

The History of the ACLU Women's Rights Project

The ACLU Women's Rights Project was established in 1971 by Ruth Bader Ginsburg, then a law professor at Rutgers, now a Supreme Court Justice. In our early years, the Women's Rights Project was the major, and sometimes the only, national legal arm of the growing movement for gender equality, recognized as the spokesperson for women's interests in the Supreme Court, and the "premier" representative of women's rights interests in that forum.¹ In the three decades since, we have continued to occupy a unique role in the women's movement. While other groups, including other ACLU departments and affiliates, have played major roles in political organizing and legislative advocacy, the Women's Rights Project has been responsible for systematic legal reform through the courts in the areas of equality for women and women's economic rights.

Early cases in which we challenged the constitutionality of sex discrimination included *Reed v. Reed*,² in which the Supreme Court held for the first time that a classification based on sex was unconstitutional, *Craig v. Boren*,³ in which the Supreme Court established the "heightened scrutiny" standard for measuring the constitutionality of sex-based classifications, and *Califano v. Goldfarb*,⁴ in which the Supreme Court struck down discriminatory Social Security regulations, finding that they were the "accidental by-product of a traditional way of thinking about females." Though *Califano* was a victory, the cases that followed it⁵ made clear that the last step to strict scrutiny would have to await a more sympathetic Court or an Equal Rights Amendment, for which the Project continues to fight.

In the meantime, the Project worked to enforce women's statutory rights, including the rights to equal employment opportunities guaranteed under Title VII of the Civil Rights Act⁶ and the Equal Pay Act.⁷ Although the Project initially focused on traditionally female occupations in which women were effectively barred from advancement, in the late seventies and early eighties we developed a litigation docket involving non-traditional jobs for women, such as truck driving⁸ and

police work.⁹ Such jobs require relatively little education, often provide on-the-job training, and are much higher-paying than traditional "women's jobs." We have also fought to combat the wage gap resulting from the undervaluation of work traditionally performed by women¹⁰ and developed a series of cases challenging the use of sex-based actuarial tables to calculate lower pensions and insurance benefits for women, as well as other forms of insurance discrimination.¹¹ Most recently, in 1998 we settled a class action lawsuit on behalf of hundreds of women in the catering industry who were underpaid and excluded from lucrative jobs that were given to men.¹² We are currently in the process of litigating an employment discrimination and gender stereotyping case in which, along with the ACLU's Lesbian and Gay Rights Project and Legal Department, we are representing a man who was fired for cross-dressing off the job.¹³

In our work on employment discrimination, we discovered that women were often being "protected" out of equal access to the job market. Though Title VII outlawed excluding women from "dirty" or "dangerous" work, "new protectionist" policies began emerging, based on a claim that it was necessary to exclude women from a range of lucrative jobs because the work might pose dangers to their potential future children. These policies rarely surfaced in traditionally female and lower-paying occupations that posed similar risks, such as health care aides and beauticians. We pioneered this field by bringing *Christman v. American Cyanamid*,¹⁴ in which five women submitted to sterilization in order to keep jobs that were eliminated shortly thereafter.¹⁵ Rather than clean up the workplace, which contained lead levels in excess of the federal standard permitted for any worker, the company chose to exclude the women. Our litigation in this area culminated in our participation in *UAW v. Johnson Controls*,¹⁶ in which the Supreme Court guaranteed women the right to equal employment opportunity without regard to childbearing capacity. *Johnson Controls*

also paved the way for a different and better way to deal with this problem: requiring workplaces that are safe and protective for both sexes.

Throughout the history of the Women's Rights Project, we have handled pregnancy discrimination cases. Pregnancy discrimination is, in many ways, at the heart of much employment discrimination against women. Some women are fired shortly after announcing their pregnancies, ostensibly on the basis of performance evaluations that are less than glowing for the first time in their tenure. Others no longer get choice assignments or promised promotions. Still others are forced to leave their jobs because of an employer's unwillingness to treat pregnancy the way it treats other temporary disabilities. For example, in June 2001, the Project filed a lawsuit on behalf of three female police officers who were denied the opportunity to work light duty during their pregnancies although other disabled employees were provided this opportunity.¹⁷ In addition to representing women, we have taken cases where men were denied childcare leaves that were readily available to women, in violation of the Equal Protection Clause of the 14th Amendment and the Family and Medical Leave Act.¹⁸ Until we eliminate the stereotype that child-rearing is exclusively a woman's role, women's employment will continue to be treated as marginal and temporary.

In addition to pregnancy discrimination cases, the Women's Rights Project has played a role in numerous cases challenging unlawful government control of pregnant women's lives. Some prosecutors have responded to the national drug epidemic by using positive toxicologies of newborns to investigate women's parenting and to bring criminal charges against them. At stake in these cases is women's rights to privacy and bodily integrity and the health and safety of women who use drugs but may avoid medical treatment for fear of being jailed or losing custody of their children. We have represented women charged with child abuse, possession, or delivery of controlled substances after their newborns tested positive on toxicology tests and have argued that

the state may not assume that a woman is unfit to be a parent simply because she has taken drugs during pregnancy.¹⁹ We have also fought for pregnant women's right to equal access to drug and alcohol treatment programs.²⁰ Most recently we participated in *Ferguson v. City of Charleston*,²¹ in which the Supreme Court held that pregnant women cannot be subject to warrantless, suspicionless searches – in the form of drug tests – simply because they are pregnant.

In the 1980s and 1990s, the Women's Rights Project recognized a growing trend of schools punishing students who became pregnant by banning them from extracurricular activities or segregating them into classes with inferior preparation for entering the job market. Pregnancy-based restrictions on education flagrantly violate Title IX of the Education Amendments²² and have long-term repercussions for the girls affected by them. The Project undertook a major effort, involving both public education and litigation, to equalize the educational opportunities available to pregnant and parenting students. In 1998, we won a big victory with *Chipman v. Grant County School District*,²³ in which we vindicated the rights of two teenage girls in rural Kentucky who were told they could not be admitted to the National Honor Society because they had become pregnant. We are currently investigating several city and state school systems that segregate pregnant teens in inferior schools.

At the same time, we took part in other efforts to guarantee women equal access to educational opportunities and resources. We challenged reliance by the National Merit Scholarship Competition and New York State merit scholarship on discriminatory standardized tests²⁴ and fought for girls' rights to participate equally in school sports.²⁵ We worked to integrate single-sex public schools, acting as co-counsel in a case against The Citadel, a military college that receives federal and state funds, for its refusal to admit Shannon Faulkner and other women into its Corps of Cadets program.²⁶ The Women's Rights Project also played a role – both through drafting amicus

briefs and meeting with the Solicitor General – in challenging the males-only admissions policy of the Virginia Military Institute in *United States v. Virginia*.²⁷ The Supreme Court’s decision in that case, written by Justice Ginsburg, held the denial of admission to women unconstitutional, finding that the government had not proved an “exceedingly persuasive” justification for the male-only discriminatory policy. The language of the opinion suggested that distinctions based on sex are subject to more than the intermediate scrutiny previously required by the Court in cases of sex discrimination.

While the Women’s Rights Project advocates for equality for all women, we have paid special attention to ensuring equality for poor women and women of color. We have challenged welfare “reform” laws including New Jersey’s child exclusion policy, which denies additional welfare benefits to any child born into a family already receiving welfare.²⁸ We argued that the policy infringes poor women’s state constitutional right to privacy by coercing their childbearing decisions and that it denies certain poor children equal protection based on whether their mothers conceived and gave birth to them while receiving welfare. In addition, we were co-counsel in *Nguyen v. INS*²⁹ and a related lower court case³⁰ challenging a federal law that imposes a different standard on fathers than on mothers for conferring citizenship on their foreign-born children. We are also involved in two racial and gender profiling cases against U.S. Customs in which African-American women have been illegally stopped at international airports and subjected to invasive body searches.³¹

While engaged in significant litigation at all levels, the Project has continued its traditional role as an advocate for women's rights in the Supreme Court. Our *amicus* docket reads like a list of the major women's rights and other Title VII cases decided by the Court. For example, the Women's Rights Project filed amicus briefs in *Pollard v. Du Pont De Nemours & Co.*³² (with Lawyers’

Committee for Civil Rights and others) (whether front pay is an element of compensatory damages); *Equal Employment Opportunity Commission v. Waffle House, Inc.*³³ (with National Employment Lawyers Association and Trial Lawyers for Public Justice) (whether any employer may force an individual to waive his right to cost-free representation by the EEOC); *Davis v. Monroe County Board of Education*³⁴ (school's failure to prevent sexual harassment of one student by another); *Faragher v. City of Boca Raton*³⁵ (with Lawyers' Committee for Civil Rights) (city's liability for sexual harassment of female lifeguards by their male supervisors); *Oncale v. Sundowner Offshore Services, Inc.*³⁶ (with ACLU Gay & Lesbian Rights Project) (same-sex harassment constitutes sexual discrimination under Title VII); *Miller v. Albright*³⁷ (with NOW LDEF) (father's right to establish his child's citizenship on the same basis as a mother); *Wards Cove Packing Co. v. Atonio*³⁸ (employment discrimination in cannery's hiring and promotion practices); *Price Waterhouse v. Hopkins*³⁹ (with NOW LDEF) (exclusion of "macho" woman from partnership in accounting firm); *Watson v. Fort Worth Bank & Trust*⁴⁰ (application of disparate impact theory to subjective selection practices); *California Federal Savings & Loan Association v. Guerra*⁴¹ (legality of maternity leave); *Wimberly v. Labor & Industrial Relations Commission of Missouri*⁴² (unemployment insurance and pregnant women); *Ohio Civil Rights Commission v. Dayton Christian Schools*⁴³ (pregnant teacher fired from fundamentalist Christian school on grounds that its religious tenets did not permit mothers of young children to work outside the home); *Anderson v. Bessemer City*⁴⁴ (disputing claim that defendants could not have intentionally discriminated against plaintiff because they had working wives); *United States Postal Service Board v. Aikens*⁴⁵ (burden on plaintiff to show basic qualifications for job or most qualified applicant); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*⁴⁶ (use of sex-based rates to charge women more than men for annuities); *County of Washington v. Gunther*⁴⁷ (application of Title VII to wage

discrimination complaints where the jobs in question are not "equal" within the meaning of the Equal Pay Act); and many others.

The Project has also authored numerous *amicus* briefs in the circuit courts. These include *Urbano v. Continental Airlines*⁴⁸ (with Women's Legal Defense Fund) (woman denied opportunity to work light duty during pregnancy); *Floyd v. Waiters*⁴⁹ (sexual harassment of students by a security guard); *Karibian v. Columbia University*⁵⁰ (with National Women's Law Center) (whether a showing of economic harm is necessary to sustain a sexual discrimination claim); *ANA v. Illinois*⁵¹ (use of pay equity study as evidence of wage discrimination); *Hayes v. Shelby Memorial Hospital*⁵² (pregnant x-ray technician fired on grounds of reproductive hazard); *Wright v. Olin*⁵³ (fertile women denied "hazardous" jobs); and others.

Thus, the Women's Rights Project, from our initial days three decades ago under the leadership of Ruth Bader Ginsburg to the present, has played a major role in developing the constitutional and statutory protections against sex discrimination. Through these efforts, the Women's Rights Project and ACLU affiliates have been a major force in the fight to bring about full equality for women.

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- ¹ Karen O'Connor and Lee Epstein, *Beyond Legislative Lobbying; Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134 (1983).
- ² *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971).
- ³ *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976).
- ⁴ *Califano v. Goldfarb*, 430 U.S. 199, 223, 97 S.Ct. 1021, 1035 (1977).
- ⁵ See, e.g., *Wengler v. Druggist Mutual Insurance*, 446 U.S. 142, 100 S.Ct. 1540 (1980) (striking down a Workers' Compensation provision requiring men to prove their dependency on their wives in order to receive benefits if their wives were hurt or killed).
- ⁶ 42 U.S.C. § 2000e.
- ⁷ 29 U.S.C. § 206.
- ⁸ *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859 (11th Cir. 1986).
- ⁹ *Brace v. O'Neill*, 567 F.2d 237 (3d Cir. 1977).
- ¹⁰ E.g., *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977).
- ¹¹ E.g., *Peters v. Wayne State University*, 718 F.2d 1100 (6th Cir. 1983); *Bartholomew v. Foster*, 524 Pa. 241 (Pa. Super. Ct. 1990).
- ¹² *Weigmann v. Glorious Food*, 169 F.R.D. 280 (S.D.N.Y. 1996).
- ¹³ *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-314 (E.D. La.).
- ¹⁴ *Christman v. American Cyanamid Co.*, 578 F. Supp. 63 (N.D. W. Va. 1983).
- ¹⁵ For an excellent description of this case, see SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN, 437-460 (1991).
- ¹⁶ *UAW v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991).
- ¹⁷ *Lochren v. County of Suffolk*, (E.D.N.Y.).
- ¹⁸ 29 U.S.C.S. § 2601. See *Knussman v. State of Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999).
- ¹⁹ E.g., *In re Stefanel Tyasha C.*, 157 A.D.2d 322 (N.Y. App. Div. 1990); *Kentucky v. Welch*, 864 S.W.2d 280 (Ky 1993); *Angela M.W. v. Kruzicki*, 209 Wis. 2d 112 (Wis. 1997).
- ²⁰ *Elaine W. v. North General Hosp.*, 613 N.E.2d 523 (N.Y. 1993).
- ²¹ *Ferguson v. City of Charlestown*, 121 S.Ct. 1281 (2001).
- ²² 20 U.S.C. §1681-1688.
- ²³ *Chipman v. Grant County School District*, 30 F. Supp. 2d 975 (E.D. Ky. 1998).

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- ²⁴ *Sharif v. New York State Education Department*, 127 F.R.D. 84 (S.D.N.Y. 1989).
- ²⁵ *Alston v. Virginia High School League*, 176 F.R.D. 220 (W.D. Va. 1997).
- ²⁶ *Faulkner v. Jones*, 66 F.3d 661 (4th Cir. 1995), *cert. denied* 516 U.S. 938 (1995).
- ²⁷ *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996).
- ²⁸ *Sojourner A. v. New Jersey Department of Human Services*, No. A-2787-00T5 (N.J. Sup. Ct. App. Div.).
- ²⁹ *Nguyen v. INS*, 2001 U.S. LEXIS 4340 (2001).
- ³⁰ *Lake v. Reno*, 226 F.3d 141 (2d Cir. 2000).
- ³¹ *Bradley v. United States*, No. 00-2317 (D. N.J.); *Hurn v. United States*, No. 99-2385 (D. N.J.).
- ³² *Pollard v. Du Pont De Nemours & Co.*, 2001 U.S. LEXIS 4123, 69 U.S.L.W. 4419 (2001).
- ³³ *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted* 121 S.Ct. 1401 (2001).
- ³⁴ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661 (1999).
- ³⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).
- ³⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998).
- ³⁷ *Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428 (1998).
- ³⁸ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989).
- ³⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989).
- ⁴⁰ *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777 (1988).
- ⁴¹ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 107 S.Ct. 683 (1987).
- ⁴² *Wimberly Labor & Indus. Relations Com.*, 479 U.S. 511, 107 S.Ct. 821 (1987).
- ⁴³ *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.* 477 U.S. 619, 106 S.Ct. 2718 (1986).
- ⁴⁴ *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504 (1985).
- ⁴⁵ *United States Postal Service Bd. v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478 (1983).
- ⁴⁶ *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492 (1983).
- ⁴⁷ *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242 (1981).
- ⁴⁸ *Urbano v. Continental Airlines*, 138 F.3d 204 (5th Cir. 1998).
- ⁴⁹ *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998).

⁵⁰ *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994).

⁵¹ *ANA v. Illinois*, 783 F.2d 716 (7th Cir. 1986).

⁵² *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984).

⁵³ *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).