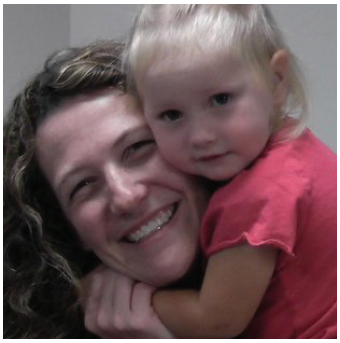
FIGHTING SEX STEREOTYPES IN THE LAW

Reflections on 40 Years of the ACLU Women's Rights Project









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125 Broad Street, 19th Floor
New York, NY 10004

www.aclu.org

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Pictured on Cover
Top row, left to right: Lilly Ledbetter, p 21 (photo: AFLCIO); Ruth Bader Ginsburg, (photo: Supreme Court Historical Society). Middle row, left to right: Betty Dukes, p 10 (photo: Office of Congressman George Miller); Frontiero v. Richardson, p 4 (photo: Supreme Court Historical Society); Heather Burgbacher, p 12 (photo: Katie Kerwin McCrimmon). Bottom row, left to right: Joellen Oslund, p 6 (photo: Courtesy of Captain Joellen Drag Oslund); Shantelle Hicks, p 12 (photo: Micah McCoy).

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INTRODUCTION

Challenging sex stereotypes in the 1970s and today

The year 2012 marks the 40th anniversary of the year in which now-Supreme Court Justice Ruth Bader Ginsburg co-founded the ACLU Women's Rights Project. At the beginning of the 1970s, hundreds of laws at every level of government treated women and men differently. The ACLU Women's Rights Project, under the leadership of Ginsburg and her co-directors, led the way in advocating legislative change and litigating to invalidate these laws. They convinced the United States Supreme Court to regard sex-based distinctions in law with suspicion, because those distinctions were rooted in "official reliance on sexual stereotypes ... that shore up and perpetuate society's longstanding prejudices."[1]

This anniversary provides an opportunity to reflect on the accomplishments of the Women's Rights Project, under Ginsburg's leadership, during its first decade and to consider all that remains to be done to combat gender stereotypes. This essay examines the ACLU's early and current efforts to combat those stereotypes in a number of core areas, including challenges to laws and practices that perpetuate the beliefs that caretaking is women's work and breadwinning the job of men; that disadvantage women because of pregnancy; and that, even in the 21st century, exclude women from certain jobs and foster stereotypes about the capabilities and interests of girls and boys, men and women.

The ACLU's efforts in the 1970s to invalidate laws based on such stereotypes were largely successful, but sex-based inequality persists. Despite significant gains, women still make up less than a quarter of Congress and of state legislators.[2] Only 20 Fortune 500 companies are run by women.[3] And while women make up about half the workforce, they make up the majority (59 percent) of the low-wage workforce,[4] and

Women make up the majority of the low-wage workforce.

a gender-based pay gap persists. Women are still a tiny minority of those employed in good-paying blue collar jobs like construction.[5]

The persistence of these troubling disparities suggests that, while nearly all laws and policies that explicitly discriminated against women were uprooted, largely as a result of the efforts of the ACLU and its legal allies in the 1970s, the norms and stereotypes about men and women that inspired those laws have not been eliminated. Stereotypes about the capacities and proper roles of women, particularly pregnant women and mothers, still inform employment practices. The government continues to perpetuate sex stereotypes in public schools. Past decades' tremendous progress towards gender equality will stall out without intensive efforts to eradicate sex stereotypes. Forty years after the Women's Rights Project's founding, the ACLU continues to fight sex discrimination and the stereotypes that underlie it.

THE ACLU WOMEN'S RIGHTS PROJECT'S EARLY YEARS

Challenging the legal structures that codified sex stereotypes

In designing the agenda for the Women's Rights Project, Ginsburg and her colleagues took aim at laws and policies that pigeonholed men and women based on norms and beliefs about the roles they should play in society: women as mothers and homemakers in the private sphere, men as breadwinners and actors in public life. Such laws were common at the local, state, and even federal level, and they reached every area of life, from the workplace to tax benefits, from estate law to the military. The ACLU sought to invalidate such laws by challenging directly the stereotypes on which they rested. The following excerpt from a Supreme Court brief articulates Ginsburg's views on gender stereotyping that animated the ACLU's litigation:

> *[N]either unsubstantiated stereotypes nor generalized factual data suffice to justify pigeonholing by gender; a legislature may not place all males in one pigeonhole, all females in another, based on assumed or documented notions about "the way women or men are."*[6]

The result of this litigation campaign was a set of extraordinary changes in the law, as well as in the policies and practices of employers and, most importantly, in the lives of American women and men.

> **"...it represented the first time ever in the history of the country that the Supreme Court had said yes to a woman; the first time the Court recognized women as victims of discrimination."**
>
> —Ruth Bader Ginsburg on Reed v. Reed

Challenges to laws perpetuating the stereotype of men as breadwinners and women as caretakers

The ACLU brought cases on behalf of both men and women whose life circumstances defied prevailing gender norms. Four cases, two brought on behalf of male plaintiffs challenging laws that devalued their contributions as caretakers and two brought on behalf of women challenging limits on their participation in male spheres, illustrate the ACLU's approach to formal rules that locked men and women into prescribed roles.

- *Reed v. Reed* (1971)[7] This case involved divorced parents of a teenage boy who tragically took his own life. Each filed a petition to be the administrator of the son's estate. Idaho law, however, mandated that men be preferred to women as estate administrators. The mother, Sally Reed, challenged this statutory preference.

- *Moritz v.* Com*missioner* (1972)[8] Charles Moritz was a never-married man who sought to deduct from his taxable income a portion of the costs he incurred for the care of his elderly mother. The government had argued, and the tax court agreed, that such a deduction was unavailable to him because he was a man.

- *Frontiero v. Richardson* (1973)[9] An Air Force officer and her husband challenged the constitutionality of a statutory scheme that allowed a male servicemember to claim his wife as a dependent, whether or not she was actually dependent on him for financial support. A servicewoman, however, could not claim her

husband as a dependent for purposes of benefits unless she could demonstrate that he was in fact dependent on her for more than half of his support.

- *Weinberger v. Wiesenfeld* (1975)[10] Stephen Wiesenfeld applied for Social Security benefits for himself and infant son following his wife's death in childbirth. Although his wife had been the family's primary breadwinner and Social Security taxes had been withheld from her salary, Wiesenfeld was not accorded the same benefits that survivors of a male wage earner would have received under the federal legislation.

In these cases, Ginsburg and the ACLU challenged the law's discriminatory treatment of male caregivers and women breadwinners. In *Reed*, they attacked the idea that laws may differentiate arbitrarily on the basis of sex: "When biological differences are not related to the activity in question, sex-based discrimination clashes with contemporary notions of fair and equal treatment."[11] In *Moritz*, Ginsburg argued to the Court of Appeals that singling out never-married men for disfavored treatment was both unfair and irrational: "Although the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits," including sex, for such discrimination "clashes with contemporary notions of fair and equal treatment."[12]

In *Frontiero*, the first case in which Ginsburg argued before the Supreme Court (representing the ACLU as *amicus curiae*), the ACLU's brief maintained that the challenged law reflected "a view of the married woman which does not accord with present day reality."[13] Ginsburg and her colleagues insisted that the differential treatment of male and female servicemembers rested on "a foundation of myth and custom which assumes that the male is the dominant partner in marriage and which reinforces restrictive and outdated sex role stereotypes about married women and their participation in the work force."[14]

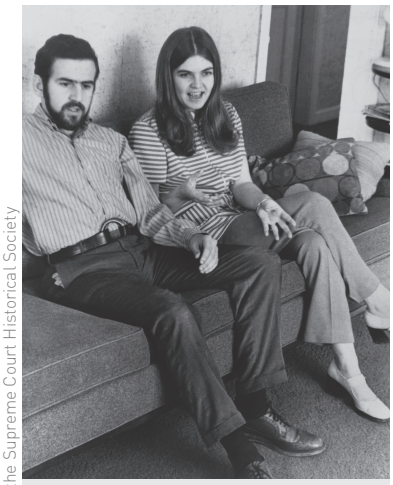

Photo: Courtesy of the Supreme Court Historical Society

Sharron Frontiero and her husband challenged unequal treatment for military dependents.

The ACLU's brief in *Wiesenfeld* focused explicitly on sex-role stereotypes, arguing that the law's sex-based distinction served no legitimate governmental interest and that it rested on a "gross, stereotypic view of the economic and parental roles of men and women."[15] The brief characterized the statute as assuming a division of parental labor along gender lines: "Breadwinner was synonymous with father, child tenderer with mother. Increasing female participation in the paid labor force has placed in clear focus the invidious quality of this rigid sex-role delineation."[16] In response to these arguments made by the ACLU, the courts developed the doctrine that sex-based distinctions in law must be viewed skeptically, because they are frequently irrational and based on overbroad generalizations. The Supreme Court's historic decision in *Reed* focused, for the first time, on the arbitrariness of such distinctions: "To give a mandatory preference to members of either sex over members of the other ... is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[17] Ginsburg characterized the *Reed* decision as "tremendously significant in that it represented the first time ever in the history of the country that the Supreme Court had said yes to a woman; the first time the Court recognized women as victims of discrimination."[18]

The *Reed* decision set in motion a chain of cases in which the courts increasingly refused to accept distinctions in the law based on notions about the proper roles of men and women. In *Moritz*, the Court of Appeals relied on *Reed* in ruling for Charles Moritz, holding that the tax code's sex-based distinction was "invidious[ly] discriminat[ory]" and lacked "justification," because it afforded a deduction "to a woman

or widower, a divorcé and a husband whose wife is incapacitated or institutionalized, but denied it to a man who has not married."[19]

The Supreme Court in *Frontiero* acknowledged the nation's history of laws that discriminated against women and that were rooted in "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[20] The Court cited its own early articulations of the view that men should be women's protectors, and women should stay out of many areas of civil life because of their "natural and proper timidity and delicacy."[21] It placed the challenged statutory scheme in the context of "statute books ... laden with gross, stereotyped distinctions between the sexes" and declared it invalid.[22] Convincing the Supreme Court to view sex-based distinctions in law with suspicion based on the tradition or habit of sex stereotyping was a major victory for the ACLU.

In *Wiesenfeld*, a unanimous Supreme Court determined that the challenged statutory distinction was premised on overbroad generalizations about male and female wage-earners. The assumption "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" was an "'archaic and overbroad' generalization."[23] The decision made clear that sex-based distinctions in law based on unexamined assumptions about male wage-earners and female caretakers would be scrutinized carefully by courts and likely struck down.

Challenges to laws and policies discriminating against pregnant women and mothers

The ACLU also attacked laws encompassing the view that women's primary role was as mothers. Ginsburg and her colleagues brought cases chipping away at the web of laws, policies, and employment practices that limited women's participation in the workforce and in other aspects of public life. Pregnancy and childbirth were often locus points for discrimination against women, particularly in the workforce. Policies excluding or forcing the discharge of pregnant women from the workplace were common in the 1970s and reflected the stereotype that a woman's primary duties were to be a homemaker and raise children.

For example, the school board in Cleveland, like many employers, had a policy of forcing pregnant teachers to take unpaid leave beginning five months before the expected birth of their children. A challenge to this policy was presented to the U.S. Supreme Court in *Cleveland Board of Education v. LaFleur* (1974). The ACLU, which had litigated similar cases in lower courts, filed an *amicus* brief. The brief succinctly stated what was at issue: "[M]andatory pregnancy 'leave' reinforces societal pressure to relinquish career aspirations for a hearth-centered existence."[24] The ACLU argued that "summary dismissal or forced, unpaid leave for pregnant women" was "rationalized as 'protective,' although the object of the protection is less than apparent," and instead "operate[d] as 'built-in headwinds' that drastically curtail women's opportunities."[25]

The Supreme Court held the school board could not automatically assume that all pregnant women were incapable of working later in pregnancy.

The challenge to the policy succeeded, paving the way for an overhaul of mandatory-leave policies and practices around the country. The Supreme Court held the school board could not automatically assume

Photo: Courtesy of Captain Joellen Drag Oslund

Captain Joellen Oslund sought greater equality for military women.

that all pregnant women were incapable of working later in pregnancy; instead, an individualized determination of physical capacity was required. "The mandatory termination provisions ... sweep too broadly," the Court said, because they "amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing," contrary to medical evidence.[26] This result helped to negate what one scholar later termed the widely held "sexual premise ... that woman's labor force participation is, by virtue of her reproductive role, short term, occasional."[27] Without dismantling this stereotype and the policies based on it, women would be unable to move past the status of contingent, temporary, dispensable workers.

The ACLU did not limit its attack on discrimination against pregnant women to female-dominated sectors like teaching. On the contrary, the Women's Rights Project brought the debate over the roles of pregnant women and mothers to the most male-dominated institution in society: the armed forces. In a less well-known set of cases that did not result in a Supreme Court opinion, the ACLU challenged policies of the Marine Corps and Air Force requiring the mandatory discharge of all servicemembers who became pregnant, a policy that did not apply to any other temporarily disabling condition. In challenging these policies, the ACLU argued that barring pregnant women from continued service reflected the discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care. These cases helped to bring about dramatic changes to Americans' beliefs and practices regarding the appropriate jobs for pregnant women, even as they helped to change gender stereotypes about who may legitimately serve in the military.

In *Struck v. Secretary of Defense* (1972), a lower court upheld an Air Force regulation providing for the discharge of pregnant officers, notwithstanding the plaintiff's capacity to continue serving while pregnant and after childbirth. Although Captain Struck, the plaintiff in that case, "did not miss one day of duty" during her pregnancy, she was "removed from the fighting zone, for the good of the service and of herself and her unborn child."[28] In her brief appealing this decision to the Supreme Court, Ginsburg argued that the plaintiff "simply asks to be judged on the basis of her individual capacities and qualifications, and not on the basis of characteristics assumed to typify pregnant women."[29] The Supreme Court never heard argument or issued an opinion on the merits of the case, because the Air

Force changed its policy and allowed Captain Struck to remain in service, perhaps to avoid a Supreme Court decision.

The ACLU challenged a similar rule in the 1976 case *Crawford v. Cushman*. Representing Marine Corps member Stephanie Crawford, the Women's Rights Project challenged a regulation mandating the discharge of pregnant Marines. Crawford was discharged when her superiors learned she was pregnant — even though her job involved only typing and filing — and was then refused reenlistment because she had a minor child.[30] In its brief to the Court of Appeals for the Second Circuit, the ACLU urged the irrationality of the distinction of pregnancy from all other physical and mental conditions for service retention purposes.[31] The rule was "conspicuously overbroad," the brief explained, because it "marks for mandatory discharge women still fit and able to perform duty assignments," a "prejudgment" that was "dehumanizing" to women.[32]

The Court of Appeals agreed, holding that the regulation violated both the Equal Protection and Due Process Clauses, because it irrationally singled out pregnancy among all other short-term disabilities as grounds for mandatory discharge of a Marine. The regulation was "irrationally overinclusive," the court said, because it discharged pregnant Marines "without any individualized determination of their fitness to serve."[33] The Marine Corps did not appeal its loss to the Supreme Court, and the case vindicated the principle that the wholesale exclusion of pregnant women and mothers cannot be justified, whether labeled sex discrimination or not.

Other efforts to eradicate pregnancy discrimination met with judicial resistance. *Geduldig v. Aiello* (1974) concerned a state disability insurance scheme that excluded pregnancy from the list of covered conditions.[34] Ginsburg and her ACLU colleagues filed an *amicus* brief arguing that women disabled (that is, unable to perform their jobs) because of pregnancy should be treated no differently than people disabled because of other short-term conditions covered by the state disability program. They further argued that singling out pregnancy for different and disadvantageous treatment constituted unconstitutional sex discrimination. "The mythology of pregnancy," according to Ginsburg, "has resisted rational inspection."[35] It was the ACLU's hope that this mythology would "at last erod[e] under the spotlight of reasoned analysis."[36]

The Supreme Court majority, however, refused to view the exclusion of pregnancy in the context of stereotypes about pregnancy and women's proper role. In fact, the Court maintained that the case was not about sex discrimination at all. It reasoned instead that the exclusion was legitimate, because it "divides potential recipients into two groups—pregnant women and nonpregnant persons."[37] Because many nonpregnant persons were women, there was no sex-based discrimination, the Court held. Two years later, in *General Electric Co. v. Gilbert*, the Supreme Court issued a similar ruling in a case challenging a private employer's exclusion of pregnancy from its disability plan as a violation of Title VII of the Civil Rights Act of 1964, the principal law prohibiting sex discrimination in employment.[38] The ACLU had submitted an *amicus* brief in that case, in which it argued that pregnancy-based classifications like the one at issue "relegate[d] women to an inferior position in the labor market."[39] The Supreme Court again distinguished the exclusion of pregnancy from "discrimination based on gender as such," reasoning that, "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[40]

"The mythology of pregnancy has resisted rational inspection." It was the ACLU's hope that this mythology would "at last erod[e] under the spotlight of reasoned analysis."

—Ruth Bader Ginsburg

The Court's failure to recognize pregnancy discrimination as a form—if not the archetypal form—of sex discrimination was a blow to all women, because it signified that employers and others would be

permitted to continue to single out pregnancy, a condition experienced by the majority of women and not by any men, for detrimental treatment. These setbacks prompted the ACLU and other feminist organizations to advance legislation aimed at prohibiting employers from treating pregnant workers disadvantageously. Their Campaign to End Discrimination Against Pregnant Workers propelled the passage of the Pregnancy Discrimination Act of 1978, an amendment to Title VII establishing that pregnancy discrimination in the workplace is unlawful sex discrimination. While the statute effectively abrogated *General Electric v. Gilbert* and the Supreme Court's interpretation of the Civil Rights Act, ensuring that pregnancy discrimination is recognized as sex discrimination in workplaces covered by federal antidiscrimination law, the *Geduldig v. Aiello* decision interpreting the Constitution remains on the books with respect to the government's treatment of pregnancy outside the workplace and has been widely criticized.[41]

The Pregnancy Discrimination Act's passage was a tremendous gain for women. The new law offered greater protection against the exclusion of pregnant women and mothers from the workplace. Its passage represented the recognition that women's exclusion from the public sphere, including the workplace, because of their capacity to have children was at the root of women's inequality. As explained in Part III, however, pregnancy discrimination has not vanished from the workplace, nor has other discriminatory treatment based on the assumption that women are, or should be, mothers first and workers second.

Challenges to school policies that impose sex stereotypes on children

The ACLU also took steps to combat sex stereotyping and exclusion of female students by schools. Ginsburg and her colleagues viewed the government's classification and segregation of children by sex as a threat to women's full citizenship.[42] Opposing school policies based on sex stereotypes was particularly important, for it is in schools that government conveys values to children required to attend.

Ginsburg and her colleagues viewed the government's classification of children by sex as a threat to women's full citizenship.

The ACLU's objection was articulated in the cases of *Helwig v. Jefferson Parish School Board* (1978)[43] and *Haymon v. Jefferson Parish School Board* (1977),[44] which were filed by ACLU attorney Jack Peebles in New Orleans based on arguments developed by Ginsburg and her colleagues at the Women's Rights Project.[45] A brief in the *Helwig* case, which did not result in a decision, explained the ACLU's position:

> *Education which denies boys and girls, young men and women, the opportunity to know one another as intellectual equals, as co-workers and competitors, as individuals with potential for achievement in every field, and which prevents them from understanding and re-evaluating the roles of men and women in today's society in an atmosphere of meaningful mutual exchange is … destructive of equality. … Sex segregated schooling perpetuates sexual stereotypes, and sexual stereotypes are in many ways as harmful to men as to women. … Men [are] straitjacketed*

> *into a posture of indomitable 'masculinity' [while] … women are characterized as dependent and powerless.*[46]

A similar ACLU challenge to a Philadelphia school for gifted boys reached the Supreme Court. In that case, *Vorchheimer v. School District of Philadelphia*, Susan Vorchheimer, a teenage girl, sought admission to Central High School, reserved for boys. In a 1977 brief to the Supreme Court, Ginsburg argued that "[i]n a world and nation with 'a long and unfortunate history of sex discrimination,' all-male institutions for superior students impede women's opportunities to establish themselves in academia, business, the professions, and politics as fully equal to men."[47] The ACLU explained that the purportedly parallel school for girls was not an adequate substitute, because Central High School was the district's "premier secondary school" and had

"[i]n a world and nation with 'a long and unfortunate history of sex discrimination,' all-male institutions for superior students impede women's opportunities to establish themselves … as fully equal to men."

—Ruth Bader Ginsburg

a "national reputation, rich endowment, [and] superior scientific facilities."[48] Single-sex schools, Ginsburg urged, inhibited boys and girls from breaking free of constricting stereotypes:

> *The judgment that sex-segregated education is 'natural and reasonable' is rooted in die-hard habits of thought, customary generalizations concerning the expected behavior, proclivities and preferences of the two sexes, familiar, overbroad assumptions about 'the way girls and women (or boys and men) are'—in short, the very generalizations and assumptions this Court has firmly rejected as grounds for separate legal regulation of the sexes.*[49]

Far from promoting "freedom of choice," the ACLU maintained, the single-sex policy "reinforces a tradition that retards progress toward a society in which women and men stand together as full and equal partners."[50]

This argument, however, did not carry the day in 1977. An equally divided Supreme Court affirmed without opinion the decision of the Court of Appeals, which had trivialized and overlooked inequalities between the boys' and girls' schools.[51] The Court of Appeals said that "the special emotional problems of the adolescent years are matters of human experience" that have led at least some "educational experts" to "opt for one-sex high schools," a choice that has "its basis in a theory of equal benefit and not discriminatory denial."[52] The case was subsequently relitigated in state court and the exclusion of girls from Central High was invalidated under Pennsylvania's state ERA,[53] but the case's fate in federal court had left the door open for discrimination to continue.

THE WORK CONTINUES

Current efforts to dismantle sex discrimination and stereotypes

The ACLU and its allies were successful in the 1970s and thereafter in stripping away most of the laws and policies that explicitly discriminated based on sex. Very few such laws remain on the books. Yet gender inequality persists. The sex stereotypes underlying the discriminatory legal regime remain and today find expression in employment practices and other ostensibly neutral laws and policies that are more difficult to challenge. Moreover, in some areas, such as single-sex education, governments continue to perpetuate sex stereotypes by means of official policies. Eliminating sex stereotypes and resulting discrimination remains an important goal for the ACLU.

Challenging persistent stereotypes about men's and women's roles in family and at work

Stereotypes continue to play a role in gender-based inequality. They are often presented as facts about differences between the sexes, rather than as normative prescriptions about proper roles for women and men. Employers often insist that sex-based wage gaps and other inequities are not the result of discrimination, but rather choices on the part of the employees. The ACLU continues to challenge the ongoing prevalence of sex stereotyping as a factor in lingering discrimination.

The recent Supreme Court case of *Wal-Mart v. Dukes* (2011) illustrates the importance, as well as the difficulty, of being attentive to sex stereotypes. In that case, a class of women sued the retail giant for wage and promotion discrimination. There was little dispute that stark sex-based disparities in pay and promotions pervaded the company, but the parties disagreed about whether discrimination caused these gaps. They also disagreed about whether the women could point to common factors in the way they were treated that would justify bringing the case as a nationwide class action. The plaintiffs argued that the employer's practice of giving its managers discretion in setting pay and promotion allowed sex stereotypes to infect wage and promotion decisions across the company, resulting in the dramatic disparities.

Betty Dukes

Photo: Office of Congressman George Miller

The ACLU co-authored an *amicus* brief, which was joined by many other women's rights groups, highlighting the archaic sex stereotypes to which the women attested they were subjected:

- One employee reported that she sat in a store-wide meeting where a female co-worker asked why the men in the store earned more than the women. A male manager answered that men "are working as the heads of their households, while women are just working for the sake of working."[54] Another District Manager told a woman that he had selected a male employee for promotion instead of her because the male employee "deserved the position" as the "head of his household," while an unmarried woman "did not 'need' the position." [55]

- Another worker testified that her District Director of Operations explained an apparent gender-based pay inequality by saying that the man in question "supports his wife and his two kids."[56] A senior vice president told an

employee that she "should raise a family and stay in the kitchen," rather than advance her career.[57]

- Some women expressed interest in rotating through traditionally male domains, and were dismissed by managers who said that women should not or could not obtain positions in those departments. When one female employee asked to work in hardware, her manager responded by saying, "you're a girl, why do you want to be in Hardware?"[58]

- Other women reported similar events, such as a manager explaining the sex-based pay disparity by saying "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money."[59]

In a 5-to-4 decision, the Supreme Court concluded that the employer's policy of allowing managers discretion in employment matters raised "no inference of discriminatory conduct" sufficient to let the case proceed as a class, and minimized the plaintiffs' accounts of stereotyping as "a few anecdotes" that, even if true, "prove nothing at all."[60] In dissent, Justice Ginsburg wrote that the evidence suggested that gender bias suffused the employer's corporate culture, and that, as women executives in the company stated, "stereotypes limit the opportunities offered to women."[61] She noted, for example, that the plaintiffs had alleged that "senior management often refer to female associates as 'little Janie Q,'" and other evidence of stereotyping.[62]

The decision hit a nerve among working women. When the ACLU posted on social media examples of the stereotyping alleged in the case, readers responded with outrage, recounting their own experiences of similar discrimination. A single mother reported being told that a male coworker "has a family to support and really needs the promotion." Many others reported on rampant disparities in pay and promotion. These responses made clear that sex discrimination on the job is not a thing of the past nor isolated in one company. Uprooting this inequality remains a central goal of the ACLU.

Challenging ongoing discrimination against pregnant women and mothers

Perhaps unsurprisingly, stereotypes about pregnant women and mothers continue to play a key role in perpetuating women's ongoing inequality in the workplace. Mothers have it especially bad—researchers have identified a "wage penalty for motherhood" that cannot be entirely explained away by factors such as mothers taking breaks in employment and part-time work.[63] While fathers benefit from a wage advantage, mothers face a "Motherhood Penalty" (with low-wage mothers affected the worst) and a "Maternal Wall in Advancement," although fathers who play a caregiving role are also penalized.[64] The problem of pregnant workers losing their jobs has become so acute that the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the civil rights employment laws, recently held a hearing focused on just this kind of discrimination.[65] According to one report, claims of pregnancy discrimination are especially prevalent among low-income workers, who are too frequently "fired on the spot" or immediately after telling supervisors they are pregnant.[66] Other employers of low-wage women workers "demonstrate hostility to pregnancy … by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them."[67] The ACLU urged the EEOC to issue additional guidance making clear to employers that federal law "requires employers to extend the same treatment to pregnant workers—including modified duty and light duty assignments—as the employer extends to any other" worker with temporary physical restrictions, including those injured on the job and those eligible for workers' compensation.[68]

At the same time, the ACLU Women's Rights Project continues to litigate cases aimed at uprooting discrimination based on stereotypes about pregnancy and parenting. For example, in *Lochren v. County of Suffolk*, the ACLU challenged the policy of the Suffolk County Police Department, which gave "light duty" assignments to non-pregnant officers who had injuries or other physical restrictions, while denying those same assignments to pregnant officers who required

them.[69] This policy effectively forced pregnant officers in need of accommodation to take unpaid leave during their pregnancy, thereby reviving the *LaFleur*-era stereotype that pregnant women and work don't mix. The ACLU successfully convinced a federal jury that these policies violated federal and state non-discrimination laws, and negotiated with the Suffolk County Police Department to implement a new policy guaranteeing a light duty position to any pregnant officer who requests it, for the duration of her pregnancy.[70]

More recently, the ACLU filed an *amicus* brief on appeal in a case challenging the denial of light duty to pregnant workers by the shipping company UPS. The brief argued that policies that deny pregnant workers the accommodations made for other workers with temporary restrictions recall "many decades during which employers, lawmakers, and courts forced pregnant women out of the workplace based on the stereotype that pregnancy is incompatible with work and on the normative view that the proper place for pregnant women was at home."[71] The district court, like some other courts around the country, upheld the company's policy of accommodating people injured on the job and other groups of non-pregnant workers as gender-neutral and pregnancy-blind.[72] The appeal is currently pending.

Girls report that principals and teachers react to their pregnancies by forcing them to leave school or attend an alternative school, which all too often offers a substandard education.

The same stereotypes about the proper role of new mothers are at play when employers and others discriminate against women who need to pump breastmilk on the job. One ACLU client, a teacher, did not have her contract renewed after she stood up for her right to pump breastmilk for her newborn baby at work.[73] She ultimately settled her case, obtaining an agreement that required the school to ensure that nursing employees have the time and space to pump milk at work. In another instance, the Law School Admissions Test—a gateway for anyone who seeks to become a lawyer—refused to grant testing modifications to a test-taker so that she could pump breastmilk, even though they routinely grant modifications to people who need accommodations for other reasons. Following ACLU advocacy, the organization that administers the test changed its policy to allow nursing mothers the breaks for pumping that they need in order to take the test.[74] These cases help to establish women's ability to have children and remain in the workplace.

Photo: Katie Kerwin McCrimmon

Heather Burgbacher fought for the right to pump breastmilk at work.

Similar stereotypes animate government action when schools deny pregnant and parenting students equal access to education. These students face enormous challenges in accomplishing their educational goals—about 70 percent of teenage girls who give birth leave school, and evidence suggests that discrimination is a major contributing factor to this high dropout—or "pushout"—rate.[75] Girls report that principals and teachers react to their pregnancies by forcing them to leave school or attend an alternative school, which all too often offers a substandard education. Sometimes the discrimination is more subtle. Schools refuse to give excused absences for doctor's appointments, teachers refuse to allow make-up work, or staff members exclude the students from school activities based on "morality" codes or make disparaging, discouraging and disapproving comments.

In one ACLU case, a 15-year-old student named Shantelle Hicks alleged that she was kicked out of middle school and publicly humiliated at an assembly by school staff because she was pregnant. The ACLU filed a complaint alleging that the school violated the student's rights. "[Students] shouldn't be treated differently because they're pregnant," Hicks told a local television station. The case is currently ongoing. The ACLU remains committed to challenging stereotypes about pregnant women and girls wherever they are used to deny equality in the workplace or at school.

Challenging schools' perpetuation of gender stereotypes

Unfortunately, in recent years, sex stereotypes have enjoyed a renewed cachet in the context of public school programs that separate boys and girls based on gender stereotypes. Over the past decade, hundreds of local governments and school boards have adopted educational programs based on the theory that girls and boys learn so fundamentally differently that they should be taught separately using different methods. Following are examples of some of the programs now in place in schools, all collected by the ACLU in a report to the Department of Education's Office for Civil Rights:

- One kindergarten teacher in a Pittsburgh school supplemented the district curriculum with stories for girls about princesses and fairies and uses tea parties, wands, and tiaras as learning incentives. She also used "fantasy and role playing to help girls learn to read and write in a quieter atmosphere." Meanwhile, the teacher of the boys' kindergarten class taught his students "sight words through a modified basketball game and got them to put words together in phrases while running relays."[76]

- In another case from Foley, AL, girls sit attentively at their desks; the rooms are painted yellow and they're warmly lit. Boys are in a blue-painted room and roam around the room during the lesson. The girls' classes hold a "weekly class meeting to talk through their interpersonal issues," which is "due to problems with girls being catty and not getting along."[77]

- In Mobile County, AL, boys and girls ate lunch at different times and were not allowed to speak to each other on school grounds. Electives were pre-assigned by gender; drama for girls and computer application for boys.[78]

Teachers and administrators do not come up with these ideas entirely on their own. A number of self-appointed experts peddle both the theories and methods of single-sex education widely to school districts. Often, these purveyors couch the sex stereotypes that animate their programs in pseudo-scientific terms, to make them seem less like stereotypes and more like incontrovertible facts. Single-sex education proponents say that boys and girls are "hardwired" to learn differently and that the most effective way to teach them is to separate them and to subject them to different teaching strategies. Teachers are instructed that because girls do badly under stress, they should not be given time limits on tests and that boys who like to read, do not enjoy contact sports and do not have a lot of close male friends should be firmly disciplined, required to spend time with "normal males" and made to play sports:

Leonard Sax, the founder of the National Association for Single-Sex Public Education (NASSPE), has argued that because of physiological differences in how boys and girls hear sounds, teachers should speak loudly and directly to boys, but softly to girls, using terms of endearment.[79]

Another proponent, Michael Gurian, has claimed that boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have similar skills only during the few days in their menstrual cycle when they have an estrogen surge; and that boys should be given Nerf baseball bats with which to hit things so they can release tensions during class.[80]

In discussing its single-sex program, the principal of a school in West Virginia claimed, "we know that boys like brighter lights, so we have the boys' rooms lit a little differently than we do the girls' rooms. Boys, we sit them side-by-side, because when they look each other in the eye it becomes more of a confrontational type thing. Girls, again, sit around tables, where they can make eye contact, where they can make relationships and that sort of thing."[81]

Reputable academic studies disprove the stereotypes that inspire such teaching methods. As one article in *Science Magazine* explains, "There is no well-designed research showing that single-sex education improves students' academic performance, but there is evidence

that sex segregation increases gender stereotyping and legitimizes institutional sexism."[82] A string of school districts—in locations as diverse as Pittsburgh, PA; Tallapoosa County, AL; Madison, WI; Adrian, MO; Sanford, ME; Cabell and Kanawha Counties, WV; and Tupelo, MS—have agreed to drop gender-segregated classes in public elementary and middle schools in the face of ACLU advocacy. In one case, the ACLU successfully sued Rene A. Rost Middle School in Louisiana, where single-sex programs had been justified on the basis of alleged differences in the learning capacities of boys and girls. Educators at the Louisiana school used different teaching strategies in their single-sex boys' and girls' classes, and assigned different books to boys and girls. Boys read *Where the Red Fern Grows*, a story about an independent boy and his hunting hound, while girls were assigned *The Witch of Blackbeard Pond*, an historical romance about a spirited girl who is pushed to conform and ultimately is saved from persecution by running off with a sea captain.[83] The school gave an all-girls class a bracelet-themed quiz and an all-boys class a bike-themed quiz.[84] In the face of ACLU litigation, the school board in Louisiana agreed to halt sex-segregation of core curricular classes.

When governments treat children in certain ways based on gender stereotypes, they limit opportunities for all students. For this reason, where possible, the ACLU challenges these policies and practices. While the context and terminology are different from the single-sex programs that the ACLU challenged decades ago in cases like *Vorchheimer*, the fundamental assumption that boys and girls should be taught differently is surprisingly familiar and equally troubling.

CONCLUSION

Building a world without gender stereotypes

President Obama signs the Lilly Ledbetter Fair Pay Restoration Act in 2009.

Photo: House Committee on Education and the Workforce Democrats

Naming and challenging persistent sex stereotypes, whether about pregnant workers or about boys' and girls' learning styles, remains central to the achievement of greater equality. The ACLU Women's Rights Project fought these stereotypes in the 1970s and continues to fight them today because despite the numerous victories, many of the underlying norms and assumptions have not yet been dismantled. These include beliefs about the roles of men and women in the family and at work, as well as policies and laws that continue to push pregnant women and mothers out of the workplace or that perpetuate gender stereotypes in public schools. The ACLU Women's Rights Project continues to litigate and advocate to finish the work that Ginsburg and her colleagues began 40 years ago, in order to build a world in which individual potential is neither "restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments" or by "arbitrary notions of a woman's" —or man's— "place."[85]

Timeline of Major Supreme Court Decisions on Women's Rights

1971

Reed v. Reed, 404 U.S. 71. The United States Supreme Court rules for the first time ever that a law that discriminates against women is unconstitutional under the Fourteenth Amendment, holding unanimously that a state statute that provides that males must be preferred to females in estate administration denies women equal protection of the law.

Phillips v. Martin Marietta, 400 U.S. 542. The Supreme Court rules that an employer violates Title VII when it refuses to hire women with young children while hiring men who are similarly situated.

1973

Frontiero v. Richardson, 411 U.S. 677. In this case, the first argued before the Supreme Court by Ruth Bader Ginsburg, the Court strikes down a federal statute that automatically grants male members of the uniformed forces housing and benefits for their wives, but requires female members to demonstrate the "actual dependency" of their husbands to qualify for the same benefits. Four Justices conclude that laws differentiating by sex are inherently suspect and subject to strict judicial scrutiny.

Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376. The Supreme Court holds that employers' use of sex-segregated "Male Help Wanted" and "Female Help Wanted" columns and newspapers' publication of these columns is illegal, because they enable employers to express unlawful gender preferences. On behalf of the Women's Rights Project, Ginsburg co-authors an *amicus* brief in the case.

1974

Geduldig v. Aiello, 417 U.S. 484. On behalf of the Women's Rights Project, Ginsburg co-authors an *amicus* brief that argues that laws discriminating on the basis of pregnancy make gender-based distinctions and should be evaluated under heightened scrutiny. The Court holds that a disability insurance program that denies benefits for disabilities resulting from pregnancy is not unconstitutional, as it does not involve discrimination on the basis of gender, but discrimination between pregnant and nonpregnant persons.

Kahn v. Shevin, 416 U.S. 351. In this Women's Rights Project case, the Court holds that a Florida statute granting widows, but not widowers, an annual five hundred dollar exemption from property taxes is constitutional because the purpose of the statute is to close the gap between men and women's economic situations.

Corning Glass Works v. Brennan, 417 U.S. 188. The Supreme Court for the first time considers an Equal Pay Act claim based on an employer paying women less than men for the same work, determining that the wage difference between Corning's female inspectors and male inspectors violates the Equal Pay Act. Ginsburg authors an *amicus* brief.

1975

Weinberger v. Weisenfeld, 420 U.S. 636. Ginsburg, on behalf of the Women's Rights Project, successfully argues that a provision of the Social Security Act providing for gender-based distinctions in the award of social security benefits is unconstitutional.

Cleveland Board of Education v. LaFleur, 414 U.S. 632. The Supreme Court holds that it is unconstitutional for public employers to require women to take unpaid maternity leaves after the first trimester of pregnancy because of a conclusive presumption that pregnant women are no longer able to work. Ginsburg co-authors an *amicus* brief.

Taylor v. Louisiana, 419 U.S. 522. The Supreme Court invalidates a Louisiana statute that allows women to serve as jurors only when they expressly volunteer, and requires states to call men and women to jury service on an equal basis.

Stanton v. Stanton, 421 U.S. 7. The Supreme Court rules that a law setting the age of majority for women at eighteen and for men at twenty-one, based on the assumption that women need less education and preparation for adulthood than do men, is unconstitutional.

Turner v. Department of Employment Security, 423 U.S. 44. In this Women's Rights Project case, the Supreme Court invalidates a state regulation making pregnant women ineligible for unemployment benefits for twelve weeks before birth and six weeks after birth regardless of their capacity to work.

1976

Craig v. Boren, 429 U.S. 190. The Supreme Court adopts a "heightened scrutiny" standard of review to evaluate legal distinctions on the basis of gender, which requires a gender-based legal distinction bear a substantial relationship to an important governmental interest. The Women's Rights Project works closely with the plaintiffs' attorney in the case and authors an *amicus* brief.

Regents of the University of California v. Bakke, 429 U.S. 953. On behalf of the Women's Rights Project, Ginsburg co-authors an *amicus* brief successfully defending affirmative action in public higher education.

General Electric Co. v. Gilbert, 429 U.S.125. Ginsburg authors an *amicus* brief to the Court, arguing that the exclusion of pregnancy-related conditions from a private employer's disability plan violates Title VII. The Court concludes that pregnancy-based discrimination is not sex discrimination. Congress will override this decision in 1978, through passage of the Pregnancy Discrimination Act.

1977

Califano v. Goldfarb, 430 U.S. 199. In this Women's Rights Project case, argued by Ginsburg, the Supreme Court invalidates gender-based distinctions in the payment of social security survivor benefits, finding these distinctions to be based on archaic assumptions regarding women's dependency.

Dothard v. Rawlinson, 433 U.S. 321. The Supreme Court invalidates Alabama's height and weight requirements for prison guards that have the effect of excluding the vast majority of female candidates, finding that these requirements violate Title VII. However, the Court upholds Alabama's exclusion of women from many jobs as prison guards in all-male maximum security prisons, finding women could present a security risk. Ginsburg co-authors an *amicus* brief in the case.

Nashville Gas Co. v. Satty, 434 U.S. 136. The Court finds that an employer's policy of denying accumulated seniority to employees returning from pregnancy leave violates Title VII in the absence of proof of business necessity of such a practice. The Women's Rights Project coauthors an *amicus* brief.

1978

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702. On behalf of the Women's Rights Project, Ginsburg co-authors an *amicus* brief for this case in which the Supreme Court holds that requiring female workers to make larger pension fund contributions than their male counterparts violates Title VII.

1979

Duren v. Missouri, 439 U.S. 357. On behalf of the Women's Rights Project, Ginsburg successfully argues to the Supreme Court that a state statute exempting women from jury duty upon their request violates a defendant's Sixth and Fourteenth Amendment rights to be tried by a jury drawn from a fair cross-section of the community.

Orr v. Orr, 440 U.S. 268. Ginsburg authors an *amicus* brief for this case, in which the Supreme Court invalidates statutes providing that husbands, but not wives,

may be required to pay alimony upon divorce and thus casts off the assumption that wives are dependent upon their husbands for financial support but husbands are never dependent on wives.

Califano v. Westcott, 443 U.S. 76. Ginsburg authors an *amicus* brief that helps persuade the Supreme Court to invalidate a program for unemployment benefits where benefits are provided to families with unemployed fathers, but not to those with unemployed mothers. The Court finds the program unconstitutional because of its presumption that fathers are primary breadwinners while mothers' employment is secondary.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256. In a challenge to legislation that unquestionably burdens women disproportionately to men by providing a lifetime employment preference for state government jobs to veterans, who are overwhelmingly male, the Court concludes that such a preference is not unconstitutional, as it was adopted "in spite of" rather than "because of" its harmful effect on women.

1980

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142. The Court strikes down a state law denying widowers worker's compensation benefits upon the work-related death of their wives unless they prove dependency or incapacity, while granting widows such benefits automatically. Ginsburg, on behalf of the Women's Rights Project, co-authors an *amicus* brief in the case.

1981

Kirchberg v. Feenstra, 450 U.S. 455. This Supreme Court case is the first to invalidate a law that gives a husband the right to control marital property without his wife's consent. The Supreme Court overturns a Louisiana statute that gave husbands the exclusive right to dispose of community property, as an abridgement of married women's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.

County of Washington v. Gunther, 452 U.S. 161. In this case, in which the Women's Rights Project submits a key *amicus* brief, the Court holds that individuals can show illegal gender-based wage discrimination under Title VII even when no member of the opposite sex holds a nearly identical job.

Rostker v. Goldberg, 523 U.S. 57. The Supreme Court holds that mandatory draft registration for men only does not violate the Constitution, stating that special deference is accorded to Congress to make gender based distinctions for military service. The Women's Rights Project serves as co-counsel for plaintiffs challenging the gender-based requirement.

1982

Mississippi University for Women v. Hogan, 458 U.S. 718. The Supreme Court rules that it is unconstitutional for a state to provide a nursing school for women only, as there is no important governmental interest in perpetuating women's over-representation in the nursing field.

1983

Arizona Governing Committee v. Norris, 463 U.S. 1073. The Court holds that a state pension plan that allows employees to choose retirement benefits from one of several companies, all of which pay women lower benefits than men, violates Title VII. The Women's Rights Project authors an *amicus* brief.

Newport News Shipbuilding Dry Dock Co. v. EEOC, 462 U.S. 669. The Supreme Court acknowledges that the Pregnancy Discrimination Act establishes that discrimination based on a woman's pregnancy is, on its face, discrimination because of sex, and thus supercedes Gilbert. An employer's health plan that covers pregnancy-related services for female employees more fully than for spouses of male employees, discriminates on the basis of sex and is forbidden under Title VII.

1984

Roberts v. United States Jaycees, 468 U.S. 609. The Women's Rights

Project co-authors an *amicus* brief in this case, urging the Supreme Court to affirm the state decision to strike down the Jaycees' policy of excluding women under state public accommodations law. The Court does so, holding that the Jaycees's exclusionary practices are not protected by the First Amendment and that Minnesota has a compelling interest in ending sex discrimination.

Hishon v. King & Spalding, 467 U.S. 69. The Supreme Court finds that partnerships are "employers" subject to Title VII's prohibition against sex discrimination, and that Title VII required the respondent law firm to consider women for partnership. The Women's Rights Project co-authors an *amicus* brief in this case.

1986

Meritor Savings Bank v. Vinson, 477 U.S. 57. The Supreme Court holds that sexual harassment that creates a hostile work environment is a form of sex discrimination prohibited by Title VII.

1987

California Federal Savings & Loan Association v. Guerra, 479 U.S. 272. In this case, an employer seeks a declaration that a state law requiring employers to provide pregnancy leave and reinstatement is preempted by the Pregnancy Discrimination Act's requirement that pregnancy be treated like other disabilities. The Court holds that the Pregnancy Discrimination Act does not prohibit practices favoring pregnant women, and that employers are free to provide comparable benefits to other disabled employees. The Women's Rights Project files an *amicus* brief.

Wimberly v. Labor & Industrial Relations Commission, 479 U.S. 511. The Supreme Court holds that a Missouri statute denying unemployment benefits to claimants who leave work "voluntarily" and "without good cause" can be applied to workers who leave because of pregnancy and is not preempted by a federal law that provides that no state can deny unemployment benefits to an individual solely on the basis of pregnancy. The Women's Rights Project files an *amicus* brief.

Johnson v. Transportation Agency, Santa Clara, 480 U.S. 616. In this Title VII case brought by a male employee who was passed over for promotion in favor of a female employee with a lower test score, the Supreme Court holds that an employer can take sex into account in such situations if it does so pursuant to an affirmative action plan meant to remedy the under-representation of women in traditionally sex-segregated jobs.

1989

Price-Waterhouse v. Hopkins, 490 U.S. 228. The Supreme Court holds that when gender discrimination plays a part in an employer's decision about an employee, an employer may still avoid Title VII liability if it proves that other reasons played a large enough role in the decision that it would have made the same decision in the absence of discrimination. The Women's Rights Project co-authors a major *amicus* brief in the case.

1990

University of Pennsylvania v. EEOC, 493 U.S. 182. This case involves a claim by a professor who was denied tenure that the reason for the denial was the negative evaluation of a department chairman who had sexually harassed her, maintaining her qualifications were equal to or better than five male professors granted tenure. The Supreme Court holds that universities have no privilege to withhold peer review materials relevant to charges of race or sexual discrimination in tenure decisions.

1991

United Auto Workers v. Johnson Controls, 499 U.S. 187. The Women's Rights Project authors an *amicus* brief that helps persuade the Supreme Court that Title VII forbids employers from adopting fetal-protection policies preventing fertile women from working in jobs that entail exposure to lead or other toxins that might harm a fetus. The case holds that women must be allowed to make their own decisions about pregnancy and dangerous work.

1992

Franklin v. Gwinnet County Public Schools, 503 U.S. 60. The Supreme Court holds that Title IX supports a claim for monetary damages. In this case the high school student seeking damages claims she was sexually harassed and abused by her teacher and coach and that administrators were aware of the harassment and abuse but took no action to stop it and encouraged her not to press charges.

1993

Harris v. Forklift Systems, 510 U.S. 17. The Supreme Court holds that a person does not have to prove psychological damage to prevail in a sexual harassment suit, but can win based on evidence of conduct that would reasonably be perceived to be hostile and sexually abusive.

1996

United States v. Virginia, 518 U.S. 515. Justice Ginsburg delivers the opinion of the Supreme Court, ruling that the all-male Virginia Military Institute's discriminatory admissions policy violates women's equal protection rights and ordering the school to admit women or forfeit its government funding. The Women's Rights Project participates in this case as *amicus* and as advisor.

M.L.B v. S.L.J., 519 U.S. 102. The Supreme Court holds that a state may not deny a parent the right to appeal termination of parental rights because poverty prevents her paying for the record; the state must supply the record itself.

1998

Gebser v. Lago Vista Independent School District, 524 U.S. 274. The Supreme Court holds that under Title IX, a school is liable for damages when a school official who has knowledge of a teacher's sexual harassment of a student and has the authority to take corrective action, acts with "deliberate indifference" to the teacher's conduct.

Burlington Industries v. Ellerth, 524 U.S. 742. The Supreme Court holds that an employer is automatically subject to vicarious liability for an actionable hostile environment created by a supervisor when tangible employment action is taken. If no such "tangible employment action" has taken place, the employer may claim that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Faragher v. City of Boca Raton, 524 U.S. 775. In this sexual harassment case, a companion case to Ellerth, the Supreme Court holds that when a harassing supervisor with authority over an employee takes a "tangible employment action" against the employee, the employer is strictly liable for the supervisor's action under Title VII. The Women's Rights Project co-authors an *amicus* brief in the case.

Miller v. Albright, 523 U.S. 420. The Supreme Court upholds different rules for unmarried citizen fathers versus those for unmarried citizen mothers who wish to transmit citizenship to their foreign-born, out-of-wedlock children. The Women's Rights Project co-authors an *amicus* brief.

Oncale v. Sundowner Offshore Services, 523 U.S. 75. The Supreme Court unanimously holds that Title VII prohibits same-sex sexual harassment. The case involves a male offshore oil rig worker subjected to sex-related humiliating actions and physical assault in a sexual manner by two male co-workers and a supervisor. The Women's Rights Project co-authors an *amicus* brief in the case.

1999

Kolstad v. American Dental Association, 527 U.S. 526. The Supreme Court holds that a court may grant punitive damages to a woman alleging sex discrimination in violation of Title VII even if she does not show that the employer's conduct was "egregious" or "outrageous." She must only show that the employer acted with malice or with reckless indifference to the lawfulness of his action.

Davis v. Monroe County Board of Education, 526 U.S. 629. The Supreme Court rules that school districts may be liable under Title IX for student to-student harassment if they are aware

of the problem and act with "deliberate indifference" rather than try to resolve it. The Women's Rights Project participates as an *amicus*.

2000

U.S. v. Morrison, 529 U.S. 598. In this case brought under the Violence Against Women Act (VAWA), which permits victims of gender-motivated violence to sue their attackers under federal law, the Supreme Court holds that neither the Commerce Clause nor the enforcement clause of the Fourteenth Amendment provides Congress with authority to enact the civil rights remedy provision of VAWA.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133. The Court holds that a jury may in some circumstances find gender discrimination in violation of Title VII based on evidence that the reasons an employer gives for an employment decision are untrue, even in the absence of any direct evidence of discrimination. The Women's Rights Project participates as *amicus*.

2001

Ferguson v. City of Charleston, 532 U.S. 67. In this case involving a South Carolina hospital that tests pregnant women for substance abuse and reports positive results to the police, the Court holds that pregnant women cannot be subject to warrantless, suspicionless searches simply because they are pregnant. The Women's Rights Project co-authors an *amicus* brief.

Pollard v. E.I. Dupont Nemours Co., 532 U.S. 843. The Women's Rights Project joins an *amicus* brief in this case in which the Supreme Court holds that "front pay"—a form of prospective relief awarded by courts in employment discrimination cases under Title VII—is not a form of "compensatory damages" subject to dollar caps. The plaintiff, one of only a few women working in the historically male manufacturing plant, sued after she was subjected to sexual harassment for several years by co-workers and supervisors who repeatedly taunted her for doing "men's work" and for holding a supervisory position over men.

Nguyen v. INS, 533 U.S. 53. The Women's Rights Project co-counsels this case challenging one of the few remaining statutes explicitly discriminating on the basis of gender. The Supreme Court in a 5-4 decision holds the law unconstitutional that automatically deems out-of-wedlock children born overseas to be United States citizens when their mothers are citizens, but requires affirmative steps acknowledging paternity to establish the child's citizenship if only the father is a citizen.

2003

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721. The Court finds that it is constitutional for a state to be sued in federal court for money damages when that state has violated the Family Medical Leave Act (FMLA). The Court finds that the act's guarantee of leave to all workers, regardless of their gender, attacked the stereotype that care giving was a woman's responsibility rather than a man's. The Women's Rights Project joins an *amicus* brief.

2004

Pennsylvania State Police v. Suders, 542 U.S. 129. Justice Ginsburg authors the opinion, holding that where a plaintiff has been forced to quit her job by an official act of her employer related to sexual harassment, an employer may not defend against a Title VII claim by showing that it took reasonable care to prevent and correct sexually harassing behavior, and that the employee unreasonably failed to take advantage of such opportunities to prevent harm. The Women's Rights Project joins an *amicus* brief.

2005

Jackson v. Birmingham Board of Education, 544 U.S. 167. The Women's Rights Project authors an *amicus* brief in this case, in which the Supreme Court holds that Title IX allows an individual to bring a retaliation claim in court when he is disciplined for complaining about sex discrimination. The plaintiff, a girl's basketball coach in a public high school, complained about sex discrimination in the school's athletic program and was later removed from his job.

2006

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53. The Supreme Court holds that indefinite suspension without pay is unlawful retaliation under Title VII, as it would reasonably deter any employee from making a complaint of discrimination in the workplace. The Women's Rights Project joins an *amicus* brief in support of the plaintiff.

2007

Ledbetter v. Goodyear Tire and Rubber, Inc., 550 U.S. 618. The Supreme Court rules against plaintiff, the sole female supervisor at a tire plant who alleged that she was paid less than her male counterparts, citing too long a delay between the initial equal pay violations and the filing of the lawsuit. The Women's Rights Project participates in an *amicus* brief in support of the plaintiff. In response to this decision, President Obama signs the Lilly Ledbetter Fair Pay Restoration Act in 2009, allowing victims of pay discrimination to file a complaint with the government within 180 days of their last paycheck.

2009

Fitzgerald v. Barnstable School Committee, 555 U.S. 246. The Supreme Court rules that parents may sue for sex discrimination in schools under both Title IX and the Equal Protection Clause. The case, which was brought by parents whose kindergartener was sexually harassed on the school bus, is important in establishing that individual teachers and administrators, as well as institutions, may be liable for sex discrimination in education. The Women's Rights Project co-authors an *amicus* brief.

Crawford v. Metropolitan Government of Nashville, 555 U.S. 271. The Supreme Court holds that Title VII's anti-retaliation provision protects employees who speak out about discrimination when answering questions during an employer's internal investigation of a coworker's complaint. The Women's Rights Project joins an *amicus* brief.

AT&T Corp. v. Hulteen, 556 U.S. 701. The Supreme Court holds that employers who had provided less retirement credit for pregnancy leave than for other medical leave, when such disparate treatment was still legal, were not required to adjust their pension plans retroactively when Congress declared such discrimination illegal with the Pregnancy Discrimination Act of 1978.

2011

Wal-Mart Stores, Inc. v Dukes, 131 S. Ct. 2541. Despite evidence of gender disparities in pay and promotions, the Supreme Court declines to certify a class of 1.5 million female employees of Wal-Mart, holding that the evidence presented did not prove that the company operated under a general policy of discrimination. The women's Rights Project co-authors an amicus brief highlighting the role of sex stereotypes.

ENDNOTES

1 Brief for Am. Civil Liberties Union et al. as Amici Curiae Supporting Appellant, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (No. 79-381), 1979 WL 199959, at *13 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

2 National Foundation for Women Legislators, *Facts About Women Legislators*, http://www.womenlegislators.org/women-legislator-facts.php (last visited Nov. 13, 2012) (giving statistics for 112th Congress); Jake Miller, *Women, Latinos: Record Numbers in Congress*, CBS News (Nov. 8, 2012), http://www.cbsnews.com/8301-250_162-57547051/women-latinos-record-numbers-in-congress/ (giving statistics for 113th Congress); Press Release, CAWP Election Watch, *Record Number of Women Will Serve in Congress* (Updated Nov. 13, 2012), http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-07-12.pdf; National Conference of State Legislatures, *Women in State Legislatures: 2013 Legislative Session,* http://www.ncsl.org/legislatures-elections/wln/women-in-state-legislatures-for-2013.aspx (last visited Nov. 9, 2012).

3 Sara Frier & Carol Hymowitz, *Mayer Becomes Highest-Profile Pregnant Woman Hired as CEO*, Bloomberg News (July 18, 2012), http://www.businessweek.com/news/2012-07-17/mayer-becomes-highest-profile-pregnant-woman-hired-as-ceo.

4 U.S. Gov't Accountability Office, GAO-12-10, Gender Pay Differences: Progress Made, but Women Remain Overrepresented among Low-Wage Workers 8 (2011).

5 Legal Momentum, Federal Policies Adopted More Than Thirty Years Ago Have Failed to Reduce Significantly Women's Exclusion From the Construction Trades (2009), *available at* http://www.legalmomentum.org/our-work/women-at-work/resources-and-publications/2009-report-failed-federal.pdf.

6 Brief for Am. Civil Liberties Union as Amicus Curiae, Craig v. Boren, 429 U.S. 190 (1976) (No. 75-628), 1976 WL 181333, at *15.

7 Reed v. Reed, 404 U.S. 71 (1971).

8 Moritz v. C.I.R., 469 F.2d 466 (10th Cir. 1972).

9 Frontiero v. Richardson, 411 U.S. 677 (1973).

10 Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

11 Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596, at *19.

12 Brief for Petitioner-Appellant at 17-18, *Moritz v. CIR*, 469 F.2d 466 (10th Cir. 1972) (No. 71-1127) (on file with the Am. Civil Liberties Union Archives).

13 Brief for Am. Civil Liberties Union as Amicus Curiae at 24, Frontiero v. Richardson, 411 U.S. 677 (1973), *rev'g* Frontiero v. Laird, 341 F. Supp. 201 (1972) (No. 71-1694) (on file with the Am. Civil Liberties Union).

14 *Id*. at 7.

15 Brief for Appellee, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (No. 73-1892), 1974 WL 186057, at *16.

16 *Id.*

17 *Reed*, 404 U.S. at 76-77.

18 Interview by the Association of Women in Science with Ruth Bader Ginsburg, Professor of Law, Columbia University (April 1975), *available at* http://www.awis.org/displaycommon.cfm?an=1&subarticlenbr=509.

19 *Moritz*, 469 F.2d at 469-70.

20 *Frontiero*, 411 U.S. at 684.

21 *Id.*

22 *Id.* at 685.

23 *Wiesenfeld*, 420 U.S. at 643.

24 Brief for Am. Civil Liberties Union et al. as Amici Curiae at 21, Cleveland Bd. Of Educ. v. LaFleur, 414 U.S. 632 (1974) (No. 72-777) (on file with Am. Civil Liberties Union).

25 *Id.* at 18-19.

26 Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 644-45 (1974).

27 Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 952 (1985).

28 Struck v. Sec'y of Def., 460 F.2d 1372, 1375 (9th Cir. 1972).

29 Brief for Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840, at *14. For an in-depth discussion of Ginsburg's advocacy in the *Struck* case, *see* Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination,* 59 Duke L.J. 771 (2010).

30 Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).

31 Brief for Appellant at 12-13, Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (No. 75-7114) (on file with Am. Civil Liberties Union Archives).

32 *Id*. at 13, 25.

33 *Cushman*, 531 F.2d at 1123.

34 Geduldig v. Aiello, 417 U.S. 484 (1974).

35 Brief for Am. Civil Liberties Union et al. as Amici Curiae, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185753, at *9.

36 *Id.* at *10.

37 *Geduldig*, 417 U.S. at 496 n.20.

38 Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

39 Brief for Women's Law Project and Am. Civil Liberties Union as Amici Curiae at 4-5, Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (No. 74-1589) (on file with Am. Civil Liberties Union Archives).

40 *Gilbert*, 417 U.S. at 134-35 (quoting *Geduldig*, 417 U.S. at 496 n.20).

41 *See* Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327, 1344 (Ginsburg, J., dissenting) (calling for the Court to "revisit" *Geduldig*'s "conclusion" that "discrimination on the basis of pregnancy is not discrimination on the basis of sex"). *See also* Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing its Reversal*, 23 N.Y.U. Rev. L. & Soc. Change 59 (1997) (describing the decision's ongoing legal force and widespread criticism of the decision by commentators and courts).

42 In the wake of Brown v. Board of Education, school districts, particularly in the South, often turned to sex segregation to avoid or blunt the mandate of racial integration. Early challenges to sex segregation therefore asked whether the challenged educational program was in truth designed to impede racial integration. For a fuller discussion, *see* Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse,* 18 Yale J.L. & Human. 187 (2006).

43 *Helwig v. Jefferson Parish Sch. Bd.*, *C.A. No. 74-2143* (E.D. La. 1978). For more context about the *Helwig* case and the ACLU's role, *see* Mayeri, *supra* note 42, at 230.

44 Haymon v. Jefferson Parish Sch. Bd., *C.A. No. 77-396* (E.D. La. 1977).

45 *See* Letter from Ruth Bader Ginsburg to Margaret W. Berck, Staff Counsel, Am. Civil Liberties Union of Louisiana (Sept. 25, 1974) (on file with the Am. Civil Liberties Union) (giving advice on the ACLU of Louisiana's brief in *Helwig*); Letter from Margaret W. Berck, Staff Counsel, Am. Civil Liberties Union of Louisiana, to Brenda Feigen Fasteau, Coordinator, Women's Rights Project (Aug. 27, 1974) (on file with the Am. Civil Liberties Union Archives) (stating that "the Women's Rights Project has noted particular interest in this case [*Helwig*]"); Letter from Margaret W. Berck, Staff Counsel, Am. Civil Liberties Union of Louisiana, to Jack Peebles, Attorney at Law, Apr. 7, 1974 (on file with Tulane University) (noting that "Ms. Ruth Ginsburg has related her interest in this case [*Helwig*] and will undoubtedly be a valuable source of information and assistance").

46 Memorandum in Support of Action for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment at 12-13, 23, Helwig v. Jefferson Parish Sch. Bd., *C.A. No. 74-2143* (E.D. La. 1978) (No. 74-2143).

47 Petitioner's Reply Brief, Vorchheimer v. Sch. Dist. of Philadelphia, 430 U.S. 703 (1977) (No. 76-37), 1976 WL 181262, at *6.

48 Brief for Petitioners, Vorchheimer v. Sch. Dist. of Philadelphia, 430 U.S. 703 (1977) (No. 76-37), 1976 WL 181263, at *14.

49 *Id*. at *35-36.

50 *Id.* at *40-41.

51 Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (Justice Rehnquist did not participate).

52 532 F.2d at 887.

53 *See* Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 710 (Pa. Com. Pl. 1983), *appeal quashed*, Newberg by Newberg v. Bd. of Pub. Educ., 478 A.2d 1352 (Pa. Super. 1984).

54 *See* Brief for Am. Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 18, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

55 *Id*.

56 *Id*.

57 *Id*. at 20.

58 *Id.* at 23.

59 *Id.* at 18.

60 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011).

61 *Wal-Mart*, 131 S. Ct. at 2564 (Ginsburg, J., dissenting).

62 *Id*.

63 Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, Am. Soc. Rev. vol. 66, pp. 204-05, 219-21 (2001).

64 Shelley J. Correll, et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297, 1321 (2007); Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 69-70 (2001).

65 Meeting of Equal Emp't Opportunity Commission, Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm.

66 Stephanie Bornstein, Ctr. for WorkLife Law, Poor Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers 11 (2011).

67 *Id.* at 14.

68 *ACLU Comments to the EEOC on Pregnancy and Caregiver Discrimination*, ACLU 4 (March 8, 2012), http://www.aclu.org/files/assets/aclu_comments_on_pregnancy_and_caregiver_discrimination_final_0.pdf.

69 Lochren v. Cnty. of Suffolk, No. 01-CV-3925 (ARL), 2008 WL 2039458 (E.D.N.Y. May 9, 2008) *subsequent history omitted*.

70 *ACLU Victory in Lochren v. Suffolk County*, Am. Civil Liberties Union Blog (June 5, 2006), http://www.aclu.org/womens-rights/aclu-victory-lochren-v-suffolk-county.

71 Brief for Am. Civil Liberties Union et al as Amici Curiae Supporting Plaintiff-Appellant at 3, Young v. United Parcel Serv., Inc., (4th Cir. Mar. 5, 2012) (No. 11-2078), *available at* http://www.aclu.org/womens-rights/young-v-ups-aclu-amicus-brief.

72 Young v. United Parcel Serv., Inc., Civ. Action No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011).

73 Press Release, Am. Civil Liberties Union, Burgbacher v. Rocky Mountain Evergreen (Aug. 16, 2011), http://www.aclu.org/womens-rights/burgbacher-v-rocky-mountain-academy-evergreen.

74 Press Release, Am. Civil Liberties Union, LSAT to Nursing Moms: Need Time to Pump? Tough Titties! (Sept. 30, 2011), http://www.aclu.org/blog/reproductive-freedom-womens-rights/lsat-nursing-moms-need-time-pump-tough-titties.

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83 Brief for Plaintiffs-Appellants, Doe v. Vermillion Parish Sch. Bd., 421 F. App'x 366 (5th Cir. 2011) (No. 10-30378), 2010 WL 3050251, at *42.

84 *Id.* (citing ROA at USCA5 2759-63; ROA at Pl. H. Exh. 47 at 15, 18).

85 Brief for Petitioner, Struck v. Sec'y of Def., 1972 WL 135840, at *7.


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