

## TRIBUTE:

# The Legacy of Ruth Bader Ginsburg and WRP Staff



< Ruth Bader Ginsburg  
in the 1970s.

**WRP gratefully acknowledges the work of intern Sandra Pullman in researching and drafting this Tribute.**

## I. THE PIONEER

In the words of Ruth Bader Ginsburg, Supreme Court Justice and founder of the Women's Rights Project at the ACLU, "Women's rights are an essential part of the overall human rights agenda, trained on the equal dignity and ability to live in freedom all people should enjoy."

Ginsburg has been a pioneer for gender equality throughout her distinguished career. While singular in her achievements, she was far from alone in her pursuits and received much support from talented, dedicated women all along the way. Celia Bader provided a strong role model for her daughter at an early age. Ginsburg recalls, "My mother told me two things constantly. One was to be a lady, and the other was to be independent. The study of law was unusual for women of my generation. For most girls growing up in the '40s, the most important degree was not your B.A., but your M.R.S."

Ginsburg attended law school, not originally for women's rights work, but "for personal, selfish reasons. I thought I could do a lawyer's job better than any other. I have no talent in the arts, but I do write fairly well and analyze problems clearly."<sup>1</sup>

Although she arrived without a civil rights agenda, the treatment Ginsburg received as a woman in law school honed her feminist instincts. One of only nine women at Harvard Law School in 1956, Ginsburg and her female classmates were asked by the dean why

they were occupying seats that would otherwise be filled by men. Despite her discomfort, self-doubt, and misgivings, Ginsburg proved to be a stellar student, making law review at Harvard in 1957, and then again at Columbia Law School, where she finished her studies in order to keep the family together when her husband graduated from Harvard and accepted a job in New York. (Her daughter was born 14 months before Ginsburg entered law school.) This major accomplishment at two top schools was unprecedented by any student, male or female. Upon graduating from Columbia in 1959, Ginsburg tied for first in her class. Still, when she was recommended for a clerkship with Supreme Court Justice Felix Frankfurter by Albert Sachs, a professor at Harvard Law School, Frankfurter responded that he wasn't ready to hire a woman and asked Sachs to recommend a man.

Ginsburg had worked for a top law firm in New York during the summer of her second year in law school. "I thought I had done a terrific job, and I expected them to offer me a job on graduation," she recalled.<sup>2</sup> Despite her performance, there was no job offer. Nor was there an offer from any of the twelve firms with which she interviewed; only two gave her a follow-up interview.

In the end, Ginsburg was hired to clerk for Judge Edmund L. Palmieri of the U.S. District Court for the Southern District of New York from 1959 to 1961. She received offers from law firms after that job, but she chose to work on Columbia Law School's International Procedure Project instead, co-authoring a book on Sweden's legal system and translating Sweden's Judicial Code into English.

Continuing in academia, Ginsburg joined the faculty of Rutgers Law School in 1963, but her status as a woman still put her at a disadvantage. When she discovered that her salary was lower than that of her male colleagues, she joined an equal pay campaign with other women teaching at the university, which resulted in substantial increases for all the complainants.

Prompted by her own experiences,

Ginsburg began to handle sex discrimination complaints referred to her by the New Jersey affiliate of the American Civil Liberties Union. Ginsburg envisioned that men and women would "create new traditions by their actions, if artificial barriers are removed, and avenues of opportunity held open to them."<sup>3</sup> The ACLU Women's Rights Project was born in 1972 under Ginsburg's leadership, in order to remove these barriers and open these opportunities. That same year, Ginsburg became the first woman to be granted tenure at Columbia Law School.

## II. THE TRAILBLAZERS

Ginsburg's experiences with sex discrimination inspired her to lead the ACLU's campaign for gender equality, but she was not the first person to see the need for the ACLU to dedicate its efforts to women's rights. Pauli Murray and Dorothy Kenyon, longtime members of the Board of Directors beginning in 1930 and 1965, respectively, had worked to put gender equality work on the ACLU's agenda.

Dorothy Kenyon was appointed to the League of Nations Committee on the Legal Status of Women from 1938 to 1940 and from 1947 to 1950 served as the first U.S. delegate to the U.N. Commission on the Status of Women. A New York City municipal justice from 1939 to 1940, she claimed the title for life. "Judge Kenyon" later wrote the ACLU *amicus* brief in *Hoyt v. Florida*, 386 U.S. 57 (1961), a Supreme Court case that considered (and rejected) a challenge to a state law that required men to serve on juries but excluded women unless they volunteered.

Pauli Murray became an activist by fighting racial discrimination, when she defended an indigent black sharecropper accused of murder, agitated against lynching, and was jailed for her protests as a freedom rider in the 1960s. As Murray explained, "I entered law school preoccupied with the racial struggle and single-mindedly bent upon becoming a civil rights

lawyer, but I graduated an unabashed feminist as well." Informed by her own experiences as a black woman, she drew connections between the legal status of women and that of African-Americans, using the term "Jane Crow" in her scholarship. She joined the ACLU Equality Committee, where she pushed the organization to focus on sex discrimination and to use the Constitution to challenge it. In 1961, Murray was appointed to the President's Commission on the Status of Women's Committee on Civil and Political Rights, and in 1966, along with Betty Friedan, she was one of thirty co-founders of the National Organization for Women (NOW), which she labeled "the NAACP for women."

Throughout Murray's and Kenyon's careers, opposition to women's rights remained pervasive and powerful. When the Equal Rights Amendment was re-proposed in the late 1940s – having been introduced almost annually since it was initially proposed in 1923 – even the ACLU voted to oppose it. Kenyon and Murray worked intensely behind the scenes and in 1970 convinced the Board to reconsider its regressive position. Ginsburg too was a strong supporter of the ERA, explaining, "The amendment would eliminate the historical impediment to unqualified judicial recognition of equal rights and responsibilities for men and women as constitutional principle...and it would serve as a clear statement of the nation's moral and legal commitment to a system in which women and men stand as full and equal individuals before the law."<sup>4</sup>

Kenyon was also one of the strongest advocates for the establishment of the Women's Rights Project at the ACLU. At Kenyon's funeral in 1972, just after the WRP was founded, Murray reflected, "I think when future historians assess the important issues of the twentieth century they may well conclude that Judge Dorothy Kenyon was one of the giants who stood in bold relief against the American sky."

Recognizing their efforts on behalf of women's equality at the ACLU and elsewhere, Ginsburg listed both Murray's and



◀ Sharron Frontiero Cohen, plaintiff in *Frontiero v. Richardson*, the first case that Ginsburg argued in front of the Supreme Court.

Kenyon's names on the groundbreaking brief she authored for the ACLU in *Reed v. Reed*, 404 U.S. 71 (1971), even though Murray and Kenyon did not directly contribute to it. In *Reed*, the United States Supreme Court invalidated an Idaho statute that automatically gave preference to men for appointment as administrator of a deceased person's estate. In so doing, the Court extended the Constitution's Equal Protection guarantee to women for the first time. Ginsburg has said that her credit to Murray and Kenyon was a symbolic gesture to reflect "the intellectual debt which contemporary feminist legal argument owed [them]."<sup>5</sup>

### III. GINSBURG'S SUPPORTING CAST

In the early '70s, observes Susan Deller Ross, who joined WRP as a staff attorney in 1975, the ACLU was "lukewarm towards women's rights issues; it took someone of Ginsburg's vision and leadership to establish the Women's Rights Project." According to one contemporary observer, the *Reed* opinion was "a call to arms" and Ginsburg was the "General" leading this foray.<sup>6</sup> Under her guidance, "Troops were assembled, and a strategy for attack was painstakingly planned."<sup>7</sup>

In 1972, as part of this effort, Brenda

Feigen was contacted by Mel Wulf, the legal director of the ACLU; Ruth Bader Ginsburg was looking for a co-director for the newly formed Women's Rights Project. "It was a great honor," Feigen remembers. Still, she needed time to consider. Feigen, whose legal expertise had previously proved invaluable in her work as legislative vice president of NOW, had just launched *Ms.* magazine with Gloria Steinem, and she hesitated to leave her fledgling publication. Finally, with a "blessing from Gloria," as Feigen puts it, she joined WRP in late 1972.

The two founding directors sought out an unused area in the ACLU office, where they hung the sign: "WOMEN WORKING." In those early years, there was much work to be done. "We knocked down a lot of barriers for women, not only on the substantive level. We also challenged what type of judicial scrutiny applied to gender discrimination under the Equal Protection Clause of the 14th Amendment," Feigen explains. Kathleen Peratis, who became WRP's director in 1974, agrees that establishing heightened scrutiny for sex classifications under the Equal Protection Clause was perhaps the decade's greatest achievement. Prior to that time, while the government's discrimination based on race was subject to the strictest scrutiny, discrimination based on gender was permissible if any reason at all could be hypothesized for the differential treatment. In *Frontiero v.*

*Richardson*, 411 U.S. 677 (1973), the first case that Ginsburg argued before the Supreme Court, WRP advocated for the application of strict scrutiny to gender discrimination just as the concept applied to race discrimination. Four Justices supported this view, one vote shy of a majority. Through a series of decisions in the wake of *Frontiero*, an intermediate standard of review was established, a standard requiring the government to show that any sex classification it defended had a "substantial relationship" to an "important state interest."

In describing *Frontiero*, which she co-counseled, Feigen expresses great respect for Ginsburg's advocacy. "It was brilliant," she gushes. "I've never heard an oral argument as unbelievably cogent as hers." Ginsburg spoke from memory, citing cases and speaking about women's history without ever turning to her notes or checking any citations. "Not a single Justice asked a single question; I think they were mesmerized by her," Feigen declares.

Ginsburg herself describes the experience as a bit more tumultuous. "I was terribly nervous. In fact, I didn't eat lunch for fear that I might throw up." Yet she eventually found her rhythm. "Two minutes into my argument, the fear dissolved. Suddenly, I realized that here before me were the nine leading jurists of America, a captive audience. I felt a surge of power that car-

➤ Margaret Moses taught a gender discrimination class in conjunction with Ginsburg in the late 1970s.



ried me through.”<sup>8</sup> In the end, Ginsburg seemed physically drained by the effort. As Feigen left the courtroom with her, Ginsburg seemed hardly able to process directions to the airport shuttle, and Feigen gladly escorted her home to New York. Feigen laughs, thinking back on her colleague’s behavior: “Literally, her head is in the law, and sometimes in the opera,” she remarks of Ginsburg.

Deb Ellis, a WRP staff attorney in the mid-80s, applauds Ginsburg’s tactic of occasionally using male plaintiffs in equal protection cases, including *Frontiero*, to demonstrate that sex-based distinctions harm men and women—indeed, entire families. Sharron Frontiero’s husband, Joseph, wasn’t eligible for spousal benefits from her work in the uniformed forces because he failed to prove economic dependency on his wife, a condition not required for wives of male members to qualify for the same benefits. While some would have focused solely on the injustice such rules work on women, Ginsburg rejected differential treatment based on gender as inherently harmful to all involved.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), Ginsburg continued to develop this analysis when she successfully argued against a provision in the Social Security Act that denied to widowed fathers benefits afforded to widowed mothers. She made the case that the classification discriminated against working women, whose

social security taxes garnered fewer family benefits than the taxes paid for working men. She also argued that the law denied men the same opportunity as women to care personally for their children.

Ginsburg and Feigen practiced an egalitarian approach not only in their legal arguments, but also in their own family lives. “Both of us agreed that we didn’t want to deprive the fathers of our children of the experience of being fathers – or the children of having fathers involved in their daily lives,” Feigen explains. In fact, she recalls Ginsburg’s annoyance one day with officials at her son’s school, who invariably called her at work when he was sick or, more often, in trouble. Ginsburg told them that day that her son had two parents. She would appreciate it if they would alternate calls. That time, it was her husband’s turn.

As a staff attorney from 1976 to 1979, Jill Goodman also remembers Ginsburg negotiating her roles as a lawyer and a mother. On one occasion Ginsburg was doing final edits on a Supreme Court brief the evening before Thanksgiving with an eye on the clock, keenly aware of just when her college-age daughter would be arriving home—obviously eager to see her daughter, but steadfastly committed to finishing the work at hand without compromise.

Margaret Moses, who came to WRP as an attorney in 1978, taught a gender discrimination class at Columbia in conjunc-

tion with Ginsburg during her time there. She recalls the example her co-teacher set in the home. For the last class in the fall of 1979, Moses invited all the students over to her apartment for dinner. “Ruth’s husband, Marty, and mine cooked in the kitchen while we taught the class,” Moses reminisces. “It was a nice way to end a gender discrimination seminar!”

#### IV. EMERGING LEADERSHIP UNDER GINSBURG’S GUIDANCE

Brenda Feigen left WRP in 1974 to pursue full-time advocacy for the Equal Rights Amendment. That same year, Ginsburg joined the ACLU Board of Directors, having become General Counsel in 1973. Though Ginsburg remained heavily involved in WRP’s work until 1980, the original directors had moved on; in their place, Kathleen Peratis took over the helm of WRP.

As director, Peratis continued to find great success in gender discrimination litigation. She recalls that employers were unprepared for such lawsuits and were ill equipped to mount valid defenses. “It was a time when we filed a case and practically got a result in the return mail!” she exclaims. Peratis admits that the tide seemed to be going so strongly in her favor, she once considered a lawsuit



◀ Susan Deller Ross,  
former WRP  
staff attorney.

against the entire state of Georgia and its employers at all levels for discrimination against women.

In the press, WRP and its new leader's preeminence in advancing women's rights was duly noted. The victory in *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975), which struck down a law making pregnant women ineligible for unemployment benefits, was covered on the front page of the *New York Times*. Peratis was quoted in the article and described as being pregnant during the litigation. Later, Aryeh Neier, then executive director of the ACLU, remarked, "Only the queen of England and Kathleen Peratis have their pregnancies announced in the *Times*!"

Pregnancy discrimination cases were a key part of WRP's agenda during this period; however, one of the most successful efforts mounted by WRP began with a setback. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court rejected the reasoning of WRP's friend-of-the-court brief that pregnancy discrimination in the workplace was tantamount to sex discrimination. Such discrimination, the Court concluded, did not treat women and men differently; rather, it treated pregnant women differently from nonpregnant persons. After losing that battle, WRP staff attorney Susan Deller Ross helped rally WRP's supporters to form the Coalition to End Discrimination Against Pregnant

Workers. Ginsburg and Ross co-authored a column for the *New York Times*, calling for legislators to mend the law post-*Gilbert*, and they continued lobbying, reporting, and testifying in Congress. The result of their efforts was the passage of the Pregnancy Discrimination Act in 1978, an amendment to Title VII that established that pregnancy discrimination in the workplace is unlawful sex discrimination.

During these years, WRP set an example of accommodating working mothers at the office. To balance the competing demands of family and career, women brought their newborn children to work with them. "We established a little day care center in the office for Kathleen [Peratis], who also had a new baby, and me," recalls Susan Deller Ross, who was hired in August 1975 and gave birth that November. College students were hired to look after the infants, and the lawyers would breastfeed during the day. "It was wild," Jill Goodman recalls of the lawyers working with their children by their side. "Now that I've had my own children, I realize how really wild that was." Though Goodman didn't then have any children, she contributed to the day care on occasion. "I can remember taking a stroller out when Susan needed to work," she recalls.

This tradition continued in later years. Joan Bertin gave birth to two children that she describes as "ACLU babies" in her fifteen years with the WRP from 1979 to

1994. She kept a crib and baby's swing in her office and took occasional nursing breaks from round-the-clock depositions. Bertin considered the setup a "very workable compromise." But not everyone at the ACLU shared that point of view. Ross recalls hearing others complain, "If we brought our babies to work, then they should be able to bring their dogs." Nevertheless, Mary Heen, who as a staff attorney in the early 80s occupied the office next door to Bertin and her baby, insists that the arrangement worked out quite well: "For me it was no problem; I love the fact that she was able to do that—but I imagine it was exhausting."

At work in the bustling ACLU office in the 1970s, WRP staff addressed a host of issues before legislators and administrators as well as in the courts. One of the major battles was over forced sterilizations, particularly for poor women in the South. Many women had been told that they had to undergo surgical sterilization or risk losing their jobs or welfare benefits and were thus coerced into giving up their right to bear children. In the late 1970s, Feigen helped Senator Edward Kennedy's staff formulate federal regulations on sterilization procedures, specifically establishing consent requirements.

When Joan Bertin arrived at WRP in 1979, sterilization was still a major issue. One of the cases in which she was most

emotionally invested involved a lawsuit against American Cyanamid, which had required its female workers to be sterilized to keep their jobs—and later eliminated those very jobs. Bertin worked closely with the women’s union to fight for their rights and the rights of all employees to a safe workplace, securing a favorable settlement out of court. Bertin and WRP continued to remain heavily involved in similar cases, and the issue was ultimately resolved favorably in the Supreme Court. In addition, the ACLU Reproductive Freedom Project was founded as a separate entity to handle cases pertaining to women’s reproductive rights and control over their bodies.

Marjorie Mazen Smith joined WRP in late 1976, and though she describes herself as a “jack of all trades” because of the variety of cases she litigated in her sixteen months on staff, two of her major cases dealt with gender restrictions in the United States Navy. In 1977, in *Beeman v. Middendorf*, 425 F. Supp. 713 (D.D.C. 1977), WRP successfully challenged a rule barring women in the customs service from working aboard navy ships. One year later, in *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978), Smith challenged a similar ban that excluded all women from working on navy vessels in any capacity. Ginsburg oversaw Smith’s work, and the two received a summary judgment ruling in their favor from the federal district court. Later, when Smith wrote to congratulate Justice Ginsburg on her appointment to the Supreme Court in 1993, Ginsburg thanked her in writing and included the line: “Recent press reports about the Navy recalled for me the great job you did before Judge Sirica.” Smith was surprised and flattered to hear the praise of her work recalled so many years later. She framed the letter and keeps it to this day.

During this period, in cases representing women in the military and in other nontraditional occupations, such as policing and firefighting, WRP began its work to help women gain entry to traditionally “male” jobs that continues to this day. Kathleen Peratis had a particular interest in employ-

ment-related issues and the protection of working women. One of the many employment discrimination cases she brought at WRP was a challenge to the City of Philadelphia’s refusal to hire women as police officers in *Brace v. O’Neil*, 1979 WL 157 (E.D. Pa. 1979). In the case, WRP successfully rebutted the City’s assertion that women couldn’t do the job.

Susan Deller Ross also worked to champion the rights of women in the workplace, fighting not only for those women who wished to do jobs traditionally held by men, but for the rights of women in traditionally female occupations. In *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977), the University of Northern Iowa’s own job evaluation showed that the all-female secretarial workforce’s wages should be the same as those of the all-male groundskeepers because the jobs were of equal value to the University. The University nevertheless paid the men more than the women, claiming that the market required them to do so. Ross and Peratis represented the female clerical employees in their sex discrimination lawsuit. Ross’s appellate brief to the Eighth Circuit advanced the idea of comparable worth in the workplace, using the employer’s own evaluation to argue that the secretaries were in fact entitled to the same pay with the groundskeepers, despite the fact that they performed different tasks. Although WRP lost this case, the influential comparable worth theory was first formulated here.

By the end of Ginsburg’s tenure at the ACLU, her reputation preceded her, recalls Margaret Moses, who came to WRP in 1978 specifically to join her favorite law professor. At the time, the U.S. Attorney’s office had also made Moses a job offer, and her prospective boss dismissed the ACLU as a valid alternative. Yet when Moses explained that she was considering the Women’s Rights Project because Ruth Bader Ginsburg was one of the four general counsels, she noticed a funny look on his face. “He’d had Ruth as a professor at Rutgers,” Moses recalls. “And at that point, I think he understood that I really might turn down the U.S.

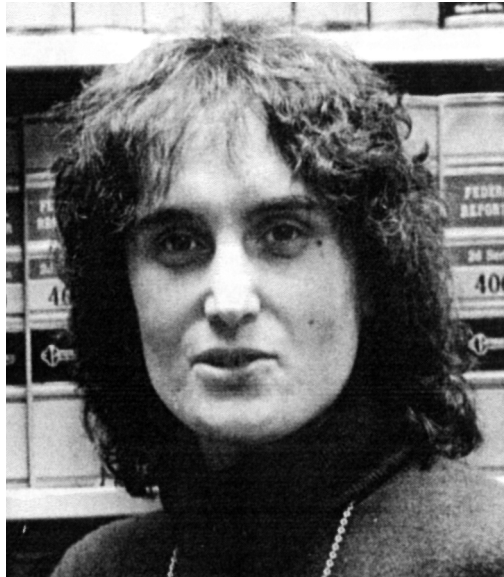
Attorney’s office for the WRP.” She did just that. Moses did not regret her decision, as the experience of working with Ginsburg proved to be illuminating. “She was an excellent role model—that combination of being brilliant and working very hard set a high standard to do the very best you could, to try to emulate her,” Moses explains.

Isabelle Katz Pinzler, who worked at WRP from 1978 to 1994, arrived toward the end of Ginsburg’s tenure and recalls being somewhat intimidated by her at first. She remembers that the staff would work very hard on a brief, but would hand it to Ginsburg labeled “rough draft” because they had learned that even the most thoroughly edited brief would come back as “a sea of red.” Jill Goodman also admits that at times “it was scary” working for Ginsburg, describing her as “meticulous” about everything she did. Ginsburg acknowledges that she is, in general, “fussy about the quality of the product.”<sup>9</sup> Goodman puts it another way: “Ruth was almost a different species,” she jokes, describing the unbelievable level at which Ginsburg worked.

It was not that Ginsburg did not appreciate their work, Pinzler is quick to explain; rather, Ginsburg taught them to write crisp sentences and get to the heart of a matter. “She taught me so much about using words precisely, to mean exactly what I want them to mean, no more, no less,” agrees Goodman. Overall, Goodman felt she had learned much about the profession from Ginsburg. “She has an aura about her, of intelligence and care—care about the law, and the craft of lawyering, and the trajectory of the law.”

These qualities did not go unnoticed outside the ACLU. In 1980, Ginsburg was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit, marking the end of her time as an ACLU litigator. More than a decade later, President Clinton nominated her as an Associate Justice of the Supreme Court, and she took her seat August 10, 1993.

WRP was conceived by Ruth Bader Ginsburg to fight for equal treatment of both genders. “The Project was so integral in



◀ Isabelle Katz Pinzler.

establishing the principle of equal rights,” asserts Mary Heen. She describes Ginsburg’s vision of “filling the empty cupboard.” The way the WRP founder saw it, the Constitution contained grandly general clauses (Due Process, Equal Protection) that could be used to advance women’s full citizenship stature. Until the 1970s, the document had rarely been recognized by courts as relevant to women’s claim to equality. But Ginsburg sensed growth potential. By the time Ginsburg took her place on the bench, she had done much to stock the cupboard. WRP was prepared to continue the fight for women’s rights into the next decade and beyond.

## V. NEW FACES, NEW ISSUES

After the original founder left the ACLU, WRP continued to evolve. Its emphasis broadened from Equal Protection litigation, which was a central focus for Ginsburg, to include more extensive efforts to secure the rights promised women by Title VII and other antidiscrimination statutes.

### Isabelle Katz Pinzler and Jill Goodman: Women in the Military

Isabelle Katz Pinzler describes her tenure as the Director of the WRP in the 1980s

after Ginsburg’s departure as a time for a “consolidation of gains” in the women’s rights movement. “It wasn’t as dramatic or headline-making as when Ruth was there,” she acknowledges. Still, the period was an important time to enforce recently earned rights. “It was a lot of hard work with less glory,” Pinzler concludes.

One of the most important cases that Pinzler worked on after Ginsburg left was *Rostker v. Goldberg*, 453 U.S. 57 (1981), which she co-counseled. The issue was whether requiring selective service registration only of men violated the constitutional guarantee of equal protection. WRP lost the case, and the Supreme Court upheld Congress’ prerogative to classify on the basis of gender in selective service registration. Nevertheless, Pinzler believes that time and history have reduced the loss. In today’s all-volunteer army, the military can no longer afford to overlook women’s contributions. She sees it as a triumph that most people now honor “our men and women in uniform,” rather than “our boys.”

Jill Goodman also sought women’s equal treatment in the military, though she initially approached this work with uneasiness. “I came of age in an antiwar era,” she explains. “We weren’t just antiwar. We were anti-military. But I learned from our plaintiffs about the role of the military, not just in society, but in the personal lives of citizens.” Goodman elaborates, “The mili-

tary is a remarkable opportunity for many people in this country. It helps them to get out of small towns; to gain education, job training and experience; to serve; and to achieve status in their eyes and the eyes of the world.” With a predominately male military that excludes women from combat, “women are deprived of that credential.” Goodman describes how the experience of getting to know her plaintiffs, both officers and enlisted women, broadened her perspective. “I’ve never felt the same way about the military since,” she acknowledges.

### Mary Heen and Deb Ellis: Equal Treatment in Insurance

In a series of cases, WRP relied on Title VII to challenge employer-provided pension plans that required women to pay more than men for the same benefit, or that provided lower monthly benefits to women than to men. These disparities were purportedly justified by women’s longer projected life spans; individual women’s contributions or benefits were calculated based on conclusions about how women on average would fare under such plans. In *Manhart v. Los Angeles Department of Water & Power*, 435 U.S. 702 (1978), a case in which WRP filed a friend-of-the-court brief, the Supreme Court held that a retirement plan that required women to contribute more than men to obtain the same

benefit violated Title VII. WRP attorneys challenged the mirror version of this discriminatory arrangement in *Peters v. Wayne State University*, 463 U.S. 1223 (1983); there, women and men paid equal sums into the retirement plan, but women received lower monthly benefits than their male counterparts upon retirement. WRP lost on appeal, but immediately thereafter, the Supreme Court decided *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris* 463 U.S. 1073 (1983)—another case in which WRP had drafted a friend-of-the-court brief—and held that this kind of arrangement violated Title VII. The Court reversed the appeals court’s decision in *Peters* in light of *Norris*, and the case was resolved favorably soon thereafter. The principles established in these cases required all employer-sponsored insurance and pension plans to treat men and women equally.

Mary Heen is proud of her role in helping to establish this Title VII precedent prohibiting discriminatory employer-provided pension plans. However, Title VII prohibits sex discrimination only on the job. WRP was involved in an effort to pass federal legislation to prohibit private insurers from discriminating in other contexts. But as Heen observes, “We were never successful in public relations with regards to non-employment insurers.” Heen identifies the issue as “one huge area still waiting for reform as a matter of principle.” Deb Ellis agrees that differential treatment of men and women in private insurance policies was one of the unresolved issues of her tenure at WRP from 1986 to 1989. WRP attempted to use the Equal Rights Amendments in state constitutions to challenge such insurance plans. “We had some success, but not a lot,” Ellis recalls. The litigation proved difficult, because in some cases, differential rates benefit women, although in other cases, women are disadvantaged. “The difficulty is that the difference to any one woman is slight—not enough to sue—and the insurance companies are extremely powerful,” Ellis explains. Even in 2005, private insurers still

commonly use sex-based rates for health and life insurance. “The principle is important,” Ellis maintains. “This is one area of American life where companies are allowed to make sex-based distinctions when distinctions based on race or ethnicity would be unacceptable.”

Though Ginsburg no longer had any formal affiliation with the ACLU when WRP litigated these issues in the 80s, she was pleased to see the staff’s continuing efforts in pursuit of gender equality. As Heen recalls, “Ruth Bader Ginsburg was appointed to the U.S. Court of Appeals in 1980 before I began as a staff counsel at the ACLU—so I never had the opportunity to work with her. However, she sent me a brief note after seeing a letter to the New York Times I had written arguing for the elimination of sex discrimination in insurance. It was a generous and encouraging thing for her to do, and it meant a lot to me to receive it from her.”

## A Joint Effort: Pregnancy Discrimination

When Ginsburg became an assistant professor of law at Rutgers Law School in 1963, pregnancy discrimination remained a tremendous barrier to working women. Fearing that her year-to-year contract would not be renewed if her pregnancy showed, she took measures to conceal her state. “I got through the spring semester without detection, with the help of a wardrobe one size larger than mine, borrowed from my mother-in-law,” she recalls. She ultimately gave birth before the fall semester began.<sup>10</sup>

Fighting discrimination on the basis of pregnancy has been an ongoing battle of the Women’s Rights Project since its inception, and almost every staff member has been involved at one point. The longest-running case has been *Knox-Schillinger v. TWA*, which began in the 1970s. “Kathleen Peratis left it on my doorstep like a foundling,” recalls Isabelle Katz Pinzler, who joined WRP in 1978 and later took over as director until 1994. The

suit challenged TWA’s practice of firing female flight attendants upon learning of their pregnancies. To prove that impending motherhood was not an indicator of incompetence, “we made damn sure the lawyer who appeared in it was pregnant,” Pinzler declares. The case dragged on for years and was passed on to whoever was pregnant at the time, since the office always seemed to have someone expecting. In 2003, more than twenty years after it was launched, the case was back in court, to determine TWA’s obligations, in view of its bankruptcy, to the flight attendants with whom it had long ago settled. Upon hearing of the delayed resolution, Mary Heen, who had worked as co-counsel on the case, was amazed. “That’s more than twice the length of the *Odyssey!*” she exclaimed. “Let justice be done!”

One of the most contentious women’s rights cases, which divided the ACLU, dealt with the rights of pregnant women. In *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1987), the question was whether Title VII permitted a state to require employers to offer women child-birth leave while requiring no leave for other disabilities. The ACLU of Southern California argued that Title VII permitted this. WRP and the national ACLU disagreed. They asserted that the Pregnancy Discrimination Act’s mandate that pregnancy be treated like any other disability meant that if leave were provided for child-birth, the same entitlement to leave must be extended to all employees temporarily disabled. The Court agreed with the ACLU of Southern California. It held that the Pregnancy Discrimination Act was a floor, not a ceiling, for the rights of pregnant workers and did not prohibit a state from requiring childbirth leave.

Joan Bertin was particularly involved in pregnancy discrimination cases during her tenure from 1979 to 1994 at WRP. She focused on fighting discrimination based on employer assertions that a workplace posed a hazard to any fetus a woman might conceive. This became a very specialized area of litigation, and Bertin spearheaded a



nearly twelve-year campaign that resulted in an important victory before the Supreme Court. “We fought tooth and nail on every ground,” Bertin recalls. In *UAW v. Johnson Controls*, 499 U.S. 187 (1991), a case in which WRP filed a friend-of-the-court brief, the Court held that Title VII prohibits employers from keeping women out of jobs that might expose their fetuses to hazardous substances. The key, Bertin believes, was recognizing that the solution to workplace hazards wasn’t to eliminate pregnant workers, but to eliminate the hazards they faced.

Jackie Berrien arrived at the ACLU in 1989, at the height of WRP’s challenges to employers’ fetal protection policies. She describes a suit against the Odeon restaurant as her “personal favorite.” The case was brought on behalf of a maitre d’ who was removed from her position when her bosses decided they didn’t wish to employ a visibly pregnant woman. In a deposition before the trial, the owners justified their actions by insisting that a pregnant woman shouldn’t be near heat and knives in the kitchen. “It was one of the oddest justifications I’d ever heard,” Berrien notes. “God knows no pregnant woman has ever been exposed to heat and knives in a kitchen!” Immediately after that deposition, the case settled in the woman’s favor.

Berrien herself did much public education work around the rights of pregnant teens in schools, and she hoped to litigate cases establishing these rights. “My gut always told me that those cases existed, young women being forced out of school [because of pregnancy], but we couldn’t identify many.” The good news was that the threat of ACLU litigation was often enough to resolve any such complaints; in general, a phone call to explain the law was sufficient to protect the rights of the pregnant student. Yet for civil rights and civil liberties lawyers looking to set precedent in this area, such easy settlements are not always perfectly aligned with personal and professional agendas. “It was for me a real point of maturing as an attorney, recognizing that the most important thing is a favorable outcome for your client, though sometimes

that isn’t reconciled with what you’re trying to do professionally,” Berrien concludes.

Berrien points out that at the time of her and Kary Moss’s arrival at WRP, there was “an explosion of the crack cocaine trade.” As a result, WRP had much work to do addressing the application of drug control policies to pregnant women, as the allegedly unique harm from the drug to a fetus in utero was thought to justify extreme measures infringing on women’s rights. Many women were being criminally prosecuted for child abuse or delivery of drugs to a minor due to drug and alcohol addiction during pregnancy. In the mid-80s, Berrien and Moss had published some of the first literature on criminal prosecution of expectant mothers for substance abuse. In *Kentucky v. Welch*, 864 S.W.2d 280 (Ky. 1993), WRP succeeded in persuading the Kentucky Supreme Court to overturn a Kentucky woman’s conviction for child abuse when the conviction was based solely on evidence that she had taken illegal drugs while pregnant.

Moss also addressed access to health care for pregnant women. One of her lawsuits challenged a private hospital’s refusal to accept pregnant women for drug and alcohol treatment. “We need to stop blaming women for their addictions,” Moss insists. She brought in the health care community to work with her, as a national debate emerged on the issue.

Years later, the work accomplished by WRP staff and others on this issue continued to have a positive impact. In 2001, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court held in an opinion joined by Justice Ginsburg that a public hospital’s policy of testing all pregnant patients’ urine for cocaine and reporting positive results to the police violated the Fourth Amendment. The hospital had argued that the policy was motivated by a special need to protect the health of the fetus. (WRP and the Reproductive Freedom Project submitted a friend-of-the-court brief in the case.) Berrien notes, “I was struck by how much the Court was rejecting” the hospital’s justification even at oral argument. Though the

crack cocaine crisis of the late ‘80s had precipitated many harsh measures against drug users, by that time there was a growing acknowledgment, Berrien explains, that “the line between medical treatment and prosecution was a dangerous one to cross.” More people understood that prosecuting pregnant drug users risked driving women away from medical help, and almost all courts that had considered the issue had overturned such prosecutions. Nevertheless, this fight continues. For instance, in 2003, a full decade after the Welch case, WRP attorneys returned to court to successfully defend this precedent when another Kentucky woman was prosecuted for child abuse based on evidence that she had used drugs during her pregnancy.

## Jackie Berrien: Intersectionality

Jackie Berrien explains that when she joined WRP in 1989, “there was a very conscious and deliberate effort to make the Project more overtly and directly responsive to the needs of women of color.” The ACLU’s legal director wanted to advance the organization’s progress on issues of race and poverty, engaging constituencies not traditionally involved with the ACLU. “Now it’s probably a routine part of thinking at the ACLU, but it was not common in the early stages,” Berrien notes. Describing the increased engagement of WRP and the ACLU with questions of racial inequality, Berrien explains, “Some of the groundwork was laid when I was there.”

Berrien, who is today the assistant director of the NAACP Legal Defense Fund, explains, “I was always interested in issues that connected race and gender.” Even in cases with a traditional women’s rights focus, such as WRP’s challenge to the all-male admission policy of the Citadel, a public military college in South Carolina, Berrien was able to apply a unique lens. For instance, she helped draft the comparison of sex segregation and race segregation in education in WRP’s legal briefs. Later, in the legal battles over the all-male admission policy of the Virginia Military



Institute (VMI), VMI attempted to defend its exclusionary admissions by arguing that a women's leadership academy created at another Virginia college constituted a "separate but equal" opportunity for women. Justice Ginsburg authored the opinion in *United States v. Virginia*, 518 U.S. 515 (1996), that rejected this justification, just as similar "separate but equal" arguments had been rejected in *Brown v. Board of Education*. "These parallels were always very interesting to me," Berrien explains.

While Berrien was at the ACLU, a movement began to create all-male public schools in inner cities, under the assumption that single-sex education would benefit African-American boys and young men. At a roundtable at the National Urban League and in a publication for the Columbia Teacher's College, Berrien argued against the notion. Rather than a solution to the educational needs for the black community, she saw the concept as a "superficial quick fix" for what she identified as a "broader problem not by any means limited to boys." The push for single-sex education in inner city school districts continues with renewed strength today.

### Sara Mandelbaum: Equal Access to Education

Arriving in 1992, Sara Mandelbaum remained at WRP after Isabelle Katz Pin-

zler and Joan Bertin ended their 15-year terms. Mandelbaum had definite ideas of what was needed in the area of women's rights: "I wanted to do cases that could not easily be done by private lawyers." She explains that the private bar had taken on many Title VII cases against large corporations, because that was where large financial settlements could be obtained. Mandelbaum wanted WRP to represent women with few legal resources, women of color, and poor women. When women in Westchester asked her to bring a suit against a country club that denied them golfing rights on a par with men, she took a pass.

Education was a key area for Mandelbaum. She represented teenage girls denied entrance to the National Honor Society because they were pregnant and girls who were told they were too fat to be cheerleaders. And when it came to single-sex education, she rigorously challenged gender-segregated study in public schools. Mandelbaum sought to discredit the widely held belief that men and women are best served by separate academic environments. The cases in the 1990s challenging all-male schools, she explains, were very significant in beginning to rebut this notion.

The most high-profile case brought by WRP in this arena was Shannon Faulkner's against the Citadel, which ended in victory

in 1995. Faulkner was a high school student who was initially admitted to the all-male academy based on her qualifications, and later denied entrance when the Citadel realized she was a woman. The highly visible litigation "gave the Project a real association with education cases, which led to other opportunities in that area." During this time period, WRP attorneys also consulted with the U.S. Justice Department in its challenge to VMI's all-male policy and filed friend-of-the-court briefs in support of women's admission. Both cases were ultimately successful, and "winning was very, very exciting," Mandelbaum recalls. In the Supreme Court decision striking down VMI's all-male admissions, Justice Ginsburg's opinion rejected the use of social science data that purported to prove that men and women learned differently, data from which VMI was "drawing frightening conclusions," according to Mandelbaum. For Mandelbaum, an important part of the case was the Supreme Court's refusal to credit a technique she identifies as one often used by anti-feminists—reliance on "pseudo-science" to justify discriminatory policies.

## VI. CONTINUING CAREERS

**Beyond WRP, the former staff's paths have been as varied as their interests while at the Project.**

**Ruth Bader Ginsburg** has been on the federal bench for twenty-five years. In 1993, she became the second woman ever to serve on the United States Supreme Court. Throughout that time she has continued to be a leading voice for gender equality, women's interests, and civil rights and liberties. Before and since her elevation to the Court, she has been a living illustration of the remarkable power of precise and persuasive legal analysis and has inspired women's advocates across the country and the world.

**Brenda Feigen** has published her memoirs, entitled *Not One of the Boys: Living Life as a Feminist*, and currently practices entertainment law in Los Angeles.

**Kathleen Peratis** is currently a partner at the New York law firm Outten and Golden, where she specializes in sexual harassment and employment discrimination cases.

**Susan Deller Ross** considers her current work for women's rights in Africa as "going forth in the spirit of the ACLU Women's Rights Project." She is Director of the International Women's Human Rights Clinic at the Georgetown University Law Center, following a stint at the U.S. Justice Department's Civil Rights Division. Under her guidance, students take cases involving domestic violence, trafficking in women and girls, domestic servitude, sex-based divorce laws, female genital mutilation, and many other cases of institutionalized male supremacy in African nations. Ross describes her students' work as "just like early sex discrimination cases under our Constitution."

**Marjorie Smith** believes that she has been "a general citizen in the area" of women's rights since leaving WRP. She has worked for the Department of Consumer Affairs, Manhattan Family Court, New York City's Legal Aid Society, and as a partner in private practice for many years. Today, Smith is an assistant professor at Brooklyn Law

School and Assistant Director of the Second Look Program Clinic in charge of prisoner assistance.

**Jill Goodman** took a job with the Office of Civil Rights in the U.S. Department of Education and then worked for eight years at the New York Attorney General's Office. Today, Goodman works for the New York State Judicial Committee on Women in the Courts, where much of her time is spent addressing violence against women, including domestic violence, sexual violence, and the closely related issues of prostitution and trafficking. WRP did not specifically confront these issues during her tenure; however, Goodman says, "I have come to believe they are at the root of the unequal status of women, both as its cause and effect." The WRP agrees, and fighting violence against women is an important part of its agenda today.

After leaving WRP, **Isabelle Katz Pinzler** served in the Department of Justice under President Clinton. She then became special counsel to the NOW Legal Defense and Education Fund and a visiting professor at New York Law School. She recalls thinking about the future of WRP when she was Director and admits that there were times when she did not think that the Project would survive. It was harder to raise money without Ginsburg's fame and credibility attached to WRP. Yet today WRP forges on stronger than ever, led by Lenora Lapidus, who was once a WRP intern under Pinzler. "So that's a little continuity for you," Pinzler points out.

**Margaret Moses** carried her feminist sensibilities with her when she went to a small private firm. "I stayed involved in women's rights," she explains, pointing to her work for the Women's Equity Action League in Washington, D.C., Moses worked in private practice and then became a professor at Loyola University of Chicago School of Law. "I've liked it all," she says of her career. "It's all been very good."

**Joan Bertin** declares, "I'm still a feminist!"

She believes that her background as a women's rights advocate benefits her today in her work at the National Coalition Against Censorship.

**Mary Heen** went into private practice for three years, doing tax work, and completed an L.L.M. at New York University Law School. Today she is a professor at the University of Richmond Law School, teaching tax and feminist legal theory. "I love it," Heen says of teaching. WRP has had an influence on her academic career: "My writings explore the connections between tax policy and social policy—including issues related to work-related child care, welfare-to-work programs implemented through the tax code, and budget policy issues."

**Deb Ellis** left WRP in 1989 to become Legal Director of the ACLU of New Jersey. She then became Legal Director of the NOW Legal Defense and Education Fund, where in 1992 she argued *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), before the United States Supreme Court. Today, Ellis is the Assistant Dean for Public Interest Law at NYU Law School, where she teaches Sex Discrimination Law. She believes the challenge now is to make the gains of the women's movement real for women with the least resources, an effort she is glad to see the current WRP pursuing on several fronts.

**Kary Moss** left WRP when she had her first child; she decided she'd like to start a family in a "calmer environment." She and her husband moved back to Michigan to be near her family. Today she is the executive director of the ACLU of Michigan. She believes that the biggest threat to women's rights is "the public perceptions that the struggle is over."

**Jackie Berrien** departed from WRP in May 1992 because, she "was interested in getting a chance to do more trial-level work." At the Voting Rights Project of the Lawyers' Committee for Civil Rights, "I got it—a ton

of it!" Today Berrien is the assistant director of the NAACP Legal Defense Fund, and she looks back fondly on her time at the WRP.

**Sara Mandelbaum** left WRP to stay home full-time with her two children. "I love practicing law and doing women's rights work," she acknowledges, "but there are a lot of other things in life." Describing her current pursuits in art and child rearing, she comments, "I'm exercising the right side of my brain." Mandelbaum is pleased with her work at WRP. "We made our contributions to moving in the right direction—we leave it to people after us to keep it up." ■

#### ENDNOTES:

<sup>1</sup>ATHENA International, *Ruth Bader Ginsburg*, at <http://www.athenafoundation.org/award/bios/ruth.html>.

<sup>2</sup>ELINOR PORTER SWIGER, *WOMEN LAWYERS AT WORK* 51, 58 (1978).

<sup>3</sup>KENNETH M. DAVIDSON, RUTH BADER GINSBURG, & HERMA H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASE, AND MATERIALS* xii-xiii (1974).

<sup>4</sup>*Id.* at 116.

<sup>5</sup>AMY LEIGH CAMPBELL, *RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN'S RIGHTS PROJECT* (2003).

<sup>6</sup>SWIGER, *supra* note 2, at 51.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 52.

<sup>9</sup>*Id.* at 64.

<sup>10</sup>ATHENA INTERNATIONAL, *supra* note 1

