

statutory rights conferred by Title VII and the ability to enjoy the benefit of numerous rights conferred by state law. Since Johnson, Guest and Griffin establish clear Congressional power to protect victims from racially motivated violence aimed at interfering with the right to travel, the right to enjoy federal statutory benefits under Title II and the right to enjoy benefits based in state law, similar power exists to protect the identical rights against destruction by gender-motivated violence.

D. The 13th Amendment and Gender-Based Violence

Gender-motivated violence is a crude form of physical subordination that tracks the badges and incidents of slavery and involuntary servitude. The Supreme Court has recognized that Congress has the power under Section 2 of the 13th Amendment to identify the badges and incidents of involuntary servitude and to outlaw them. Eg. Jones v. Alfred H. Mayer, 392 U.S. 409 (1968)(racial discrimination in sale of housing); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)(racial discrimination in access to amusement park); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973)(racial discrimination in access to communituy swimming pool); Runyon v. McCrary, 427 U.S. 160 (1976)(racial discrimination in admission to private school) Griffin v. Breckenridge, 403 U.S. 88 (1971)(racially motivated assault a badge or incident of slavery).

Although the core of 13th Amendment protection is the liberation of Afro-American slaves from bondage, the Court has recognized that 13th Amendment based legislation protects whites as well as blacks from racial discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Since the Court has recognized Congress' power to legislate on behalf of whites under Section 2 of the 13th Amendment, no principled basis exists to deny Congress a similar power on behalf of women. To the extent pervasive gender-based violence is denying women an equal status in society, it is precisely analogous to the badges and incidents of Afro-American slavery swept away by Congress and the courts in the cases following Jones v. Mayer.

Whether it is viewed as an attempt to eliminate the extraordinary economic costs of gender-based violence; an attempt to reinforce the values of equality protected by the 14th Amendment; an attempt to assure respect for the privileges and immunities of national citizenship; or an effort to apply the moral imperative of the 13th Amendment to the victims of gender-based violence, Section 301 of the Violence Against Women Act of 1991 is, in my opinion, within the power of Congress.

Statement of Professor Cass R. Sunstein
University of Chicago

Mr. Chairman and Members of the Subcommittee:

I am grateful to have the opportunity to appear before y . today to discuss the constitutional issues associated with S. 1 the "Violence Against Women Act of 1991." I will deal only with the questions of congressional power that are raised by S. 15. . brief, I believe that S. 15 is constitutional, but that certain amendments to Title III would be desirable to connect its provisions more closely to the relevant sources of congressional power. I will not discuss issues of policy.

I. In General

My conclusions are as follows. The key constitutional provisions grant Congress the authority to "provide for the . general Welfare of the United States," U.S. Const., Art. I, section 8, cl. 1; to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes," Art. I, section 8, cl. 3; "to enforce, by appropriate legislation, the provisions of" the fourteenth amendment, Amendment XIV, section 5; and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the

United States, or in any Department or Officer thereof," Article I, section 8, cl. 18.

Under these provisions, Congress unquestionably has the power to spend money, as S. 15 provides, for various federal purposes; to provide grants, as S. 15 does, to state and local governments for the purpose of reducing violence against women; to protect, against the effects of a multistate system, orders issued by courts of one state to protect women against violence; and to set out rules of evidence designed to ensure fairness in the administration of the criminal justice system. For this reason, Titles I, II, IV, and V raise no serious legal question.

If Congress has made the appropriate findings and heard the appropriate evidence, Title III -- which creates a federal cause of action for those subject to "crimes of violence motivated by the victim's gender" -- is also, in all probability, constitutional under both the commerce clause and section 5 of the fourteenth amendment. I do suggest, however, that Title III should be amended to clarify the connection between its provisions and the sources of constitutional authority.

In particular, Title III might include provisions that (a) make clear the effects of gender crimes on interstate commerce and (b) emphasize the existance of current bias or discrimination in the criminal justice system -- bias or discrimination that, Congress believes, in many cases deprives women subject to violent crime of the equal protection of the laws. The legislative history, including the committee report, should also reveal attention to these considerations. With the appropriate

findings, and with the appropriate factual record, Title III should raise no serious constitutional objection.

II. Titles I, II, IV, and V

Titles I, II, IV, and V are plainly authorized by the Constitution. I offer a brief discussion.

A. Federal expenditures for federal purposes are plainly within congressional power. Many provisions of S. 15 simply create programs and authorize expenditures for federal purposes. Subtitle D of Title I creates a National Commission on Violent Crime Against Women. Subtitle E of Title II requires the Secretary of Education to educate young people about domestic violence. Subtitle B of Title V provides for education and training programs for federal judges and court personnel.

These provisions raise no serious question. Congress has the power to make law and to "provide for the common Defence and general Welfare of the United States." The power to establish and fund commissions is of course ancillary to the power to make law. The power to provide funds to executive and judicial officials is incidental to the power to create lower courts and to create executive offices to carry out national responsibilities. See generally Buckley v. Valeo, 424 U.S. 1 (1976).

Subtitle F of Title II requires the Postmaster General to issue regulations to secure the confidentiality of the addresses of an abused person. Because Congress has the power to "establish Post Offices," Art. 1, section 8, cl. 7, there can be no doubt

that it has the authority to engage in regulatory activity of this sort. See, e.g., Hamling v. United States, 418 U.S. 87 (1974); Badders v. U.S., 240 U.S. 391 (1916); In re Rapier, 143 U.S. 110 (1892).

B. Federal grants to state and local government are authorized by the Spending Clause. Much of S. 15 consists of conditional federal grants. With respect to Title I: Subtitle B grants money to state and local governments, and to Indian tribes, to combat violent crimes against women. Subtitle C grants money to prevent crime in urban transportation and in public parks. Subtitle F grants money for education and prevention of sexual assaults. With respect to Title II: Subtitle B provides grants to encourage states and localities to treat spousal violence as a serious violation of the criminal law. Subtitle C appropriates money to fund shelters for victims of domestic violence. Subtitle D provides grants for public information campaigns, shelter assistance, and related purposes.

Title IV generally provides grants for campus rape education and prevention. It also requires reporting of the relevant actitivies and of the levels of criminal offenses on campus. In the relevant programs, the school must disclose to the victim of sexual assault the outcome of any investigation. Title V creates grants to develop programs to be used by states on rape, sexual assault, and domestic violence.

There is no doubt that these programs are constitutional under the spending clause ("The Congress shall have Power To . provide for the common Defence and general Welfare of the

United States"], taken in conjunction with the necessary and proper clause. Programs of cooperative federalism -- in which the national government grants money, but with strings attached -- are extremely well-established. See South Dakota v. Dole, 483 U.S. 203 (1987); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

If Congress attached an arguably unconstitutional condition to a grant, there would of course be room for constitutional doubt. But none of these programs raises these concerns.*

C. New evidentiary rules are authorized by Article III. Subtitle E creates new evidentiary rules in cases of violence against women. Congress unquestionably has the power to create such rules under its power to create lower federal courts, together with the necessary and proper clause. If this provision raised serious questions, the Federal Rules of Civil Procedure and the Federal Rules of Evidence would do so as well; there is ample authority to the contrary. See, e.g., Hanna v. Plumer, 380 U.S. 460, 472 (1965) ["For the constitutional provision for a federal court system [augmented by the Necessary and Proper Clause] carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."); In Re Air

*The fact that universities must disclose the outcomes of proceedings to victims does not violate rights of assailants or of universities.

Crash Disaster Near Chicago, 701 F.2d 1189, 1193 (7th Cir. 1983); Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984).

D. Congressional protection against interstate sexual violence falls within the commerce clause, and the full faith and credit clause justifies congressional protection of state "protective orders." Title II makes it a crime for someone to travel across state lines to injure a spouse or intimate partner. It also creates a federal penalty for the violation of a protective order in states other than those in which the order was issued, and allows restitution in such cases. Finally, it grants full faith and credit in all states to protection orders issued in any state.

All of these provisions are plainly permissible. Congress' power over interstate commerce of course allows it to regulate interstate crimes. See Perez v. United States, 402 U.S. 146 (1971). The latter two provisions of Title III are authorized by the full faith and credit clause (Article IV, section 1), together with the necessary and proper clause. These two provisions are designed to protect orders in one state against the possible threats to them that are posed by the existence of a federal system. They therefore fall well within congressional power.

III. Title III

Title III of S. 15 creates a cause of action for anyone who has been subject to "crimes of violence motivated by the victim's

gender." It allows the victim to sue for (among other things) compensatory and punitive damages. With the appropriate record and findings, this provision is in all likelihood constitutional under both the commerce clause and section five of the fourteenth amendment. It would, however, be highly desirable to amend S. 15 in certain respects, in order to make clearer the connection between Title III and Congress' enumerated powers. I outline some possibilities below.

A. The commerce clause. (1) Background. In a series of cases, the Supreme Court has held that the commerce power is exceptionally broad, allowing Congress to reach seemingly local activity. In Wickard v. Filburn, 317 U.S. 111 (1942), for example, the Court upheld the wheat quotas in the Agricultural Adjustment Act, as applied to a dairy farm that appeared to produce wheat merely for consumption on the farm itself. The Court said that the consumption of purely home-grown wheat could be regulated nationally: "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market . . . . But if we assume that it is never marketed, it supplies a need of the man who grew it. . . ." Id. at 128. Purely local activity could thus be regulated because of its "effect" on interstate commerce. Importantly, the Court said that the cumulative effect of a number of purely local activities could be sufficient to find the necessary "effect." Such a cumulative effect was all that was required.

Along similar lines is Perez v. United States, 402 U.S. 146 (1971). There the Court upheld a prohibition on loan-sharking enforced by threats of violence, as applied to acts committed wholely intrastate, and without proof of interstate movement, use of interstate facilities, or interstate effects. The Court said that loan sharking "in its national setting" is a method used by "interstate organized crime," and that so long as the broad class of activities has interstate effects, there was no need for proof "that the particular intrastate activity against which a sanction was laid had an effect on commerce." According to the Court, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class" (emphasis in original; citation omitted). Id. at 154. See also United States v. Darby, 312 U.S. 100, 121 (1941) (allowing regulation "when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.").

Finally, consider Katzenbach v. McClung, 379 U.S. 294 (1964). There the Court upheld the application of the Civil Rights Act of 1964 to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama. The Court emphasized evidence before Congress that discrimination on the basis of race discouraged interstate travel, and therefore had consequences for interstate commerce. Congress could reasonably find that "established restaurants . . . sold less interstate goods because of the

discrimination, that interstate travel was obstructed directly it, that business in general suffered and that many new businesses refrained from establishing there as a result." Id. 300. The Court said that such evidence suggested that all restaurants could be regulated, even if particular restaurants had little connection to interstate commerce. If "the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." Id at 304-04.

Other cases reiterate this "rational basis" standard. See, e.g., Hodel v. Virginia Surface Mining Assn., 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981); Katzenbach v. McClung, 379 U.S. at 303-04; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 262 (1964). In Hodel v. Indiana, the Court described the basic test in this way: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." 452 U.S. at 323-24.

(2) Title III and the commerce clause. These cases suggest three basic principles that bear on Title III. First, the standard of review is highly deferential; Congress need only have a "rational basis" for its decision. Second, Congress can reach activity that by itself does not affect interstate commerce, so

long as it is part of a class of activities having a cumulative effect on interstate commerce. Third, Congress can reach activity that by itself is trivial or without interstate effects.

With appropriate evidence and findings,* S. 15 should fit comfortably under the rationale of these cases. Congress could reasonably find, for example, that the existence of sex-related violence "overhangs the market," in the sense that it discourages women from working in jobs and travelling to places in which sex-related violence occurs. Such violence might well lead women to keep to the home or to stay out of certain places -- including workplaces and other institutions engaged in interstate commerce -- altogether, and thus to disrupt the interstate production of goods and services. This was precisely the rationale on which the Court relied in upholding the 1964 Civil Rights Act with respect to race (and, presumably, sex as well). Indeed, it is probably more plausible to say that sex-related violence, as a class, affects interstate commerce than it is to say that nonviolent sex-related acts of discrimination, as a class, affect interstate commerce -- and under Heart of Atlanta Motel, broad congressional power can be found under the latter rationale.

In addition, Congress might reasonably find that sex-related violence affects interstate commerce not simply by deterring women from engaging in certain interstate commercial activities, but also by producing large losses in interstate productivity

*I do not, however, take a position on whether the relevant evidence justifies the necessary findings, and my subsequent references to what Congress might "reasonably find" are based on the assumption that the record in fact justifies that conclusion.

after the violent acts have occurred. The facts before the Committee -- emphasizing enormous levels of sex-related violence, and the recent increase in that form of criminality -- could reasonably justify the conclusion that the interstate market is adversely affected. The adverse effects might include a decrease in goods and services, diminished employee productivity, increased medical costs, and decreases in both the supply of and demand for interstate products. Compare Heart of Atlanta Motel, supra. For all of these purposes, it is irrelevant that isolated acts of sex-related violence do not have such effects. The cumulative effect principle would be entirely sufficient.

I believe that under this rationale, Title III would and should be found within congressional power.[*] It would, however, be extremely valuable to ensure that the text of the statute and its history include the necessary findings and the evidence on which they are based. I recommend that section 301(a) be amended to include two additional subsections briefly referring to the findings described in the previous two paragraphs of this statement.

b. Section 5. (1) Background. The equal protection clause of the fourteenth amendment was the only provision of that amendment that was entirely new to the American Constitution. Its basic motivating force was to ensure that the system of criminal

[*]This view would not mean that Congress has the general power to enact a federal criminal code. It depends on specific congressional conclusions about the interstate effects of sex-related violence -- just as in Perez, Heart of Atlanta Motel, Darby, and many other cases.

justice would protect blacks as well as whites from criminal violence (public and private). Thus the background to the clause prominently included the concern that in the aftermath of slavery, the states were not protecting blacks against acts of violence as well as they were protecting whites. In its core meaning, the equal "protection" of the laws was designed to ensure that the criminal justice system would protect black people, no less than whites, against crimes. See generally Fairman, Reconstruction and Reunion, 1864-1888, Part 1 (1971); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949); Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 1972 Wash. U. L.Q. 421. Section 5 of the fourteenth amendment unquestionably gives Congress power to respond to this situation. Indeed, that was one of its core purposes.

With respect to Congress' precise power under section 5, however, the law is somewhat unsettled. In an early case, the Supreme Court suggested that under section 5, Congress could actually conclude that a practice violated the fourteenth amendment even if the Court disagreed; and having so concluded, Congress could prohibit that practice. On this "substantive" view, Congress can actually define the content of the equal protection clause. Katzenbach v. Morgan, 384 U.S. 641 (1966). In Katzenbach, the Court upheld a statute barring states from denying the right to vote to people who had at least a sixth grade education, on the theory that Congress could conclude that the denial "constituted an invidious discrimination in violation

of the Equal Protection Clause." Id. at 656. The majority of the Court has not accepted this broad, substantive view of congressional power in any subsequent case. It would therefore be unwise to attempt to rely on the substantive view to defend S. 15.

A much more modest and generally accepted view, also set out in Katzenbach, says that section 5 allows Congress to provide remedies for what are, uncontroversially, violations of the fourteenth amendment. These remedies may be quite broad and prophylactic, in the sense that in the process of reaching constitutional violations, Congress can also reach practices that do not violate the Constitution. See City of Rome v. United States, 446 U.S. 156 (1980); cf. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (similar reasoning under fifteenth amendment).

In City of Rome, for example, the Court used this rationale to uphold the Voting Rights Act prohibition on racially discriminatory effects in voting systems -- even though such effects do not violate the Constitution unless accompanied by a discriminatory intent. The Court said: "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177. Here, as under the commerce clause, the Court has applied highly deferential rational basis review. Moreover, it has allowed Congress to reach activities that by themselves do

not raise constitutional concerns so long as those activities are part of a class of activities within congressional authority.

(2) S. 15 and section 5. The Court has made it very clear that state laws and practices that discriminate on the basis of sex will be scrutinized closely under the equal protection clause. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). If the criminal justice system discriminated against women, it would be violating the equal protection clause. Moreover, one form of impermissible discrimination could be a refusal to treat violence against women as seriously as other forms of violent crime, or as violence against men. See Yick Wo v. Hopkins, 118 U.S. 356 (discriminatory enforcement of the law violates the equal protection clause); McCleskey v. Kemp, 481 U.S. 279 (1987) (refusing to find discriminatory purpose in the existence of capital punishment simply because of statistical evidence, but acknowledging that if a discriminatory purpose were present, the process would violate the equal protection clause).

As McCleskey makes clear, courts are ill-equipped to remedy systemic discrimination in the criminal justice system. Indeed, the McCleskey Court expressly invited a legislative response to any such discrimination: "McCleskey's arguments are best presented to the legislative bodies." 481 U.S. at 319.

A congressional finding of an equal protection violation here could take one of two forms. Under the more controversial "substantive" reading, Congress could simply say that it has reached its own independent conclusion that existing criminal

justice systems deny the equal protection of the laws to women because they deal inadequately with sexual violence against women. Under the much less controversial "remedial" reading, Congress could say that it is seeking to remedy what would clearly be a constitutional violation under the Supreme Court's own decisions. Such a violation consists of bias or discrimination in the administration of the criminal justice system -- in the form of a refusal to deal adequately with crimes against women, in part because the victims in the relevant cases are women.

On this second view, S. 15 is quite similar to the provisions of the Voting Rights Act upheld in South Carolina v. Katzenbach and City of Rome v. United States. In both of these cases, it was irrelevant that not every instance of prohibited conduct violated the equal protection clause. In both of these cases, the Court allowed Congress to invalidate a practice that the Court would not itself strike down. In both cases, the Court relied heavily on extensive factual documentation of widespread, systemic discrimination. In both cases, the Court allowed Congress to paint with a broad brush, that is, to reach situations that might not, in their particulars, violate the Constitution, in the interest of creating a prophylactic against situations that do violate the Constitution.

This argument on behalf of S. 15 appears to fall well within the precedents, and indeed it seems clearly correct. It does suggest, however, that Title III should be rewritten to emphasize legislative findings of equal protection violations, instead of

or as well as violations of the privileges and immunities clause.* I would suggest that section 301(a)(3) be rewritten along these lines, and that at the very least, a new section (c) be added after the current section (b) to make this crystal clear.

Notably, this argument would make it altogether unnecessary to ask the complex, controversial, and unresolved question whether section 5 of the fourteenth amendment allows Congress to reach purely private action. On the argument outlined above, Congress is responding to an equal protection problem in the administration of state and local law by state and local governmental authorities. It is not responding to private acts at all -- no more than the equal protection clause itself does so by requiring states to protect blacks as well as whites from private

---

*In its current version, S. 15 refers to rights, privileges, and immunities. See 301(b). The purpose of this provision is not entirely clear. Insofar as it is referring to the privileges and immunities clause of article IV, section 2, it is referring to a provision that has nothing to do with sex discrimination. Insofar as it is referring to the privileges and immunities protected by the fourteenth amendment, it is referring to a relatively narrow category of rights, as held in The Slaughter-House Cases, 83 U.S. 36 (1873) (referring to expressly guaranteed national rights, to right to use navigable waters to the United States, the right of free access to seaports, and the right to come to seat of government to assert claims upon it). The relationship between section 5 of the fourteenth amendment and the privileges and immunities clause raises large and difficult questions. Insofar as it is building on 42 U.S.C. 1983 as a precedent, that statute is fundamentally different, since it creates a cause of action for (a) violations of existing federal constitutional rights and (b) violations of existing federal statutory rights. Unless Congress can point to some other source of constitutional authority to add "gender crimes" to (a) and (b) -- and I believe that it does -- section 1983 seems to be an inadequate precedent. The intended function of section 301(b) is therefore most obscure.

violence. Thus it is entirely unnecessary to decide the question unanswered by United States v. Guest, 383 U.S. 745 (1966), whether Congress may reach purely private action, or purely private acts of violence. The target of S. 15 is the administration of the system of criminal justice, as applied to sex-related violence. Indeed, S. 15 is far easier than Guest, (a) because it is aimed at state criminal justice systems and not private people at all, and (b) because to the extent that it is aimed at both of these, there is far clearer state involvement here than in Guest itself, which found sufficient involvement solely on the basis of false private reports of criminal activity that had been given to police officers.

IV. Conclusion

Almost all of S. 15, as currently drafted, falls easily within constitutional authority. Moreover, the idea that Congress can ensure that no group is because of its group status subject to particular forms of violence, and that there is equality in the administration of the criminal justice system, fits most comfortably with the words and history of the fourteenth amendment, and with the post-Civil War allocation of authority between the national government and the states.*

Title III raises somewhat more subtle issues, but I believe

*To this extent, the federalism concerns -- expressed about a predecessor to this bill in the letter of October 9, 1990, from the U.S. Department of Justice to this Committee -- seem misplaced.

that with the appropriate text, findings, evidence, and legislation history, it too would raise no serious constitutional doubt, and would be upheld under both the commerce clause and section 5 of the fourteenth amendment. I have outlined several possible amendments designed to accomplish that end.

I would be happy to respond to any questions that you may have.

Mrs. SCHROEDER. Doesn't it make sense, then, to do something about it?

Ms. SYMONDS. It absolutely does. That's the question. What do we do about it in the most effective way to really stop this horrible crime?

I think that's the beauty of many of the other provisions of this bill, which as I said, I think, look very creatively at the problem and are really designed in a very direct way to stop it so that we're not fearful when we walk on the streets.

Mrs. SCHROEDER. Well, I mean, this is to also say the Federal Government's going to start taking this very seriously. I think that is one of the problems of women's rights that has not been taken seriously since the Civil Rights Act of 1964, when sex was put in kind of as a joke.

Then every time we try to move into civil rights statutes, people kind of say, "Well, but it's women, and there are so many of them, and can't they just get a grip? Why are they so fussy?" Meanwhile, the statistics are really incredible, and the crime statistics continue to be going up against women, whereas they tend to be going down against men, which shows a gender bias in many other things that we see out there.

So I just want to say, Mr. Chairman, I am very frustrated by the ACLU's view on this, and I only wish they had been as reasonable as some of the others. I will put their statements in the record, and I thank you.

Mr. EDWARDS. Thank you. I have some other statements to put in the record, a statement of the Judicial Conference of the United States. Without objection, it will be made a part of the record. It's from Judge Stanley Marcus, district judge. They take no position, although he is very knowledgeable about the matter. We discussed this in some detail.

I also would, without objection, put in the record at this moment the letter dated the 16th of this month from the Conference of Chief Justices. This group of State judges is in opposition to the bill. We can refer that to the record.

[The letters, with enclosures, follow:]

UNITED STATES DISTRICT COURT
[illegible]
[illegible]
FIFTH FLOOR
301 NORTH MIAMI AVENUE
MIAMI, FLORIDA [illegible]

STANLEY MARCUS
District Judge

November 16, 1993

Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
United States House of Representatives
H1-A806 O'Neill House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I appreciate the invitation of the Subcommittee on Civil and Constitutional Rights to comment on the provisions of H.R. 1133, the Violence Against Women Act of 1993, and the provisions in S. 11 (the Senate companion bill), which would create a new civil rights cause of action for victims of crimes of violence motivated by gender. As you know Mr. Chairman, in August, 1991, the Chief Justice of the United States appointed an Ad Hoc Committee on Gender-Based Violence for the Judicial Conference. The primary propose of the Ad Hoc Committee is to monitor the pending bills on the subject and provide such assistance as may be appropriate, given the historic role the courts have played in guaranteeing the civil rights of all our citizens. I serve as Chair of that Ad Hoc Committee in addition to my duties as Chair of the Judicial Conference Committee on Federal-State Jurisdiction.

Enclosed with this letter are copies of the resolutions adopted by the Judicial Conference concerning the Violence Against Women legislation. In September of 1991 the Judicial Conference adopted a resolution in opposition to specific provisions of S. 15, the predecessor bill to S. 11. At that time, the Judicial Conference opposed provisions in Titles II and III of S. 15, expressing concern about the impact of the legislation on the federal and state courts and its potential to disrupt traditional jurisdictional boundaries between the federal and state courts.

In March of 1993 the Judicial Conference reviewed its previous position on the Violence Against Women legislation and determined to take no position on the specific provisions of S. 11, except to endorse the provisions of Title V of S. 11, which encourage the circuit judicial councils to conduct studies with respect to gender bias in their respective circuits. The Judicial Conference reiterated the concerns expressed in its

prior resolution and its general concerns about the trend toward federalization of state law crimes and causes of action.

Mr. Chairman, the Judicial Conference has no position on the merits of the specific provisions included in H.R. 1133 or its companion measure S. 11 which would create a new civil rights cause of action for victims of crimes of violence motivated by gender. We believe it is the province and function of Congress to balance these issues as Congress strives to address meaningfully the serious problems associated with violence against women.

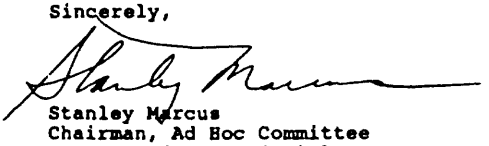
I have had an opportunity over the past several months, in my capacity as Chair of the Ad Hoc Committee, to discus this legislation with many Members of Congress and staff in both the House and Senate. As you know, the provisions of S. 11 have now been included as a part of S. 1607, the Violent Crime Control and Law Enforcement Act of 1993. While the civil rights provisions included in H.R. 1133 include some of the limitations included in the Senate language, the definition of crime of violence appears to be broader. The Senate bill includes language requiring proof of discriminatory motivation as an element of the cause of action by defining a "crime of violence motivated by gender" as a "crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." The Senate language also limits the crime of violence to those crimes constituting a felony against the person or a felony involving property if there is a risk of serious harm to an individual. The bill specifically provides that there is no supplemental or pendant jurisdiction over divorce proceedings, alimony, equitable distribution of martial property, or child custody decrees. The bill also limits removal of the Title III actions initially filed in the state courts. It is my understanding that the subcommittee will also be considering this language in its hearing today.

Mr. Chairman, as we've noted, the creation of rights and remedies in the federal courts is within the province of Congress. Most respectfully, however, we believe that it is important for Congress to provide the additional resources needed by the Judiciary to enable it to meet this additional responsibility. Therefore, we would urge you to address that need in the bill and in future support at the Appropriations Committees of the Congress.

As your subcommittee considers this important legislation we stand ready to provide whatever assistance you may deem appropriate.

Thank you again for considering our views.

Sincerely,



Stanley Marcus
Chairman, Ad Hoc Committee
on Gender-Based Violence

Enclosures

Report of the Proceedings of the Judicial Conference of the United States

March 16, 1993

Washington, D. C.
1993

AD HOC COMMITTEE ON GENDER-BASED VIOLENCE

The Judicial Conference adopted the following resolution:

After considering the report and recommendations of the Ad Hoc Committee on Gender-Based Violence, and as a result of the dialogue the Ad Hoc Committee has undertaken with the sponsors of the proposed Violence Against Women Act of 1991 (S. 15, 102d Congress) since the Judicial Conference adopted its resolution about the proposed 1991 Act (JCUS-SEP 91, pp 57-58), the Conference takes no position on specific provisions of the proposed Violence Against Women Act of 1993 (S.11, 103d Congress). The Conference reiterates its concerns expressed in its prior resolution and its general concerns about the trend toward federalization of state law crimes and causes of action.

At the same time, the Conference believes that the provision of Title V of S. 11, encouraging circuit judicial councils to conduct studies with respect to gender bias in their respective circuits, has great merit and the Conference endorses that specific provision.

Report of the Proceedings of the Judicial Conference of the United States

September 23-24, 1991

Asheville, North Carolina
1991

COMMITTEE ON FEDERAL-STATE JURISDICTION

VIOLENCE AGAINST WOMEN ACT

After considering the report and recommendations of the Committee on Federal-State Jurisdiction and the Ad Hoc Committee on Gender-Based Violence, the Judicial Conference approved the following resolution on S. 15 (102nd Congress), the proposed Violence Against Women Act of 1991:

> The Judicial Conference of the United States, while supporting the objectives of the Violence Against Women Act of 1991 (S. 15), joins the National Conference of State Chief Justices in opposing specific provisions of the current draft that significantly threaten the ability of the federal courts to administer this Act, and other Acts of Congress, promptly, fairly, and in accordance with their objectives.
>
> Title III of S. 15 as drafted creates federal jurisdiction to allow victims of certain defined criminal acts motivated by gender to recover compensatory and punitive damages. The Conference agrees with the State Chief Justices that the current broad definition of crime (applicable, for example, to misdemeanors and other minor threats against persons and property) creates a right that "will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is."
>
> Title II creates a federal crime where one who, having traveled across a state line, commits an intentional act that injures his spouse or intimate partner. Furthermore, the federal court before which the criminal case is brought may issue temporary orders of protection of an abused spouse or intimate partner.
>
> The Conference agrees with the State Chief Justices when they say that S. 15 as drafted could cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts. The Chief Justices point out that over three million domestic relations cases were filed in state courts in 1989. If a party to one-tenth of those suits were to seek collateral recourse under S. 15, those cases alone would exceed the total of all cases now pending in the district courts and courts of appeals of the federal judiciary.
>
> In the recently enacted Civil Justice Reform Act, Congress recognized and stated very well the predicament of the civil dockets of the federal courts. By adding to those dockets causes of action now actionable in state courts, as S. 15 would do, or as sections 202 and 1213(G) of S. 1241 (the Violent Crime Control Act of 1991) would do, the serious problem will become much worse.
>
> The subject of violence based on gender and possible responses is extremely complex. The Conference is prepared to work with Congress to ensure the most efficient utilization of scarce judicial resources and to fashion an appropriate response to violence directed against women.

The Conference instructed the Ad Hoc Committee on Gender-Based Violence to continue its dialogue with the sponsors of S. 15 and, in collaboration with the Executive Committee, to make known the position of the Judicial Conference to the members of Congress. See also "Violence Against Women Act," supra p. 47.

VIOLENCE AGAINST WOMEN ACT

The Violence Against Women Act of 1991 (S. 15, 102nd Congress) would, among other things, make the intentional injury to a spouse or intimate partner, by one who crossed a state line, a federal crime (Title II), provide for a civil rights remedy in the federal courts for victims of gender-based violence (Title III) and "encourage the circuit courts to conduct studies of instances, if any, of gender bias in each circuit" (Title V). The Executive Committee agreed to take no position on Title V, but directed the Administrative Office to continue to work with Congress to obtain acceptable modifications. With regard to Titles II and III, three Conference committees had reviewed the legislation and reported concern about its potential impact on the federal courts. Accordingly, the Committee voted to recommend the appointment by the Chief Justice of a special Ad Hoc Committee on Gender-Based Violence, not limited to members of the Executive Committee, to address the bill. See also "Violence Against Women Act," infra pp. 57-58.

Conference of Chief Justices

President
Jean A. Turnage
Chief Justice
Supreme Court of Montana

November 16, 1993

Office of Government Relations
NATIONAL CENTER FOR STATE COURTS
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The Honorable Don Edwards
Chairman
House Judiciary Committee
Subcommittee on Civil Rights
Room 806 O'Neill House Office Building
Washington, DC 20515

Dear Representative Edwards:

On behalf of the Conference of Chief Justices, an association of the fifty-seven chief justices of the states, territories, and the District of Columbia, I wish to express my grave concerns over the section of the proposed Violence Against Women Act that would create a Federal civil cause of action for gender-based violence which has appeared as Title III of S. 11 and H.R. 1133. Adoption of either the House or Senate version of this section would present major problems for state courts.

At the outset, we wish to state our unequivocal support for the intention of this bill. The problem of violence against women in our society is well established and the need for expanded and aggressive public programs to address the issue is well documented. Our concern with Title III should in no way be taken as evidence of a lack of concern by the Conference of Chief Justices for the issue or lack of sympathy for programs that respond to the problem.

The position of the Conference was expressed succinctly in a Resolution adopted January 31, 1991, which is attached to this letter. The arguments in support of the Conference's position are well expressed in a statement submitted to the Committee on the Judiciary, United States Senate, in April of 1991 by the Honorable Vincent L. McKusick, Chief Justice of Maine, then President of the Conference of Chief Justices. The changes that have been made in the language of House and Senate versions of Title III in the 103rd Congress have done little to address the fundamental problem for state courts posed by this legislation.

We respectfully suggest that major dislocations of state court responsibility for family law should be taken only in the most extreme circumstances. It has been argued

that Federal action is required because of the inadequacy of State programs given the fact that the problem persists. We do not find this argument convincing. State governments have taken major steps to address the problem. The range of state programs includes tort reform, improved law enforcement practices and procedures, judicial training programs, court based domestic intervention centers, and special offices of the prosecutor. The variety of state responses bears witness to the complexity of the issue and the depth of state government concern. Furthermore, the number and breadth of state programs are growing. Any assertion that states are ignoring the problem cannot be substantiated.

As presently worded, Title III represents a major change in civil rights law. The Senate version of the bill states a person "who commits a crime of violence motivated by gender . . . shall be liable to the person injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." (S. 11, Title III, Sec. 302(c)) While the Federal civil rights statute (42 USC 1983) at present limits jurisdiction to actions of persons operating under color of law, both the House and Senate versions of Title III of the Violence Against Women Act would include violent acts of an individual acting privately, not just those operating under color of law. The effect will be to give deprivation of civil rights based on gender greater protection than deprivation based on other class membership such as race.

Expanding the grounds for a civil cause of action will have serious consequences for State courts. Concurrent jurisdiction between Federal and State courts, implied in the House bill and explicit in the Senate version, means both judicial systems will be impacted. State courts are likely to be impacted to a greater extent than Federal courts as the most common source of violence against women charges in domestic relations cases that are the exclusive province of the State courts. The most recent state court filings summary from the National Center for State Courts reports that in 1991 there were 2.6 million domestic relations cases filed, making up 33% of the total civil caseload.

The 1991 Resolution of the Conference of Chief Justices was adopted after much deliberation and a search for language that would establish a cause of action based on gender grounded in accepted legal doctrine. We failed to find such language at that time and nothing has happened in the interim to change our basic position.

If Congress still wishes to create a civil cause of action for gender based violence, I would urge it to do so within the context of the current U.S. civil rights code by limiting the action to under color of law. Such language would extend civil rights protection to women without raising jurisdictional problems for State and Federal courts

If even this is unsatisfactory to Congress, there are no alternatives that are wholly acceptable to State courts; however, I would plead for language that is carefully crafted to narrow the fact situations to which it applies and to rely on established legal doctrine and language wherever possible. From this perspective, the House version of Title III is

extremely broad, defining the term "crime of violence motivated by the victim's gender" to mean "a crime of violence that is rape. . ., sexual assault, sexual abuse, or abusive sexual contact." This language expands the concept of rape beyond accepted legal doctrine. The Senate version attempts to anchor the term more closely to accepted notions of criminal behavior by defining "crime of violence" as "acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another." At the same time, there is no legal precedent for defining "animus based on the victim's gender," nor does the exclusion of those "acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender" provide an adequate limit.

We appreciate the opportunity to restate our concerns with this very important legislation.

Sincerely yours,

Lyle Reid

Lyle Reid
Chief Justice of Tennessee
Chair, Committee on State-Federal Relations

Attachments: "Statement Before the U S Senate Committee on the Judiciary
S. 15 Violence Against Women Act of 1991"

"Conference of Chief Justices Resolution X
S 15 Violence Against Women Act"

STATEMENT BY CONFERENCE OF CHIEF JUSTICES ON S. 15 - VIOLENCE AGAINST WOMEN ACT OF 1991

Submitted on Behalf of the
Conference of Chief Justices
The Honorable Vincent L. McKusick, President

On January 31, 1991, at its midyear meeting, the Conference of Chief Justices adopted a resolution which supported the general purposes of S. 15 and most of its major provisions, but which took exception to Section 301(c). This provision, which creates a federal civil right to sue for damages arising from crimes of violence motivated by gender, could, as currently drafted, cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts. Stated below are the reasons for the concerns of the state supreme court chief justices.

Impact of Section 301 on domestic relations cases. If, as appears to be the case, Section 301(c) permits civil suits against male relatives, particularly against husbands or intimate partners, it can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is. Adding to the likelihood of this occurrence are the facts that: (1) the bill, in Section 302, applies the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. 1988) to suits filed under Title III of S. 15; (2) Section 301(c) permits punitive damages which would not be permissible under the laws of many states; (3) the term "crime of violence," as used in Section 301(c) and defined in Section 301(d), appears to include misdemeanor assaults; (4) under this civil cause of action the "crime of violence" would be provable not by an evidentiary standard of "beyond a reasonable doubt," but rather by a mere preponderance; and (5) S. 15, by failure to make federal jurisdiction exclusive, appears to grant concurrent jurisdiction to state courts pursuant to the holding in Gulf Offshore Co. v Mobil Oil Corp., 453 U. S. 473,478.

The issue of inter-spousal litigation goes to the very core of familial relationships and is a very sensitive policy issue in most states. It does not appear that S. 15 is meant to plunge the federal government into this complex area which has been traditionally reserved to the states, but this might well be the result if the current language stands. It should be noted that the volume of domestic relations litigation in state courts is enormous. State courts reported the filing of 17,321,125

civil cases in 1989, of which roughly 20% were domestic relations cases (see table below). This volume alone should raise a warning signal about introducing a major new ingredient into this area.

COMPARISON OF CIVIL CASELOADS: FIVE STATES

Case Type	Connecticut	Florida	Kansas	Minnesota	North Dakota
Tort	8%	11%	3%	5%	2%
Contract	13%	9%	41%	4%	22%
Real Property	9%	20%	11%	14%	5%
Domestic Relations	14%	28%	20%	22%	36%
Estate	23%	8%	9%	7%	11%
Mental Health	2%	2%	3%	1%	4%
Small Claims	30%	23%	13%	46%	20%
TOTAL	100%	100%	100%	100%	100%

Source: State Court Caseload Statistics: Annual Report 1989

It should also be noted that the very nature of marriage as a sexual union raises the possibility that every form of violence can be interpreted as gender-based. It would be imprudent to include spousal litigation under Section 301 when in fact the criminal protections afforded spouses under Title II of S. 15 incorporate Chapter 109A of Title 18, United State Code which permits marriage as a defense to a charge of sexual abuse (18 U. S. C. Sec. 2243(c)(2)).

Section 301(c) appears to eliminate, or at least vitiate, the "state action" requirement for civil rights litigation and is so broad in scope that it can, with unknown consequences, throw great confusion into state laws and decisions affecting hundreds of thousands of litigants. Section 1983 of Title 42, United States Code provides a federal civil remedy for persons whose rights under the Constitution or federal statutes have been violated "under color of state law." Section 301 of S. 15 invokes the "state action" language of Section 1983 but significantly changes its effect. As Section 301(c) of S. 15 is now worded, "state action" is not a prerequisite for a suit as it is under Section 1983 of Title 42. Instead, Section 301(c) of S. 15 applies to "Any person, including any person who acts under color of any statute . . ." suggesting that any individual can be sued under the law without reference to the "state action" test. This breadth of coverage raises important implications for state-federal relations and appears to be a major shift in the jurisdictional balance between state and federal courts.

In pursuit of a noble, but fairly limited, objective, Section 301(c) overrides state laws on damages and civil suits between spouses, and creates a definition of a "crime of violence" which is so broad that it makes minor misdemeanors the basis for a civil suit under 301(c). Specifically, Section 301(d) defines a crime of violence by incorporating the following language from Section 16 of Title 18, United States Code.

> The term crime of violence means:
>
> > (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> > (b) . . . .

Obviously, there is a need to protect women. It is, therefore, hard to take issue with any aspect of a bill which arises from a genuine concern for the welfare of women. However, sober consideration of the broad-scale implications of Title III of S. 15 can only lead to the conclusion that in pursuit of a narrow objective it can wreak major unforeseen changes in a large area of civil litigation which is not federal in nature.

Conclusion. The Conference of Chief Justices reaffirms its opposition to Section 301(c), requesting its elimination, or at the least, amendments to address the concerns noted above.

Conference of Chief Justices

RESOLUTION X

S.15

Violence Against Women Act

WHEREAS, The Constitution of the United States reserves to the states, or to the people, all powers not expressly delegated to the United States, nor prohibited by it to the states; and

WHEREAS, spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law; and

WHEREAS, state courts have the primary responsibility for administering a coherent and comprehensive system of civil, criminal, and domestic relations law and have the structure, experience and procedures for the proper disposition of all cases within their systems; and

WHEREAS, the United States Senate is considering S.15, the Violence Against Women Act of 1991, which proposes federal programs intended to assist in solving problems of sexual and domestic violence; and

WHEREAS, states also have recognized, and are giving serious attention to, these problems and are developing effective programs for dealing with them; and

WHEREAS, Section 301(c) of S.15 may be construed to create a federal cause of action against any person who commits a "crime of violence motivated by gender" by describing its jurisdiction as encompassing "any person, including a person who acts under color of any State (sic), ordinance, regulations, custom or usage of any State"; and

WHEREAS, The most regularly enforced federal civil rights statute (42 USC 1983) limits its jurisdiction to deprivation of civil rights by state action; and

WHEREAS, provisions of Section 301(c) would conflict with the laws of many states by providing for punitive damages and would be inconsistent with 42 USC 1983; and

WHEREAS, the federal cause of action created by Section 301 (c) would impair the ability of state courts to manage criminal and family law matters traditionally entrusted to the states;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices commends Congress for addressing the critical problems of sexual and spousal violence and supports the intended objectives of S.15; and

BE IT FURTHER RESOLVED that Section 301(c) be eliminated.

Adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices at the Fourteenth Midyear Meeting at Scottsdale, Arizona on January 31, 1991.

Mr. EDWARDS. Mr. Hyde.

Mr. HYDE. Well, I apologize for really not being terribly familiar with this whole issue. This has suddenly burst upon us, and I think it's important. I think it's something that I would like to know more about.

I am concerned that the ACLU has misgivings. I would be most interested in hearing the views of the administration, of the Attorney General Janet Reno, on this. There is a well-known road paved with awfully good intentions, and I stipulate there are some awfully good intentions here. I just want to make sure where the road goes.

Mr. Fein did not give us a statement, but I understand you, too, were suddenly set upon to testify. But this rush to judgment does concern me on very important legislation. I wish we had more time to go into it. This is going to the full committee tomorrow is it, Mr. Chairman? This will be before the full committee tomorrow?

Mr. EDWARDS. I believe that Mrs. Schroeder has it slated for tomorrow.

Mr. HYDE. I'll try to know more about it tomorrow, then. Thank you.

Mr. EDWARDS. Correct me if I'm wrong, Mrs. Schroeder.

Mrs. SCHROEDER. I believe the chairman's got it slated for mark-up tomorrow.

Mr. EDWARDS. Walk me through what a judge does. A judge looks at the complaint, and what will satisfy the judge that there is a gender animus here? What kind of proof would have to be presented to the judge?

Ms. GOLDFARB. Do you mean, for example, in order to withstand a motion to dismiss?

Mr. EDWARDS. Yes.

Ms. GOLDFARB. There has been a lot of case law on the issue of animus under 42 U.S.C., section 1985(3). Most recently, in the *Bray* case, where among other things Justice Scalia specifically said that there need not be animosity or hostile motivation in order to constitute animus; that it's sufficient if there is a group-based motivation, and it need not be subjectively hostile.

It gives the example of people who want to prevent women from being attorneys in order to protect women from the unpleasantness and sordidness of legal proceedings, that would constitute animus based on gender, even though it's subjectively benign.

There has been a series of cases decided on this issue that we feel are adequate to give guidance to the Federal judges. It is significant that the addition of the term "animus" to the Senate bill was sufficient for the Federal judges to withdraw their opposition to the bill, and they have now said that they view the term "animus" as offering them enough specificity to permit them to decide the cases.

Mr. EDWARDS. We welcome the gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

To Ms. Symonds, I haven't had a chance to read your statement, and I apologize that I wasn't able to hear it.

I understand some of the concerns, but let me ask, does this do harm, in your judgment? I mean, you raised some questions, and

they are important questions. But from the standpoint, particularly, of the American Civil Liberties Union, would this, if enacted, jeopardize some particular civil liberty, and if so, which one and how?

Ms. SYMONDS. On the whole, probably not. That's why we don't formally oppose it. Maybe we are splitting hairs here, and perhaps our position is just——

Mr. FRANK. One of my colleagues with regard to NAFTA would like to be able to answer, "On the whole, probably." We'll have to put that on the scoreboard.

[Laughter.]

Ms. SYMONDS. We don't formally oppose this, because we don't——

Mr. FRANK. Do you informally oppose it?

Ms. SYMONDS. In a way.

[Laughter.]

Ms. SYMONDS. We're asking what we think are tough questions here, and we don't support it.

Mr. FRANK. Well, I understand, Ms. Symonds. But when I go before my constituents and say, "I'm going to show you my argument, and I'm going to ask you a bunch of tough questions," by now they know enough to know that I'm trying to duck them.

Ms. SYMONDS. No, we're not trying to duck you. What we're trying to do is grapple with a phenomenonally complex piece of legislation. I can't tell you how many hours I and other lawyers in my office have spent thinking about this, researching it, analyzing it. I'm just not sure it's a yes or no, up or down issue.

Mr. FRANK. But as you realize, of course, it is for us. But your arguments, I don't mean to denigrate them, because I appreciate the time you've given, and particularly some of your volunteer attorneys who do this out of their own commitment to the public good. So we are talking within that framework.

But it sort of does violence to a conceptual framework of the law rather than damage to individual civil liberties?

Ms. SYMONDS. I'm sorry, I want to be sure I understood what you said. I'm not sure I heard you correctly, but I think you're right.

Mr. FRANK. Is it more to the kind of concept of good lawyering and good law rather than harm to any civil liberty? That is, it may seem to you a little sloppy, but not damaging or dangerous?

Ms. SYMONDS. I think that's right. I would frame it this way. Passage of title III will not reduce the civil liberties of the litigants involved. But I think the additional question for this committee is, is it good public policy. I think it's on that basis that I bring my questions to you for your consideration.

Mr. FRANK. That may be why you're not taking a formal position for the Civil Liberties Union. Seriously, because it's not a civil liberties question, it's more a lawyer's concern about the shape and state of the law.

Ms. SYMONDS. That's right. I'm here because it has a civil liberties context, and the litigation of civil rights claims is something that, as you know, we are actively involved in. But this is not unconstitutional.

Mr. FRANK. I must say, in the hate crime sentencing, I had concerns, and the chairman of the subcommittee had concerns, and in

fact the ranking member offered some amendments which I welcomed, because I think they reduced some of our civil liberties concerns, free speech.

I just want to make it clear, and I don't mean to suggest to the contrary, but I think it is important to have this for the record. You're not suggesting that there is any chilling effect or any interference with freedom of expression or anything like that in this legislation?

Ms. SYMONDS. Let me qualify that. That's correct, except there may be a couple of evidentiary matters that could potentially go to expression, and if I had just a minute, I could go over those.

One, we have a question as to whether if a defendant had been shown to be reading certain magazines such as Playboy or pornographic materials; is that relevant to evidence? If the answer is yes, perhaps there is a first amendment question there.

The second question is, if membership in certain organizations can be used as relevant evidence, that also may have first amendment repercussions. But those are the only ones we have identified.

Mr. FRANK. I must say, I would agree with your concerns, and I wouldn't think the magazines ought to be relevant, but that's a more general question than this legislation, it would seem to me. I mean, that's something we would have to address—those questions would exist whether we pass that legislation or not, because there are other contexts in which those are viewed, for instance, hate crime sentencing.

Ms. SYMONDS. That's correct, but I think if this type of civil rights claim is more likely to generate that type of evidence that a plaintiff would want to put in. And I don't know the answer to the question I'm posing.

Mr. FRANK. I would agree with you, that I would not want there to be some kind of general right to go looking at what you were reading and infer from that. It may be that we would want to address that as things move along, to make some statements about what would and wouldn't be evidentiary.

But other than that, you don't see in and of itself any kind of problem?

Ms. SYMONDS. Right. Other than the reading materials issue and the membership in organizations issue, I see no first amendment issue here that concerns me.

Mr. FRANK. Now, on the reading materials, I can see that; membership in organizations, I can't. I don't know what organization. What organizations would be?

Ms. SYMONDS. I don't know. The Senate report, when it talks about the kind of proof used in 1985, in three race cases, talks about membership in white supremacist organizations. Now, if there are some organizations that also have an antiwoman component but that participate in protected constitutional activity, there may be a problem if the plaintiff wants to put in the record——

Mr. FRANK. I understand.

Ms. SYMONDS [continuing]. That the defendant was a member of that organization.

Mr. FRANK. I would certainly want to address that with regard to reading material.

Mr. EDWARDS. The time of the gentleman has expired. Thank you.

Mr. FRANK. Thank you.

Mr. EDWARDS. Thank you very much. I wish we could ask some more questions, but we have four more witnesses, and thanks very much. We might submit something in writing to you.

Next is James Turner, the Acting Assistant Attorney General of the Civil Rights Division of the Department of Justice here in Washington, who has been a friend and confidant and expert witness before this committee for many, many years.

He always provides us with valuable incisive testimony. We consider him a good friend and a wise and good lawyer.

Mr. Turner, we welcome you. Without objection, your full statement will be made a part of the record, and we're on a short time leash, so you may proceed.

Mr. HYDE.

Mr. HYDE. Mr. Chairman, if I may, I have a meeting I must attend at 2:30. I really want to hear what Mr. Turner has to say, and my counsel has pledged to take real good notes, for which I am always grateful. I would ask unanimous consent to insert in the record a statement on H.R. 1237 which we have already voted out, and I would like it to appear in the record at an appropriate place.

Mr. EDWARDS. Without objection, so ordered.

[The prepared statement of Mr. Hyde follows:]

STATEMENT OF THE HONORABLE HENRY J. HYDE

ON H.R. 1237

THE "NATIONAL CHILD PROTECTION ACT OF 1993"

November 16, 1993

The National Child Protection Act will help to keep those who prey upon youth from being put into positions of trust involving children. Experience shows that individuals who have engaged in the sexual or physical abuse of children in the past are far more likely to do so in the future. This legislation is designed to insure that adults who are entrusted with the care of children -- whether on a volunteer basis or for pay -- do not have a record of child abuse or other crimes which would make it dangerous to allow them to provide child care.

The Chairman will be offering an amendment in the nature of a substitute which addresses some of the concerns raised by volunteer organizations and state legislators at the hearing held by the Subcommittee earlier this year. I support his effort and hope that we can see this legislation enacted into law before the close of the session.

Mr. HYDE. I also have an opening statement on this title III, H.R. 1133, which I would ask unanimous consent to be inserted following your statement.

Mr. EDWARDS. Without objection, so ordered.

[The opening statements of Mr. Edwards, Mr. Hyde, and Mrs. Schroeder follow:]

OPENING STATEMENT OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRMAN, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

TODAY THE SUBCOMMITTEE IS HOLDING A HEARING ON THE CIVIL RIGHTS PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT, SPONSORED BY OUR GOOD FRIEND AND SUBCOMMITTEE COLLEAGUE, PAT SCHROEDER. SHE AND I HAVE WORKED TOGETHER OVER THE YEARS ON MANY WOMEN'S RIGHTS ISSUES, AND I SUPPORT HER EFFORTS IN THIS AREA AS WELL.

THE CRIME SUBCOMMITTEE HAS REPORTED ITS PORTIONS OF THE BILL TO THE FULL COMMITTEE, WHICH MEETS TOMORROW ON THOSE SECTIONS. THIS SUBCOMMITTEE HAS A RESPONSIBILITY TO REVIEW THE CIVIL RIGHTS PROVISIONS IN THIS BILL BEFORE PROCEEDING FURTHER. I KNOW THAT THERE IS STRONG SUPPORT FOR THESE PROVISIONS, AND ALSO SOME EXPRESSIONS OF CONCERN ABOUT THEM. IT IS IMPORTANT THAT THESE VIEWS BE

AIRED BEFORE THE COMMITTEE ACTS.

I WELCOME ALL OF OUR WITNESSES AND APOLOGIZE FOR THE SHORT NOTICE OF THIS HEARING. SOMETIMES, UNFORTUNATELY, THESE EVENTS ARE BEYOND OUR CONTROL.

I ALSO REGRET THAT THERE ARE SEVERAL OTHER WITNESSES WHO WOULD HAVE LIKED TO TESTIFY BUT, BECAUSE OF THE TIME PROBLEMS, WERE UNABLE TO DO SO. FOR EXAMPLE, I WOULD HAVE LIKED TO HAVE HEARD FROM THE FEDERAL JUDGES ON THE IMPACT OF THESE PROVISIONS ON THE FEDERAL COURTS, AND FROM THE CONFERENCE OF STATE CHIEF JUSTICES, WHICH OPPOSES THESE PROVISIONS FOR A VARIETY OF REASONS.

STATEMENT OF HON. HENRY J. HYDE

ON TITLE III, H.R. 1133, "VIOLENCE AGAINST WOMEN ACT"

November 16, 1993

Title III of H.R. 1133, the Violence Against Women Act creates a federal civil rights action where a crime of violence has been committed based on gender. A prevailing plaintiff may obtain compensatory damages, punitive damages, injunctive relief, declaratory relief or any combination thereof.

Today's hearing will allow us to look into some of the serious questions that have been raised about the creation of a federal civil rights cause of action for gender-motivated violence. What standard of intent is required under the law? What kind of evidence is required to show that gender "animus" motivated the crime? What effect, if any, will this seemingly more stringent intent standard have on other federal civil rights actions? Are all crimes of sexual violence automatically covered under the statute, or are there some limits on the types of acts that will be covered? Is there evidence that state law tort remedies inadequately protect the rights of women?

Although I am a co-sponsor of H.R. 1133, I am sensitive to the need to provide solid answers to these important questions. I want to thank the Chairman for holding this hearing since it appears that H.R. 1133 will be considered by the Full Committee without this Subcommittee ever having reported the Title of the bill that is within our jurisdiction.

I want to thank each of the witnesses for agreeing to testify on such short notice. We appreciate your taking the time to appear before us and look forward to hearing your testimony.

STATEMENT OF REPRESENTATIVE PAT SCHROEDER

ON THE CIVIL RIGHTS PROVISIONS
OF THE VIOLENCE AGAINST WOMEN ACT OF 1993

Judiciary Subcommittee on Civil and Constitutional Rights
NOVEMBER 16, 1993

Last spring acts of violence against women were recognized as human rights abuses by the United Nations. Female genital mutilation, rape, gender discrimination in courts and legal statutes, and equal access to resources will no longer be ignored by the international community.

Now, how about our community here at home?

Today we are considering the merits of a new civil rights statute protecting individuals from violence motivated by gender.

This Committee has already recognized that women are often the victims of violent attacks because they are women. Twice we have passed the Hate Crimes Sentencing Enhancement and twice we have included crimes motivated by gender. Hate crimes motivated by gender were excluded from the Hate Crimes Statistics Act because this Committee thought there would be too many to count.

It is true that women are more often the victims of violence.

* Over the past decade the rape rate has risen four times as fast as the total crime rate.
* A woman is 20 times more likely to be raped in the United States than in Japan; and the U.S. rape rate is 13 times higher than Great Britain's and four times higher than Germany's.
* Violence will occur at least once in two-thirds of all marriages.
* In the United State, a woman is more likely to be assaulted, injured, raped, or killed by a male partner than any other assailant.
* Between 22-35 percent of women who visit the emergency rooms are there because of symptoms related to on-going abuse.
* 54 percent of domestic violence victims sustain injury, compared to 27 percent injured in cases of assault by non-intimates.

FAILURE OF STATE COURTS

* Less than 40 percent of reported rapes result in arrest.
* The conviction rate for rape is only 3 percent; the conviction rate for robbery is 18 percent.
* An estimated 2,000 to 4,000 women are beaten to death

every year.

I. This committee has already recognized that women as a class of individuals who are vulnerable to bias crimes. And Congress is clearly in the business of creating a second line of defense for address bias crimes.

II. This language is somewhat different than existing civil rights law. The act of violence doesn't have be taken "under color of state law", nor does it require more than one wrong doer. Gender motivated violence cannot be adequately affected by exiting civil rights structures because gender crimes manifest themselves differently than other crimes--they tend to be acts by individuals.

III. This language is narrower than existing civil rights statutes in that this only protects individuals from acts of violence that rise to a felony status. Other civil rights language protects disadvantaged groups from virtually any deprivation of rights, privileges, etc.

IV. As was the concern in Hate Crimes Statistic Act, opposition to this has been raised on the argument that this will overload the courts. As we know (1) reporting is already low for these crimes. (2) Many state already hate crime statues for gender-based violence. For example, California, and no cases have yet been filed under the statue.

V. Some say this is of no use because the defendants will all be poor. Rape and domestic violence and crimes that cross all class, race, and religious lines.

Mr. EDWARDS. You may proceed, Mr. Turner. We also welcome the gentleman from New York, Mr. Nadler. If you have a statement, can you make it after Mr. Turner?

Mr. NADLER. I don't have a statement.

Mr. EDWARDS. Mr. Turner, you may proceed.

STATEMENT OF JAMES P. TURNER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. TURNER. Thank you, Mr. Chairman and members of the subcommittee.

It's a great pleasure to be here today to respond to your invitation to discuss the civil rights title of the Violence Against Women Act of 1993. This legislation would, as has been indicated, create a Federal civil remedy for crimes of violence motivated by gender.

The creation of a civil remedy for gender-motivated violence is an issue that Congress has wrestled with for several years. To some extent this is a question that transcends the expertise of the Civil Rights Division. The bill would create a private civil remedy that would not implicate the authority of the Attorney General, and thus becomes more comparable to 42 U.S.C. 1981, 1982, 1983, which create only private civil rights remedies.

We are pleased, however, to have the opportunity to consult with the subcommittee on some of the matters raised by the bill. I might add that we are currently engaged, as we frequently are, in a reexamination of possible enhancements of Federal criminal penalties for violence motivated by race, gender and other characteristics.

The first point I want to make, and I will try to be brief in honoring the committee's wish, is that Congress has the authority under the Constitution to enact this legislation. The bill is premised on the power of Congress to enforce the 14th amendment and to regulate interstate commerce. The 14th amendment justification for the bill is laid out in the findings that the Federal and State criminal laws do not adequately protect against the bias element of gender-motivated crimes.

These findings are supported by the record created prior to the passage of this legislation in the other body. They state a classic denial of equal protection, and I would rest there. We can discuss it if you wish further.

The findings also do not address the inadequacy of the State and local civil remedies. The Senate report suggests that these remedies are inadequate in part because of State law immunities. It also refers to studies largely conducted by the States of bias within their own justice systems.

We therefore would suggest the addition of findings addressing State civil remedies on the basis that standard State tort remedies have not been sufficient in this area because they are not tailored to remedy gender-motivated violence, but they address standard tort concepts such as assault and battery.

The House recently passed the Hate Crimes Sentencing Enhancement Act, which increases penalties for crimes in which a victim is selected because of race, color, religion, national origin, ethnicity, gender or sexual orientation. That bill recognizes that the

bias element of these crimes increases the harm that they inflict upon society and warrants an enhanced punishment.

The legislation is also grounded in the power of Congress to regulate interstate commerce. Congress has broad power to act pursuant to the commerce clause. It need only have a rational basis for concluding that a class of activities affects interstate commerce. This standard, I think, is satisfied by the recitations in the legislation.

Some may argue that this broad interpretation of the commerce power would permit Congress to pass Federal legislation prohibiting run of the mill street crimes, random street violence. This is something we are prepared to discuss with you. I think there are some fairly explicit limiting aspects to this proposed legislation.

One of the principal concerns has been that it would unleash a flood of new complaints that would further inundate an already struggling and overpowered docket of the Federal judiciary. It is not possible to predict how many lawsuits would be filed if this bill becomes law. There is no doubt that it would increase the work load of the Federal courts.

Several elements, as I have alluded to, respond to this concern. First, the crime must be committed because of the gender of the victim. Proof of that must include a showing that the crime was committed in part because of an animus toward the gender of the victim. The full extent of this requirement may have to be fleshed out in the case law. It would not be sufficient, in my view, to simply show that a crime was committed by a man against a woman or vice versa.

In addition, the selection must have occurred at least in part because of animus toward the victim's gender. Webster describes animus in part as prejudiced and often spiteful or malevolent ill will. There must be some showing of hostility toward the gender of the victim.

Some ambiguity, I think, arises from the bill's reliance on criminal law to define civil liability. Individuals are given the right to be free of crimes of violence motivated by gender. Conduct, however, is not a crime unless the Government can prove beyond a reasonable doubt that the defendant engaged in the prohibited activity. The bill therefore could be read as requiring that plaintiffs proved beyond a reasonable doubt that their attackers committed the elements constituting crimes of violence.

While the bill states that the element of gender motivation needs to be proved only by a preponderance, it does not address the standard of proof for the remaining elements of violence motivated by gender. If Congress wishes to rely on crimes to define civil liability, it could state explicitly in the legislation which standard of proof will be required.

This arrangement, in addition, also allows States to amend the standard for establishing Federal civil liability each time they amend their own criminal statute. I'm not sure that this presents a difficulty of constitutional proportions, but Congress ought to be aware that the passing of authority to the States will result from this kind of provision.

There are factors that do not limit the scope but in fact expand it, and the traditional civil rights bills have relied on specific federally protected activities, such as employment or housing or proof of a conspiracy. None of that is involved in this legislation. There it is broader than the normal civil rights bill.

Because violence motivated by gender presents our Nation with an enormously serious and complex problem, the response of government at all levels has been uncertain. Justice systems of the States, from arrest through prosecution, have found gender-motivated violence presents a unique problem. Congress has also been perplexed as to how to treat such violence.

In enacting the Hate Crimes Statistics Act, the collection of data on crimes motivated by race, religion, ethnicity, and sexual orientation but not gender were mandated. The principal Federal criminal statute prohibiting violent interference by private individual civil rights, 18 U.S.C. 245, also does not protect against violence based on gender. This provision recognizes that in some instances, these crimes manifest the same type of bias that has been addressed by previous civil rights laws under the Federal system.

While incidents of sexual aggression or violence may be fueled by a jumble of psychological factors, one of these factors can certainly be animus to the opposite sex. This bill says that where that animus can be established, the civil rights of the victim have been violated. In doing so, it builds on the foundation laid by existing civil rights laws.

Mr. Chairman, that concludes my remarks. I would be glad to discuss any questions the committee has.

Mrs. SCHROEDER [presiding]. Thank you very much. I know the chairman had to step out for a few moments.

[The prepared statement of Mr. Turner follows:]

PREPARED STATEMENT OF JAMES P. TURNER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, it is a pleasure to be here today to discuss the civil rights title of the Violence Against Women Act of 1993. This legislation, which was recently passed the Senate, would create a federal civil remedy for crimes of violence motivated by gender. In recent years, our society has become increasingly aware of the distinct problems that violence poses for women and the difficulties that women face in obtaining justice after such violence occurs. While Congress has enacted numerous civil remedies for victims of discrimination in other contexts, there is no comparable federal civil remedy for victims of gender-motivated violence. We support the effort to create such a remedy and look forward to working with the House on this legislation.

Violence motivated by gender presents our nation with an enormously serious and complex problem. As the record created in support of this legislation demonstrates, the justice systems of the states, from arrest through prosecution, have found that gender-motivated violence presents unique problems. As a result, all too often they have afforded victims of such violence unequal treatment.

Congress has been equally perplexed as to how to treat such violence. For example, in enacting the Hate Crime Statistics Act, Congress mandated the collection of data on crimes motivated by race, religion, ethnicity, and sexual orientation, but not gender. The principal federal criminal statute prohibiting violent interference by private individuals with civil rights -- 18 U.S.C.

245 -- does not protect against violence based on gender. These omissions represent recognition that the problem of gender-motivated violence is complex. They manifest a concern that the federal government should not take to itself the task of prosecuting sexual violence and that these matters should be left largely to the states.

This bill recognizes that many of these crimes manifest the same type of bias that has been addressed by previous federal civil rights laws. While incidents of sexual aggression or violence may be fueled by a jumble of factors that psychologists struggle to sort out, one of these factors can certainly be animus toward the opposite sex. This bill simply says that where that animus can be established, the civil rights of the victim have been violated. In doing so, it builds on the foundation laid by our existing civil rights laws.

The legislation would create a federal, private civil cause of action that could be pursued in federal or state court by a victim of violence motivated by gender against the perpetrator of the violence. A victim would be entitled to recover compensatory and punitive damages, and would be entitled to an award of injunctive and declaratory relief. These are the remedies generally available in a civil rights suit brought by a private individual. Since the bill limits recovery to "the individual injured," it is unclear whether there could be any recovery if the victim were killed. The Subcommittee may wish to clarify that point.

A victim could sue to redress injury suffered as a result of

any "crime of violence motivated by gender," which is defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." A "crime of violence" is further defined as conduct that would constitute a state or federal offense of the type described in 18 U.S.C. 16. There need not have been a criminal prosecution prior to the filing of a civil suit under this provision.

One of the principal concerns regarding this legislation has been that it would unleash a flood of new complaints that would further inundate an already struggling federal judiciary. Yet, there are several elements of the bill that respond to this criticism. First, the crime must be committed because of the gender of the victim and the proof of that must include a showing that the crime was committed in part because of animus toward the gender of the victim. While the full extent of this requirement will have to be fleshed out through caselaw, it clearly means that it will not be sufficient to show simply that a crime was committed by a man against a woman or vice versa. There must have been a conscious selection of the victim because of her gender.

In addition, the selection must have occurred at least in part because of animus toward the victim's gender. Webster defines animus in part as "prejudiced and often spiteful or malevolent ill will." Thus, there must be some showing of hostility toward the gender of the victim.

This animus requirement establishes that the remedy is truly

a civil rights remedy. It redresses conduct that is motivated by bias or hatred toward a class of individuals because of a defining characteristic -- gender. As such, the remedy is similar to other civil rights remedies for violent conduct. Pursuant to 18 U.S.C. 245, for example, in proving that violence occurred because of race, the United States would generally offer evidence that the defendant acted because of hostility toward African Americans. That evidence might consist of the defendant's use of racial epithets, membership in racist organizations, or past conduct indicating racial hatred. We would expect that the animus requirement of this bill would invite the introduction of similar evidence regarding gender and limit the occasions for recovery under the bill.

It is impossible to predict with certainty the number of crimes that might be proven by a preponderance of the evidence to have been motivated by animus toward the gender of the victim. It may be that victims will be quite successful at proving such animus and we will learn a great deal in the process about the motivation for such crimes. Or, victims may prove less successful. The evidence will have to be developed and evaluated on a case-by-case basis. Our view is that the animus element should substantially reduce the number of meritorious actions and allow only those litigants who are proven victims of discrimination in a traditional sense to succeed.

The bill is also limited to conduct that would constitute a violation of state or federal law of the type described in 18

U.S.C. 16. That provision defines the term "crime of violence" to include "(a) an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This definition is further limited for purposes of the bill to "exclude[] an offense against property that presents no risk of injury to an individual." The bill, therefore, would extend only to conduct that presents a risk of injury to an individual.

A further limitation is imposed by the requirement that the offense be punishable by a maximum term of imprisonment exceeding one year. This requirement that the offense constitute a felony would exclude many incidents of domestic violence.

The bill's reliance on criminal law to define civil liability might create an ambiguity regarding the burden of proof, which the Subcommittee may wish to address. Individuals are given the right to be free of crimes of violence motivated by gender. A crime of violence is defined as conduct "that would constitute a State or Federal offense * * * ." Conduct is not punishable as a crime unless the government can prove beyond a reasonable doubt that the defendant engaged in the prohibited activity. This bill, therefore, could be read as requiring that plaintiffs prove beyond a reasonable doubt that their attackers committed the elements constituting crimes of violence. While the bill states that the

element of gender motivation need be proved only by a preponderance of the evidence, it does not address the standard of proof for the remaining elements of a crime of violence motivated by gender. Under these circumstances, it would be helpful if the legislation stated explicity what standard of proof governs these remaining elements.

Additionally, the bill's reliance on state criminal law to define civil liability effectively allows states to amend the standard for establishing federal civil liability each time they amend their own criminal laws. While I am not sure that this presents a difficulty of constitutional dimension, the Subcommittee may want to consider the impact of this state law predicate.

The bill contains two more significant protections for federal courts. It prohibits removal of an action arising under the bill from state to federal court. This provision, of course, would not limit the total number of actions brought pursuant to the bill, but it does address the concern that federal courts would be substantially burdened by these new actions.

The bill also contains a rule of construction that ensures that it would not be read "to confer on the courts of the United States jurisdiction of any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." Thus, the bill will not work a major transfer of traditionally state and local matters to federal courts. As a result of the rule of construction and the prohibition on removal, those claims arising in connection with

divorce proceedings would be adjudicated in state court.

Having noted the factors that limit the bill, it is also important to recognize that the bill does not contain some of the traditional limitations that have been incorporated in civil rights statutes. It does not require proof that the victim was attacked because of her involvement in a specific federally protected activity, as does 18 U.S.C. 245. It is not limited to the protection of specific areas of commerce, such as employment, or housing. It does not require proof of a conspiracy or that the attackers act in disguise, as does 42 U.S.C. 1985(3), to which the bill has been analogized.

Yet, if the bill is to produce a meaningful remedy, its broad scope is justified because gender-motivated violence can occur anywhere, regardless in what activity the victim is engaged. And, while those who commit racial attacks often act in concert with others, we suspect that it is far more common for women to be the objects of violence committed by a single individual. The bill does not require that whole classes of crimes -- such as rape -- be considered bias crimes in all cases. Rather, it takes the approach followed in other civil rights laws. If the victim can prove in a specific case that the defendant's violent conduct was motivated by gender, then a civil rights remedy is appropriate.

The Constitutional Basis

The bill is rightly premised on the power of Congress to enforce the Fourteenth Amendment and to regulate interstate commerce. The Fourteenth Amendment justification for the bill is

laid out in findings in the bill that state and federal criminal laws do not protect adequately against the bias element of gender motivated crimes, nor do they provide victims of such crimes sufficient redress. These findings are supported by the strong record created by the Senate Judiciary Committee.

One such finding notes that "existing bias and discrimination in the criminal justice system often deprives victims of gender-motivated crimes of equal protection of the laws and the redress to which they are entitled." This finding states a classic denial of equal protection, which Congress is entitled to address pursuant to section 5 of the Fourteenth Amendment. The factual underpinnings of this finding have been developed in considerable depth by the Senate Judiciary Committee. The Committee's report summarized its findings by stating: "[In] many States, rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle; they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private life and intimate conduct to win a damage award; and, finally, in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions." S. Rep. No. 103-138, 103d Cong., 1st Sess. 55 (1993). As a result, the Committee reported, over 60 percent of rape reports do not result in arrest and a rape case is more than twice as likely to be dismissed as a murder case. Less than half of those arrested for rape are convicted, compared with 69 percent of those arrested for murder. Id. at 42. I do not

expect that every rape would qualify as gender-motivated violence sufficient to trigger a civil remedy under this legislation. Indeed, these statistics standing alone might be explained as showing something other than a failure of state and local enforcement efforts. The Committee, however, found that they are buttressed by strong anecdotal evidence of bias exhibited by prosecutors and judges. This record plainly is sufficient to enable Congress to conclude that state and local jurisdictions are failing to provide victims of gender-motivated violence with equal protection of the laws and to enact remedial legislation pursuant to section 5 of the Fourteenth Amendment.

Although the Senate report notes the inadequacy of state and local civil remedies for gender motivated crimes, the bill itself makes express findings regarding only the criminal justice systems of the states. The Senate report suggests that these civil remedies are inadequate in part because of immunities. It also refers to studies conducted largely by states of bias within their own court systems. See S. Rep. No. 103-138 at p. 42 nn. 52-53. However, there is no express finding on the inadequacy of state and local civil remedies. This Subcommittee may wish to respond to this oversight.

I note that the House of Representatives recently passed the Hate Crimes Sentencing Enhancement Act, which increases penalties for crimes in which a victim is selected because of race, color, religion, national origin, ethnicity, gender, or sexual orientation. That bill recognizes that the bias element of these

crimes increases the harm that they inflict on society and warrants enhanced punishment. The Supreme Court has acknowledged the additional harm inflicted by bias crimes and has upheld state legislation resembling the Hate Crimes Sentencing Enhancement Act that increases punishment when a crime is motivated by bias. See Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). The bill is premised on similar recognition that violence motivated by bias stands apart and warrants a governmental response targeted at the specific problem of gender bias.

The legislation is also grounded in the power of Congress to regulate interstate commerce. Congress has broad power to act pursuant to the Commerce Clause. It may regulate any activity that has an effect on interstate commerce, even if the activity involves purely local or intrastate conduct. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981); Wickard v. Filburn, 317 U.S. 111, 123-125 (1942). Congress need only have a rational basis for concluding that a class of activities regulated by legislation affects interstate commerce and there need be only a reasonable connection between that affect and the means chosen to regulate it. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 276; Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964). The commerce power, of course, has been used in the past to support civil rights legislation, including, for example, the Civil Rights Act of 1964. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

There is no doubt that this standard is satisfied by a finding

that violence motivated by gender affects interstate commerce. This type of violence -- much like hate crimes based on race -- sends a powerful message that areas of our nation and certain activities are off limits to women. Women who cannot traverse public streets without fear will also not use places of public accommodation, purchase goods, or conduct business in such areas. Fear of gender-motivated violence restricts the hours during which women can engage in a variety of activities and seriously curtails their participation in the commerce of our nation.

Some may argue that this interpretation of the commerce power would permit Congress to pass federal legislation prohibiting run-of-the-mill street crimes. Whether the power extends that far or not, there is a clear distinction between the conduct addressed by this bill and random street violence. Indeed, the bill states specifically that it does not apply to random acts of violence. Violence motivated by gender sends a message to women that they will be targeted for crime because they are women, just as racial assaults send a message to African Americans that they will be targets of violence because of race. Thus, women, as a group, are deterred from engaging in commerce. The deterrent message extends far beyond those touched immediately by crime to all women. It is the bias element that sets these crimes apart and strengthens the Commerce Clause rationale for reaching them.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that you or the Members of the Subcommittee may have.

Mrs. SCHROEDER. Let me yield to the gentleman from Massachusetts for questions. Does the gentleman have any questions?

Mr. FRANK. I have no questions.

Mrs. SCHROEDER. Does the gentleman from New York have any questions? Mr. Nadler.

Mr. NADLER. Yes, I have just one question. The previous witness from the Civil Liberties Union stated that in her opinion the definitions in the bill were too vague, and that it offered judges, juries and prosecutors, and litigants generally, insufficient guidance as to what the standard of proof of gender bias for animus would be. Can you comment on that?

Mr. TURNER. Well, certainly they are not abundantly clear. However, if you read the legislative history that was compiled in the Senate, for example, the report in the 103d Congress, report 103-138, says at page 51 for a cause of action to arise under title III, a plaintiff must prove that the crime of violence, whether an assault, a kidnapping or a rape, was motivated by gender. With that kind of language, I think there is enough for courts to operate on.

Obviously, it could be spelled out exactly what you mean if you want to go further than that. But that's the general kind of language that statutes of this type have.

Mr. NADLER. What type of evidence would you think, as a couple of examples, might be probative of motivation of bias or animus by gender?

Mr. TURNER. Well, certainly, a prior similar act or evidence would show that an individual was engaged in a pattern of this kind of conduct, whatever he or she said at the time of the incident, expressions of motive or motivation, and could include gender bias. You would have to look at the case, gather all the evidence there was.

I think the way it would come up in a court would be, the plaintiff would allege that there was this kind of evidence that motivated it. The defendant would move to dismiss and based on the discovery, it would be argued out before the court and the court would apply the guidance that the Congress had supplied.

Mr. NADLER. Is evidence of prior conduct admissible? I thought generally we didn't permit evidence of previous convictions or prior arrests.

Mr. TURNER. You might not in a criminal setting, but I think in the civil thing it would be all right.

Mr. NADLER. I have just one further question. I gather from a previous comment that in the Senate report it referred to reading material or perhaps membership in organizations. Do you think that the bill is meant to allow admission of evidence of what the defendant or respondent, what books or magazines he read, what movies he saw or what organizations he belonged to? Also, do you think that under the bill any of that is admissible; and do you think it's admissible under the bill and that it ought be admissible?

Mr. TURNER. I'm not sure but what you have to look at is the case setting to answer that question, Congressman. Certainly, if an individual had once picked up a copy of Playboy or some other——

Mr. NADLER. What if he had a subscription?

Mr. TURNER. If he had a subscription, I don't think that standing alone is probative of anything. On the other hand, if a judge was

faced with that as one of a number of issues, it possibly could be relevant in making this motivation determination in a civil proceeding. It's just——

Mrs. SCHROEDER. Will the gentleman yield?

Mr. TURNER [continuing]. Almost going to have to be defined on a case basis.

Mr. NADLER. Sure.

Mrs. SCHROEDER. What if he belonged to Skull and Bones?

Mr. TURNER. My department has no opinion about that, Congresswoman.

Mr. NADLER. Can you give me an example of any other place where what one reads might be admissible in evidence as to motive?

Mr. TURNER. Nothing leaps to mind. I would be glad to reflect on it and supplement the testimony.

Mr. NADLER. Thank you.

Mrs. SCHROEDER. Thank you.

I wanted to ask a question. I think what I heard you saying is what I agree with, but I'm not sure. I want to make sure.

In civil rights, animus has become a word of art. We have had animus in many statutes, and you don't frame out every single thing about what animus means. I mean, it's been defined by a long body of cases, in my understanding. So when someone says "animus," it's not like a whole new word.

Mr. TURNER. That's right. There is that whole body of case law that goes with that.

Mrs. SCHROEDER. So animus has got that definition. Now, I am not aware of any cases where you establish animus by what somebody reads, are you, in civil rights laws?

Mr. TURNER. No.

Mrs. SCHROEDER. I'm not, either. So I'm not sure that that isn't—I think animus has been established more by what the person is saying as they commit the crime.

I think a classic example would be the man who walked into a young women's dorm and machinegunned 18 of them, screaming obscenities about women, and how he was going to get even with them or something.

That's kind of where it comes in, and I think the same is true with race or the same with religious based or sexual orientation based. Animus is always established by the acts, I think usually around the action, to differentiate it from just a random act of violence.

We clearly don't intend to include random acts of violence which can happen against anybody. So animus then puts it in that case law.

Mr. TURNER. I read that as a major limiting factor and the Senate report says that you would have to show it was due at least in part to an animus based on the victim's gender.

Mrs. SCHROEDER. Right.

Mr. TURNER. A cause of action cannot be established by saying, "I am a woman, I have an injury, ergo I have a civil rights claim."

Mrs. SCHROEDER. Exactly.

Mr. TURNER. To satisfy the burden of establishing a civil rights cause of action, the plaintiff must prove that the defendant's act was motivated by gender bias.

Mrs. SCHROEDER. Absolutely.

Mr. TURNER. That's my understanding.

Mrs. SCHROEDER. I appreciate that, Mr. Turner, because that was my understanding, too, and some days I get very frustrated thinking maybe I didn't understand anything. But I think that's fairly clear.

Mr. FRANK. It should be clear that the burden of proof is on the plaintiff to establish that as a separate element of the lawsuit, that you don't proceed unless the plaintiff has successfully borne the burden of establishing that the action was motivated by the animus. Is that correct under this?

Mr. TURNER. That's correct. In so understanding the intent of this legislation, the administration does support the concept of this legislation. If there is any way we can assist the subcommittee in perfecting the language, we would be pleased to do so.

Mr. NADLER. Reclaiming my time, I have to say I think this is an excellent piece of legislation. I was just startled as I walked in the door. I think I heard one of the previous witnesses say that in the Senate report there is language indicating that what someone reads might be probative of intent. I hope that we will clarify, perhaps in our report language, that we don't mean that, that you have to prove animus and intent, but not by what you read or organizations you belong to.

Mrs. SCHROEDER. Absolutely. I don't think anybody intended that to be, and I don't know where that is. I have not been able to find it in this one. But if somebody can find it and show it to us.

Mr. FRANK. It's a 1985 report.

Mr. NADLER. A 1985 report?

Mrs. SCHROEDER. It may be changed.

Mr. FRANK. It also may be that reading is a less usual occurrence in the Senate.

[Laughter.]

Mrs. SCHROEDER. Thank you very, very much, Mr. Turner, and if you have anything further that comes to mind, sure let us know. We appreciate that.

Mr. TURNER. Thank you.

Mrs. SCHROEDER. Now I guess we'll call up our final panel of the afternoon. First we have Patricia Ireland, who's the president of the National Organization for Women, here in Washington, DC; and Ellie Smeal, the president for the Fund for the Feminist Majority. We welcome you this afternoon. We'll put both of your statements in the record, and each of you may summarize.

Ms. Ireland, do you want to begin?

STATEMENT OF PATRICIA IRELAND, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

Ms. IRELAND. Thank you, Madam Chair, and I want to thank the members of the committee who are here. We certainly have appreciated the support that you've given and the leadership on this issue.

I would like to address in particular the concerns about the civil rights provisions, and more specifically the importance of the civil rights provisions of this bill. That's because I think it is critical that this bill clearly identifies what is so often seen as a personal problem is identified here as indeed a political or systemic problem.

It's very clear to all of us who see the bombings of NAACP offices, the vandalizing of synagogues, that these are more clearly political and public violence. But because so much of the violence against women is behind closed doors, is a private violence, it's often been, the political aspect of it has often been ignored. It's not just a problem that an individual woman faces when she is beaten, because she crashes her husband's car, as the ACLU put as one example in their brief, but rather a systemic problem that all women face.

If one out of three women, according to the Senate Judiciary Committee's report, will face violent crime in her life, I can tell you that three out of three of us fear it. We fear every crime that men fear, and on top of that, the violence and contempt that are heaped upon us just because we're women.

I find the ACLU's failure to support the civil rights provisions unfathomable. We have lots of experience in court determining what the requisite intent and motive is, and how to prove it.

If the confusion of litigants and judges and juries is what the ACLU fears, that is minor compared to the upside of signaling to those same litigants and jurors and judges who, according to numerous gender bias studies, have a great bias against women in the courts, that they have a boys will be boys attitude, and "she must have asked for it" attitude that is pervasive.

This is not 1 study or 10 studies, but multiple dozens of studies in State after State where much to everyone's surprise, they find the same gender bias.

So I think that if there is concern that there will be confusion, it is nothing compared to what we gain by giving a clear signal that this is recognized as a civil rights violation and a form of discrimination against women. I would note that, of course, some have argued that the sexual harassment laws are confusing or cause confusion in the workplace.

Yet a unanimous Supreme Court just gave us some very clear understanding that that is not confusing, that if a defendant says, "You're a dumb ass woman," as the man in *Harris* v. *Forcliff* says; or, as in the example you cited, if the man is shouting out or leaves a note behind as he is shooting engineering students who are women, that because of feminists there are too many women in engineering, that this is pretty clearly proven, pretty easily established in court.

I think it's very clear that the current civil rights laws do not work for women. Some types of bias that are identified under those laws that apply in race cases apply equally to crimes against women but are difficult to prove because of the conspiracy requirement, again with the difference being the public versus the private type of violence that women often face.

So I want to congratulate the members of the committee who have worked so hard to move this forward. I was somewhat startled to hear from some members of the committee that they thought this had been rushed to judgment.

This has been languishing for years and years and years. It's high time and I think certainly if it can be moved forward, we're in full support of the bill, especially the civil rights provisions that this committee is addressing here today.

Mrs. SCHROEDER. Thank you very, very much.

Ms. Smeal.

STATEMENT OF ELEANOR SMEAL, PRESIDENT, FUND FOR THE FEMINIST MAJORITY

Ms. SMEAL. I'm Ellie Smeal, and I'm speaking on behalf of the Fund for the Feminist Majority. We want to speak in favor of both the act and most particularly the civil rights provision.

For some 5 years, we have had a domestic violence project. I won't go through all the statistics that have been presented by the NOW Legal Defense and Education Fund, but we have been working particularly with bias in the police forces, and with domestic violence. Our work has shown that because of the underrepresentation of women in the police force, we have less response to domestic violence and violence against women than would be if we were more adequately represented.

In fact, the studies show repeatedly that there is pervasive bias against women by local law enforcement and State enforcement. In fact, one of the most important parts of this bill is that it provides a Federal civil remedy. Too frequently, the police force themselves are unsympathetic to a woman's charges. In fact, most recently, the studies that resulted as a result of the police brutality situation in Los Angeles show that in fact women themselves can become a target of police brutality. Not only do the police not respond sympathetically, but when they do respond, it can be extremely hostile.

So to me it's very, very important that this provides a right for women themselves to enter Federal court when there is no real remedy being offered to them at the local level. The data is pervasive. It shows not just this police department but departments all over this country where there is massive discrimination and hostility toward women.

In addition, our study of 911 numbers shows the massive need for dealing with domestic violence. In major cities of this country, we're talking about domestic violence being the number one reason why you call a 911 number. Basically, we are looking at reports such as the Senate Judiciary report of October 1992, that shows that 1.1 million women a year file police reports, and we believe that is 25 percent of what is really out there, something like 3 million incidents occur.

So the need for dealing with domestic violence and all forms of sexual harassment and dealing with hatred toward women is overwhelming. The police themselves, because the bias permeates our society, are frequently people who have the bias themselves.

We believe that with what has happened in the past, the leaving out of gender, for example, in the hate crimes statistics laws, that this could help correct that error, and say to the country once and

for all that hate against women in the form of violence is something our country will not tolerate. In fact, we sent out the wrong signal in the past by excluding women from other civil rights protections, and I think this is an opportunity to correct it.

I would like to submit to the committee our formal testimony, and also our study on the response at the local level by police on violence towards women.

Thank you.

Mrs. SCHROEDER. Without objection, and I thank both of you. I think you put it in a very important perspective as to why the civil rights addition is terribly important.

[The prepared statement of Ms. Smeal follows:]

THE FUND FOR THE
FEMINIST
MAJORITY

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TESTIMONY BY ELEANOR SMEAL,
PRESIDENT, FUND FOR THE FEMINIST MAJORITY
BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHT

NOVEMBER 16, 1993

On behalf of the Fund for the Feminist Majority, I wish to speak in favor of the Violence Against Women Act. The Feminist Majority has worked nationally to end violence against women for over five years. The Feminist Majority has educated the public and law enforcement officials on the relationship between gender representation in the police force and police brutality and response to domestic violence and other violent crimes towards women. Through the efforts of our Los Angeles office and the feminist community, the Los Angeles City Council has passed a resolution directing the Los Angeles Police Department to achieve the goal of 44% women in the police department corresponding with the percentage of women in the workforce.

The Violence Against Women Act provides important civil action remedies for women who have been survivors of gender-based violence and crucial funding for a variety of programs to curb violence against women.

The civil rights provision in this bill is a critical recognition that women -- as a class of persons who have been historically discriminated against and have been treated as inferior throughout time -- are at risk of violence because they are women. This bill will not open the floodgates to litigation. However, by giving women the ability to bring gender-hate cases to federal court, the bill recognizes that gender-based violence exists and that perpetrators of this violence should face federal civil as well as criminal penalties.

Violent crimes against women are of an epidemic proportion. We will not recite all of the well-known and well-documented statistics which already have been presented to this subcommittee by the NOW Legal Defense and Education Fund. But I do want to share with you the results of a study that the Feminist Majority has just completed of 911 domestic violence calls. Incidents of domestic violence against women are typically the number one reason that 911 is called. Our study found that New York City received 158,094 domestic violence calls to 911 in 1991. Houston, Texas reported an average of 168,000 domestic violence calls annually. Columbus, Ohio received 65,000 domestic violence calls in 1992. These figures are tip of the iceberg -- many municipalities do not even keep count of domestic violence calls. The October 1992 Senate Judiciary Committee Report, *Violence Against Women: A Week in the Life of America*, showed that more than 1.1 million women filed police reports because of domestic violence annually. According to most experts, as many as 3 million violent domestic crimes go unreported every year.

The Violence Against Women Act is legislation that is desperately needed to help curb the violence that forces women to live in constant fear of their physical well-being and indeed their lives. Title III of the Act is necessary both to officially acknowledge that crimes against women because they are women are occurring and to provide women a federal civil remedies to compensate in part for the inefficient, ineffective, and often unsympathetic police response at state and local levels. I am submitting for the Subcommittee our *Gender Balance In The Police Force* fact sheet which documents the frequent lack of response of local police forces to domestic violence, rape, sexual assault, and other violent crimes against women.

We urge the immediate passage of the Violence Against Women Act, including the Civil Rights Provision of Title III.

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GENDER BALANCE IN THE POLICE FORCE: RESPONDING TO VIOLENCE AGAINST WOMEN

Fact Sheet

A gender balanced police force, containing equal numbers of men and women at all ranks, would alter the way police respond to violence against women and violence in general. Gender balance would:

- increase police responsiveness to violence against women
- reduce police brutality
- facilitate implementation of community policing

CURRENT POLICE RESPONSE TO VIOLENCE AGAINST WOMEN:

Police culture is male in population and perspective – overall, 92% of sworn officers are men and 83% are white. In this male domain, the absence of significant numbers of women at supervisory, higher ranking command, and patrol positions has resulted in a police force that treats violence against women less seriously, a negligence that female victims know all too well. (Reaves, Brian. State and Local Police Departments, 1990. Washington, DC: U.S Department of Justice, 1992).

- 23% of women who decline from reporting their being raped to the police do so because they thought the police would be inefficient, ineffective, or insensitive. (Harlow, Catherine Wolf. Female Victims of Violent Crime. Washington, DC: U.S. Department of Justice, 1991)

- In an internal investigation, the Oakland Police Department found 90% of the sexual assault reports that were not investigated in 1989 and 1990 should have been. 1 in 4 women who reported a rape or attempted rape to the Oakland Police Department were ignored. ("Police Were Wrong in Rapes, Chief Says," L.A. Times, February 4, 1991)

COMPARING WOMEN AND MEN OFFICERS:

Homant and Kennedy (1985) concluded that women officers were significantly more involved than male officers in domestic disputes, and less tolerant of domestic violence, including marital rape. Women officers:

- Agreed significantly more than policemen with the statement "responding to family fights is a very important part of a police officer's role."
- Made more of a point to inform women about shelter homes and get them there.
- Were intolerant or significantly less tolerant, than male officers with the following statements:

> "Society should expect that a husband or wife will occasionally have minor fights, involving slapping and kicking."

"There should be no law against marital rape except for legally separated couples."

• A 1986 study by Saunders and Size found that of all police officers interviewed —99.9% being male— endorsement of traditional roles for women was significantly associated with views that victims cause domestic violence and that arrests should not be made.

Women Officers Less Violent, More Effective At Diffusing Violent Situations

Studies conducted by Bloch & Anderson (1974), Sherman (1975), Hickman (1983), Grennan (1987), and Lunnenborg (1989) all conclude that women officers:

• Are less aggressive, and more likely to reduce the potential for a violent situation by relying on verbal skills and a communicator rather than an authoritative policing style

• A study of police brutality in the Los Angeles Police Department by the Christopher Commission found that of the 120 officers with the greatest number of use of force reports, no women officers were found. And women officers comprised only 3.4 % of officers involved in 83 of the most serious lawsuits against the LAPD during 1986 through 1990. The Christopher Commission study concluded that hiring women police officers holds the key to substantially decreasing the incidence of police violence. (Report by The Women's Advisory Council to the Los Angeles Police Commission, September 1993.)

• In a study of women on patrol, Sherman (1975) found "citizens felt policewomen handled service calls, especially domestic fights, better than policemen. The citizens felt the policewomen were more sensitive and responsive to their needs." (Sherman, Lewis J. 1973. "An Evaluation of Policewomen in Patrol in a Suburban Police Department." Journal of Police Science and Administration 3: 434-438)

Grennan's (1987) study of civilian complaints made against the New York City Police Department found that females "neither use unnecessary force at the same rate nor are they as violent as their male colleagues." While women represent 12.6% of police force, only 5.1% of excessive force complaints were made against them. (Grennan, Sean A. 1987. "Findings on the Role of Officer Gender in Violent Encounters with Citizens." Journal of Police Science and Administration 15: 78-85)

REPRESENTATION OF WOMEN IN POLICING

Compared to the percentage of women in the labor force — 44.7%, women are still grossly underrepresented in all ranks of policing. Nationwide, as full sworn officers, women constitute:

• 4.6% of State Police Departments — 3.9% White; 0.4% Black; 0.2% Hispanic
• 8.1% of Local Police Departments — 5.5% White; 2.0% Black; 0.5% Hispanic
• 15.4% of Sheriff Departments — 11.9% White; 2.6% Black; 0.8% Hispanic
• 3.3 % of all supervisors, 30% of these being women of color.
• 3.7% of all sergeants, 2.5% of all lieutenants, and 1.4% of all higher ranking command staff. (McGuiness, Kate and Donahue, Trish. Women in Law Enforcement,

WHY WOMEN REMAIN A MINORITY IN POLICING

• Women attribute their high turnover rate to a combination of discriminatory practices, unequal promotional opportunities, and constant pressures to demonstrate their competence and effectiveness vis-a-vis their male counterparts. (Martin, Susan. 1983. "Women Police and Stress." Police Chief 50: 107-109)

Warner, Steel, Lovrich (1989) and Martin (1989) found that:

• More benefits are available for women in the labor force when other women are in political decision-making positions

• Change occurs only with a formal affirmative action plan or a court-enforced program

• Women are accepted as recruits in the proportion to their representation among applicants, but they constitute only 20% of applicant pool.(Martin, 1989)

• Affirmative action policies impact both the size of the female applicant pool and the number of female applicants (Martin, 1989)

TOWARDS A GENDER BALANCED POLICE FORCE

In agencies under court order to increase women and minorities, Female officers constituted 21% of sworn personnel. In comparison, women constituted 17 % of sworn personnel in agencies with voluntary affirmative action programs and 13% in departments with no plans. (Martin, Susan, Women On The Move? A Report on the Status of Women in Policing. Washington, DC: The Police Foundation)

• A Los Angeles Police Department report noted that its attrition rate for women police academy students dropped dramatically-from 50 percent to seven percent-when women began to facilitate training sessions, and programs included special sessions for the concerns of women students. (McGuinness, Kate and Donahue, Trish. Women in Law Enforcement, pp. 256-257)

GENDER BALANCE AND COMMUNITY POLICING

Community policing is a philosophy based on respect by police for members of the communities which they serve. Traditionally, police have had an overwhelmingly authoritarian, almost paramilitary approach to policing. This approach has resulted in creating antagonism and hostility between police departments and jurisdictional constituents. (Greenwald, Judith Ellen. "Aggression as a Component of Police-Citizen Transactions: Differences Between Male and Female Police Officers." Doctoral Dissertation. City University of New York, 1976.)

• Researchers have concluded that increasing the number of women police officers improves relations between police departments and their communities. (Belknap, Jane and Shelley, Jill Kastens. "The New Lone Ranger, Policewomen on Patrol." Cincinnati: University of Cincinnati, 1990.)

• Women police officers are more likely to be perceived as "friendly and service oriented " by members of their communities. The superior verbal ability and conflict resolution skills of women police officers reduces the possibility that minor incidents between police and citizens will escalate into more violent ones. (Neiderhoffer, A. New Directions in Police Community Relations, Rinehart Press, 1974. and Linden, R. 1983. "Women in Policing – a study of lower mainland Royal Canadian Mounted Police detachments." Canadian Police College Journal 7: 217-229).

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Mrs. SCHROEDER. Let me yield first to the gentleman from Massachusetts.

Mr. FRANK. Thank you.

The question having been raised of the potential chilling effect because of books and magazines that people have read and movies that they may have seen, that this might be a factor, I think it would be helpful to lay that to rest. What would your views be with regard to that? Would you expect that in these cases that would be a relevant field of inquiry and to what extent?

Ms. SMEAL. Well, obviously, I think the mention was Playboy. Reading a magazine alone would probably not show animus. But I don't want to rule out the fact that if you would show a pattern and practice that the person who committed the hate crime or the violence didn't routinely read material that was denigrating to women—and when I say denigrating, I mean as a class that showed hate—I think we forget that frequently extremist groups like the Ku Klux Klan have as many hostile attitudes toward women and say it in print as they do toward race groups.

So I think it would depend on the specific facts of the case to show indeed that this was not just a random act of violence, or violence because of a particular thing a woman did, but in fact was against the class.

Mr. FRANK. I think that's an important distinction, and one of the things I would say, in my own sense, I think it's unfortunate. You certainly weren't the one to mention it. Somebody else mentioned Playboy. Playboy doesn't belong in this category. I would think it would never be probative in this kind of a situation if what we're talking about is hate.

I think the fact that you said hate is very relevant, yes, if someone had spent a long time and had a vast collection of newspaper articles that described women being badly beaten, that might be an evidentiary factor. But it would be very limited to that kind of situation where you were talking about someone who had gone beyond the expression of opinion and debate about issues, whether we like the viewpoint or not.

But where there was a pattern, a sustained pattern, that manifested this kind of morbid interest in abuse, and obviously we're not ruling that out. But I think we ought to lay the Playboy issue to rest and make it clear that that's not what we are authorizing.

One other question which would come up, and that is, I'm not sure of the law, but what of other categories, for instance, race. Is race covered? Now, I noticed one of the statements we read said race is covered only if that's done under cover of law. What if we're asked to generalize with regard, say, to race or to physical handicap or other issues?

Ms. IRELAND. I'm not sure exactly what your question is.

Mr. FRANK. The question is, what would your response be if someone said, "All right, why don't we amend this to add race?"

Ms. IRELAND. Well, certainly, the National Organization for Women, and I know the Feminist Majority Foundation, have strong support for ending racism and homophobia and have worked on issues of people with disabilities. I would only urge that we not derail this bill for that concern that we haven't remedied every ill in the society with this one bill.

I would note that, as Ellie Smeal did, when the hate crimes statistics bill was pending, we and others urged that women should be included, and we were told it was moving along and it was too late and too bad. I would just say that those who, as we do, believe that we should extend civil rights protection based on sexual orientation and other factors, we should be moving on another bill or we should be moving to amend this.

But I think at this point, having been pending for some 5 years, it really is time to move forward with this bill on this specific type of violence and hate crime.

Ms. SMEAL. Right now, race and national origin are covered for this type of hate crime, if in fact there's a conspiracy or if you can demonstrate there's a conspiracy. This particular bill does not include the conspiracy notion, because so frequently women are beaten or battered alone. In fact, we felt, and I think it was reviewed, that if that language was added, that it would in fact not deal adequately with the way in which violence toward women is most commonly viewed.

Mr. FRANK. You added women to the other section?

Ms. SMEAL. Yes.

Mr. FRANK. Because the question would be then, what about adding, and that's because of the requirement of conspiracy, but the question would have been then, what about adding other categories to this category where there is no conspiracy.

I agree with Ms. Ireland's answer, but if I understand it correctly, it is that where you have a series of wrongs, the fact that a bill only corrects one of a number of wrongs, as long as it in and of itself doesn't make anything else worse, there is no reason to hold it up. You can't always do everything in one bill, and therefore it's worth going forward with a bill that improves things, even if it doesn't solve everything.

Ms. IRELAND. And I'm not sure that the existing civil rights laws, at least in the context of race and national origin and color discrimination, do not provide some good remedies. That is, I think they have been shown to provide some good remedies as we just saw with, for instance, under color of law with the second civil rights trial of Rodney King.

Mr. FRANK. Yes, but you don't want to overargue that one, Ms. Ireland. You're not arguing that, I mean, there's a danger of overarguing, yes, they do provide some good remedies. But still, there will be protections for women here that others won't have in other categories.

Ms. IRELAND. Absolutely.

Mr. FRANK. We don't always protect everybody equally, because there are some nonconspiratorial haters out there.

Ms. IRELAND. I think the thing we have to look at, Representative Frank, and I think you're right, not to overemphasize the point, but violence against women is different. Remember, as the LDEF's testimony underscores, that a woman is six times more likely to face violence from someone she knows. It is so much more often within our own families, and the helpful advice to stay away from dark alleys really doesn't do it for us compared to what we face in our own homes far too often.

Mr. FRANK. No, I think that's right. But I do want to say that I mostly associate myself with your first answer, which is if you've got something that makes some things better and doesn't solve everything, as long as it doesn't make anything else worse, you go with it. I may remind you of that from time to time when we deal with future pieces of legislation.

Ms. IRELAND. I'm sure I will face that again.

[Laughter.]

Mr. FRANK. I will accept that as the basis for going forward now.

Mrs. SCHROEDER. He seems too overjoyed that he got that out there.

Ms. IRELAND. It's now on the record.

Mrs. SCHROEDER. Congressman Nadler, do you have any questions?

Mr. NADLER. Thank you very much.

I don't really have any questions. I simply want to say here that title III in particular is of extreme importance in this legislation. The rest of the bill is, too. Having been in the State legislature for 16 years I have watched how we failed adequately to deal in New York with domestic violence in particular, and how in 1986 the task force appointed by the Chief Judge of the State came out with a report on gender bias, bias against women in the courts, the report was called Women in the Courts, and documented a million different kinds of bias and unequal treatment from A to Z against women, and how painstaking it has been to try to get minimal improvements in that situation.

A Federal role, such as this bill represents, and especially title III, is of extreme necessity and urgency. And on the argument that it doesn't solve all the problems—well, most legislation doesn't.

Mrs. SCHROEDER. Thank you very much.

Would Sally Goldfarb like to come back to the mike and clear up a few questions?

Ms. IRELAND. Could we get our lawyer up here? Is that OK?

Mrs. SCHROEDER. Sure.

Ms. IRELAND. It's helpful to have the legal distinctions, if you don't mind. I think for the one question that's hanging out there, I would appreciate it.

Mrs. SCHROEDER. Go ahead, on the differences between this and the civil rights protections for people in other classes.

Ms. GOLDFARB. This would be a new development in that this law would not require either under color of State law, which is currently required by 42 U.S.C., section 1983, nor would it require conspiracy as is required under section 1985(3). But I agree with the other speakers on the panel that that difference is amply justified by the unique nature of discriminatory violence against women, and that if we don't make that slight change, we are not going to cover the problem.

I also want to add that the NOW Legal Defense and Education Fund would welcome the addition of other protected groups to the coverage of title III. But since it does not appear to be feasible, we view the focus of title III on gender-related crime as being appropriate, long overdue, and we agree that it should not be delayed further in the hopes of eventually encompassing all conceivable types of discrimination.

Mrs. SCHROEDER. I wanted to ask a question, too, about Ms. Smeal's discussion of the problem with police. Do you feel that title III will help us in getting a new focus among the police force as civil rights actions at the Federal level did with police forces post-1964?

Ms. GOLDFARB. Absolutely. I think that the educational value of this legislation is so great because it will give a message to both private individuals and to government officials that violence against women is a serious problem, and one that the Congress views as an issue of equal rights.

Currently, we have a situation where, for example, as recently as 1990, the city of Oakland, CA, police department was routinely closing rape complaints without any investigation. This was later revealed by the press.

The reason was that the victims in these cases were prostitutes or drug users. The police department decided it simply wasn't worth their while to do anything about it. It's just the tip of the iceberg in terms of the problems we're facing at the State and local level.

This kind of Federal leadership, and particularly civil rights legislation, will, I believe, be an enormous impetus toward changing attitudes.

Mrs. SCHROEDER. I think those attitudes are so similar to the attitudes we found in the military vis-a-vis women.

Ms. GOLDFARB. Right.

Mrs. SCHROEDER. I know we had police chiefs testifying several different times about the problems they had on their force about domestic violence; and if you weren't enforcing domestic violence claims against members of the force, why would you do it against anybody else? So this whole culture grew that made it so difficult to crack.

Ms. IRELAND. It's not only the culture that is reflected in the law, but when I went through law school, I do remember far too well learning what the rule of thumb stood for.

I think we do need a signal to everyone in law enforcement and in the judiciary and everywhere else that that whole concept, in that case the rule of thumb was that you could beat your wife and children as long as you didn't use a stick that was bigger than your thumb. It is one of those truly disgusting common law maxims that we have inherited, and that pervades our system still to this day.

We all remember as well the case in South Carolina that was going on at roughly the same time as the first King trial, the criminal trial of the man who had bound his wife with duct tape over her mouth and tied her arms and legs and beat her and raped her, videotaped it, and still the jury refused to convict. In that case, because it was a criminal case, they excluded from evidence the testimony of his prior wife that he had done the same thing to her.

So I think when we look at those kinds of cases and the criminal standing and the criminal rules of evidence that excluded that kind of evidence and that left her without any remedy because of this jury in South Carolina, it was the first case under their removal of the marital exemption to rape, or the marital defense to rape, probably still had it in their heads very clearly that a man cannot rape his wife. His excuse was that she liked rough sex.

Again that idea that women mean yes when they say no and that we like to be forced is pervasive. This would be a very strong signal. But I think it would go far beyond the educational and symbolic value. It would be a very real tool for those who have been working in the courts at the trial level.

Mrs. SCHROEDER. And if we were to take title III out of it, which does the civil rights thing, then you think this bill would be severely flawed.

Ms. IRELAND. Well, I think the bill would be flawed, and again I think it would send a very strong message that this is not taken as seriously, and that this violence against women is not as pervasive and as problematic as we all know it is.

I mean, literally, women restrict their lives because of this fear. It's a systemic problem that is affecting probably the largest group of people who are attempted to be kept in their place by violence.

Ms. SMEAL. Every study shows that one of the major reasons it's so hard to fight violence toward women is that it's so underreported. One of the reasons it's underreported is because so frequently the survivor does not receive any kind of sympathy, or even decency in treatment from local law enforcement.

This allows them to go directly—and I can't emphasize, I think I didn't do justice because I was trying to hurry—to the pervasive studies, the comprehensive and extensive studies showing sex bias, gender bias, within the police force. It isn't little problems. Frequently, police officers themselves have records of abuse toward women, and are treating them as a sex object.

In the Christopher Commission, after the post-brutality of *Rodney King* case, on the transcripts, it showed that police officers spoke about women as a class in the most derogatory of terms. They were quite as shocking as what they said about race. It didn't receive the press coverage that it should have. But it was there, and it was pervasive, right on the police records or the police recordings of what they say to each other. I think that there is such evidence.

The exciting thing about this act is that it will provide another remedy that women can go directly to court and not have this filter that has indeed proven to be inadequate and biased.

Ms. GOLDFARB. If I may respond to your question, the Violence Against Women Act is of course, a large bill and contains many important provisions. But in the view of the NOW Legal Defense and Education Fund, title III that we're considering today is the heart of the legislation. If that were dropped, in our minds, the legislation would be severely crippled in its effectiveness and its meaningfulness to American women.

Mrs. SCHROEDER. And then we're just tinkering around the edge.

Congressman Nadler.

Mr. NADLER. I just wanted to comment or perhaps ask a question.

Ms. Smeal said a moment ago that the severe underreporting, and you described some reasons why perhaps that might be true. I would simply add also that if a woman under the current system reports domestic violence, she knows that what is going to happen is probably an ineffective response, and probably she's going to go to a battered women's shelter where the experience will not be

great. It's only going to be a limited space and time anyway, while the batterer or the alleged batterer retains the home.

Ms. IRELAND. Right.

Mr. NADLER. And that should be reversed, obviously, I would think. But under the current system, it isn't, and frankly because in a battering situation where they're living together, probably more often than not it is the alleged batterer who has the funds or access to the funds. She's in a powerless situation.

At least the civil tort claim aspect of this might do something, not enough in that situation, but something to remedy the monetary one-sidedness of the whole situation.

Ms. SMEAL. Especially in a case where this does cross class lines, where they've received no remedy at all, but indeed, they could receive a Federal remedy that would be sizable. Some men of quite substantial means have been so brutal, and there has been no other remedy at the local level.

I don't think, this is going to flood the courts, but just a few examples could waken the Nation to these dreadful problems. Look at what one Anita Hill did for the whole of sexual harassment. This could give a totally different view.

But by our constant failure to really call a crime what it is, by somehow making it lesser because it deals with women, I think sends just another message to abusers that somehow it is not as bad because it is done to a woman, that society has not made a decision that they must correct it. I think that just the mere act of this, putting it into the law, is saying that there is a civil remedy toward hate crimes.

The reason why all of us have used the example of what happened in Montreal, the shooting of the engineering students by a man who thought he should be there, not them, and yelling at them that they were just a bunch of women and feminists, and shooting them because of that, the reason we're using that is it was so vivid. But there are many times that men do things as vividly for a hatred of the gender that we represent. Yet, we have not really recognized this kind of act in the law.

Mrs. SCHROEDER. Thank you very much. I see our esteemed chairman is back. Mr. Chairman, thank you. I'm sorry it's been such a frantic afternoon. I also want to publicly apologize, I guess, to ACLU's staff, they brought me up a message saying they had shown up for meetings. So I am sorry.

Mr. EDWARDS [presiding]. Well, thank you very much, Mrs. Schroeder, for carrying on.

I apologize for having to leave for a while. It was really a very important meeting in Foreign Affairs around the corner.

I understand that you were excellent witnesses and helped us a lot. I do wish that we could have heard from the Leadership Conference on Civil Rights. We've been counting on them and the NAACP for many years. It's very disturbing to the chairman that they won't testify on this issue. Maybe they have opinions, but it really is important for us to hear everything.

But it is a real problem in this country. It is absolutely inexcusable. It's frightening that this kind of brutality goes unanswered or relatively unanswered. Ms. Smeal, you pointed out that somebody has to send a message, and I hope this message does it. I can't

imagine that it would be overburdening to the court, because it really has been narrowed considerably; don't you agree?

Ms. SMEAL. Yes. And that's what we all have said in our testimony. That's not the issue here. What is the issue is that we have an epidemic, and we must use the weight of the law to really say that it is wrong and it will be dealt with.

Mr. EDWARDS. I don't know if what bothers the NAACP Legal Defense Fund is the fact that black Americans don't have the same civil rights law protecting them. If a black man is beaten up on the street, there is no law that says he has access to the Federal system, unless it happens to be under color of law, under old Reconstruction statutes.

I don't know, if this bill becomes law, and I trust it will; but I'm going to do everything I can to make it law, if this will result in a demand for other protected classes. This makes women a protected class. So far, women have not been a protected class of people as minority Americans are.

We hope, someday to have the same for people who have separate, a different sexual orientation. It seems to me that, and I think, Mrs. Schroeder and Mr. Nadler, that there is a real need there.

However, the votes aren't there. That's always a problem around here, so far. We hope in the near future we will have the votes for that. But you have certainly made a step forward, a giant step, I hope, and one that will mean a lot to our country. So unless my colleagues have any further questions, we will thank you all for your great help.

Did Mr. Turner leave? I'm so sorry I missed his testimony. It was kind of the Department of Justice to send Jim Turner over. Jim is not a political appointee. He is a civil service soldier who always is there and works hard and gives us the value of his experience.

Thank you very much. The subcommittee is adjourned.

[Whereupon, at 3:15 p.m., the subcommittee adjourned, to recovene subject to the call of the Chair.]

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